

Symposium on Maritime Piracy in International Law

**INTERNATIONAL LAW ON PIRACY
AND SOME CURRENT CHALLENGES
RELATED TO ITS DEFINITION**

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1. Introduction

Maritime piracy is not a new phenomena. It has been known since at least the ancient times, when Cicero described them as *hostes humani generis* – enemies of all peoples¹. However, the recent surge in piracy attacks, especially off the coast of Somalia, has made the international community to refocus its attention on this problem. This, in turn, has led to intensified efforts of States, individually and under the auspices of international organisations, to combat piracy. It is therefore interesting to analyse as to how far the existing international law framework provides the necessary tools for that combat. This will be the aim of this paper.

In order to present challenges that piracy, arguably, poses to the modern international law, it is firstly necessary to show what are the existing norms of international law governing piracy. This will be done in

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¹ I. Shearer, *Piracy*, [in:] 'Max Planck Encyclopaedia of Public International Law' (www.mpepil.com), at p. 1; A.P. Rubin, *The Law of Piracy*, Transnational Publisher 1997, 2nd ed., at pp. 1-19.

two steps. Initially, the focus will be put on the law of the sea, notably on the United Nations Convention on the Law of the Sea (“UNCLOS” or “the Convention”)². Afterwards, it will turn to other (than, strictly understood, law of the sea) fields of international law. In the second part of this paper, an attempt will be made to characterize selected challenges modern piracy creates from the viewpoint of international law. The following challenges that relate to the very definition of piracy were chosen in this respect: (a) the problem of “piracy” being committed “for private ends” and the possibility to qualify terrorist acts as piratical; (b) the territorial scope of piracy; and (c) the so called “two ships criterion” in the definition of piracy.

2. International Law Framework – Rules Governing Piracy

2.1. Codification of the international law of the sea concerning piracy

The aim of this part of the analysis is to provide a brief overview of the creation of the law of the sea rules on piracy. Although it takes historical perspective, the main accent is put on UNCLOS and its provisions. Other legal endeavours are characterized for background purposes.

2.1.1. Work within the League of Nations

First attempts to codify and/or develop international law of the sea were made under the auspices of the League of Nations³. In 1924 the Council of the League of Nations appointed members of the Committee of Experts for the Progressive Codification of International Law. The Committee of Experts, at its First Session (Geneva, 1–8.4.1925), adopted a list of subjects for preliminary examination – piracy among them – and

² United Nations Convention on the Law of the Sea, done at Montego Bay, 10.12.1982; UNTS, Vol. 1833, at p. 3. The Convention entered into force on 16.11.1994 and has presently 162 parties.

³ See generally on the codification of the law of the sea: J. Harrison, *Making the Law of the Sea. A Study in the Development of International Law*, Cambridge University Press 2011, at pp. 29–31; D.P. O’Connell (edited by I.A. Shearer), *The International Law of the Sea*, Clarendon Press – Oxford 1982, Vol. 1, at pp. 20–22; R.R. Churchill, A.V. Lowe, *The law of the sea*, Manchester University Press 1999, at pp. 13–15.

appointed eleven sub-committees to report to the Committee on these subjects⁴. One year later the Committee transmitted questionnaires to the Governments (asking “their opinion upon the question whether the regulation by international agreement of the subjects treated, both in their general aspects and as regards the specific points mentioned in the questionnaires, is desirable and realizable in the future”) and, *inter alia*, the one on piracy included also a report on the subject and a preliminary draft of a convention⁵. The questionnaire on piracy received mixed answers as to the desirability of drafting a convention on that matter: nine Governments replied affirmatively; nine Governments replied affirmatively but with reservations; three Governments though not opposed found the question of no urgency and of limited interest; six Governments refrained from expressing any opinion and two Governments did not think the conclusion of a convention to be either possible or desirable⁶.

On that basis, the Committee prepared a Report that was submitted to the Council in 1927. The Report suggested that 5 topics (nationality, territorial waters, diplomatic immunities and privileges, responsibility of states, and piracy) were ripe for codification at a diplomatic conference. However, realizing that States attach unequal importance to those topics, the Committee proposed to exclude the subjects of piracy and possibly of diplomatic immunities from the conference⁷. Accordingly, also in 1927,

⁴ See: *United Nations Documents on the Development and Codification of International Law*, ‘American Journal of International Law’ 1947, Supplement, Vol. 41, No. 4, at pp. 66–68.

⁵ *Ibidem*, at p. 69.

⁶ *Ibidem*, at p. 71. Among States opposed to the draft convention on piracy were United States of America. As reported by J.S. Reeves, *Progress of the Work of the League of Nations Codification Committee*, ‘American Journal of International Law’ 1927, Vol. 21, No. 4, at p. 665: “With regard to the sixth subject enumerated in the communication of the Secretary-General, namely, Piracy, it is the view of the Government of the United States that piracy, as that term is known in international law, is so nearly extinct as to render of little importance consideration of that subject as one to be regulated by international agreement” (emphasis added).

⁷ *United Nations Documents on the Development and Codification of International Law*, *op. cit.*, at pp. 74–75. In the words of the Polish Representative, Mr. M. Zaleski: “It is perhaps doubtful whether the question of Piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the conference, if the scope of the conference ought to be cut down. The subject is in any case not one

the League's Assembly adopted the resolution calling for convening a First Codification Conference in 1929, possibly in The Hague, to consider the issues of: nationality, territorial waters and responsibility of states⁸. Ultimately, the Conference was held in The Hague from 13.3.1930 to 12.4.1930. Notwithstanding its results, from the perspective of the present paper it is important to underline that the topic of piracy was not considered at the conference. Also, the work on the subject of piracy did not progress further within the League of Nations.

2.1.2. Harvard Research in International Law Draft on Piracy

The list of topics that was identified by the League of Nations' Committee of Experts inspired also a non-governmental response. Namely, at the initiative of Harvard Law School, Research in International Law was established that undertook an effort to prepare a scientific study, initially on topics pinpointed by the Committee. This led to the adoption in 1932, under the chairmanship of J. W. Bingham, of a draft Convention on Piracy (consisting of 19 articles) with commentaries ("Harvard Draft")⁹. This draft involved in particular the definition of piracy and pirate ship (Articles 3 and 4), as well as differentiation between rights of States towards a pirate ship depending whether it was found in areas within or outside national jurisdiction (Articles 6 and 7), and elaborated on rights of States with regard to the captured pirates, asserting that a State may prosecute and punish that person, however under certain conditions also provided for in that provision (Article 14). Interestingly, it also provided for the so called "reverse hot pursuit" (Article 7(1)), that is a pursuit for a pirate ship that started in areas beyond national jurisdiction and that can be continued into or over the territorial sea of another State, where the seizure may be made.

of vital interest for every State, or one the treatment of which can be regarded as in any way urgent, and the replies of certain Governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement". *Report of the Polish Representative, M. Zaleski, Approved by the Council on June 13th, 1927*, 'American Journal of International Law' 1928, Special Supplement, Vol. 22, at p. 222.

⁸ *Ibidem*, at pp. 75–76.

⁹ Available in: 'American Journal of International Law' 1932, Supplement, Vol. 26, at pp. 739 – 885.

Although the Harvard Draft was of a private character, it has influenced international law, in particular the International Law Commission (ILC) when it dealt with its draft on the Articles on the Law of the Sea that, in turn, constituted basis for the four Geneva Conventions on the Law of the Sea adopted in 1958.

2.1.3. ILC Draft Articles and 1958 Geneva Conventions on the Law of the Sea

Already at its first session in 1949, the ILC identified in the provisional list of topics whose codification it considered necessary and feasible, *inter alia*, the following: the régime of the high seas and the régime of the territorial sea. J.P.A. François was appointed as a Special Rapporteur for both of the topics. The ILC concluded its work in 1956 adopting Articles concerning the law of the sea with commentaries (“ILC Draft”)¹⁰. They involved in particular a set of rules concerning piracy (Articles 38–45). The ILC Draft constituted a basis for the work of the diplomatic conference convened in Geneva in 1958. Four separate conventions were adopted at the conference on 29.4.1958: (a) the Convention on the Territorial Sea and the Contiguous Zone¹¹; (b) the Convention on the High Seas (“CHS”)¹²; (c) the Convention on Fishing and Conservation of the Living Resources of the High Seas¹³; and (d) the Convention on the Continental Shelf¹⁴. For the purposes of the present paper, of particular importance is CHS which, in Articles 14–21, involves provisions on piracy. It is worthwhile to note that, except minor editorial and/or linguistic modifications, the Convention follows closely the ILC Draft in that respect.

Moreover, it shall be underlined that CHS provisions on piracy were adopted, in most cases without substantial discussion, also at the III UN Conference on the Law of the Sea in 1982. For this reason, the

¹⁰ ‘Yearbook of the International Law Commission’ 1956, Vol. II, at pp. 253–301.

¹¹ UNTS, Vol. 516, at p. 205. Entered into force on 10.9.1964 and has currently 52 parties.

¹² UNTS, Vol. 450, at p. 11. Entered into force on 30.9.1962 and has currently 63 parties.

¹³ UNTS, Vol. 559, at p. 285. Entered into force on 20.3.1966 and has currently 38 parties.

¹⁴ UNTS, Vol. 499, at p. 311. Entered into force on 10.6.1964 and has currently 58 parties.

ILC Articles and CHS provisions are not discussed in detail here. Rather, they are taken up in the context of UNCLOS norms on piracy.

2.2. Modern regulation: 1982 United Nations Convention on the Law of the Sea

Undoubtedly, UNCLOS is the cornerstone of the modern law of the sea and by some is even referred to as the “Constitution of the Oceans”¹⁵. Without the need to decide here on the question of the constitutional status of the Convention¹⁶, one can highlight in this context its following features. Firstly, 161 States and one international organisation (the European Union) are presently parties to UNCLOS. Perhaps it is too low number to be able to term the Convention as universal, however it still means that approximately 80% of the present UN Members are parties to it¹⁷. Secondly, it constitutes a “package deal” where practically all aspects of marine affairs are regulated in one document (as contrasted with four different Geneva Conventions, with varied participation of States in each of them). Thirdly, one could underline that in accordance with Article 309 of UNCLOS no reservations or exceptions may be made to it. Although declarations or statements could be made (Article 310), none of them refers to the Convention’s provisions on piracy¹⁸. Fourthly, the UN General Assembly repeatedly emphasises in its annually adopted resolution “Oceans and the law of the sea”:

“[t]he universal and unified character of the Convention, and reaffirming that the Convention sets out the legal framework within which all activities in the oceans and seas must be carried out and is of strategic importance as the basis

¹⁵ *A Constitution for the Oceans* Remarks by Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea. Available at: <http://www.un.org/Depts/los/index.htm>.

¹⁶ *E.g.*, R. Falk, H. Elver, *Comparing Global Perspectives: The 1982 UNCLOS and the 1992 UNCED* [in:] D. Vidas, W. Østreng (eds.), ‘Order for the Oceans at the Turn of the Century’, Kluwer Law International 1999, at p. 153 („*It is a constitutional document that may be the greatest treaty making accomplishment in the entire history of international law*”).

¹⁷ Out of States not party to it, the most famous example is the USA.

¹⁸ See: http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

for national, regional and global action and cooperation in the marine sector, and that its integrity needs to be maintained, as recognized also by the United Nations Conference on Environment and Development in chapter 17 of Agenda 21” (emphasis added)¹⁹.

Therefore, at least when it comes to Articles 100–107 of UNCLOS (that is the ones dealing with piracy), it can be asserted that the Convention reflects customary international law²⁰. As such, these norms bind all States, notwithstanding the fact whether they expressed their will to be bound by the Convention.

UNCLOS provisions on piracy can be grouped into three subsets of rules. The first one relates to “*the who*” – that is the definitions of “piracy” (Article 101 UNCLOS; Article 15 CHS, Article 39 of the ILC Draft)²¹ and “pirate ship or aircraft” (Article 103 UNCLOS; Article 17 CHS; Article 41

¹⁹ Recently in: UNGA Resolution “Oceans and the law of the sea” adopted on 24.12.2011, A/RES/66/231, Preamble.

²⁰ That assertion is supported for example by: D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press 2009, at pp. 31–32; D.R. Rothwell, T. Stephens, *The International Law of the Sea*, Hart Publishing 2010, at p. 162; R.R. Churchill, A.V. Lowe, *op. cit.*, at p. 210; H.L. Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, ‘International Journal of Marine Coastal Law’ 2003, Vol. 18, No. 3, at pp. 374–375. I. Brownlie, *Principles of Public International Law*, Oxford University Press, 6th Edition 2003, at p. 229. Notable exception to this view is A.P. Rubin. With regard to Harvard Research Draft, A.P. Rubin considers it as an “exercise *de lege ferenda*”, not reflecting international law (customary or otherwise); A.P. Rubin, *op. cit.*, at p. 345. The cited Author is much of the same opinion on the ILC Draft and, consequently, on the 1958 Geneva Convention on the High Seas and UNCLOS. See *Ibidem*, at pp. 353 and 367.

²¹ Article 101 UNCLOS: “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).”

ILC Draft)²², as well as the provision assimilating piracy committed by a warship or government ship or government aircraft whose crew has mutinied and taken control of the ship to acts committed by private ship or aircraft (Article 102 UNCLOS; Article 16 CHS; Article 40 ILC Draft), and the provision specifying that a ship or aircraft may retain its nationality – subject to the national law of flag State – although it has become a piratical one (Article 104 UNCLOS; Article 18 CHS; Article 42 ILC Draft). When it comes to the definition of “piracy” it shall be underlined at this stage of analysis that it is restricted to acts committed at high seas and that it contains a “two ships criterion” – piratical act has to be committed “against another ship” to be properly defined as “piracy”. Therefore, acts of individuals against their own ship do not fulfil that definition.

The second set of UNCLOS rules on piracy consists of provisions dealing with “*the what*” – specifying what rights and obligations other States have towards pirates. Namely, “[a]ll 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” (Article 100 UNCLOS; Article 14 CHS; Article 38 ILC Draft). Also, in the above mentioned areas, “every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under control of pirates, and arrest the persons and seize the property on board”. Additionally, the courts of the seizing State “may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith” (Article 105 UNCLOS; Article 19 CHS; Article 43 ILC Draft). One could add to this group of the Convention’s provisions the one dealing with the right of visit²³ – that is the right of a warship to board foreign ship when there is a reasonable ground for suspecting that the latter is engaged in piracy (Article 110 UNCLOS; Article 22 CHS; Article 46 ILC Draft).

²² Article 103 UNCLOS: “A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act”.

²³ Right of visit is not traditionally discussed in the context of piracy, however it seems to be relevant in the present context insofar it establishes the right of warships to board vessels they suspect of piracy.

Finally, the third set of UNCLOS provisions establishes “*the how*” – specifying that these are only warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect, that can seize a ship or aircraft on suspicion of piracy (Article 107 UNCLOS; Article 21 CHS; Article 45 ILC Draft). This provision is supplemented by Article 106 UNCLOS (Article 20 CHS; Article 44 ILC Draft) where it is stated that:

“[w]here 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”.

Although UNCLOS provisions with regard to piracy seem, *prima facie*, to be relatively comprehensive and exhaustive, they nevertheless pose some legal and practical problems. Those related with the first set of UNCLOS rules concerning piracy will be further elaborated on in the third part of this paper.

2.3. Outside the Framework of the International Law of the Sea

Even though UNCLOS is considered as the main treaty when it comes to the law of the sea in general, and piracy in particular, it is worthwhile to look into some other international agreements, both of universal and regional character, that could have a role to play with respect to piracy.

2.3.1. International agreements of global character

2.3.1.1. 1988 SUA Convention

Firstly, as regards instruments of global character, it is necessary to draw attention to the 1988 Convention for the suppression of unlawful acts against the safety of maritime navigation (“SUA Convention”)²⁴. Although it does not refer to “piracy” as such, it does regulate a number

²⁴ Convention for the suppression of unlawful acts against the safety of maritime navigation, done at Rome 10.3.1988, ‘International Legal Materials’ 1988, Vol. 27, No. 3, at pp. 672–684. SUA Convention entered into force on 1.3.1992 and has currently 158 parties (approximately 94.73% of the gross tonnage of the world’s merchant fleet).

of offences listed in its Article 3(1). Among them are the following: (a) seizing or exercising control over a ship by force or threat thereof or any other form of intimidation; (b) performing 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) destroying a ship or causing damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship. Putting jurisdictional scope of the SUA Convention (defined in its Article 4) aside for the moment, the characterization of above-listed offences seems to be broad enough (especially the one in Article 3(1)(a)), to cover many instances of what could also be termed as “piracy” for the purposes of Article 101 UNCLOS. As D. Guilfoyle put it “[t]his broad offence would not cover the petty-theft smash-and-grab type of piracy common in South East Asian waters, but it certainly appears to fit the Somali variety”²⁵.

Moreover, unlike Article 101 UNCLOS, SUA Convention does not require that the crime is committed by one ship against another. One could add here that that was an intentional attempt by the proponent of this convention, since it was negotiated after the Achille Lauro incident (described below) took place, and that showed the inapplicability of piracy as defined in UNCLOS to, *inter alia*, crimes committed by the passengers of a ship against that very ship. Also, the crimes under SUA Convention does not have to be committed “for private ends” which is yet another requirement under Article 101 UNCLOS and will be discussed below.

Another interesting feature of the SUA Convention is its territorial scope of application. As specified in Article 4:

“This Convention applies if the ship is navigating or is 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”.

And even if this condition is not met, SUA Convention would nevertheless apply by virtue of its Article 4(2) that extends its scope to situations where: “[t]he offender or the alleged offender is found in the territory of State Party other than the State referred to in paragraph 1”.

²⁵ D. Guilfoyle, *The Legal Challenges in Fighting Piracy* [in:] B. van Ginkel, F.-P. van der Putten (eds.), ‘The International Response to Somali Piracy. Challenges and Opportunities’, Martinus Nijhoff Publishers, Leiden–Boston 2010, at p. 131.

Clearly, in accordance with Article 4(1), SUA Convention will apply as long as the crime is not (intended to be) committed by (from) a ship within the territorial sea of one State. This is much broader formulation than the one in Article 101 UNCLOS. Most notably, it does not have to take place in the high seas.

Lastly, the SUA Convention obliges States to establish jurisdiction in relation to crimes enlisted in Article 3 when one of the jurisdictional links provided for in Article 6(1) is fulfilled²⁶. This provision is supplemented by Article 10 which says that a State in the territory of which the offender or alleged offender is found shall, if it does not extradite him, submit him for prosecution²⁷.

Reassuring, one can point out that SUA Convention's definition is different to the one in UNCLOS in three main points: (a) the two ships criterion was omitted; (b) there is no requirement that a crime is committed for private ends; (c) it does not necessarily have to take place in the high seas (or EEZ). Hence, the jurisdictional scope of application of the SUA Convention is broader than of UNCLOS. Even if the former does not relate to "piracy" as such, it will be possible to apply it to cases that at the same time constitute piracy under UNCLOS and, moreover, to instances of "piracy-like crimes" that may not be defined as "piracy" proper due to the limitations inherent in Article 101 UNCLOS.

2.3.1.2.1979 UN Hostages Convention

Another legal instrument of potential application with regard to piracy is the 1979 International Convention against taking of hostages ("UN Hostages Convention")²⁸. It specifies in its Article 1(1):

²⁶ That is when the offence is committed: (a) against or on board a ship flying the flag of that State at the time the offence is committed; or (b) in the territory of that State, including its territorial sea; or (c) by a national of that State.

²⁷ The extent to which this obligation may be properly termed as an obligation of '*aut dedere aut judicare*' is omitted here. See for example: ILC, *Preliminary report on the obligation to extradite or prosecute ("aut dedere aut judicare")*, A/CN.4/57 of 7.6.2006, at paras 37–38.

²⁸ UNTS, Vol. 1316, at p. 205. This Convention entered into force on 3.6.1983 and has presently 169 parties.

“Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the „hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, *to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage* commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention” (emphasis added).

It is not uncommon that pirates, especially off the coast of Somalia, kidnap vessels and take the whole crew hostage. Thus, these actions indeed fulfill the above quoted definition as pirates compel States to pay ransom in return for releasing the hostages. It is worthwhile to note in this context, that also UN Security Council resolutions, as well as the Institute of International Law²⁹, recognize the applicability of the UN Hostage Convention in the Somali context.

2.3.1.3. Regional agreements: ReCAAP

With regard to regional agreements, it is necessary to highlight the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)³⁰. Apart from the fact that the Agreement is reported to be successful in limiting the number of piratical attacks in the region, it contains certain interesting legal solutions. First, it is important to note that ReCAAP (Article 1(1)) repeats the definition of “piracy” from Article 101 UNCLOS. It also contains important safeguard clause wherein it states that nothing in ReCAAP “shall affect the rights and obligations of any Contracting Party under the international agreements, including the UNCLOS, and the relevant rules of international law”. In doing so, the parties to ReCAAP gave priority to their obligations deriving from UNCLOS³¹, as well as confirmed the Convention’s definition of piracy in regional context. However, the ReCAAP differs from UNCLOS in

²⁹ See below, points ii) and iii) respectively.

³⁰ *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*, done at Tokyo on 11.11.2004. UNTS, Vol. 2398, at p. 199. The Agreement entered into force on 4.9.2006 and has presently 17 parties. See: <http://www.recaap.org/>.

³¹ If they are parties to UNCLOS. Out of the present parties to Regional Cooperation Agreement, only Cambodia is not a party to UNCLOS (although it signed UNCLOS).

two important aspects: (a) it contains the definition of “armed robbery” (Article 1(1)) which is not used in the UNCLOS context, however is referred to (though not legally defined) in the framework of International Maritime Organization (IMO)³². This definition is based on the one of “piracy” though derives from it insofar as it speaks of acts committed in a place within Contracting Party’s jurisdiction and it does not contain the “two ships criterion”; (b) the ReCAAP provides for the obligation to “prevent and suppress piracy and armed robbery against ships”, “arrest pirates or persons who have committed armed robbery against ships”, as well as to “seize ships or aircraft used for committing piracy or armed robbery against ships [...]” and to “rescue victim ships and victims of piracy or armed robbery against ships” (Article 3). This set of duties is much broader than one established under the Convention, as the latter obliges States “only” to cooperate (Article 100 UNCLOS) whereas that obligation does not extend to preventing or suppressing piracy, or arresting pirates etc. One could also highlight that the cooperation of States on the basis of ReCAAP was institutionalized, since on its basis an Information Sharing Centre was created.

2.3.2. Somali context: United Nations Security Council Resolutions

The overview of legal instruments pertaining to piracy would not be complete without referring to the United Nations Security Council resolutions dealing with the piracy off the coast of Somalia. As it is apparent, these resolutions do not apply to piracy in general but only to particular instance of piracy off Somali coasts. Nevertheless, it seems important to characterize some of their main features.

Firstly, it should be underlined that up to date, over a period of roughly four years, the UN Security Council has issued eleven resolutions relating to the above mentioned situation³³, most of which are based on

³² Cf. *infra* note 108.

³³ UNSC resolution 1816 (2008), S/RES/1816 of 2.6.2008; UNSC resolution 1838 (2008), S/RES/1838 of 7.10.2008; UNSC resolution 1846 (2008), S/RES/1846 of 2.12.2008; UNSC resolution 1851 (2008); S/RES/1851 of 16.12.2008; UNSC resolution 1897 (2009), S/RES/1897 of 30.11.2009; UNSC resolution 1918 (2010), S/RES/1918 of 27.4.2010; UNSC resolution 1950 (2010), S/RES/1950 of 23.11.2010; UNSC resolution 1976 (2011), S/RES/1976 of 11.4.2011; UNSC resolution 2015 (2011), S/RES/2015 of 24.10.2011 and UNSC resolution 2020 (2011), S/RES/2020 of 22.11.2011.

Chapter VII of UN Charter (except for resolutions: 1918 (2010), 1976 (2011) and 2015 (2011)).

Secondly, all of them highlight the fundamental role of UNCLOS with respect to, notably, piracy. To cite the most recent example:

“Further reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (“The Convention”), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities”³⁴ (emphasis in original).

However, they also refer to other treaties, in particular to SUA and UN Hostages Conventions³⁵. This reaffirms the applicability of these Conventions to, at least some, instances of Somali piracy.

Thirdly, all of these Security Council resolutions speak jointly of “piracy and armed robbery”. Security Council does not define the latter phrase for its purposes. However, as it was mentioned before, the latter phrase is usually understood as acts piratical in nature that are committed within the territorial sea and therefore do not fall into the definition of “piracy” contained in Article 101 UNCLOS. The usage by the UN Security Council of this phrase is justified precisely by the fact that some of Somali “piracy” takes place in waters under States’ jurisdiction (territorial sea, archipelagic waters, internal waters) and would otherwise fall outside the scope of international response to it.

Fourthly, what follows from the previous point, UN Security Council resolutions authorize³⁶ States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia to take “all necessary measures” for the purpose of suppressing these acts. This in essence means, in conjunction with the fact that these are “Chapter VII resolutions”, that the fight with piracy and armed robbery can be undertaken also within the territorial sea of Somalia and may involve use of force. However, it needs to be underlined that the Security

³⁴ UNSC resolution 2020 (2011), preamble. UNSC resolution 1976 (2011) refers in that context explicitly to Articles 100, 101 and 105 of UNCLOS.

³⁵ See for example UNSC resolution 2020 (2011), preamble.

³⁶ Those authorizations (and their prolongations) are contained in UNSC resolutions: 1816 (2008), at para 7; 1846 (2008), at para 10; 1851 (2008), at para 6; 1897 (2009), at para 7; 1950 (2010), at para 7 and 2020 (2011), at para 9.

Council allowed this to happen only after it received an appropriate request from Transitional Federal Government (“TFG”) of Somalia and the authorisation extends only to States for which advance notification has been provided by the TFG to the UN Secretary-General³⁷.

Furthermore, it shall be highlighted in this context that the UN Security Council, in its resolution 1851 (2008), extended the authorisation to take all necessary measures to apply also “in Somalia”. Although it does not state it explicitly, it is commonly understood as allowing for anti-piracy actions also within the Somali land territory³⁸.

Lastly, it is worthwhile to underline that they contain an interesting safeguard clause, where the Security Council:

“Affirms that the authorizations renewed in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations, under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law; and affirms further that such authorizations have been S/RES/2020 (2011) renewed only following the receipt of the 10 November 2011 letter conveying the consent of the TFG”³⁹ (emphasis in original).

This rather unprecedented clause is supposed to make sure that the authorisations contained in the above-cited UN Security Council resolutions (and/or States practice, coupled with *opinio iuris*, in their implementation) neither intend to alter existing rights or obligations States already have under international law (especially under treaty law, *i.e.*, UNCLOS), nor do they purport to have a potential of establishing new customary international law⁴⁰.

³⁷ See T. Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, ‘European Journal of International Law’ 2009, Vol. 20, No. 2, at p. 406 *et seq.* for the comment on that issue.

³⁸ *Ibidem*, at p. 404. The Author explains that this extension of the scope of application was a consequence of the operation conducted by the French troops in the Somali land territory in April 2008 as a part of the rescue effort that followed the piratical attack on the French cruise ship *Le Ponant*.

³⁹ UNSC Resolution 2020 (2011), at para 10.

⁴⁰ This safeguard clause was also inserted into the 2011 UNGA resolution “Oceans and the law of the sea”, at para 90.

2.3.3. Documents that are not legally binding

Among many non-legally binding documents on piracy, it is appropriate to name just a few of them. First, the authoritative Institute of International Law in 2009 issued Naples Declaration on Piracy⁴¹ that in its relevant part acknowledges:

“[t]hat existing international law on piracy, as reflected in the 1982 UN Convention on the Law of the Sea, which is restricted to proscribing acts of violence committed for private ends on the high seas and undertaken by one ship against another, does not fully cover all acts of violence endangering the safety of international navigation.”

It seems that Members of the Institute, while confirming that UNCLOS rules on piracy are also of customary character, recognize the restrictions of the definition of “piracy” of Article 101 of the Convention. This has led to the satisfaction of the Institute over the adoption by the UN Security Council resolution 1816 (2008) discussed above, as it broadened and adapted “the scope of the existing international rules on piracy to include, in particular, acts against vessels committed in the territorial sea”. However, it needs to be underlined that resolution 1816 (2008), just as other Security Council’s “authorization resolutions” on piracy off the coast of Somalia, contained the above-discussed safeguard clause that indicated that it was not its intention to *generally* extend the scope of existing international rules on piracy.

Second, States of the region particularly affected by piracy off the coast of Somalia signed on 29.1.2009 the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (known as the “Djibouti Code of Conduct”)⁴². Formally speaking, this document is an outcome of IMO sub-regional meeting and is not legally binding⁴³. What is interesting to note

⁴¹ Available at: <http://www.idi-iil.org/index.html>.

⁴² See: <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx>. See also IMO Council doc. C 102/14 of 3.4.2009. Currently 18 countries, from the 21 eligible to do so, signed the Djibouti Code of Conduct.

⁴³ Although it should be stressed that it is construed as a treaty, containing *inter alia* dispute settlement and depository clause. The language it uses is, however, not of

is that the signatories of the Djibouti Code of Conduct: (a) agreed that international law, as reflected in UNCLOS, sets out the legal framework applicable to combating piracy and armed robbery at sea; (b) agreed also to the definition of “armed robbery”. Again (similarly as in the ReCAAP case), this definition follows the definition of “piracy” of Article 101 UNCLOS (which is also transposed *verbatim* into the Code), however it relates to acts committed within State’s internal waters, archipelagic waters and territorial sea and it disposes of the “two ships criterion”. The Djibouti Code of Conduct provides also for enhanced cooperation in the fields of exchanging of information (Article 2(a) of the Code; on the basis of Article 8 Information Sharing Centres were to be established) and combating piracy (and piracy only; Article 4 of the Code does not apply to “armed robbery”). Finally, signatories to the Djibouti Code of Conduct expressed their intent to review their legislation in order to, among others, “allow for the prosecution, conviction and punishment of those involved in piracy or armed robbery against ships, and to facilitate extradition or handing over when prosecution is not possible [...]” (Article 11 of the Code).

Reference should also be made to the IMO *Best Management Practices for Protection against Somalia Based Piracy* (“BMP 4”)⁴⁴ – set of rules and best practices developed by the maritime industry that are intended to assist ships to avoid, deter or delay piracy attacks off the coast of Somalia. Encouraged by the UN Security Council⁴⁵, IMO Maritime and Safety Committee strongly urged, *inter alia*, that ships’ masters received the BMP 4⁴⁶.

obligatory character (parties “may” or “intend” etc.). Finally, its Article 15(a) states that “Nothing in this Code of conduct is intended to create or establish a binding agreement, except as noted in Article 13”. Article 13, in turn, states that “Within two years of the effective date of this Code of conduct, and having designated the national focal points referred to in Article 8, the Participants intend to consult, with the assistance of IMO, with the aim of arriving at a binding agreement.” The author of this paper is not aware of the results of such consultations.

⁴⁴ IMO Maritime Safety Committee doc. MSC.1/Circ.1339 of 14.9.2011. This is the 4th, revised, version of the Best Management Practices.

⁴⁵ UNSC Resolution 1950 (2010), at para 20.

⁴⁶ Resolution MSC.324(89) “Implementation of Best Management Practice Guidance” [in:] IMO Maritime Safety Committee doc. MSC 89/25/Add.4, Annex 29, at p. 1.

3. Modern challenges related to the definition of piracy

It was already briefly noted above that although UNCLOS (Article 101) definition of “piracy” is well accepted in international law, it notwithstanding has certain inherent limitations. Firstly, it is restricted to acts committed “for private ends”⁴⁷. Secondly, *ratione loci*, acts of piracy have to take place either on the high seas or in a place outside the jurisdiction of any place⁴⁸. Thirdly, it takes at least two ships (or aircrafts) to commit an act of piracy as it needs to be directed “against another ship or aircraft”⁴⁹. These limitations will be discussed below.

3.1. Piracy committed “for private ends”

The phrase “committed for private ends” in the Convention’s definition may be understood twofold. On the one hand, one can look into the *subjective motives* of the perpetrator to see whether his or her intentions are of private or public/political character. In other words, the test here would lie in qualifying the act as committed for “private” gain (e.g., robbery, revenge) as contrasted with public/political purpose encompassing, for instance, a situation where perpetrators want to compel a State to act in a certain manner (as was the case in e.g., Achille Lauro incident noted below).

On the other hand, the test could be *objective* in a sense that it is not the motive but the absence of State sanction that matters. If one accepts this view, it would mean that the motives of the perpetrator are irrelevant. What becomes decisive is whether piratical actions raise question of State immunity or engage State responsibility⁵⁰. If a certain action lacks State authorisation/sanction, it can be characterized as committed “for private ends”.

These difficulties may be illustrated by reference to three incidents. Firstly, in 1961 a Portuguese ship Santa Maria was seized in the high

⁴⁷ Article 101(a) of UNCLOS.

⁴⁸ Article 101(a)(i) and (ii) of UNCLOS.

⁴⁹ Article 101(a)(i) of UNCLOS.

⁵⁰ This is the case argued for by D. Guilfoyle, *Shipping Interdiction...*, at p. 37 *et seq.*

seas by some of its passengers, under the leadership of Captain Galvão, a Portuguese political dissident. He explained that it had been the first step “aimed at overthrowing the Dictator Salazar of Portugal” (as a part of a political controversy between Salazar and General Delgado). At the request of Portugal (the Government of Salazar) to capture Santa Maria, a number of States responded favourably and, interestingly, some of them explicitly defined the incident as piracy (USA, UK), and USA even qualified Galvão as insurgent⁵¹.

Secondly, in 1985 an Italian cruise vessel *Achille Lauro* was seized by four armed members of the Palestine Liberation Front (“PLF”), a faction of Palestine Liberation Organisation (“PLO”) that had previously boarded the ship posing as tourists. They took 97 passengers onboard the ship hostage and demanded that Israel released 50 Palestinian prisoners, threatening to blow up the ship unless their demands are met. The next day they killed partially disabled Jew of US citizenship (Leon Klinghoffer)⁵².

In these two cases the “two ships criterion” is not met, so this incident could not be defined as piracy in any case⁵³. For the sake of argument it is still interesting to note that if one accepts the subjective interpretation of the phrase “for private ends” they would not qualify as piracy, as the motive was political (especially in the second case where there was a real attempt at compelling a State to undertake certain action). The situation is somewhat more complex if one accepts the second reading of the phrase under discussion. In this alternative, it would be necessary to decide on the status of PLF/PLO⁵⁴ – especially as to whether these organisations could be qualified as “private” (thus allowing, putting other problems as to the definition of piracy aside, to qualify the incident as piratical attack)

⁵¹ L.C. Green, *The Santa Maria: Rebels or Pirates*, ‘British Yearbook of International Law’ 1961, Vol. 37, at pp. 496–497.

⁵² Reported on the basis of: M. Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, ‘American Journal of International Law’ 1988, Vol. 82, No. 2, at p. 269; A.L. Liput, *Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorist to Justice*, ‘Fordham International Law Journal’ 1985–1986, Vol. 9, No. 2, at pp. 334–335.

⁵³ Similarly: R.R. Churchill, A.V. Lowe, *op. cit.*, at p. 210.

⁵⁴ The accounts of what happened in 1985 differ as to whether it was PLF or PLO that was responsible for the attack on *Achille Lauro*.

or, rather, public (especially as an insurrectional movement)⁵⁵. Similarly, in the Santa Maria incident the comment, somewhat hastily made, of USA as regards the status of Galvão could have significant legal consequences, as to piratical nature of the incident.

Thirdly, in the case of *Castle John v. NV Mabeco*, the Belgian Court of Cassation held in 1986 that a Greenpeace vessel (in this case the perpetrators are undoubtedly entirely of “private” character) had committed piracy against an allegedly polluting Dutch vessel when it attacked it, because this act of violence was “in support of a personal point of view” and not political⁵⁶. This was in response to the appellants argument that:

“action which impedes, threatens, prevents, or makes more difficult the discharge at sea of waste products which are harmful for the environment, taken with a view to alerting public opinion, cannot be considered as having been committed ‘for private ends’ [...]”⁵⁷.

As already mentioned, the Belgian Court of Cassation rejected that argument. It reasoned that:

“[t]he applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or a State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective [...]”⁵⁸.

Thus, the Court referred here rather to the objective notion of the phrase “for private ends”. As it suggested, what could have changed the qualification of the acts in question was the fact that they were committed “in the interest of a State” or “to the detriment of a State”. The first part of the argument is straightforward – since Greenpeace is neither

⁵⁵ For a broader treatment of this issue see: D. Guilfoyle, *Shipping Interdiction...*, at pp. 36–42.

⁵⁶ Reported by: I. Shearer, *op. cit.*, at point 16; D. Guilfoyle, *Shipping Interdiction...*, at p. 38 and S.P. Menefee, *Case of the Castle John, or Greenbeard the Pirate: Environmentalism, Piracy and the Development of International Law*, ‘California Western International Journal’ 1993, Vol. 24, No. 1, at pp. 10–16.

⁵⁷ Quoted in: S.P. Menefee, *op. cit.*, at p. 13.

⁵⁸ Quoted in: *ibidem*, at p. 14.

a State nor did it act in the interest/on behalf of one – its actions were “for private ends”. The second is slightly different as it concentrates not on a status of perpetrators but rather on the question *against whom* the crime is committed. This last point will be further elaborated on in the context of maritime terrorism.

In any case, it seems logical to assume that the subjective intent (solely) should not be decisive in determining whether a given act is piracy or not. Ultimately, it would be always very difficult to identify what was a “true” intention of a perpetrator. Not to mention a possibility of a “mixed” intention – *i.e.*, acting with political motives but, at the same time, robbing a ship for private gain⁵⁹. This logic is also supported in law. The Harvard Draft is quite explicit on that point in saying that:

“Although states at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce, or privateers whose commissions violated the announced policy of the captor [...], it seems best to confine the common jurisdiction to offenders acting for private ends only. [...] The cases of acts committed for political or other public ends are covered by Article 16. [...] If the forces or employees of any state or government by mutiny or otherwise should seize a ship and use it to plunder on or over the high sea on their own account, this, of course, would be piracy and fall under the common jurisdiction. The acts would be committed for private ends, not for public ends, and there would be no question of the immunity which pertains to state or governmental acts”⁶⁰.

Hence, it was the aim of the drafters to exclude from the definition of piracy insurgents⁶¹ and privateers because of their “public” status

⁵⁹ It should be underlined that *animus furandi* – intention to rob – was explicitly excluded from the definition of piracy by the ILC: ‘Yearbook of the International Law Commission’, 1956, Vol. II, at p. 282. See also on that point D.P. O’Connell, *op. cit.*, Vol. II, at pp. 967 – 968. The same approach was taken earlier in the English Court decision in 1934 *In re Piracy Jure Gentium*, A.C. 586 [1934]: “actual robbery is not an essential element in the crime of piracy *jure gentium*, and that a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*”, available at: <http://www.uniset.ca/other/cs5/1934AC586.html>.

⁶⁰ Harvard Draft, at p. 798.

⁶¹ For the discussion on recognized vs. unrecognized insurgency movements see: D. Guilfoyle, *Shipping Interdiction...*, at pp. 35–39. See also R. Jennings, A. Watts,

(insurgency movements have, at least potentially, limited international personality and privateers act on behalf of a State). This, in turn, could be additionally seen in the context of the approach of the Harvard Draft to piracy – *i.e.*, as to a crime that should be subjected to (using modern language) universal jurisdiction, namely, that every State could arrest pirates and exercise jurisdiction over them⁶². Any offence that could be tried only by a given State (in particular coastal State over crimes committed in its territorial sea) or that should rather be left to the discretion of a given, injured State – was thus excluded from the scope of piracy in the Harvard Draft⁶³. Furthermore, any offence that could be attributable to a State, raising questions concerning state immunity and responsibility, was excluded as well.

With regard to that last assertion, it should be reminded that in accordance with Article 102 UNCLOS acts committed by warships and other governmental ships, whose crew mutinied, are assimilated to acts committed by private ships and thereby they do not trigger State responsibility. The rationale here is that piracy can be committed by private individuals⁶⁴ and for private ends only. If a vessel belonging to a State or on behalf of a State commits a violent act towards another ship or aircraft, then the applicable law would not be the one of piracy but that of State responsibility.

The commentary to the 1956 ILC Draft does not shed more light on the formulation “for private ends”⁶⁵. Moreover, as was explained in 1955 by the Special Rapporteur J.P.A. François, Harvard Draft provisions

Oppenheim’s International Law, Longman 1996, 9th ed. Vol. 1 (Peace), at pp. 747–752; D.P. O’Connell, *op. cit.*, Vol. II, at pp. 975–976; M. Halberstam, *op. cit.*, at pp. 274–276.

⁶² See in particular Harvard Draft, at p. 782.

⁶³ Article 16 of the Harvard Draft, referred to in the quote from the commentary to Article 3, provides for a right of a State to protect its nationals, ships and commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy. As the commentary explains, it was thought that in instances when for example a revolutionary organization uses an armed ship to establish a blockade against foreign commerce, it is for the injured State to decide on potential actions it might want to take (and not for other States). Harvard Draft, at p. 857; see also at p. 786. See also on that point. M. Halberstam, *op. cit.*, at p. 279.

⁶⁴ See R. Jennings, A. Watts, *op. cit.*, at p. 747.

⁶⁵ ILC Draft, p. 282. It is simply stated, in commentary to the then Article 39, that “[t]he acts must be committed for private ends.”

and commentary were exhaustive and entirely satisfactory⁶⁶. At the same time, it did not preclude a discussion on that issue within the ILC. The most vivid debate took place in relation to the 1937 Nyon Arrangement on Submarine Warfare and instances of the sinking of ships in the Mediterranean Sea by submarines of which no country was willing to admit ownership⁶⁷. Ultimately, Special Rapporteur stated that “the Commission had to decide whether to restrict piracy to acts committed for private ends, *thus excluding acts committed for political motives or by warships*”⁶⁸ (emphasis added).

After the last exchange of views on that matter, a proposal (formulated by S.B. Krylov) to delete the phrase “for private ends” was put to a vote and rejected (by vote ratio: 10-2-1⁶⁹). It is worth noting that that phrase also made it to the 1958 Convention on the High Seas (Article 15) and a number of then socialist States attached their declarations criticizing the definition of piracy in this Convention⁷⁰. One should remark, however, that virtually the same definition was most recently adopted in Article 101 UNCLOS to which none of these (nor any other) States formulated such a declaration.

Moreover, during the III Conference on the Law of the Sea a proposal was made (by Malta in 1971) to delete the phrase “for private ends” from the provision containing the definition of piracy, thus allowing to include in the definition “[...] acts of violence or depredation committed

⁶⁶ ‘Yearbook of the International Law Commission’, 1955, Vol. 1, at p. 39, point 29.

⁶⁷ *Ibidem*, at pp. 43–44 and 55–56 (Sir G. Fitzmaurice being opposed to that argument and in favour of retaining the phrase “for private ends” and S.B. Krylov, supported by Mr Zourek, being of the exact opposite view). Interestingly, in the background to this dispute was a Polish (that was supported by the then Soviet Republic, represented in the ILC by S.B. Krylov, and Czechoslovakia, represented by J. Zourek) and China controversy over attacks by Chinese vessels on Polish and Soviet merchant fleet. See on that issue: *Ibidem*, at pp. 37–39 and p. 41; A.P. Rubin, *op. cit.*, at p. 350.

⁶⁸ ‘Yearbook of the International Law Commission’ 1955, Vol. 1, at p. 55, point 16.

⁶⁹ *Ibidem*, at p. 57, point 34.

⁷⁰ Those countries were: Albania, Belarus, Bulgaria, Hungary, Mongolia, Poland, Romania, Russia and Ukraine. Unanimous declaration read that: “[t]he definition of piracy given in the Convention does not cover certain acts which under contemporary international law should be considered as acts of piracy and does not serve to ensure freedom of navigation on international sea routes”. Germany and the Netherlands objected to these declarations, insofar as they constituted a reservation.

for professional political ends”⁷¹. As it is already clear, that proposal was not accepted⁷².

Given these arguments it is possible to conclude that the phrase “for private ends” should be rather interpreted objectively. Its main purpose is to exclude from the definition of piracy: (a) acts of States (*e.g.*, warships); (b) acts of public/political nature undertaken by or on behalf of a State (*e.g.*, privateers); (c) acts of entities of *quasi*-public status (*e.g.*, insurgency movements). As was stated above, it would be unreasonable to hold that political motives – at least if it would be enough for the individual to declare his motives as such – automatically take the crime outside the scope of the definition of piracy. This problem will be discussed once more below in the context of marine terrorism and its relationship with piracy.

However, it is important to underline that the mere private legal status of those who commit an alleged crime of piracy may not be entirely decisive⁷³. After all, Article 101 of UNCLOS speaks both of acts committed by a “private ship” or a “private aircraft”⁷⁴ and at the same time underlines that the crime has to be committed “for private ends”. If the latter phrase was to be understood only by reference to the status of those who commit the crime, the former phrase would be superfluous. Is it therefore the only object of the phrase “for private ends” to exclude acts by privateers and insurgents (or, broadly speaking, acts committed on behalf of a State⁷⁵ or by an entity having a *quasi*-public character)? In other words one can ask

⁷¹ S.N. Nandan, S. Rosenne (eds), ‘United Nations Convention on the Law of the Sea 1982. A Commentary’, Vol. III, Martinus Nijhoff Publishers 1995, at pp. 198–199 (“Virginia Commentary”).

⁷² On the basis of the Virginia Commentary it seems correct to conclude that there was no major discussion during the III UN Conference on the Law of the Sea neither on the phrase “for private ends” itself, nor on the Maltese proposal to delete it.

⁷³ Cf. I. Brownlie, *op. cit.*, at pp. 229–230: “[a]cts must be committed for private ends. It follows that piracy cannot be committed by warships or other government ships, or government aircraft, except where the crew ‘has mutinied and taken control of that ship or aircraft’.”

⁷⁴ For these reasons the discussion on the so called State piracy was, as a general rule, omitted in this paper.

⁷⁵ For example nowadays, in the context of the so called “privatization of war”, it would be possible to state that if a private military company commits – on behalf of the State that “hired” it – an act of violence at sea, this act would rather not qualify as piracy.

the question whether private ship/individuals can act “for public ends” and, thereby, be outside the scope of the definition of piracy in Article 101 UNCLOS? As was argued above, the presumption here should be in the negative. This was illustrated by the *Castle John* case where political motives of individuals are still to be considered in terms of their personal, private views and, consequently, those motives do not converse their actions into public ones. In a way, the phrase “for private ends” asks the question of who is responsible for (who is the ultimate “beneficiary” of) the action – a State/entity recognized in public international law or not. If the answer is that at the end of a particular action is a State – then it triggers the law of state responsibility and/or immunity (not piracy *jure gentium*). In such a situation, at least as a rule, State responsibility arises as between the wrongdoing and injured State and there is no question of universal jurisdiction⁷⁶.

It is also possible to look at the problem posed above from a different perspective, namely the one of the rationale of outlawing piracy. Naturally, the designation “*hostis humani generis*” comes first into mind. Piracy is criminalized because those who commit it are enemies of mankind. This point was already made by Judge Moore in his Dissenting Opinion to the (in)famous *Lotus* case:

“(…) [a]nd as the scene of the pirate’s operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish”⁷⁷ (emphasis added).

However, one can point out that pirates are considered as enemies of all men only when it comes to the high seas (and presently also EEZ). If the same act is committed in the territorial waters of a given State, it does not constitute piracy. Perhaps, therefore, one should not attach too

⁷⁶ See in particular: *Draft Articles on Responsibility of States for internationally wrongful acts with commentaries*, ‘Yearbook of the International Law Commission’ 2001, Vol. II, Part Two, Articles 42 and 48.

⁷⁷ Dissenting Opinion of Judge Moore to the judgment of Permanent Court of International Justice (PCIJ) of 7.9.1927 in the case of the S.S. “*Lotus*”, PCIJ Reports, Series A 1927, No. 10, at p. 70.

much weight to the “*hostis humani generis*” argument but rather ask *why* pirates are enemies of all nations⁷⁸. Seen from this perspective, piracy is a crime *juris gentium* as it endangers internationally recognized right of freedom of navigation and, thereby, interest of all States. This risk for the exercise of this right posed by piracy is of such a magnitude that it justifies: (a) the exception from the rule that only the flag State exercises exclusive jurisdiction over its vessels⁷⁹; (b) the possibility to exercise jurisdiction over pirate ships, property onboard, and pirates by the seizing State (which does not have to establish any jurisdictional link with either the ship or the property onboard, or the pirates themselves)⁸⁰; and (c) the duty of States to cooperate to the fullest possible extent in the repression of piracy⁸¹. This seems to be, at least nowadays, a proper justification for the criminalization of piracy. If so, then the phrase “for private ends” would encompass any act committed by a private ship (or aircraft) that endangers the freedom of navigation (thus, *inter alia*, the need of the “two ships criterion” discussed below) and is of such a character that any State or other “public” entity may not be held accountable for it⁸².

These conclusions could be translated also into the context of Somali piracy. Most notably, an argument is sometimes being put forward that the true motive of Somali pirates is the protection of Somali waters against illegal, unreported and unregulated (IUU) fishing activities of certain fleets or against dumping by the developed world of radioactive and/or toxic material in these waters⁸³. Based on the foregoing

⁷⁸ As it is summarized in the Harvard Draft, at p. 803: “This Latin phrase has been called properly by able commentators an epithet and not a definition” [alluding apparently to Wheaton; *Ibidem*, at p. 807].

⁷⁹ Article 92(1) of UNCLOS.

⁸⁰ Article 105 of UNCLOS.

⁸¹ Article 100 of UNCLOS.

⁸² This is the view advocated by D. Guilfoyle, *Shipping Interdiction...*, at p. 37.

⁸³ These problems were noticed by the Security Council as well. See UNSC resolution 1950 (2010), preamble: “stressing the importance of preventing, in accordance with international law, illegal fishing and illegal dumping, including toxic substances”. That was repeated and strengthened (stressing also the need “to investigate allegations of such illegal fishing and dumping”) in UNSC Resolution 1976 (2011), preamble. See also J.A. Roach, *Suppressing Somali Piracy – Next Steps*, ‘ASIL Insights’ 1.12.2010, Vol. 14, No. 39 available at: <http://www.asil.org/insights.cfm>; J.P. Pham, *The Failed State and Regional Dimensions of Somali Piracy* [in:] B. van Ginkel, F.-P. van der Putten, *op. cit.*, at

argumentation, one should conclude that such claims would, however, not constitute a proper defence against the accusation of piracy. Also, even if money paid as ransom to pirates is used afterwards to finance illegal or even terrorist activities, this would not preclude to term the initial seizing of a ship and taking it hostage as piratical in nature. What could matter, though, is the status of those who commit piracy off the coast of Somalia. Namely, one could ponder if they could be qualified as insurgents. This, however, seems rather doubtful and, at best, an *unrecognized* insurgency movement could come into play⁸⁴. Although there are divergent views as to whether the phrase “for private ends” excludes acts committed only by recognized insurgency movements, it seems consensual that even accepting the exclusion of unrecognized ones, this applies only when their attacks are directed against one State only⁸⁵. Since piracy off the coast of Somalia affects many third States, even theoretical exclusion of those attacks from the notion of piracy on the ground of “for private ends” argument, is not possible.

3.1.1. Piracy and terrorism

The proper interpretation of the phrase “for private ends” comes into play in one more important context – the one of terrorism⁸⁶. This situation is particularly complex. The crime of piracy itself, just as piracy *jure gentium*, have changed throughout the ages. However, seen from the

pp. 43–45; *Piracy off the Somali Coast. Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, Nairobi 10–21 November 2008. Final Report*, International Expert Group on Piracy off the Somali Coast, at p. 19; available at: <http://www.asil.org> (“Piracy off the Somali Coast. Final Report”).

⁸⁴ Cf. *Supra* note 60 and 61 above with accompanying text. The TFG is recognized by international community as a legitimate Government in Somalia. An insurgency movement pursuing to overthrow it is known as *al-Shabaab*. See for example: The Telegraph, 5.10.2008, *Somali pirates: Islamist insurgents demand weapons from hijacked ship*, available at: <http://www.telegraph.co.uk>; Reuters Africa, 20.10.2011, *Shabaab-Somali pirate links growing: UN adviser*, available at: <http://af.reuters.com>. *Al-Shabaab* is described by, for example, US, UK Canadian and Australian Governments as terrorist organisation. See on that point: J.P. Pham, *op. cit.*, at pp. 39–40.

⁸⁵ R. Jennings, A. Watts, *op. cit.*, at p. 750.

⁸⁶ Naturally, this paper is interested not in every terrorist attack but only “marine” one – the one that takes place in the high seas (or EEZ) and involves using a ship.

perspective of international law, the concern has evolved rather around such elements of the definition of piracy as: whether there needs to be an *animus furandi*; whether actual theft or robbery need to take place; whether mutinied crew can be defined as piratical; or, finally, whether it is justified in law to classify insurgents as pirates. Terrorism, including marine terrorism, is a relatively new phenomenon which poses challenges to many fields of international law. In particular, it is unclear as to how (if at all) to differentiate between “terrorism” and “piracy”. Are these terms mutually exclusive or perhaps the same act can be qualified as piratical and terrorist at the same time?

It is most often stated that since the phrase “for private ends” excludes political motives, then piracy is conceptually different than terrorism and, consequently, the latter does not fall into the scope of the definition of piracy in Article 101 UNCLOS⁸⁷.

In any case it is useful to see what terrorism, under international law, is. It should be underlined in that context that there is no agreed definition of “terrorism” in international law⁸⁸. However, one could point out that Appeal Chamber of the Special Tribunal for Lebanon held in 2011 that the customary international definition of terrorism consists of the following elements:

⁸⁷ See for example: P. Wendel, *op. cit.*, at p. 18; D.R. Rothwell, T. Stephens, *op. cit.*, at p. 162; N. Klein, *Maritime Security and the Law of the Sea*, Oxford University Press 2011, at p. 119 (although the Author seems to accept the possibility of different interpretation). In the Polish literature, see for that view: K. Kubiak, *Przemoc na oceanach. Współczesne piractwo morskie i terroryzm morski [Violence at Seas. Modern Marine Piracy and Terrorism]*, Wyd. TRIO, Warszawa 2009, at pp. 12–13 where the Author claims that the main difference between pirates and terrorist lays in their will to remain, or otherwise, anonymous. Pirates – the Author claims – want to remain unknown, whereas terrorist – just on the contrary. See also Ł. Kułaga, *Zwalczanie współczesnego piractwa morskiego w świetle regulacji Konwencji o prawie morza z 1982 r. oraz innych regulacji prawnomiędzynarodowych [Combating Modern Piracy in the Light of United Nations Convention on the Law of the Sea and Other Provisions of International Law]* [in:] C. Mik, K. Marciniak, ‘Konwencja NZ o prawie morza. W piętnastą rocznicę wejścia w życie’ [UN Convention on the Law of the Sea of 1982. In the Fifteenth Anniversary of the Entry into Force], Toruń 2009, at pp. 228–232. The Author seems to accept the view that piracy may cover terrorism.

⁸⁸ See generally: A. Cassese, *International Criminal Law*, Oxford University Press 2003, at pp. 120–125.

“(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element”⁸⁹.

Also, since 1996 the work has been underway within the United Nations to draft a comprehensive convention on international terrorism (“CCIT”)⁹⁰. Even though this work is far from being completed (and it is doubtful whether it will be possible to garner enough international consensus for its conclusion, not least due to the problem of the definition of terrorism), it is useful to look at the most recent draft of the convention, where it is proposed in Article 2 that:

“1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or (c) Damage to property, places, facilities or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss, *when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government*

⁸⁹ Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging of 16.2.1011, no STL-11-01/I/AC/R176bis, at para 85. See also: M.P. Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, ‘ASIL Insights’ 4.3.2011, Vol. 15, No. 6.

⁹⁰ UNGA Resolution A/RES/51/210 of 17.12.1996, esp. at para 9, where it decided “to establish an Ad Hoc Committee, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism”.

or an international organization to do or to abstain from doing any act”⁹¹ (emphasis added).

For the purposes of the present paper it will suffice to draw two main conclusions from this brief characterization of terrorism. Firstly, it seems that when it comes to the nature of the act itself, as long as it is committed in the marine context, it may fulfill the criteria of both terrorism and piracy. An “illegal act of violence or detention” may encompass the above mentioned acts of terrorism. After all, terrorism has been labelled as “chameleon-like” since it “may fall under various categories of crimes, depending on the circumstances in which terrorist acts are perpetrated”⁹². Thus, what becomes decisive for the present purposes, *i.e.*, to differentiate between “terrorism” and “piracy”, is the *intent*.

It seems that there is a consensus in international law that an act of terrorism is intended to compel a State to act in a certain manner and/or to intimidate the population. It is clear therefore that this intent may be defined as “political”. It is equally clear that if one accepts the view that the phrase “for private ends” in Article 101 of UNCLOS is to be understood subjectively, terrorist acts will automatically fall outside of the Convention’s definition of piracy. However, as was argued above, the test should rather be objective thus leaving the possibility that terrorism (as for example in the case of *Achille Lauro*, had other criteria of piracy been fulfilled) could at the same time constitute piracy.

This brings the discussion to another problem, namely, the one of terrorist acts committed by movements or organisations claiming the status of insurgents, the so-called “freedom fighters”⁹³. As was already mentioned above, early debates on piracy focused *inter alia* on the need to exclude insurgents from the definition of piracy. There are two main arguments that can be made in that context.

First, the reason for not treating insurgents as pirates lays in the fact that they have *quasi*-public status and act rather as belligerents than individuals for private ends. Additional problem in that context is how

⁹¹ UN doc. A/C.6/65/L.10 of 3.11.2010, *Measures to eliminate international terrorism. Report of the Working Group*, at p. 6.

⁹² A. Cassese, *International Criminal...*, at p. 125.

⁹³ For historical perspective see e.g. J. Dugard, *Towards the Definition of International Terrorism*, ‘American Society of International Law Proceedings’ 1973, Vol. 67, esp. at pp. 96–97.

to treat unrecognized insurgents. Diverse opinions were expressed in the literature on this subject⁹⁴. D. P. O'Connell argued for example that the real line of demarcation is not the recognized *versus* unrecognized status of the insurgents but the quality of the acts alone⁹⁵. In the Oppenheim's handbook, on the other hand, it is stated that:

“vessels of *unrecognized* insurgents interfering with ships of *third states* may be treated as piratical; when such attacks show criminal ruthlessness resulting in the loss of life, their crews may be subjected to the drastic penalties which international law reserves for pirates *jure gentium*”⁹⁶ (emphasis added).

This discussion, insofar as it concerns the recognized/unrecognized status of insurgents, cannot be easily translated into the context of terrorism. One may pose a question whether it is possible to speak, in the same sense as with the recognized insurgents, of a recognized terrorist organisation, thereby claiming it has a certain public international status; rights and obligations under international law. This problem, indeed, is one of the reasons why the internationally accepted definition of terrorism cannot be found. Some States claim that acts of violence perpetrated by “freedom fighters”, exercising their right of self-determination, cannot be properly termed terrorist⁹⁷. This, in turn, amounts to *ipso facto* recognition of their right to pursue their (political) aims by violent, terroristic methods. While the discussion on this issue within the UN is not over yet, it is still possible to point out that the General Assembly declared, *inter alia*, that:

“1. *The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;*

⁹⁴ On the position of the Harvard Draft and the ILC on this point see *Supra* note from 60 to 68 with accompanying text. See also D. Guilfoyle, *Shipping Interdiction...*, at p. 34–35; M. Halberstam, *op. cit.*, at pp. 278–281.

⁹⁵ D.P. O'Connell, *op. cit.*, at p. 975.

⁹⁶ R. Jennings, A. Watts, *op. cit.*, at p. 750.

⁹⁷ A. Cassese, *International Criminal...*, at p. 120 and p. 130.

2. *Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society*⁹⁸ (emphasis added).

Hence, it may be inferred that neither terrorist organisations may be recognized as legitimate (in a way that insurgents can be), nor can they claim to have certain *quasi*-public status that would necessitate to treat them rather as belligerents acting for “public ends”.

The second argument that was made pertains to the fact that insurgents may act only *vis-à-vis* a government of a State they want to overthrow. Thus, their actions would not be of a “*hostis humani generis*” character and would not constitute piracy. This problem was already reflected in the Oppenheim’s handbook quotation above, where it is stated that actions of unrecognized insurgents trigger the laws of piracy only when they interfere with ships of third States. It would seem therefore that as long as their actions are directed against a particular State (or rather its ships) – not endangering the right of freedom of navigation of other States – such action would not be piratical. Even when one accepts that view⁹⁹, it also does not seem appropriate to transpose that conclusion into the realm of terrorism. As was recognized by the UN General Assembly acts of terrorism “constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security”. It is thus unconceivable to hold that only one State is affected by a terrorist activity and thereby only this State can undertake (or not) steps against individuals in question. One should bear in mind that for a terrorist act to qualify as piratical as well, all other (this is on the assumption that the phrase “for private ends”, presently under consideration, does not exclude terrorism) criteria of the

⁹⁸ UNGA Resolution A/RES/49/60 of 17.2.1995, Measures to eliminate international terrorism, at para 1 and 2. The phrase in the first paragraph that was marked in italics has become a standard clause of UNGA resolutions concerning terrorism. See for example recently adopted UNGA Resolution A/RES/65/34 of 10.1.2011, at para 1.

⁹⁹ As already noted, e.g. D.P. O’Connell, *op. cit.*, at p. 975 or the Harvard Draft, *op. cit.*, at pp. 798 and 857 qualify the actions of unrecognized movements in a different manner.

definition of piracy in Article 101 of UNCLOS need to be fulfilled. Hence, the situation must, *inter alia*, take place in the high seas and action must be directed against another vessel. As was already argued before, accepting the view that the phrase “for private ends” excludes terrorism, would be tantamount to stating that “normally” such an action constitutes piracy but since in a given context it was a terrorist action against one State only, it takes it outside the scope of the definition of piracy. This view should be rejected.

One can argue here that international terrorism¹⁰⁰ is of such a character that it remains the concern of the whole international community of States (this point will be further elaborated on below). What should be decisive for its qualification as piratical is the fact that it endangers the right of freedom of navigation, as this is the rationale for outlawing piracy *jure gentium*. Given the methods and scale of terrorist attacks, it seems hardly plausible to fulfil the definition of terrorism and at the same time do not fulfill the criteria of piracy. This could take the form of a hostage-taking (similarly as in *Achille Lauro*) or kidnapping a ship (especially the one carrying oil or gas) in order to sail it into another (*e.g.*, passenger) ship in the high seas¹⁰¹. Such an action may be intended to have “political” effects and be directed against a State or group of States. It does not prevent one from seeing it as piratical as well. To borrow the logics from the *Castle John* case, the fact the certain individuals hold private views on political/public matters and want to achieve political/public aims, does not mean that their acts are not for “private ends”. These are, after all, their private views and their private ends. The situation would be different when one could prove, that the aim was indeed public – for example the action was sponsored or at least tolerated by a government. This would indeed take it outside the scope of piracy¹⁰².

¹⁰⁰ So called “domestic terrorism” – committed in the territory of a State and against it – is outside the scope of this analysis.

¹⁰¹ See also: Ł. Kułaga, *op. cit.*, at p. 239.

¹⁰² See A. Cassese, *International Criminal...*, at p. 126: “Another general feature of terrorism is that it is criminal whether perpetrated by *individuals acting in their private capacity* (normally as members of a terrorist group or organization) or by *State officials*. In the latter case, of course, alongside individual criminal liability there may arise State responsibility (emphasis in original). Only terrorist acts from the first group could fall into the definition of piracy. The problem here, though, is that States could tolerate

Reassuring, it is possible to conclude that terrorist attack is not prevented from being qualified as piratical. The phrase “for private ends” shall be understood objectively and as long as the attack in question was not authorised in any way by a State, it could fall within the scope of piracy, as provided for in Article 101 of UNCLOS.

At this point it is useful to remind that the SUA Convention was negotiated mainly in response to legal (and practical) challenges that the *Achille Lauro* incident posed to the international law, including law of piracy. As was noticed earlier, the SUA Convention does not contain the proviso “for private ends”, nor the “two ships criterion”. It seems therefore well suited to be applied in the context of terrorist marine activities¹⁰³. Up to date, however, States have not made use of that legal instrument for this purposes.

3.2. Territorial scope of the definition of piracy: “piracy” and “armed robbery”

The Convention restricts territorial application of the definition of piracy to: (a) high seas¹⁰⁴, or (b) to places outside the jurisdiction of any State¹⁰⁵. These formulations deserve closer attention.

As to the first limitation, one could point out that UNCLOS gives only negative definition of the high seas. Namely, it is every maritime area that is not included in the exclusive economic zone (EEZ), territorial sea, internal waters or archipelagic waters¹⁰⁶. *Prima facie* this would exclude from the discussed definition large portion of oceans (up to 200 nautical miles from baselines) that are under EEZ provisions. This conclusion, however, would be false, as in accordance with Article 58 (2) UNCLOS: “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”.

or acquiesce to terrorist activities which could have not been known at the time when a crime was committed. Therefore an act initially defined as “private” could eventually turn (also) into a “public” one.

¹⁰³ This is so even though SUA Convention does not refer to “piracy” at all, and alludes to terrorism only in its preamble.

¹⁰⁴ Article 101(a)(i) of UNCLOS.

¹⁰⁵ Article 101(a)(ii) of UNCLOS.

¹⁰⁶ Article 86 of UNCLOS.

Consequently, by virtue of this provision, acts committed in the EEZ may also constitute piracy within the meaning of Article 101 UNCLOS. Formally speaking, this conclusion has to be qualified that regulations concerning piracy in the high seas apply in the EEZ only as long as they are not incompatible with Part V of the Convention (devoted to EEZ). It would be nonetheless difficult to conceive what situation would render Article 101 of UNCLOS (merely defining piracy) incompatible with Part V of the Convention. If anything, only the exercise of third States in the coastal State's EEZ of their rights under Article 105 (seizing ships and arresting people onboard) or 110 (right of visit) of UNCLOS, might potentially become problematic. Such a situation would have to entail such a massive operation of third States that a coastal State would be prevented from exercising its rights enshrined in Article 56 of UNCLOS (most notably sovereign right to explore, exploit, conserve and manage natural resources). This seems implausible and most probably would have to entail actions lacking *bona fide*. Another example would include a conflict between fishing vessels about their catch in the EEZ¹⁰⁷.

It is therefore safe to conclude that piracy can be committed both in the high seas and in the EEZ. *A contrario*, acts committed in the territorial sea, archipelagic waters or internal waters cannot be termed "piracy" and, consequently, third States do not enjoy rights enumerated in Article 103 UNCLOS. There are, however, certain legal and practical difficulties pertaining to that issue, which may be illustrated by the table 1.

These figures, taken from the IMO reports on "Piracy and armed robbery", show that there has been a significant number of attacks that were conducted not in the high seas but in territorial sea or port area. Consequently, they do not fulfil the "piracy" criteria prescribed in Article 101 of UNCLOS. It is for that reason that in the IMO context a phrase "piracy and armed robbery" is used. The "armed robbery" part is supposed to cover situations where acts are "piratical" in nature though due to the maritime area they were committed in, they do not constitute piracy proper.

¹⁰⁷ Example given by: P. Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law*, Springer 2007, at pp. 17–18.

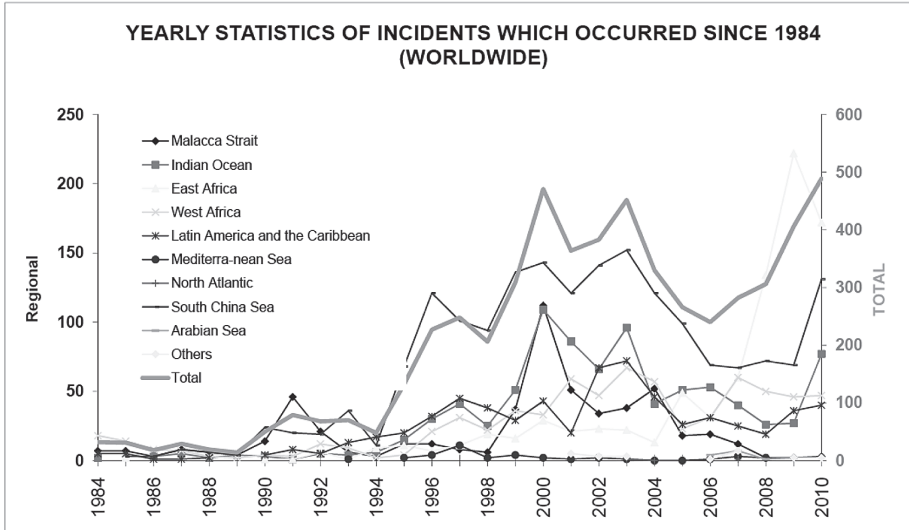


Table 1. Source: IMO doc. MSC.4/Circ.169 of 1.4.2011, Annex 4.

ANNEX 3
REGIONAL ANALYSIS OF REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS WHICH WERE REPORTED TO HAVE BEEN ALLEGEDLY COMMITTED OR ATTEMPTED DURING 2010

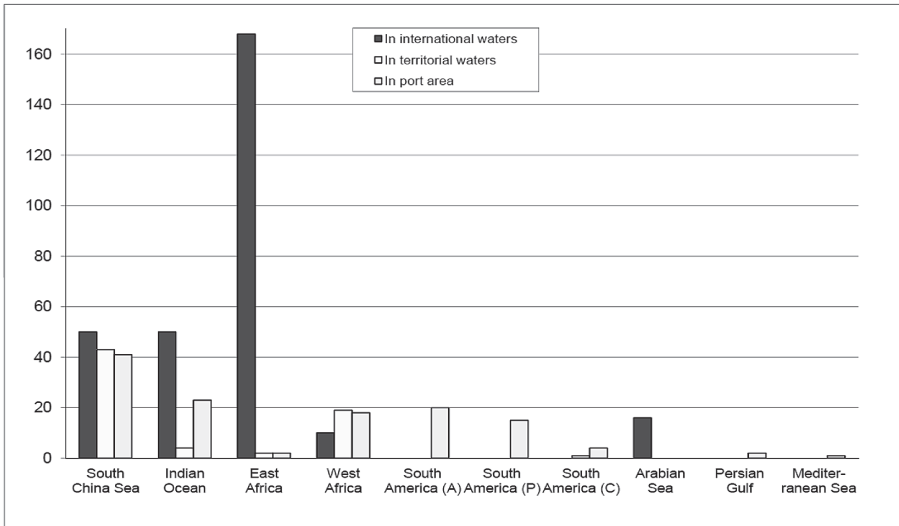


Table 2. Source: *Ibidem*, Annex 3.

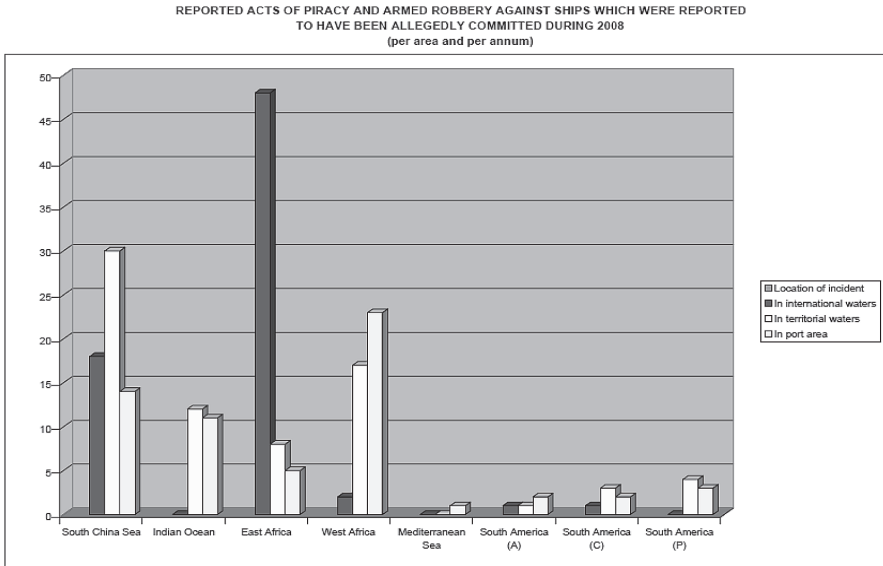


Table 3. Source: IMO doc. MSC.4/Circ.133 of 19.03.2009, Annex 3.

As it was already noted, IMO frequently uses the term “armed robbery”¹⁰⁸. Interestingly, the term is increasingly used in the legal context. ReCAAP contains (the only legally binding) definition of “armed robbery”. Also, Djibouti Code of Conduct, in similar terms, defines it. Lastly, the term is frequently used both in the UN Security Council resolutions on piracy off the coast of Somalia, as well as by the UN General Assembly in the “Oceans and the law of the sea” resolutions. It would be nevertheless too premature to speak of any customary international law¹⁰⁹ definition

¹⁰⁸ In the IMO context it is defined in the, non-legally binding, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships (resolution A.1025(26), Annex, paragraph 2.2), as follows:

“ ‘Armed robbery against ships’ means any of the following acts:

- (a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;
- (b) any act of inciting or of intentionally facilitating an act described above.”

¹⁰⁹ See generally on the creation of customary international law: I. Brownlie, *op. cit.*, at pp. 6–12; H. Thirlway, *The Sources of International Law* [in:] M.D. Evans (ed.),

of armed robbery. The practice of States in that regard does not seem to be widespread and consistent enough. Moreover, the mere usage of the term “armed robbery” does not indicate that there exists *opinio iuris* as to its content and legally binding force.

It shall be also underlined in this context that there is a fundamental difference between high seas/EEZ and territorial sea/internal waters. The later marine areas are within the scope of the coastal State sovereignty which exercises jurisdiction over them and acts committed therein. One cannot draw simple analogy that since “piracy” and “armed robbery” are often used together there are similar sets of legal rules that apply when these crimes are committed. Just on the contrary. Piracy (proper) – seen from the perspective of the structure of UNCLOS – is a crime towards internationally recognized right of freedom of navigation in areas outside of sovereign jurisdiction of a coastal State¹¹⁰. The situation within territorial sea or archipelagic waters is different in two aspects. Firstly, as a rule, third States do not enjoy the right of freedom of navigation there but somewhat limited right of innocent passage¹¹¹ or archipelagic sea lane passage¹¹². Secondly, and decisively, these are areas to which the sovereignty of a coastal State extends. Permitting third States to repress piracy, seize ships and even exercise their jurisdiction over the seized pirates in territorial sea/archipelagic waters would equal to a severe limitation of coastal State sovereignty. Therefore, criminal acts in these marine areas are considered rather as injurious to the coastal State and therefore left to its jurisdiction. As it is stated in the ILC commentary to the 1956 Draft Articles:

“[t]he Commission considers, despite certain dissenting opinions, that where the attack takes place within the territory of a State, including its territorial sea, the general rule should be applied that it is a matter for

‘International Law’, 3rd ed., Oxford University Press 2010, at pp. 101–108; A. Cassese, *International Law*, 2nd ed., Oxford University Press 2005, at pp. 153–169 with literature and case-law quoted therein.

¹¹⁰ Article 87(1)(a) UNCLOS. This freedom was also transposed into the EEZ regime: see Article 58(1) of UNCLOS.

¹¹¹ Articles 17–32 and 52 of UNCLOS.

¹¹² Article 53 of UNCLOS.

the State affected to take the necessary measures for the repression of the acts committed within its territory”¹¹³.

Hence, it shall be concluded that: (a) the definition of piracy does not apply to acts committed in territorial sea/archipelagic waters; (b) there is a growing tendency to use the term “armed robbery” to denote “piracy” (though certain differences in the definition of these terms exist) but committed in above mentioned marine areas; (c) similarity in the “criminal nature” in these two instances of maritime offence does not extend to similar legal consequences (including rights and obligations of States) flowing from their breach.

As was already mentioned, Article 101 of UNCLOS contains also second “territorial limitation” to the definition of piracy, namely, it mentions “places outside the jurisdiction of any State”¹¹⁴. The ILC Commentary to 1956 Draft Articles explains that the intention here was to include in the definition acts committed on an island constituting *terra nullius* or on the shores of an unoccupied territory¹¹⁵. Thus, this provision is of rather limited use presently (for the apparent lack of *res nulliae*), however, it might be argued that it could encompass piracy, if any, off the coast of Antarctica.

3.3. The “two ships criterion”

Yet another problem relating to the definition of piracy is the one sometimes referred to as the “two ships criterion”. It derives from the formulation that piracy has to be committed “against another ship” on the high seas¹¹⁶. What is therefore left outside of this definition is for example a mutiny or other acts of violence – such as the ones exemplified

¹¹³ ‘Yearbook of the International Law Commission’ 1956, Vol. II, at p. 282. See also Virginia Commentary, at pp. 200–201. As it is explained there at the III UN Conference on the Law of the Sea there was no further interpretation on this rule.

¹¹⁴ Article 101(a)(ii) of UNCLOS.

¹¹⁵ ‘Yearbook of the International Law Commission’ 1956, Vol. II, at p. 282. Debate of the ILC on that point can also be found in: ‘Yearbook of the International Law Commission’ 1955, Vol. I, at pp. 52–53.

¹¹⁶ Article 101(a)(i) of UNCLOS. Article 101(a)(ii) of UNCLOS uses different formulation and will be discussed below.

in the above mentioned *Achille Lauro* or *Santa Maria* incidents. In other words, this problem refers to situations where acts of violence, detention or depredation are committed by crew or passengers of the ship against this very ship or its crew/passengers (also known as: internal taking). This was a deliberate attempt by the ILC, as it is remarked in its commentary to the 1956 Draft Articles, although it was aware of the differences in opinion on that point¹¹⁷. This approach was taken in line with what was suggested in the Harvard Draft¹¹⁸ and should be assessed positively. As was explained above, the “logics” of the crime of piracy stems mainly from the fact that it endangers international shipping and, thus, is an object of concern of all States¹¹⁹. A ship that, for whatever reason, was taken over by criminals – and does not interfere with other ships – falls short, and rightly so, of the definition of piracy. Instead, depending of the nature of the crime, such acts may fall into one or many other categories of crimes – either national (e.g., under the law of the flag State, if the ship may still be considered as flying the flag of that State) or international (e.g., UN Hostages Convention or SUA Convention). Naturally, such a ship, following its criminal conduct afterwards, may turn into a “pirate ship” in the meaning of Articles 101 and 103 of UNCLOS. This point deserves one additional comment. The definition contained in Article 103 of UNCLOS states in its relevant part that: “A ship or aircraft is considered a pirate ship or aircraft if it is *intended* by the persons in dominant control *to be used for the purpose of committing one of the acts referred to in article 101*” (emphasis added).

¹¹⁷ ‘Yearbook of the International Law Commission’ 1956, Vol. II, at p. 282: “Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy”. Cf. R. Jennings, A. Watts, *op. cit.*, at p. 747, where it is noted that previous editions of the Oppenheim’s manual contained a very broad definition of piracy that encompassed mutiny. This definition was abandoned though, as it was thought that nowadays piracy *jure gentium* is expressed in the Convention on the high seas and UNCLOS.

¹¹⁸ ‘Yearbook of the International Law Commission’ 1955, Vol. I, at pp. 41–42.

¹¹⁹ Alternatively, one can search for rationale of criminalizing of piracy in the fact that pirates are “*hostes humani generis*”. See also on that point D. Guilfoyle, *Shipping Interdiction...*, at p. 28 where the Author speaks of theoretical justifications of the prohibition of piracy and is of the opinion that currently the justification is to be found rather in the protection of freedom of navigation than in the fact that pirates are “enemies of mankind”. Cf. D.P. O’Connell, *op. cit.*, Vol. II, at pp. 968–969.

What is therefore interesting is that for a ship to become a pirate one, it would be enough that the persons who conducted the internal taking *intended* to commit an act of piracy, as described in Article 101 of UNCLOS. In other words, it would be possible to define a ship as piratical even when the act of piracy itself was not committed (but “merely” intended)¹²⁰. What is more, this would be also enough to trigger the application of Article 105 of UNCLOS which allows, *inter alia*, to seize a “pirate ship” on the high seas.

Another problem that relates to the “two ships criterion” is not of quantitative but of qualitative character. Namely, one needs two *ships* to commit a crime. However, in the Somali context the piratical attacks take place from “skiffs”. As the methodology of Somali pirates was explained:

“Initially pirate attacks were launched from beach heads in open 20’ long skiffs, with high free boards and powered by 75 to 85 horse power outboard motors whose range and safety was dictated by the state of the sea, amount of fuel on board and engine power. The most highly regarded outboard motor along the east coast is the Yamaha 85 horsepower outboard motor. This allows a skiff to attain speed of 30 knots in relatively calm seas with four people aboard. More recent reports indicate that these skiffs are now being powered by as much as two 150 hp motors. These skiffs move about looking for slow moving vulnerable commercial or fishing vessels ideally travelling under 15 knots with a low freeboard”¹²¹.

Later, the practice of pirates has changed and involved the use of “mother ships”:

“The pirates began to use ‘mother ships’, larger ships or dhows already pirated that could move inconspicuously into the ocean carrying pirates weapons and skiffs. When a targeted ship was spotted the skiffs were released close by and raced towards the targeted ship with pirates armed with automatic weapons and RPG’s”¹²².

It is therefore appropriate to ask, whether “skiffs” can be considered as “ships” in the meaning of international law of the sea and, consequently,

¹²⁰ See on that point: R. Jennings, A. Watts, *op. cit.*, at p. 752.

¹²¹ *Piracy off the Somali Coast. Final Report*, at p. 18.

¹²² *Ibidem*, at p. 19.

do they fall within the scope of the “piracy” definition in Article 101 of UNCLOS. One could note at the outset that UNCLOS contains no definition of a ship¹²³ (and, moreover, it also uses the term “vessel” – not defined as well). Such a definition may be found in various agreements, notably those concluded under the auspices of IMO, however their content depends on the issue a given agreement is devoted to¹²⁴. Given the purpose-oriented definitions adopted in various treaties, also the original attempt by Special Rapporteur J.P.A. François to include the definition of the ship in the ILC Draft Articles, failed altogether¹²⁵. Hence, it would be impossible to find a universal definition of a ship in the field of, broadly speaking, international law of the sea¹²⁶. Nevertheless, one should assume that a ship within the meaning of Article 101 of UNCLOS is broad enough to include “skiffs”. The object and purpose¹²⁷ of the Convention’s rules on piracy would be defeated if the mere usage by pirates of a non-standard vehicle would make them immune to the crime of piracy. Additionally, the subsequent practice of States¹²⁸, especially in capturing pirates on “skiffs” off the coast of Somalia, speaks also in favour of such a broad interpretation of Article 101 of UNCLOS.

Lastly, it is important to underline that Article 101(a)(ii) of UNCLOS employs different language. Namely, in places outside the jurisdiction of any State¹²⁹ piracy has to be committed against “a ship” (not against

¹²³ See however the definition of “warship” in Article 29 of UNCLOS.

¹²⁴ By way of an example, 1973 International Convention for the Prevention of Pollution from Ships, as modified by 1978 Protocol (MARPOL 1973/78) defines a ship as “a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms”.

¹²⁵ This definition, in the context of a merchant vessels, read: “A ship is a device capable of traversing the sea but not the air space, with the equipment and crew appropriate to the purpose for which it is used”. See: ‘Yearbook of the International Law Commission’ 1954, Vol. II, at p. 9 (Article 6) and ‘Yearbook of the International Law Commission’ 1955, Vol. II, at p. 10.

¹²⁶ R.-J. Dupuy, D. Vignes, *A Handbook on the New Law of the Sea*, Martinus Nijhoff Publishers 1991, at pp. 841–844; D.P. O’Connell, *op. cit.*, at pp. 747–750.

¹²⁷ See Article 31(1) of the Vienna Convention on the Law of Treaties, done at Vienna on 23.5.1969, UNTS, Vol. 1155, p. 331 (“VCLT”).

¹²⁸ Article 31(3)(3)(b) of VCLT.

¹²⁹ For the discussion on that phrase see *Supra* note 116 with accompanying text.

“another ship”). Since this provision uses different formulation than the preceding paragraph of the Convention, it could mean that it shall be interpreted differently and, consequently, the phrase “a ship” may include internal taking of a ship by pirates. Opinions in the doctrine vary on that point¹³⁰. It is proposed here that – notwithstanding the unfortunate different formulations in Article 101(1)(i) and (ii) – internal taking, even in areas outside the jurisdiction of any State, should not constitute piracy. As explained above, a rationale for outlawing piracy is that it presents a danger for the right of freedom of navigation on high seas. There is no reason to change that logics when it comes to areas outside the jurisdiction of any State (which could presently refer only to Antarctica)¹³¹. The ILC’s rationale behind (current) Article 101(1)(ii) of UNCLOS was to broaden the territorial scope of areas *where* piracy could be committed but not to change the definition when it comes to *how* it could be committed.

4. Conclusions

As this paper purported to show, the crime of piracy has its established definition, both in treaty and customary international law. It has been adopted in some agreements and/or non binding documents well after 1982 (when the III UN Conference on the Law of the Sea concluded its work). Nevertheless, this established definition continues to pose some legal and practical challenges to the modern fight against piracy.

First, these problems relate to the fact that “piracy” *jure gentium* cannot be committed in the territorial sea/internal waters. Since this question involves also problems that are related to the sovereignty of a coastal State, the answer to the challenge is twofold. On the one hand, there is a growing tendency to refer to “armed robbery” (that is, however, defined slightly different than piracy) and, on the other, the consent of

¹³⁰ The ILC commentary explains that the general intention was, still, to exclude internal taking. ‘Yearbook of the International Law Commission’ 1956, Vol. II, at p. 282. See also D.P. O’Connell, *op. cit.*, Vol. II, at pp. 970–971. Cf. Virginia Commentary, at p. 201 (point 101.8(e)) where the Authors state that in places outside jurisdiction of any State internal taking would be qualified as piracy. Also: Ł. Kułaga, *op. cit.*, at p. 233.

¹³¹ See also R.-J. Dupuy, D. Vignes, *op. cit.*, at pp. 850–851.

a coastal State and/or UN Security Council resolution under Chapter VII of UN Charter needs to be in place as well. The coexistence of the terms “piracy” and “armed robbery” in the modern discussion in international law shall not, however, lead to their analogous treatment when it comes to their legal status and consequences of committing them.

Second, the phrase “for private ends” in the definition of piracy as reflected in Article 101 of UNCLOS shall not be interpreted subjectively. Consequently, declarations of a perpetrator that the crime was committed for political ends does not automatically exclude it from the scope of piracy provisions. Similarly, terrorist acts may at the same time be qualified as piratical. In that last instance, however, it may be the case that it will be better for a given State to base its action on the SUA Convention. UNCLOS piracy provisions should be rather of subsidiary character in that context.

Lastly, in order to qualify as piratical a given act needs to be committed against another ship. This requirement does not prevent attacks that are conducted on “skiffs” off the coast of Somalia from being defined as piracy. On the other hand, the internal taking of a ship is excluded from this definition. Here, again, SUA Convention could provide a legal basis to criminalize and prosecute such acts (although without calling them “piracy”).