11E COMMISSION

PIRACY, PRESENT PROBLEMS

PIRATERIE, PROBLÈMES ACTUELS

RAPPORTEURS : TULLIO SCOVAZZI & TULLIO TREVES

La commission est composée de

MM. Lucius Caflisch, Yoram Dinstein, John Dugard, Malcolm Evans, James Kateka, Roman A. Kolodkin, Theodor Meron, Djamchid Momtaz, Sean Murphy, Rafael Nieto-Navia, Fabián Novak, Bernard H. Oxman, Jin-Hyun Paik, Alfred Soons, Budislav Vukas.

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REPORT

PRELIMINARY NOTE ON THE WORK OF COMMISSION 11 – "PIRACY, PRESENT PROBLEMS"

Commission 11 met on 27 August 2019, during the *Institut* session of The Hague, and examined a paper on "Points for discussion based on the UNCLOS [= United Nations Convention on the Law of the Sea] provisions on piracy", prepared by the rapporteurs. The members of Commission 11 agreed to avoid suggestions to amend the UNCLOS regime or assumptions that it has been affected by subsequent customary international rules. They consequently agreed that the main purpose of the work should be to present elucidations or interpretations of the relevant UNCLOS provisions in the light of subsequent practice. They deemed that all the points listed in the above-mentioned paper were relevant and that subjects deserving particular discussion were the meaning of universal jurisdiction and the specific obligations of the State that has arrested alleged pirates.

The members of Commission 11 were invited to send to the rapporteurs their comments on the points for discussion. A number of comments were received.

On the basis of the comments, the rapporteurs prepared a preliminary report that included a draft *Institut* resolution. The latter was discussed at the Commission 11 hybrid meeting held in Geneva, *Maison de la Paix*, on 18 March 2022.

On 20 October 2022, the rapporteurs circulated a revised preliminary report that included a revised draft *Institut* resolution. The latter was discussed at the Commission 11 hybrid meeting held in Geneva, *Maison de la Paix*, on 4 November 2022. The positions on the main point of disagreement (acts of protest at sea) were bridged through a commonly satisfactory wording and the other pending questions were discussed and settled.

On 10 November 2022, the rapporteurs circulated the final version of the draft *Institut* resolution and, on 15 December 2022, they circulated the draft report for comments. On the basis of the comments received, they prepared the final report to which the draft *Institut* resolution is attached.

Finally, the rapporteurs wish to thank Commission 11 members for all their fruitful comments and suggestions and their very constructive contribution to the work.

31 December 2022.

Tullio Treves & Tullio Scovazzi

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1. INTRODUCTION: THE 2009 NAPLES DECLARATION

The *Institut* discussed the subject of piracy at its Naples session, when it adopted on 11 September 2009 the "Naples Declaration on Piracy" by 51 votes in favour, 0 against and 1 abstention.[1]

During the discussion, the rapporteur (T. Treves) pointed out that the draft instrument was intended as a "declaration", rather than a "resolution" and that it "did not purport to cover all the legal aspects of the piracy phenomenon", but only "the aspects that were felt to be most topical" in the situation of that time[2], when there was an increase in acts of piracy and other acts of violence, which endangered the safety of international navigation and trade and put at risk the life and freedom of seafarers.

While not covering all the notable aspects of the subject, the Naples Declaration on Piracy and the discussion that preceded its adoption can provide useful guidance for the subsequent drafting of a more general Resolution on "Piracy, Present Problems". The text of the Declaration is the following:

"The Institute of International Law,

Deeply concerned by the increase of acts of piracy and of other acts of violence which endanger the safety of international navigation and trade and put at risk the life and freedom of seafarers;

Acknowledging that 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;

Noting the lack of capability of some coastal States to comply with their responsibility to ensure safety of navigation in the territorial sea and to take effective steps, within their territory, including internal waters, to prevent acts of piracy and other acts of violence at sea and activities connected with such acts;

Welcomes UN Security Council Resolution 1816 (2008) and others broadening and adapting, as regards the most serious current situation and without prejudice to general international law, the scope of the existing international rules on piracy to include, in particular, acts against vessels committed in the territorial sea;

Expresses its concern over the reluctance of States to exercise their jurisdiction under the UN Convention on the Law of the Sea to prosecute pirates and perpetrators of other acts of violence at sea and to implement the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 1979 UN Convention against the Taking of Hostages;

[1] Institut de Droit International, *Annuaire*, vol. 73, 2009, p. 584.
[2] *Ibidem*, p. 572.

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Expresses its concern over the lack of uniformity and sometimes the inadequacy of domestic policies and laws concerning pirates and perpetrators of other acts of violence at sea when found within their jurisdiction;

Calls upon States, with full regard to the human rights of the victims and of the other persons involved, to implement the relevant resolutions of the UN Security Council, and, in particular:

(a) to adopt or develop effective domestic laws and procedures to prevent and suppress piracy and other acts of violence at sea,

(b) to adopt cooperative arrangements to deal with piracy and other acts of violence at sea, including the preparation and deployment of effective naval responses and assistance to coastal States that lack the capability to fight piracy and other acts of violence at sea and to prosecute the perpetrators thereof"[3].

Some considerations may be drawn from the Naples Declaration.

A) There is a latent assumption that the present definition of piracy, as resulting from the United Nations Convention on the Law of the Sea (Montego Bay, 1982; UNCLOS), might be inadequate, because of its narrow scope, to meet the current needs of the fight against piracy. This definition does not cover all acts of violence committed at sea for private ends, being limited to acts of violence taking place on the high seas and undertaken by a ship against another ship. The question arises whether a future *Institut* Resolution should recommend enlarging the present definition of piracy. This would necessarily entail an amendment of the text of the UNCLOS.

B) The *Institut* welcomes the recent United Nations Security Council practice to consider piracy, in one specific situation (that is, the situation in Somalia), as a threat to international peace and security and to authorise measures that go beyond what would be allowed by the UNCLOS. However, the *Institut* remarks, as it was stressed by the relevant Security Council resolutions, that such practice is without prejudice to general international law.

C) The unexpected reluctance of States to exercise their jurisdiction over pirates is noted by the *Institut* with concern. While general international law allows universal jurisdiction over persons suspected of piracy on the high seas, which is not the normal basis for jurisdiction in international criminal law[4], States' practice off the coast of Somalia has shown instances where captor States, for a number of reasons, have preferred not fully to exercise their powers[5]. The question arises

[3] *Ibidem*, p. 584.

[4] See the intervention by B. Conforti, according to whom piracy is a "problème juridique complexe en ce qu'il implique un exercice du pouvoir étatique qui ne relève pas du schéma classique des compétences de l'État" (*ibidem*, p. 571).

[5] See the interventions by L. Caflisch: "premièrement, les règles actuelles relatives à la piraterie ne s'appliquent pas à la mer territoriale et deuxièmement, certains États ne répriment pas comme ils le devraient la piraterie. L'Institut devrait se pencher plus avant sur ces deux questions" (*ibidem*, p. 572) ; by Y. Dinstein: "He was more concerned about the phenomenon of commanders of European warships releasing pirates whom they captured *in flagrante delicto* simply because they feared that, if the pirates

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whether a future *Institut* Resolution should understand the right to exercise jurisdiction in a sense closer to a "duty", broadening the meaning of Art. 100 UNCLOS, without necessarily amending its wording.

D) The *Institut* expresses the view that two other treaties are relevant for the fight against piracy and armed robbery at sea, namely the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 1988) and the International Convention against the Taking of Hostages (New York, 1979), and should be broadly ratified and implemented by States parties[6].

E) The *Institut* finds that there is a lack of uniformity in national legislation on piracy and other acts of violence at sea, calling upon States to adopt or develop effective domestic laws and procedures to prevent and suppress such crimes.

F) The *Institut* emphasizes the human rights implications of piracy, in particular as regards the human rights of the victims[7] and of the other persons involved.

G) The *Institut* also stresses the need to adopt cooperative arrangements to deal with piracy and other acts of violence at sea.

These considerations do not exhaust the series of questions linked to piracy, as the subsequent elaboration will show. Nevertheless, they constitute a sensible basis for future discussion within the *Institut* for the purpose of drafting a resolution which, as stated in Art. 1 of its Statutes, is intended to "promote the progress of international law".

2. HISTORICAL BACKGROUND

The plague of piracy[8] takes its roots in ancient times[9], when measures directed to preventing and suppressing piracy were already put in place.

Pirates were a source of major concern for the ancient Romans. It appears that the origin of the idea of universal jurisdiction over pirates has to be attributed to the authority of Cicero (106–43 B. C.), even though his intention was probably a different one. In a passage of *De officiis*, written in 44 B. C., he describes the pirate

were brought to Europe, the end could be that the pirates (perhaps after a short jail sentence) would request political asylum. It was, therefore, necessary to underscore in the proposed Declaration not merely the universal right to exercise jurisdiction but also the universal duty to prosecute and punish offenders" (*ibidem*, p. 575); and by G. Bastid-Burdeau: "[elle] invite ensuite l'Institut à dépasser la Convention de 1982 qui ne stipule qu'un droit pour les États d'arraisonner les navires et de poursuivre les pirates, alors qu'il devrait y avoir en l'occurrence une obligation" (*ibidem*, p. 577).

[6] See the intervention by Y. Dinstein: "he noted that there was no mention of the issue of hostage-taking, observing that there was a 1979 International Convention against the Taking of Hostages. Admittedly, the Convention was designed to cope with the suppression of terrorism. Yet, there was nothing in the text of the Convention that would make it inapplicable to hostage-taking by pirates" (*ibidem*, p. 575).

[7] See the intervention by F. Pocar: "He suggested inserting in the first paragraph a reference to the human rights violations of hostages taken by pirates" (*ibidem*, p. 577).

[8] The word pirate comes from the ancient Greek πειρατής.

[9] On the historical developments, see RUBIN, *The Law of Piracy*, Newport, 1988; CHADWICK, *Piracy and the Origins of Universal Jurisdiction*, Leiden, 2018.

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as the common enemy of all (*communis hostis omnium*)[10]. When Cicero used this pejorative qualification for pirates, he was making the point that, while the agreements concluded with an enemy are binding, agreements concluded with pirates to give them a ransom in exchange for freedom or life are not binding, because with such wrongdoers neither faith nor oath is to be kept. The passage, which is based on the assumption that pirates are placed even below the level of legal protection that can be granted to enemies because they are the enemies of everybody, seems in itself dubious rather than convincing[11].

In fact, the Romans did not need to wait for Cicero to get rid of pirates who infested the Mediterranean. Already in 67 B.C. did Pompey, acting under the authority of special legislation (*Lex Gabinia de piratis persequendis*), engage in military campaigns directed against pirates, in particular the Cilician pirates of the eastern Mediterranean who had been pillaging the sea and coastal localities for eighty years. At that time, groups of pirates could be considered as maritime communities who sustained themselves by plunder and were a parasitical alternative to communities based on maritime commerce. Pirates were a serious obstacle to the political and commercial order that Rome wanted to establish at sea. The eradication of such undesirable (for the Romans) communities was accomplished through the use of force. Captured pirates were in most cases punished and summarily executed without any legal procedure. An easy justification for what was currently done became the notion of pirates as common enemies of everybody, put forward by Cicero. But this is far from present understanding of universal jurisdiction and it is questionable whether the Romans shaped the present approach towards piracy by identifying pirates as those who offend intrinsic values common to all States[12].

When the founding fathers of international law wrote their treatises, piracy was, again, a common practice and concern in the Mediterranean Sea and in other seas as well. This is why some well-known legal authorities were involved in questions of piracy and contributed to the elaboration of an international regime of piracy.

[10] "Est autem ius etiam bellicum fidesque iuris iurandi saepe cum hoste servanda. Quod enim ita iuratum est, ut mens conciperet fieri oportere, id servandum est; quod aliter, id si non fecerit, nullum est periurium. Ut, si praedonibus pactum pro capite pretium non attuleris, nulla fraus est, ne si iuratus quidem id non feceris. Nam pirata non est ex perduellium numero definitus, sed communis hostis omnium; cum hoc nec fides debet nec ius iurandum esse commune" (CICERO, *De officiis*, book III, para. 107).

[11] Why agreements with the enemy of myself should be binding for me and those with the enemy of everybody should not? The number of enemies appears to be an incongruous factor in addressing the question of validity of an agreement. It should be replaced by the more relevant remark that agreements with pirates are concluded under threat. Roman jurists at a certain stage of their elaboration reached the conclusion that there are a number of situations that lead to the invalidity of (what today we would call) contracts, including threat. However, this stage probably was achieved after the first century B.C. and, in any case, Cicero's *De officiis* is a moral and not a legal dissertation.

[12] Interestingly, St. Augustine (354-430) compares pirates, who infest the seas with a small ship, to State army leaders, who do the same with a big fleet: "Eleganter enim et veraciter Alexandro illi Magno quidam comprehensus pirata respondit. Nam cum idem rex hominem interrogaret, quid ei videretur, ut mare haberet infestum, ille libera contumacia: 'Quod tibi, inquit, ut orbem terrarum; sed quia id ego exiguo navigio facio, latro vocor; quia tu magna classe, imperator'" (AUGUSTINUS HIPPONENSIS, *De civitate Dei contra paganos libri XXII*, book 4, chap. 4).

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At that time, piracy was flanked by privateering, that is attacks and robberies against vessels flying the flag of a given State carried out by private mariners who were authorized to do so under letters of marque issued by another State. Although the actions by pirates and by privateers were similar, if not identical, the former, acting for private ends, represented the statelessness and lawlessness of the sea, while the latter were a sort of manifestation of State authority by proxy. Incidentally, privateering is not a problem anymore. It was abolished by the 1856 Declaration of Paris[13] and by subsequent instruments.

Alberico Gentili (1552-1608), in the *De jure belli libri tres*, published in 1598, stressed the distinction between States, which can make war ("principes bellum gerunt"[14]), and robbers, who cannot make war ("latrones bellum non gerunt"[15]). He drew the conclusion that the law of war cannot apply to pirates, as they are criminals subject to the jurisdiction of the State. Among several other sources, he quoted Cicero in this regard[16]. Gentili was personally involved in pleading on behalf of Spain before English courts in cases relating to privateering or piracy[17]. Notable is his position that the victims – in the specific case, the victims were Spanish nationals – are entitled to restitution of property depredated by a pirate, even though such property was sold or given by the pirate to a third party[18] (this right is today implied in Art. 105 UNCLOS).

In a passage of his *De jure praedae* written in 1604[19], Hugo Grotius (1583-1645) remarked that the Portuguese, who at that time claimed sovereignty over vast parts of the oceans and prevented free navigation and trade by ships flying the flag of other States, acted like pirates, that is in the same way as those people who in ancient times were considered as harmful to all humankind[20]. In the *De jure belli*

[13] "La course est et demeure abolie" (Art. 1).
[14] GENTILIS, *De jure belli libri tres*, 1598. This is the title of chapter III of book I.
[15] *Ibidem*. This is the title of chapter IV of book I.
[16] "Piratae omnium mortalium hostes sunt communes. Et itaque negat Cicero, posse cum istis intercedere jura belli" (*ibidem*, book I, chapter III).
[17] GENTILIS, *Hispanicae advocationes*, 2nd ed., Amstelredami, 1661 (the first edition was published in 1613).
[18] "Hostis quidam Hispanorum in piratica Britannorum navi cum esset, sive dux, sive miles, accepit a piratis pecunias, an res alias. Quaeritur si haec, vel res, vel pecuniae repeti ab illo per eos possint, qui spoliati sunt. Sane si res accepit, quae extent, & videtur iste teneri ad restitutionem earum. Et sic est lex, & Doctores ad eam: qui etiam in id damnant emptorem, eumque bonae fidei, & nec recepto pretio: Lex tanto magis damnatura socium piraticae. (…) Caeterum non est hic bona ejus fides, qui sciebat, se a piratis accipere" (*ibidem*, p. 47).
[19] GROTIUS, *De jure praedae commentarius*, edited by H. G. Hamaker, Hagae Comitum, 1868 (only in 1864 was the manuscript of this work accidentally found and subsequently published). But its chapter XII had already been published anonymously in 1609 under the title *Mare liberum sive de jure quod Batavis competit ad Indicana commercia dissertatio*.
[20] "Haec si ad institutum nostrum conferamus, repetitis quae ante narrata sunt, perspicuum fiet Lusitanos mercatorum specie non procul a piratis discedere. Si enim hoc nomen illis convenit, qui maria obsident et gentium commercia infestant, an non venient in hunc numerum qui, cum omnes populos Europaeos, etiam in quos nulla belli causas habent, oceano et Indiae accessu per vim arceant inter diversissimos atque inter se contrarios colores, quos huic feritati obtendunt, ne unum quidem reperiunt, quem aequioribus apud se hominibus potuerint approbare? Cum igitur his genus homines, ut in omne humanum genus injuriosos, cunctorum communem odium mereri antiquitas semper judicari; ne nunc quidem sint, nisi forte paucissimi, qui Lusitanos istius criminis absolvant, quid est quod ex illorum paenis timeat aliquis sustinere invidiam?" (*ibidem*, chapter XIV, p. 308).

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ac pacis libri tres, published in 1625, Grotius dehumanized pirates as barbarians, more similar to beasts than men[21]. After having quoted the well-known passage of Cicero on pirates[22], Grotius stated that atrocious wrongdoers who do not belong to any State can be punished by every person:

> *"(…) qui atrociter malefici sunt, neque pars sunt ullius civitatis, hi a quovis homine puniri possunt (…)[23]".*

Grotius was instrumental in developing the idea of the pirate as a universally punishable outlaw[24]. This was confirmed by Emmerich de Vattel (1714-1767), who pointed out that pirates, as enemies of humankind, may be sent to the gibbet by the first into whose hands they fall:

> "C'est ainsi que les pirates sont envoyés à la potence par les premiers entre les mains de qui ils tombent"[25].

In the meantime, communities of pirates and privateers – the distinction was not always a clearcut one – flourished in the Caribbean Sea area where they constituted communities who lived a counter-life, subverting the values of European civilization, such as discipline, order and reason. The "golden age" of piracy took place between 1700 and 1730. However, in this period Great Britain took the definite position that pirates were a threat to freedom of navigation and commerce, two of the main interests of the community of all (European) States. At that time, pirates' inhumanity was matched only by the ferocity of States' campaigns to suppress them.

A series of British court judgments, which decided on the indictments against egregious pirates, such as Cusack, Dawson, Kidd[26], Green or Bonnet, marked a progression towards the notion of universal jurisdiction over pirates. Even though in most cases the assertion of universal jurisdiction was not strictly needed, as there was an actual jurisdictional connection between the accused and the State that tried him, it clearly became the British (and later American) view, shared by the other major maritime powers, that piracy provided a special basis of

[21] "De talibus enim barbaris, & feris magis, quam hominibus, dici recte potest (…)" (GROTIUS, *De jure belli ac pacis libri tres*, 1625, book II, chapter XX, para. XL, sub-para. 3).
[22] *Ibidem*, book III, chapter XI, para. X, para. II, sub-para. 1.
[23] *Ibidem*, book III, chapter XIX, para. III, sub-para. 1.
[24] Bynkershoek (1673-1743) stressed that property depredated by pirates belongs to the original owner: "Interest scire, qui piratae ac latrones sint, nam ab his capta dominium non mutant" (BYNKERSHOEK, *Quaestionum juris publici libri duo*, book I, chapter XVII, published for the first time in 1737).
[25] VATTEL, *Le droit des gens ou principes de la loi naturelle*, 1758, book I, chapter XX, para. 233. Vattel must be thanked for having spared us any Cicero's quotation.
[26] For example, William Kidd was convicted and sentenced in 1701, together with other pirates, at the Admiralty-Sessions held by His Majesty's Commission at the Old Bailey: "You the Prisoners at the Bar, Will. Kid, N. Churchil, J. Howe, Gabriel Loff, Hugh Parrot, Abel Owens, Darby Molins, Rob. Hickman, and J. Eldrig; you have been severally indicted for several Piracies and Robberies, and you Will. Kid of Murder. You have been tryed by the Law of the Land and convicted; and nothing now remains, but that Sentence be passed according to the Law. And the Sentence of the Law is this, You shall be taken from the Place where you are, and be carried to the Place from whence you were; and from thence to the Place of Execution, and there be severally hanged by your Necks until you be dead. And the Lord have Mercy on your Souls. Will. Kid, My Lord, it is a very hard Sentence. For my part, I am the innocentest Person of them all, only I have been sworn against by perjured Persons" (*The Arraignment, Tryal and Condemnation of Captain William Kidd, for Murther and Piracy*, London, 1701, p. 60).

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jurisdiction to prosecute and punish everybody, including foreigners who had acted on the high seas.

For example, as stated by Sir Charles Hegdes, judge of the Admiralties, during the trial of Joseph Dawson and others,

> *"Now the Jurisdiction of the Admiralty is declared, and described in the Statute, and Commission by vertue of which we here meet, and is extended throughout all Seas, and the Ports, Havens, Crecks, and Rivers beneath the first Bridges next the Sea, even unto the higher Water-mark. The King of England hath not only an Empire and Soveraignty over the Britiſh Seas; but also an undoubted Jurisdiction, and Power, in concurrency with other Princes, and States, for the punishment of all Piracies and Robberies at Sea, in the most remote parts of the World, so that if any person whatsoever. Native or Forreigner, Chriſtian or Infidel, Turk or Pagan, with whole Country we have no War, with whom we hold Trade and Correspondence, and are in Amity, shall be robbed or spoiled, in the narrow seas, the Mediterranean, Atlantick, Southern, or any other Seas, or the branches thereof, either on this, or the other side of the Line, it is Piracy within the limits of your Enquiry, and the cognizance of this Court"*[27].

Deciding in 1718 the case against Bonnet, the Admiralty Court of Charles-Town, Province of South Carolina, remarked that

> *"[Piracy] is an Offence that is destructive of all Trade and Commerce between Nation and Nation; so it is the Interest of all Sovereign Princes to punish and suppress the same. And the King of England hath not only an Empire and Sovereignty over the British Sea, but also an undoubted Jurisdiction and Power, in concurrency with other Princes and States, for the Punishment of all Piracies and Robberies at Sea, in the most remote Parts of the World"*[28].

Writing in the second half of the 18th century about jurisdiction and sanctions against pirates, the French jurist René-Josué Valin (1695-1765) drew the following conclusions:

> "Quant à la peine due aux pirates & forbans, elle est du dernier supplice, suivant l'opinion commune, parce que ce sont des ennemis déclarés de la société, des violateurs de la foie publique & du droit des gens, des voleurs publics à mains armées & à force ouverte. (…) Par cette raison, il est permis à quiconque de les arrêter pour leur faire subir la peine que mérite leur

[27] *The Tryals of Joseph Dawson, Edward Forseith, William May, William Bishop, James Lewis, and John Sparkes for Several Piracies and Robberies by Them Committed in the Company of Every the Grand Pirate, near the Coasts of the Easts Indies; and Several Other Places on the Seas*, London, 1696, p. 6.
[28] *The Tryals of Major Stede Bonnet, and Other Pirates*, London, 1719, p. 3.

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crime. Mais il n'est pas permis de les tuer autrement que dans le combat, & il faut nécessairement les déférer à la justice"[29].

In fact, pirates had to defend themselves not only from the navies and courts of Great Britain and other States – what was certainly known by them – but also from the rhetorical invectives of Cicero and Grotius who had depicted them as people responsible for the most heinous crimes, enemies of humankind and abhorrent beings, standing midway between men and beasts – what was likely less known by them, but inherent in the legal culture of judges and lawyers. For example, the Attorney-General Richard Allein drew the following picture of the already mentioned pirate Bonnet and his fellows:

> *"That it is a Crime so odious and horrid in all its Circumstances, that those who have treated on that Subject have been at a loss for Words and Terms to stamp a sufficient Ignominy upon it: Some calling them Sea-Wolfs; others Beasts of Prey, and Enemies of Mankind, with whom neither Faith nor Treaty is to be kept. And all this is but a faint Description of these Miscreants: For Beafts of Prey, the fierce and cruel in their Natures, yet, as has been observ'd of them, they only do it to satisfy their Hunger, and are never found to prey upon Creatures of the same Species with themselves. Add hereto, that those wild Beasts have neither rational Souls, Understanding; nor Reason to guide their Actions, or to distinguish between Good or Evil. But Pirates prey upon all Mankind, their own Species and Fellow-Creatures, without Distinction of Nations or Religions; English, French, Spaniards, and Portuguese, and Moors and Turks, are all alike to them: for Pirates are not content with taking from the Merchants what Things they stand in need of, but throw their Goods over-board, burn their Ships, and sometimes bereave them of their Lives for Pastime and Diversion, as we have had frequent Instances of late, and prove destructive to all Trade and Commerce in general"*[30].

Notable is that, in times past, the presence of two ships (the pirate ship and the victim ship; the so-called dual condition) was not seen as a necessary element for the crime of piracy, which might include also cases where a mutiny of the crew violently dispossessed the master of the command of the ship:

> *"Now Piracy is only a Sea term for Robbery, Piracy being a Robbery committed within the Jurisdiction of the Admiralty: if any man be assaulted within that Jurisdiction, and his Ship or Goods violently taken away without a Legal Authority, this is Robbery and Piracy. If the Mariners of any Ship shall violently dispossess the Master, and afterwards carry away*

[29] VALIN, *Nouveau commentaire sur l'ordonnance de la marine du mois d'août 1681*, 2nd ed. La Rochelle, 1776, book III, title IX, art. III. Notably, Valin took a position for returning properties to the depredated owners (see *infra*, para. 12.A): « Les navires & effets de nos sujets ou alliés repris sur les pirates, & réclamés dans l'an & jour de la déclaration qui en aura été faite à l'amirauté, seront rendus aux propriétaires, en payant le tiers de la valeur du vaisseau & des marchandises, pour frais de recousse » (*ibidem*, book III, title IX, art. X).
[30] *The Tryals* cit. *(supra,* note *28)*, p. 8.

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> *the Ship itself, or any of the Goods, or Tackle, Apparel, or Furniture, with a felonious Intention, in any place where the Lord Admiral hath, or pretends to have Jurisdiction; this is also Robbery and Piracy; the intention will, in these cases, appear, by considering the end for which the Fact was committed, and the end will be known, if the Evidence shall shew you what hath been done"*[31].

Yet the fact that piracy has been treated with universal public enmity and pirates considered as scum of the seas[32] continuously from ancient times should not mislead us into assuming that the law of piracy has always been the same[33].

Piracy was the very first crime recognized as such in international law, entailing the exercise of universal jurisdiction, to be today understood, *mutatis mutandis*, as

> *"(...) the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law"*[34].

Universal jurisdiction in cases of piracy, which includes all the three aspects of "jurisdiction" (prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction)[35], appears to be the result of a number of concurring circumstances, namely: that piracy affects the agreed vital interest of the international community in freedom of the sea and maritime trade; that pirates target their victims indiscriminately, potentially endangering the nationals and ships of every State; that piracy takes place on the high seas beyond national borders and should not take advantage from a jurisdictional vacuum. Open to discussion is whether the particularly heinous nature of crime should be added to the concurring

[31] *The Tryals of Joseph Dawson* etc. cit. (*supra*, note 27), p. 6.

[32] "A proprement parler, dans le sens le plus restraint et le plus généralement adopté, les pirates ou forbans, qu'en langage vulgaire marin on appelle aussi écumeurs des mers, sont ceux qui courent les mers de leur propre autorité, pour y commettre des actes de depredation, pillant à main armée soit en temps de paix, soit en temps de guerre, les navires de toutes les nations, sans faire d'autre distinction que celle qui leur convient pour assurer l'impunité de leurs méfaits" (ORTOLAN, *Règles internationales et diplomatie de la mer*, Paris, 1856, I, p. 232).

[33] This is remarked in the commentary to the Harvard Draft (quoted *infra*, note 57), p. 787.

[34] Resolution of the *Institut* on universal criminal jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes, adopted on 26 August 2005 (Institut de Droit International, *Annuaire*, vol. 71, t. II, 2005, p. 297). In the case of piracy, to have universal jurisdiction the crime has to be committed everywhere on the high seas.

[35] According to the arbitral award of 21 May 2020 on *The Enrica Lexie Incident* (Italy v. India), "the concept of 'jurisdiction', derived from the Latin *juris dicere* (literally: 'to speak the law'), while broadly used in international law, remains largely undefined in the case law of international courts and tribunals" (para. 525). "One may distinguish between prescriptive jurisdiction, adjucative jurisdiction, and enforcement jurisdiction. Prescriptive jurisdiction is the authority of a State to make laws in relation to persons, property, or conduct; adjudicative jurisdiction is the authority of a State to apply law to persons or things; and enforcement jurisdiction is the authority of a State to exercise its power to compel compliance with law. Under international law, the exercise of jurisdiction by a State entails an element of prescribing laws, rules, or regulations over conduct, or applying or enforcing such laws, rules, or regulations over persons or property" (para. 526).

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circumstances. For example, the usual behaviour of pirate Gibbs, convicted and sentenced to the death penalty in 1831 by a court in New York, was the following:

> *"The crew were immediately destroyed; those who resisted were hewn to pieces; Those who offered no resistance were reserved to be shot and thrown overboard. Such was the manner in which they proceeded in all their subsequent captures. The unhappy being that cried for mercy in the hope that something like humanity was to be found in the breasts even of the worst of men, shared the same fate with him who resolved to sell his life at the highest price"*[36].
>
> *"They knew that the principle inculcated by the old maxim, that 'dead man tells no tales', was the safe one for them, and they scrupulously followed it"*[37].

However, with all the due consideration for the suffering of the victims of piracy, history shows that there are several crimes relevant for international law as heinous as piracy that were not, and still are not today, subjected to universal jurisdiction. Moreover piracy in itself does not appear among the crimes listed in the 1998 Rome Statute of the International Criminal Court, that is among the "unimaginable atrocities that deeply shock the conscience of humanity"[38]. This omission does not detract from the fact that pirates could be held responsible for acts that constitute other crimes within the jurisdiction of the International Criminal Court if the requisite elements for those crimes are met[39].

More than as a manifestation of the moral wish expressed in general terms by Immanuel Kant that the violation of a right committed in one part of the world be felt in all its other parts[40], universal jurisdiction over pirates is the result of a unique combination of circumstances that date back to Grotius and Cicero before him. Even before the time of codification, universal jurisdiction was clearly established in customary international law, as confirmed by learned authors[41], national decisions[42],

[36] *Confession of Chas. Gibbs alias James Jeffreys Who Has Been Sentenced to Be Executed at N. York on the 22d April, 1831, for Piracy and Murder, on Board the Brig Vineyard*, Boston, 1831, p. 5.
[37] *Ibidem*, p. 6.
[38] Preamble of the Rome Statute.
[39] For example, the crimes against humanity of "murder" or "torture" (Art. 7, para. 1, sub-paras. *a* and *f*, of the Rome Statute). A crime against humanity requires to be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (Art. 7, para. 1).
[40] "Da es nun mit der unter den Völkern der Erde einmal durchgängig überhand genommenen (engeren oder weiteren) Gemeinschaft so weit gekommen ist, daß die Rechtsverletzung an einem Platz der Erde an allen gefühlt wird" (KANT, *Zum ewigen Frieden*, 1795, comment to Art. III).
[41] See, for example, WHEATON, *Elements of International Law*, 2nd ed. by BEACH LAWRENCE, London, 1863, p. 255: "Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals".
[42] For instance, in 1820, the Supreme Court of the United States, in deciding the *United States v. Klintock* case, held that "general piracy, or murder, or robbery, committed in the places described in the 8th section [= of the Crimes Act of April 30, 1790], by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act and punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations" (MOORE, *A Digest of International Law*, II, Washington, 1906, p. 956).

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domestic legislation[43] and some international treaties. For instance, the instruments of regional uniform law that were adopted in Latin America in 1878 and 1928, provided that

> *"Los delitos considerados de piratería por el Derecho Internacional Público, quedarán sujetos a la jurisdicción del Estado bajo cuyo poder caigan los delincuentes"*[44].
>
> *"La pirateria, la trata de negros y el comercio de esclavos, la trata de blancas, la destrucción o deterioro de cables submarinos y los demás delitos de la misma índole contra el derecho internacional, cometidos en alta mar, en el aire o en teritorios no organizados aún en Estado, se castigarán por el captor de acuerdo con sus leyes penales"*[45].

As clearly pointed out on 26 July 1934 by the Judicial Committee of the Privy Council of the British Empire *In re Piracy Jure Gentium*,

> *"whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national or any ship, because a person guilty of such piracy has placed himself beyond the protection of any State"*[46].

Universal jurisdiction over pirates is a key distinctive aspect also of the present regime of piracy[47]. It is considered as an exception to the exclusive flag State jurisdiction over ships on the high seas. As an exception, it must be applied restrictively to the specific case of piracy, excluding cases in which other criminal activities are involved[48]. Nevertheless, universal jurisdiction has always involved a tension between the flag State exclusive jurisdiction, on the one hand, and the collective interest to prevent and repress certain criminal activities, on the other. The primary importance of navigation allows all States to intervene against piracy on the high seas and subsequently to bring pirates before national courts, without any specific connection of the intervening State to the ships or the persons involved in the crime. It has been remarked that "piracy on the high seas would be impossible to suppress or prosecute effectively if an attacked ship had to await the intervention of a naval vessel of either its flag state or that of its attacker"[49].

What is still today open to discussion is how broad the definition of piracy is and, consequently, in what cases universal jurisdiction can be exercised.

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[43] For a review of national legislation see MORRISON (ed.), *A Collection of Piracy Laws of Various Countries*, in *American Journal of International Law*, Supplement, 1932, p. 887.
[44] Art. 13 of the Treaty on International Penal Law (Montevideo, 1878).
[45] Art. 308 of the Code of private international law annexed to the Convention on Private International Law (La Habana, 1928).
[46] LAUTERPACHT (ed.), *Annual Digest and Reports of Public International Law Cases*, 1933-1934, p. 215.
[47] See *infra*, para. 11.
[48] The burden of proof rests with the State exercising universal jurisdiction and asserting the exception.
[49] GUILFOYLE, *Policy Tensions and the Legal Regime Governing Piracy*, in GUILFOYLE (ed.), *Modern Piracy – Legal Challenges and Responses*, Cheltenham, 2013, p. 325.

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3. THE CODIFICATION OF PIRACY

In the first half of the past century, the League of Nations established a Committee of Experts for the Progressive Codification of International Law mandated with the task of preparing a list of subjects of international law the regulation of which by international agreement seemed to be most desirable and practicable. A Sub-Committee, in which Michikazu Matsuda served as rapporteur, addressed the question of whether, and to what extent, it would be possible to establish, by an international convention, appropriate provisions to secure the suppression of piracy. In fact, the subject of piracy was far from being clear in legal terms[50].

In Matsuda's 1927 report and in the draft provisions for the suppression of piracy that followed it, some of the fundamental elements of the present notion of piracy can be found.

For instance, as regards the definition of piracy:

> *"According to international law, piracy consists in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property or acts of violence against persons. The pirate attacks merchant ships of any and every nation without making any distinction except in so far as will enable him to escape punishment for his misdeeds. He is a sea-robber, pillaging by force of arms, stealing or destroying the property of others and committing outrages of all kinds upon individuals"*[51].

As regards the condition of piracy taking place on the high seas:

> *"Piracy has as its field of operation that vast domain which is termed 'the high seas'. It consitutes a crime against the security of commerce on the high seas, where alone it can be committed. The same acts committed in the territorial waters of a State do not come within the scope of international law, but fall within the competence of the local sovereign power"*[52].

As regards the private ends, as opposed to political ends:

> *"Certain authors take the view that desire for gain is necessarily one of the characteristics of piracy. But the motive of the acts of violence might be not the prospect of gain but hatred or a desire for vengeance. In my opinion it is preferable not to adopt the criterion of desire for gain, since it is both too restrictive and contained in the larger qualification 'for private ends'. It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often*

[50] « La notion 'vulgaire' de piraterie est très simple ; c'est le 'brigandage sur mer' (…) ; les anciens auteurs disaient déjà : *piratae dicuntur praedatores marini*. Au contraire la notion juridique de la piraterie est très difficile à préciser; on peut estimer (…) qu'il n'existe pas sur la piraterie de définition faisant autorité » (GIDEL, *Le droit international public de la mer*, I, Châteauroux, 1932, p. 306).

[51] League of Nations, Committee of Experts for the Progressive Codification of International Law, *Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation*, doc. C.196.M.70.1927.V of 20 April 1927, p. 116.

[52] *Ibidem*.

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> *delicate question of motives. Nevertheless, when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon commission of that crime. Such a rule does not assure any absolute impunity for the political acts in question, since they remain subject to the ordinary rules of international law"*[53].

As regards universal jurisdiction:

> *"When pirates choose as the scene of their acts of sea-robbery a place common to all men and when they attack all nations indiscriminately, their practices become harmful to the international community of all States. They become the enemies of the human race and place themselves outside the law of peaceful people. (...) By committing an act of piracy, the pirate and his vessel ipso facto lose the protection of the State whose flag they are otherwise entitled to fly. Persons engaged in the commission of such crimes obviously cannot have been authorised by any civilised State to do so. In this connection we should note that the commission of the crime of piracy does not involve as a preliminary condition that the ship in question should not have the right to fly a recognised flag"*[54].

The rapporteur emphasized that much confusion was due to the lack of a clear distinction between piracy and other crimes at sea and rejected the attempts to enlarge the notion by including acts of so-called "piracy by analogy":

> *"In addition to piracy by the law of nations, States have occasionally, by treaty or in their internal law, established a piracy by analogy which has no claim to be universally recognised and must not be confused with true piracy"*[55].

In reply to a questionnaire by the League of Nations, eighteen States recognised the possibility and the desirability of an international convention on piracy, six refrained from putting forward any opinion, three did not think that the regulation of the question was especially urgent and two replied in the negative. For example, the negative attitude of the United States was explained by the fact that piracy "is so nearly extinct as to render of little importance consideration of that subject as one to be regulated by international agreement"[56]. In fact, the subject of piracy was not retained by the League of Nations for further work of codification.

At the doctrinal level, in 1932 the Harvard Law School carried out a research project on piracy under the direction of Joseph W. Bingham that culminated in a draft convention with commentary (Harvard Draft)[57].

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[53] *Ibidem*.
[54] *Ibidem*.
[55] *Ibidem*, p. 118.
[56] *Ibidem*, p. 279.
[57] Text in *American Journal of International Law*, 1932, Suppl., p. 739. On the Harvard Law School research project see DUBNER, *The Law of International Sea Piracy*, The Hague, 1980, p. 55: "it is fair to state that their in-depth research is by far the most extensive and thorough work on the subject of sea piracy".

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After World War II, within the framework of the codification and progressive development of international law of the sea undertaken by the General Assembly of the United Nations, the "draft articles concerning the law of the sea" adopted in 1956 by the International Law Commission (ILC Draft)[58] included eight provisions on piracy. The ILC Draft provisions became, without major substantive changes, the eight articles on piracy in the Convention on the High Seas (Geneva, 1958; H. S. Conv.), which, in turn, became, after minimal discussion and without any substantive changes[59], the eight articles on piracy in the UNCLOS[60]. The articles of the Harvard Draft, the ILC Draft, the H. S. Conv. and the UNCLOS will be recalled hereunder wherever relevant for discussing the content of a future *Institut* Resolution on piracy.

At the doctrinal level, in 1970, the International Law Association discussed a Resolution on "Piracy (sea and air)"[61] that, *inter alia*, did away with the dual condition[62] so as to include in the notion of piracy so-called aircraft hijacking. The resolution was not adopted[63].

The codification of the rules on piracy has taken place in the context of international law of the sea in general rather than in the more specific context of the law of war (often referred to, today, as international humanitarian law), in particular the law of naval warfare[64]. This is a confirmation of the fact that there is no war between States and pirates. Force is used by States against pirates because the latter are considered by international law as criminals against whom law should be enforced[65], and not as enemies. For instance, pirates do not acquire

[58] Text in United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 259.
[59] On the UNCLOS negotiations on piracy see NANDAN, ROSENNE & GRANDY (eds.), *United Nations Convention on the Law of the Sea 1982 – A Commentary*, III, The Hague, 1995, p. 182; GUILFOYLE, *Article 100* to *Article 107*, in PROELSS (ed.), *United Nations Convention on the Law of the Sea – A Commentary*, München, 2017, p. 733.
[60] According to DINSTEIN, *Piracy Jure Gentium*, in *Coexistence, Cooperation and Solidarity – Liber Amicorium Rüdiger Wolfrum*, Leiden, 2012, p. 1126, "the intact 1982 retention of the 1958 provisions on piracy affirms that States accept them as an accurate reflection of international law".
[61] International Law Association, *Report of the Fifty-fourth Conference Held at The Hague*, 1970, p. 708.
[62] *Infra*, para. 7.G.
[63] "An interesting and well attended discussion took place during which various points emerged. One was the feeling that the institution of piracy, although one of the oldest in international law, is unfortunately not yet obsolete. Certain references were made to recent incidents of maritime piracy, but the main interest centred on the question of aerial piracy, and indeed on the problems of extending the old rules about maritime piracy to aerial piracy. It was recognised that this extension presented certain difficulties, but opinions differed as to whether these were insuperable or whether it would be better to deal with this problem under a different heading altogether. (…) These differences of opinion were reflected when it came to take a vote. By a very narrow majority the decision was taken to refer the resolution back to the Committee for further study": International Law Association, *Report* cit. (*supra*, note 61), p. 946.
[64] "Yet, anti-piratical operations have to be pursued in accordance with the norms of international law governing LOS (law of the sea). In contrast, armed conflicts must be prosecuted in conformity with the *jus in bello*, commonly known as either LOAC (the Law of Armed Conflict) or IHL (International Humanitarian Law)": DINSTEIN, *Piracy vs. International Armed Conflict*, in DEL CASTILLO (ed.), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea – Liber Amicorum Judge Hugo Caminos*, Leiden, 2015, p. 422.
[65] On the limits of the use of force see *infra*, para. 12.C.

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a combatant status and the use of force against pirates must be directed at arresting them and not at putting them *hors de combat*, including killing them, as can be done with enemy combatants. Even though in some recent United Nations Security Council resolutions the reference to both "international humanitarian and human rights law" has led to confusion[66], it has been remarked that "attempts to suggest the laws of war might provide standards or guidance on the use of force against pirates are fundamentally unhelpful"[67]. In fact, piracy has been considered by the Security Council itself as a question of law enforcement and not as one of war operation. Even in cases where the personnel involved in both operations are the same, there is a substantive difference between using military forces in a conflict and conducting military operations with a view to prevent and suppress a crime[68].

4. PIRACY AS A LOCALISED, BUT RECURRENT, CRIMINAL ACTIVITY, AS CONFIRMED BY SECURITY COUNCIL RESOLUTIONS

Already in 1932, the commentary to the Harvard Draft remarked that piracy was sporadic[69]. During the Geneva Conference, a proposal by Uruguay to delete *in toto* the relevant provisions, "because piracy no longer constituted a general problem", was rejected by 33 votes against 12 with 3 abstentions[70]. During the negotiations for the UNCLOS, some States considered piracy almost a relic of the past[71]. For that reason, there was very little discussion on the topic.

However, piracy and armed robbery against ships have subsequently been resumed in certain areas of the oceans and seas. In the last two decades, these criminal practices have proved to be a major threat to maritime security and a serious danger to maritime navigation in certain areas, especially off the coast of

[66] For example, by Resolution 1851 (2008) of 18 December 2008, the Security Council decided that "(…) States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG [= Transitional Federal Government] to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable *international humanitarian* and human rights *law*" (para. 6; italics added). On Security Council resolutions see *infra*, para. 4.

[67] MURDOCH & GUILFOYLE, *Capture and Disruption Operations: The Use of Force in Counter-piracy off Somalia*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 153.

[68] "We would like again to emphasize the differences between using military forces in a conflict scenario and conducting military operations with a view to initiating criminal proceedings. Even if the latter can be done by the same personnel as the former, it cannot be done in the same way or under the same rules": FRIMAN & LINDBORG, *Initiating Criminal Proceedings with Military Force: Some Legal Aspects of Policing Somali Pirates by Navies*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 200.

[69] "(…) large scale piracy disappeared long ago and (…) piracy of any sort on or over the high sea is sporadic except in limited areas bordered by states without the naval forces to combat it" (*American Journal of International Law*, 1932, Suppl., p. 764).

[70] *United Nations Conference on the Law of the Sea*, *Official Records*, IV, Geneva, 1958, p. 78 and 84.

[71] See the intervention of 11 July 1974 by the delegate of the Khmer Republic, Lim: "Enfin, certains dispositions des conventions de Genève de 1958, comme celles qui concernent la piraterie en haute mer, sont devenues lettres mortes en ce sens qu'elles ne trouvent pratiquement plus l'occasion de s'appliquer" (Nations Unies, *Troisième Conférence des Nations Unies sur le droit de la mer*, I, New York, 1975, p. 183).

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Somalia, in the Gulf of Guinea, in the Straits of Malacca and Singapore and in the South China Sea.

According to the last report of the United Nations Secretary-General on "Oceans and the Law of the Sea"[72], in 2021 piracy and armed robbery at sea have continued to decrease globally. In the first six months of 2022 the International Maritime Bureau has received the lowest number of reported incidents for the first half of any year since 1994. Following the continued improvement of the situation off the coast of Somalia, the authorization granted by the Security Council to States and regional organizations cooperating with Somalia to fight piracy off its coast expired on 3 March 2022. However, some other areas, including the Singapore Strait and the Gulf of Guinea, saw an increased number of incidents[73].

Piracy can be considered today as a transitory and localized, but recurring, criminal activity[74]. From time to time, local geographical, political and economic conditions can facilitate the upsurge of piracy. This is why the fight against piracy needs adequate rules of international law to be in place at both the global and regional levels.

A short review of what happened off Somalia may be useful in evaluating the concerns that piracy raised in not-too-distant a past[75]. For the first time, by Resolution 1801 (2008) adopted on 20 February 2008, the Security Council, concerned "at the upsurge of piracy off the Somali coast"[76], encouraged

> *"Member States whose naval vessels and military aircraft operate in international waters and airspace adjacent to the coast of Somalia to be vigilant to any incidents of piracy therein and to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid, against any such act"*[77].

[72] United Nations doc. A/77/331 of 9 September 2022, paras. 46 and 47.

[73] The situation in previous years was worse. For example: "While 2019 saw an approximate 13.5 per cent reduction in reported actual and attempted acts worldwide as compared to 2018, the first half of 2020 witnessed an approximate 20 per cent increase in incidents as compared to the same period in 2019, with an almost two-fold increase in Asia, which may be partly attributed to the challenges posed by COVID-19. Globally, the areas most affected by piracy and armed robbery against ships were West Africa (67 incidents), the Straits of Malacca and Singapore (45 incidents) and the South China Sea (34 incidents). While no incidents of piracy or armed robbery against ships were reported in waters around the Somali coastline, Somalia-based pirates continued to present a potential threat to international shipping. Of particular concern was the continued personal risks to seafarers in 2019, with 134 persons kidnapped and 59 persons taken hostage. In the first half of 2020, 54 persons were kidnapped and 23 persons were taken hostage. Approximately 90 per cent of the kidnapping incidents occurred in the Gulf of Guinea" (United Nations, *Oceans and the Law of the Sea*, *Report of the Secretary-General*, doc. A/75/340 of 9 September 2020, paras. 45 and 46).

[74] "Piracy is always situated and contingent. It is more useful to talk of *piracies* than piracy": GUILFOYLE, *Introduction: Piracy, Law and Lawyers*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 9.

[75] See ROACH, *Countering Piracy off Somalia: International Law and International Institutions*, in *American Journal of International Law*, 2010, p. 397.

[76] Preambular paragraph.

[77] Para. 12.

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Shortly thereafter, noting International Maritime Organization (IMO) Assembly Resolution A.1002 (25) of 29 November 2007, the Security Council condemned and deplored, by Resolution 1816 (2008) of 2 June 2008, "all acts of piracy and armed robbery against vessels in the territorial waters and the high seas off the coast of Somalia"[78], consisting in attacks and hijacking of commercial ships, including those operated by the World Food Programme. It urged States interested in the use of commercial maritime routes "to increase and coordinate their efforts to deter acts of piracy and armed robbery at sea in cooperation with the TFG" (Transitory Federal Government)[79] and "to render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law"[80]. In particular, the Security Council decided:

> *"(…) that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:*
> *(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and*
> *(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery"*[81].

In deciding upon these measures, the Security Council acted under Chapter VII (action with respect to threats to the peace, breaches to the peace, and acts of aggression) of the Charter of the United Nations, insofar as "incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region"[82]. This authorization relating to the territorial sea could be understood as a consequence of the highly unstable political situation in Somalia. Piracy *per se* would not justify alone such a broad intervention within a sovereign State's territorial sea.

In fact, piracy off the coast of Somalia proved to be a highly adaptive practice that also entailed a business-like structure[83]. Somali pirates hijacked ships and held crews and passengers for ransom in exchange for the release of people, ship and cargo, with the support of coastal communities and the help of a network of

[78] Para. 1.
[79] Para. 2.
[80] Para. 3.
[81] Para. 7. For the distinction between piracy and armed robbery at sea see *infra*, para. 16.
[82] Preambular paragraph.
[83] See GUILFOYLE, *Piracy off Somalia and Counter-piracy Efforts*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 35; KATEKA, *Combating Piracy and Armed Robbery Off the Somali Coast and the Gulf of Guinea*, in DEL CASTILLO, *Law of the Sea* cit. (*supra*, note 64), p. 456.

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persons able to negotiate and launder ransom payments[84]. They resorted to the tactic of hijacking fishing vessels to redeploy them as pirate "mother ships", enabling them to use their skiffs to attack ships transiting at a large distance from the coast, even 500 n. m. into the Indian Ocean. Cargo ships with low freeboard when fully laden could be more easily attacked. The presence of hostages on board the mother ship discouraged subsequent interventions by naval forces[85]. Concerns were expressed for the inhumane conditions of hostages in captivity.

Since Resolution 1816 (2008), the Security Council decisions were periodically strengthened and renewed[86]. For instance, by Resolution 1851 (2008), the Security Council decided that States and regional organizations cooperating in the fight against piracy and armed robbery at sea could "undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea"[87], implying an authorization to pursue pirates also into their places of operation on Somali land territory[88]. With the passing of time, Security Council resolutions on piracy off Somalia became richer in their content and devoted more attention to law enforcement measures. For instance, Resolution 2608 (2021) was adopted

> *"Recognizing the need and commending the efforts of States, including in particular States in the region, to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy including those who plan, organize, facilitate or illicitly finance or profit from such attacks, and reiterating its concern over persons suspected of piracy having been released without facing justice, or released prematurely, reaffirming that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts"*[89].

The same Resolution 2608 (2021) underlined "the primary responsibility of the Somali authorities in the fight against piracy and armed robbery at sea off the coast

[84] For one of the first cases, the attack in 2008 to the French ship *Le Ponant*, see PANOSSIAN, *L'affaire du Ponant et le renouveau de la lutte internationale contre la piraterie*, in *Revue Générale de Droit International*, 2008, p. 660.
[85] In certain cases, some hostages were kept as "insurance policies" after the payment of ransom.
[86] Namely, by Resolutions 1838 (2008) of 7 October 2008, 1846 (2008) of 2 December 2008, 1851 (2008) of 16 December 2008, 1897 (2009) of 30 November 2009, 1918 (2010) of 27 April 2010, 1950 (2010) of 23 November 2010, 1976 (2011) of 11 April 2011, 2015 (2011) of 24 October 2011, 2020 (2011) of 22 November 2011, 2077 (2012) of 21 November 2012, 2015 (2013) of 18 November 2013, 2184 (2014) of 12 November 2014, 2246 (2015) of 10 November 2015, 2316 (2016) of 9 November 2016, 2383 (2017) of 7 November 2017, 2442 (2018) of 6 November 2018, 2500 (2019) of 4 December 2019, 2554 (2020) of 4 December 2020 and 2608 (2021) of 3 December 2021. See also the statements by the President of the Security Council of 25 August 2010 (doc. S/PRST/2010/16) and 19 November 2012 (doc. S/PRST/2012/24).
[87] Para. 6.
[88] See the interventions at the Security Council by the representatives of the United Kingdom and the United States (doc. S/PV.6046, p. 4 and 9).
[89] Preambular paragraph.

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of Somalia"[90] and welcomed the fact that "there were no successful piracy attacks off the coast of Somalia in the prior 12 months" and that "joint counter-piracy efforts have resulted in a steady decline in pirate attacks as well as in hijackings since 2011, with no successful ship hijackings for ransom reported off the coast of Somalia since March 2017"[91]. This is why the measures decided by the Security Council have not been renewed after 3 March 2022.

The Security Council adopted also three resolutions – 2018 (2011) of 31 October 2011, 2039 (2012) of 29 February 2012 and 2634 (2022) of 31 May 2022 – condemning all acts of piracy and armed robbery at sea committed off the coast of the States of the Gulf of Guinea. None of these resolutions was based on Chapter VII of the United Nations Charter and none of them authorized third States to enter in the territorial seas of coastal States in the region. The last resolution, *inter alia*, strongly condemned "piracy and armed robbery at sea, including acts of murder, kidnapping and hostage-taking, in the Gulf of Guinea"[92], stressed "the primary responsibility of the States of the Gulf of Guinea to counter piracy and armed robbery at sea in the Gulf of Guinea and address their underlying causes, in close cooperation with regional and subregional organizations and their international partners"[93] and called upon "Member States in the region to criminalize piracy and armed robbery at sea under their domestic laws, and to investigate, and to prosecute or extradite, in accordance with applicable international law, including international human rights law"[94].

In the Gulf of Guinea, which is bordered by several States, attacks have taken place also in internal waters and territorial sea, including sometimes on anchored ships waiting to unload[95]. Piracy and armed robbery at sea are linked with other forms of transnational organized crime, such as "oil and cargo theft, illicit trafficking and diversion of arms, drug trafficking, human trafficking, illegal trade and smuggling, illegal, unreported and unregulated fishing"[96].

Most attacks on ships in Southeast Asia take place in ports, in internal or archipelagic waters, in the territorial sea or in straits used for international navigation, such as the Straits of Malacca and Singapore[97]. Perpetrators board ships at night, armed with long knives, and try to steal different kinds of property. No Security Council resolution specifically addresses piracy or armed robbery at sea occurring in Southeast Asia.

[90] Preambular paragraph.
[91] Preambular paragraph. See the report of the Secretary-General on "The situation with respect to piracy and armed robbery ay sea off the coast of Somalia" (doc. S/2021/920 of 3 November 2021).
[92] Para. 1.
[93] Para. 2.
[94] Para. 3.
[95] MURPHY, *Petro-piracy: Predation and Counter-predation in Nigerian Waters*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 61.
[96] Preambular paragraph of Resolution 2634 (2022).
[97] See BECKMAN, *Piracy and Armed Robbery against Ships in Southeast Asia*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 13.

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5. WHETHER THE UNCLOS SHOULD BE AMENDED

After having made a short review of the characteristics of piracy in past and present times, the preliminary question to be addressed is whether a future *Institut* Resolution on piracy should go as far as to recommend amendments to the UNCLOS provisions[98]. On the one hand, the *Institut* Resolution is not expected to be a mere repetition of the UNCLOS regime, but should build upon the experiences and needs that can be drawn from recent international practice, in order to bring an added value to the existing international regime of piracy[99]. On the other hand, an amendment to the UNCLOS text is a step that is not easily made and has important political and legal repercussions that cannot be taken lightly.

Two considerations lead to the conclusion that, in the case of piracy, it would be more appropriate not to recommend changes in the wording of UNCLOS provisions.

First, the UNCLOS provisions, although in need of some updating, are commonly seen by States as constituting the basis of the present international regime of piracy. Following the cautious approach taken by the Security Council in authorising counter-piracy action in relation to Somalia, all the relevant resolutions, from the first to the last ones, affirm that

> *"international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (...), sets out the legal framework applicable to combating piracy and armed robbery, as well as other ocean activities"*[100].

According to the statement made on 9 August 2021 by the President of the Security Council,

> *"the Security Council reaffirms that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to activities in the oceans, including countering illicit activities at sea"*[101].

The Security Council stressed that its authorizations apply only to the particular situation existing in Somalia – not elsewhere – and are not intended to lead to any change in customary international law. For instance, in Resolution 1816 (2008) the Security Council affirmed that:

> *"the authorization provided in this resolution applies 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*

[98] Amendments are regulated by Arts 312 and 313 UNCLOS.
[99] Under Art. 1 of its Statutes, adopted by the 1873 Ghent international legal conference, the purpose of the *Institut* "is to promote the progress of international law".
[100] Preambular paragraph of Resolution 1816 (2008).
[101] Doc. S/PRST/2021/15.

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> *situation, and underscores in particular that it shall not be considered as establishing customary international law (...)"*[102].

During the discussion for the adoption of Resolution 1816 (2008), the point was stressed by the representative of Indonesia:

> *"First, the draft resolution shall be consistent with international law, particularly the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, and shall not envisage any modification of the existing, carefully balanced international law of the sea, which is encapsulated in the constitution of the ocean, that is, UNCLOS, which was brought into being after decades of negotiation. It shall also not become a basis of customary international law for the repression of piracy and armed robbery at sea"*[103].

It seems clear that, while exercising in one particular case the primary responsibility for the maintenance of international peace and security granted to it by the United Nations Charter[104], the Security Council did not aim at creating a precedent for departing from the general international rules on piracy, as reflected in the UNCLOS. Nor did any State find it desirable to initiate such a departure.

Second and more generally, the widespread feeling is frequently expressed that the UNCLOS, considered as a consitution for the oceans, strikes a fair but delicate balance between different interests and activities taking place at sea. A proposal for amendments to some provisions in the UNCLOS could be a counterproductive move – especially if there is no strong need to do so. The danger would be to open a Pandora's box affecting also other provisions that have little or nothing to do with piracy and put in doubt the present international regime of the sea as a whole.

For these two reasons, the attempt will be made hereunder to start from the UNCLOS provisions on piracy as the basis for discussion[105] and to see whether, where needed, a number of understandings could be envisaged that would be considered as a natural interpretation of the UNCLOS provisions in the light of subsequent international practice, in particular the new models of co-operation against piracy promoted by the Security Council's resolutions and relevant rules of international law (for instance, rules on human rights or treaties on co-operation in criminal matters, including the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation).

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[102] Para. 9.
[103] Doc. S/PV.5902.
[104] Art. 24, para. 1.
[105] The view has been expressed that the limitations of UNCLOS as regards piracy are not those usually pointed out (the dual condition and the exclusion of terrorist attacks), as the SUA could be applied in most cases: "The real shortcomings of UNCLOS lie in its jurisdictional provisions. First, unlike other treaties establishing transnational crimes, UNCLOS does not require its parties to make the crime at issue, piracy, an offence under their national law. (…) Secondly, again unlike the other transnational crime treaties, there is no obligation on a state having custody of a suspected pirate to prosecute or extradite": CHURCHILL, *The Piracy Provisions of the UN Convention on the Law of the Sea – Fit for Purpose?*, in KOUTRAKOS & SKORDAS (eds.), *The Law and Practice of Piracy at Sea - European and International Perspectives*, Oxford, 2014, p. 32.

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Such a process is supported by a well-established rule of the law of treaties, according to which "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and "any relevant rules of international law applicable in the relations between the parties" are factors to be taken into account for the interpretation of any treaty provision[106]. The proposed *Institut* resolution, without aiming at changing the UNCLOS regime[107], will interpret that regime with due emphasis on the obligation to co-operate in the prevention and suppression of piracy.

The first article of the *Institut* Resolution[108] could accordingly be the following:

1. *This Resolution is based on the provisions of the UNCLOS and other rules of international law bearing on the problems of piracy and armed robbery at sea.*

2. *The UNCLOS provisions on piracy reflect customary international law. This Resolution concerns the interpretation and application of such provisions, particularly in the light of subsequent practice and relevant rules of international law.*

6. THE DUTY TO CO-OPERATE IN THE REPRESSION OF PIRACY (ART. 100 UNCLOS)

Taking place on the high seas and mostly affecting international navigation, piracy has by definition an international character which calls for international co-operation in taking measures for its prevention and repression. This is the objective of Art. 100 UNCLOS:

> *"All States shall co-operate 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"*[109].

The wording of Art. 100 UNCLOS literally follows Art. 14 H. S. Conv.[110] and Art. 38 ILC Draft. Art. 18 of the Harvard Draft focused on the duty to co-operate to prevent piracy, rather than to repress it:

> *"The parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation".*

There is no need to focus on the distinction between "prevention" and "repression", it being sufficiently clear that "repression", if understood in a broad, but not unsual, sense, can well include also the prevention of acts of piracy before they are committed. The already mentioned Security Council Resolution 1816 (2008) includes in the notion of repression action directed at "boarding, searching and seizing vessels engaged in or suspected of engaging in acts of piracy", as well

[106] Art. 31, par. 3, sub-paras. *b* and *c*, of the Convention on the Law of Treaties (Vienna, 1969).
[107] To avoid useless repetitions, the text of the relevant UNCLOS provisions will not be restated in the *Institut* Resolution.
[108] The preamble will be considered at a later stage.
[109] The question of piracy occurring in places "outside the jurisdiction of any State" will be considered *infra*, para. 7.F.
[110] It was adopted by 69 votes to none (*United Nations Conference on the Law of the Sea*, *Official Records*, II, Geneva, 1958, p. 21).

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as at "apprehending persons engaged in such acts with a view to such persons being prosecuted"[111].

It seems appropriate to understand Art. 100 UNCLOS in a broad sense, as encompassing co-operation in any kind of measures or actions that are useful for the prevention and repression of piracy. The chapeau of Art. 2 of the *Institut* resolution should consequently state as follows:

> *The duty to co-operate to the fullest possible extent in the repression of piracy, provided for in Article 100 of the UNCLOS, includes, inter alia:*

6.A. National Legislation

The duty to co-operate includes, first of all, the adoption at the domestic level of legislation that fully implements all the obligations arising from the UNCLOS provisions on piracy. National legislation in the field of piracy varies considerably, making co-operation in fighting piracy a complex task. In certain States an offence of "piracy" is lacking. While acts of piracy could fall under the scope of other crimes, such as robbery, hostage taking or acts against the safety of navigation, it is important to provide for an autonomous offence, without the need of referring to other non-specific conducts. The crime of "piracy" should cover not only the typical conduct of pirates (Art. 101, a, UNCLOS), but also the voluntary participation in the operation of pirate ships (Art. 101, b, UNCLOS) and the incitation or facilitation of piracy (Art. 101, c, UNCLOS).

Wherever needed, national legislation against piracy should be reviewed to allow an adequate repressive action, ensuring that those who are convicted of the crime of piracy are punished by appropriate penalties which take into account the grave nature of the offence[112]. Such an obligation is usual in treaties for cooperation in criminal matters[113].

In certain States, jurisdiction over piracy is limited on the basis of the flag of the ships involved or the nationality of the suspected pirates or the victims, but jurisdiction should be established on a universal basis.

As the UNCLOS does not include rules on legal assistance, national legislation should also ensure that appropriate assistance is granted to other States in criminal proceedings relating to piracy for purposes such as: taking evidence or statements from persons; executing searches and seizures; examining objects and sites; providing information, evidentiary items and expert evaluations; identifying or tracing the proceeds of crime, property, instrumentalities or other things for evidentiary purposes; facilitating the voluntary appearance of persons in the requesting State; extraditing suspected or convicted pirates.

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[111] 5th preambular para.

[112] The draft Resolution on "Piracy (Sea and Air)" discussed in 1970 by the International Law Association (*supra*, note 61) provided that "all States are obliged to punish piracy (sea and air) as an offence *jure gentium* and, consequently, to define this offence in their municipal laws and to provide therein for its severe and effective punishment" (Art. 1).

[113] See, for example, Art. 5 SUA.

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Another question is whether national legislation should include also rules limiting or prohibiting the payment of a ransom to pirates. In the case of piracy off the coast of Somalia, ransom payments were sometime made by shipowners to save the life of crew members and recover ships. While governments did not endorse or participate in such transactions, generally the payments were not considered illegal[114]. It seems preferable not to enter into such a delicate question that involves situations of necessity.

The *Institut* resolution should consequently invite States to enact adequate national legislation on piracy. This implies that, if legislation is already in place, it should be reviewed and, where necessary, updated to ensure that it fully reflects the UNCLOS obligations and other measures to prevent and repress piracy. The first sub-paragraph of Art. 2 of the *Institut* resolution could consequently be the following:

> *a) the adoption of national legislation implementing all the obligations arising from the UNCLOS provisions on piracy, in particular in order to subject those who are convicted of the crime of piracy to appropriate penalties which take into consideration its gravity, to promote international assistance in proceedings relating to piracy and to facilitate extradition or transfer of suspected or convicted pirates, as appropriate;*

6.B. International Agreements and Arrangements

Another and consequential component of the obligation to co-operate is to conclude, whenever appropriate, the bilateral or multilateral agreements necessary to implement the above-mentioned forms of legal assistance.

Some multilateral treaties, which contain provisions regarding mutual legal assistance, jurisdiction and extradiction, come to the mind in this regard[115]. First of all, the already mentioned Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 1988; SUA), its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 1988) and the two Protocols to the SUA and the 1988 Protocol (London, 2005) broadly establish the framework for collaboration between States Parties in the fight against a number of criminal activities taking place at sea. While piracy is not explicitly mentioned in the SUA and not all piratical acts fall under it, several instances of piracy can easily correspond to the action of a person who "seizes or exercises control over a ship by force or threat thereof or any other form of intimidation"[116]. *Inter alia*, the SUA provides for an obligation on each State party to establish jurisdiction over an offence committed (a) against or on board a ship flying the State party's flag, (b) in the territory of the

[114] See MACDONALD EGGERS, *Insurance Protection against Piracy*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 292.
[115] See SATKAUSKAS, *Piracy at Sea and the Limits of International Law, in Aegean Review of the Law of the Sea*, 2011, p. 217.
[116] Art. 3, para. 1, a. Notably, attacks from people on board the ship fall under this provision, while piracy needs two ships (see *infra*, para. 7.G).

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State party, including the territorial sea, or (c) by a national of the State party[117]. It also binds a State party to establish its jurisdiction over an alleged offender present in its territory in situations where the State party does not extradite him or her to any of the States Parties that have established their jurisdiction[118]. Further, having established such jurisdiction, a State Party in whose terrritory an offender is found is obliged to submit the case to prosecution in accordance with its laws, if the person is not extradited (*aut dedere aut judicare* provision)[119].

Mutatis mutandis, the International Convention against the Taking of Hostages (New York, 1979) contains similar provisions on jurisdiction and *aut dedere aut judicare* that could be usefully applied in cases where pirates detain a person in order to compel a third party to do or abstain from doing any act, as an explicit or implicit condition for the release of the hostage.

A useful model for co-operation against piracy can also be found in the United Nations Convention against Transnational Organised Crime (Palermo, 2000). States parties have an obligation to criminalize prohibited conduct when it constitutes a serious crime (that is a crime punishable by a maximum deprivation of liberty of at least four years or a more serious penalty), is transnational in nature and is committed by an organised criminal group, as defined by the Convention[120]. Acts of piracy could frequently fall under this Convention.

By requiring a jurisdictional link between the State party and the crime committed, the three above mentioned treaties complement the UNCLOS provisions on piracy, without replacing them.

The duty to co-operate is not limited to multilateral treaties applying at the world level. It also includes regional or bilateral treaties[121] and arrangements of a practical nature that sometimes belong to the category of so-called soft law. Arrangements applying on land could also be useful[122].

Instances of regional instruments are the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 2004) and the Revised Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti, 2009, revised in 2017). Under the Tokyo Agreement, concluded by 16 Asian countries, an Information Sharing Center is established, whose functions include that of managing and maintaining the expeditious flow of information

[117] Art. 6, para. 1. Other optional bases of jurisdiction are provided for in para. 2, including jurisdiction over an offense when (a) during its commission, the State Party's national has been seized, threatened, injured or killed, or (b) it is committed in an attempt to compel the State Party to do or abstain from doing any act.
[118] Art. 6, para. 4.
[119] Art. 10, para. 1.
[120] Arts 2 and 3.
[121] For the agreements concluded by the European Union with Kenya, Seychelles and Mauritius see *infra*, para. 11.
[122] "Pirate gangs are more likely to be discovered through good police work on the ground than by arresting the perpetrators in the course of an attack at sea": BECKMAN, *Piracy and Armed Robbery against Ships in Southeast Asia* in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 28.

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relating to incidents of piracy and armed robbery, that of providing appropriate alerts and that of circulating requests for cooperation[123]. Under the Djibouti Code of Conduct, the participant States express their intention to establish a national maritime security plan with related contingency plans for harmonizing and coordinating the implementation of security measures[124].

On the basis of Security Council resolutions on piracy and armed robbery at sea off Somalia, activities of prevention and repression of piracy were carried out by the military forces of a number of countries, either jointly or separetely.

For example, the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast[125], the so-called Atalanta operation by the European Union Naval Force (EUNAVFOR), was established in 2008 to contribute to the protection of vessels of the World Food Programme delivering food aid to displaced persons in Somalia, in accordance with the mandate of Security Council Resolution 1814 (2008), to the protection of vulnerable vessels cruising off the Somali coast and to the deterrence, prevention and repression of acts of piracy and armed robbery in this area, in accordance with the mandate of Security Council Resolution 1816 (2008). Also non-European Union member States could be invited to participate in the operation, which was composed of sixteen European Union member States together with Colombia, Montenegro and Serbia. In 2020, operation Atalanta was extended until December 2022 and the mandate adjusted to include, as a secondary task, the monitoring of weapons and drug trafficking, illicit charcoal trade and illegal, unreported and unregulated fishing.

Other multilateral naval missions in the area were Operation Ocean Shield, organized by the North Atlantic Treaty Organization (NATO) and the Combined Maritime Task Forces (CMF), led by the United States.

In general, counter-piracy activities off Somalia have encompassed different tasks: surveillance, relying on planes, helicopters, satellites, drones and patrolling vessels; protection, through escorting vessels, providing safe transit corridors or embarking armed guards; early disruption, through shows of force or pre-emptive strikes on piracy logistics; disruption of attacks, through warning shots or armed interventions; and recapture of vessels, through boarding and special forces operations[126]. Other kinds of measures may be added to enlarge the picture of co-operation in the prevention and repression of piracy: the sharing of police information; the boarding of ships by law enforcement officials of other States (so-called ship-riders); training in avoidance, evasion and defensive techniques; the drawing up of maritime security plans; the establishment of regional anti-piracy

[123] Arts 4 and 7.
[124] Art. 3, para. 4.
[125] European Union Council Joint Action 2008/851/CFSP of 10 November 2008 (*Official Journal of the European Union* No. L. 301 of 12 November 2008). The Joint Action was amended by Council Decision 2010/766/CFSP of 7 December 2010 (*ibidem* No. L 327 of 11 December 2010).
[126] See BUEGER, *Responses to Contemporary Piracy: Disentangling the Organizational Field*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 91.

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centers; and the granting by a coastal State of the permission to pursue suspected pirates within its territorial sea or maritime internal waters. They also can be considered as a form of international co-operation[127].

Such a complex picture of counter-piracy operations, absent a unified command structure, has required some forms of coordination. The Contact Group on Piracy off the Coast of Somalia (CGPCS) was established in 2009. It is an informal forum for sharing information and coordinating efforts, without decision-making authority and a standing secretariat. It is organized in five working groups. States and international organizations are members of the CGPCS; industry associations may participate as observers. Moreover, Shared Awareness and Deconfliction (SHADE) meetings are held periodically to improve the coordination and cooperation of maritime forces operating in the region. In 2022, CGPCS decided to refocus its name and mandate, becoming the Contact Group on Illicit Maritime Activities in the Western Indian Ocean and to address, besides piracy and armed robbery at sea, different kinds of transnational organized crime, such as illicit traffic in narcotic drugs and psychotropic substances, illicit traffic in wildlife, smuggling of migrants, illicit trafficking in persons and firearms, and terrorist acts against shipping and offshore installations[128].

Without entering into a detailed list of forms of international co-operation, the second and third sub-paragraphs of Art. 2 of the *Institut* resolution could consequently be the following:

> *b) the conclusion of appropriate bilateral and multilateral agreements or arrangements providing for measures of international co-operation in the prevention and repression of piracy, such as the surveillance and escorting of ships, the establishment of safe transit corridors, the early disruption of attacks, the sharing of police information, the boarding of law enforcement officials of other States, training in avoidance, evasion and defensive techniques, the drawing up of maritime security plans and the establishment regional anti-piracy centers;*
>
> *c) the conclusion of appropriate bilateral and multilateral agreements or arrangements addressing international legal assistance in proceedings relating to piracy, including extradition and transfer of suspected or convicted pirates;*

6.C. Co-operation within International Organizations

Counter-piracy measures are often discussed and implemented by States with and within competent international organizations.

Besides measures authorized or promoted by the relevant United Nations Security Council resolutions, other calls to action against piracy made by international organizations can be mentioned. The IMO has adopted a number of

[127] Under Art. 111, para. 3, UNCLOS, "the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third States".
[128] See the report of the 24th plenary session of the CGPCS (Nairobi, 27 January 2022).

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instruments to strengthen measures and co-operation in the fight against piracy and armed robbery at sea, such as the Code of practice for the investigation of crimes of piracy and armed robbery against ships, annexed to General Assembly Resolution A.1025 (26) of 2 December 2009, the Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships, annexed to Maritime Safety Committee Circular 1334 of 23 June 2009[129], and the Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships, annexed to to Maritime Safety Committee Circular 1333 of 12 June 2015. In 2008, IMO and the Maritime Organization of West and Central Africa (MOWCA) developed a Memorandum of understanding on the establishment of a sub-regional integrated coast guard function network in West and Central Africa, signed by fifteen coastal States in the region.

The fourth sub-paragraph of Art. 2 of the *Institut* resolution could consequently be the following:

> *d) co-operation with and within competent international institutions;*

6.D. Urgent Measures of Intervention

It is open to question how far the obligation to co-operate in the repression of piracy goes, in the light of Art. 100 UNCLOS, in particular whether such an obligation necessarily means that a State, having the possibility to do so, is bound to intervene to prevent a piratical attack and to arrest the suspected pirates[130].

The commentary to the Harvard Draft was rather negative on the matter, calling for specific agreements:

> *"States probably would not be willing to assume a more definite general duty to seize or to prosecute all pirates, for this would involve liabilities for non-performance which might in some cases prove burdensome. The suppression of piracy can be furthered, however, by supplementary treaties between states particularly interested, providing definitely for policing, prosecution and extradition"*[131].

The ILC confined its comment to two sentences, which could be seen as being somehow in tension:

> *"Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case"*[132].

The draft Resolution on "Piracy (Sea and Air)" discussed in 1970 by the International Law Association[133] envisaged that

[129] On defensive action by ship owners see *infra*, para. 13.
[130] On the obligation to bring the arrested pirates to trial see *infra*, para. 11.
[131] *American Journal of International Law*, 1932, Suppl., p. 867.
[132] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 282.
[133] *Supra*, note 61.

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> *"All States are obliged to take all necessary steps to seize on or over the high seas or in any other place outside the jurisdiction of any State any ship or aircraft on which piratical acts are committed"*[134].

The draft Ocean Space Treaty submitted by Malta in 1971 to the United Nations Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction included a provision intended to stress the mandatory character of the duty to co-operate:

> *"All States have the obligation to prevent and punish piracy and fully to co-operate in its repression in ocean space and in the super-jacent atmosphere"*[135].

However, the Maltese proposal was not retained by the subsequent Third United Nations Conference on the Law of the Sea.

According to the arbitral award of 21 May 2020 on *The Enrica Lexie Incident* (Italy v. India), the duty to cooperate under Art. 100 UNCLOS does not necessarily imply a duty to arrest and prosecute alleged pirates, as international co-operation can also take the form of the conclusion of bilateral or multilateral agreements on mutual assistance:

> *"The Arbitral Tribunal notes that Article 100 does not stipulate the forms or modalities of cooperation States shall undertake in order fulfil their duty to cooperate in the repression of piracy.*
> *The duty to cooperate under Article 100 of the Convention does not necessarily imply a duty to capture and prosecute pirates. Rather, States' obligations under Article 100 can be implemented, for example, by including in their national legislation provisions on mutual assistance in criminal matters, extradition and transfer of suspected, detained and convicted pirates or conclusion of bilateral and multilateral agreements or arrangements in order to facilitate such cooperation. This is consistent with other provisions of the Convention prescribing a duty to cooperate as 'a duty of a continuing nature – an obligation of conduct rather than a one-time commitment or result'.*
> *Moreover, the Arbitral Tribunal notes that when MRCC [= Maritime Rescue Coordination Centre] Mumbai first contacted the 'Enrica Lexie' by telephone and instructed it to change course and head towards Kochi, the MRCC explained that this was necessary in order to 'take stock of events' in connection with the information it had received about the suspected pirate attack, which is evidence of India's willingness to cooperate in the repression of piracy. Therefore, given that 'the State must be allowed a certain latitude as to the measures it should take', the Arbitral Tribunal does not find that India breached its obligation to cooperate in the*

[134] Art. 2.
[135] Doc. A/AC.138/53 of 23 August 1971, Art. 17.

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> *repression of piracy, even from the viewpoint that 'States may not lightly decline to intervene against acts of piracy'.*
> *Further, the Arbitral Tribunal observes that as reflected in the ILC's commentary cited above, the threshold for accusing a State of violating Article 100 of UNCLOS is relatively high, and Italy has not provided sufficient evidence to discharge its burden of proof in this regard"*[136].

However, it seems too reductive to limit the obligation provided for in Art. 100 UNCLOS to legal co-operation leading to the conclusion of appropriate agreements for mutual assistance in the repression of piracy and to the implementation of such treaties. The obligation to co-operate is formulated in Art. 100 UNCLOS in mandatory terms ("shall co-operate") and shall be complied with "to the fullest possible extent". Even in the absence of a specific agreement, a State, where it has the reasonable and practicable possibility to do so, might not lightly decline to intervene against acts of piracy[137] and turn a blind eye on a situation that usually entails risks for human life. Crews and passengers are exposed to the danger of being the victims of serious crimes that, if tolerated by States, would constitute corresponding violations of fundamental human rights (right to life, right not to be subject to torture or to cruel, inhuman or degrading treatment, right to liberty, etc.), as embodied in customary international rules and reflected in relevant treaties. The experiences off the coast of Somalia and elsewhere show the States are called upon to take very seriously the general interest of the international community towards freedom of navigation and security of commercial maritime routes. This leads to the conclusion that, in a situation of urgency, a State should in principle be under an obligation to prevent and suppress acts of piracy through action carried out by its warships or military aircraft, to arrest those who are suspected of this crime and to rescue the victims, if it is in a reasonable and practicable position to do so.

UNCLOS Art. 236, although for other purposes – that is the protection and preservation of the marine environment – requires warships, naval auxiliary, other vessels or aircraft owned or operated by a State and used on government non-commercial service to act in a manner consistent with the UNCLOS, so far as reasonable and practicable, as long as such action does not impair operations or operational capabilities of such vessels or aircraft. In the light of the need to protect and respect the human rights due to the victims of piratical acts, the same legal construction could, *mutatis mutandis*, be used in the case of piracy, as a reasonable way to interpret the obligation to co-operate to the fullest possible extent in the repression of piracy.

[136] Paras. from 722 to 727 of the award.
[137] See WOLFRUM, *The Obligation to Cooperate in the Fight against Piracy: Legal Considerations*, in *Essays in Commemoration of the Seventieth Anniversary of Professor Yanai Shunji*, *Chuo Law Review*, 2009, p. 95.

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The fifth sub-paragraph of Art. 2 of the *Institut* Resolution could accordingly be the following:

> *e) as far as reasonable and practicable, urgent action by ships or aircraft referred to in Article 107 of the UNCLOS, such as seizing a pirate ship, arresting suspected pirates and rescuing victims of piracy, where necessary to prevent or repress acts of piracy.*

7. THE DEFINITION OF PIRACY (ART. 101 UNCLOS)

As already recalled by the Digest of Roman emperor Justinian, definitions are a dangerous aspect of legal texts[138]. In the light of subsequent practice, a definition may turn out to be too broadly or too narrowly drafted. Not surprisingly, much discussion has thus taken place as regards the UNCLOS definition of piracy[139].

Art. 101 UNCLOS defines piracy as follows:

> *"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)".*

Art. 101 UNCLOS literally follows, except for the manner of indicating the sub-paragraphs[140], Art. 15 H. S. Conv.[141]. There is only one minor substantive difference between Art. 101 UNCLOS and Art. 39 ILC Draft: the addition in the UNCLOS of "aircraft" to the vehicles against which acts of piracy can be directed[142].

The reservations made by a number of States (Albania, Belarus, Bulgaria, Czechoslovakia, Hungary, Mongolia, Poland, Romania, Soviet Union, Ukraine) to Art. 15 H. S. Conv., assuming that the definition of piracy was too narrow[143],

[138] "Omnis definitio in jure civili periculosa est; parum est enim, ut non subverti possit" (*Digesta*, book L, title XVII, fragment 202). The teaching of the *Digest* is recalled by GONZÁLEZ-LAPEYRE, *Un nouvel envisagement sur la piraterie maritime*, in DEL CASTILLO, *Law of the Sea* cit. (*supra*, note 64), p. 444, with a specific reference to the definition of piracy.

[139] "Piracy is not a subject that has ever been noted for its definitional clarity": GUILFOYLE, *Policy Tensions and the Legal Regime Governing Piracy*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 326.

[140] With letters in the UNCLOS; with numbers in the H. S. Conv.

[141] It was adopted by 54 votes to 9 with 4 abstentions (*United Nations Conference on the Law of the Sea*, *Official Records*, II, Geneva, 1958, p. 21).

[142] Art. 101 UNCLOS, sub-paras. (a) (i) and (a) (ii).

[143] For example, the reservation cast by the Soviet Union on 22 November 1960 stated that it considered that "the definition of piracy given in the Convention does not cover certain acts which under

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were not repeated at the time when the same States became parties to the UNCLOS and should consequently be considered as terminated.

It has also been remarked that the concept of piracy under commercial law could be broader than what would be piracy under international law[144]. In commercial contracts of sale, transport or insurance, parties usually refer to the risk of piracy in the popular or business understanding of piracy, as any kind of robbery taking place at sea, extending to attacks in ports or even attacks originating from the shore. While national private law can give effect to whatever objectively ascertainable intention of the parties to a contract, international law – and the *Institut* resolution as well – should basically take into account the limits resulting from the UNCLOS definition of piracy.

Art. 101 UNCLOS is based on a number of conclusions reached by the International Law Commission as to the essential features of piracy, namely:

> *"(i) The intention to rob (animus furandi) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain;*
> *(ii) The acts must be committed for private ends;*
> *(iii) Save in the case provided for in article 40 [= mutiny] piracy can be committed only by private ships and not by warships or other government ships;*
> *(iv) Piracy can be committed only on the high seas or in place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea;*
> *(v) Acts of piracy can be committed not only by ships on the high seas, but also by aircraft, if such acts are directed against ships on the high seas;*
> *(vi) 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"*[145].

It is useful to examine the essential elements of piracy separately.

7.A. The Act

Under Art. 101 UNCLOS, an act of piracy is an illegal act of violence or detention or an act of depredation[146].

contemporary international law should be considered as acts of piracy and does not serve to ensure freedom of navigation on international sea routes".

[144] See MACDONALD EGGERS, *What is a Pirate? A Common Law Answer to an Age-old Question*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 263.

[145] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 282.

[146] "L'accord est unanime sur ce point qu'il n'y a pas piraterie s'il n'y a pas d'actes de violence. Ces violences peuvent être dirigées non seulement contre les biens (…), mais aussi contre les personnes (…). Les violences contre les personnes peuvent consister dans des violences corporelles ou dans la privation de la liberté, afin d'obtenir des rançons": GIDEL. *Le droit* cit. (*supra*, note 50), I, p. 309.

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It could first be asked according to what law the act of violence or detention should be qualified as "illegal"[147]. It seems evident that Art. 101 UNCLOS, which is a rule of international law, refers to acts that are illegal according to the generality of domestic systems of penal law and according to general principles of penal law as well. Probably, the adjective "illegal" was included in Art. 101 UNCLOS to cover the rather unlikely case in which the victims of acts of piracy, after having recovered from the attack, board in their turn the pirate ship and suceed in overpowering the pirates, acting for the purpose of asserting their right. But there is no need to address specifically such an extraordinary case.

It could then be asked what is the intent of the acts of "violence", "detention" or "depredation" – the alternative use of the conjunction "or" is important here[148] – that constitute acts of piracy under Art. 101 UNCLOS. It appears that the words "violence" (killing, wounding, raping, etc.) and "detention" (segregating, hijacking for ransom, etc.) are used to indicate illegal acts against persons, while the word "depredation" to denote acts against properties.

The intention to rob (*animus furandi*), though being a frequent aspect of piratical acts, is not an essential element of the crime. A pirate could depredate the victim of his or her property in order to destroy it for hatred, revenge or wanton abuse of power, without acquiring any material benefit from it[149].

The term "depredation" is broad enough to include, besides acts of patent spoliation and ravage, acts of secret theft. The example has been made[150] of thieves who covertly board a ship, steal from its cargo or the staterooms of the passengers and escape to their own craft lying nearby. They fall under the definition of piracy. The conclusion would probably be different if some people boarded another ship to play cards with people on board and returned to their own ship with the money

[147] Why acts of depredation do not need to be illegal? An explanation could be that illegality is already implied in the word "depredation".

[148] "On the other hand, the cargo need not to be the object of his [= of the pirate] act of violence. If he stops a vessel and takes a rich passenger off with the intention of keeping him for the purpose of a high ransom, his act is piracy; it is likewise piracy if he stops a vessel merely to kill a certain person on board, although he may afterwards free vessel, crew, and cargo" (OPPENHEIM, *International Law*, I, 4th ed. by MCNAIR, London, 1928, p. 503). As pointed out in 1934 by the Judicial Committee of the Privy Council of the British Empire, in *Re Piracy Jure Gentium* (quoted *supra*, note 46), "when it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel, without any commission from any State, could attack and kill everybody on board a vessel, sailing under a national flag, without committing the crime of piracy, unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law".

[149] In the order of 18 March 1844 on the *Peter Harmony and others, claimants of the brig Malek Adhel v. The United States* case, the Supreme Court of the United States held that piracy "belongs to the class of offences which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power. (…) If he [= the pirate] wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*" (*United States Report*, vol. 43, 1844, p. 210).

[150] Commentary to the Harvard Draft cit. (*supra*, note 57), p. 794.

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of the cheated passengers or crew of the boarded ship, as this kind of action would not meet the concept of depredation.

Criminal acts different from illegal violence, detention or depredation, for example trafficking in narcotic drugs or psychotropic substances, do not constitute piracy. A case clearly illustrates this point. In 1986 naval units of the Italian finance police seized on the high seas without the authorization of the flag State the ship *Fidelio* flying the flag of Honduras. She was found to carry 5,928 kg of resin of *cannabis* (so-called hashish), corresponding to 14,470,570 doses. Almost another ton of resin was thrown overboard by the crew before the seizure. Neither the captain nor any of the eleven members of the crew were nationals of the captor State. The prosecutor made an effort to have the Italian jurisdiction over the accused affirmed. He put forward, *inter alia*, the argument that massive drug traffickers are more dangerous for human society than pirates and should consequently be submitted to the same universal jurisdiction. All was done in vain. The Tribunal of Palermo (judgment of 7 November 1988), the Court of Appeal of Palermo (judgment of 1 June 1992)[151] and the Court of Cassation (judgment of 1 February 1993) held that the Italian criminal legislation could not be applied with respect to actions having taken place on a foreign ship beyond the territorial sea and declared the lack of jurisdiction of any Italian court on the matter. The three courts held that the seizure on the high seas was justifiable because of the suspicion that the *Fidelio* could be a pirate ship. But, as the accused were not pirates, the courts also found that the rule of international law to be applied in the specific case was the general prohibition on interfering with foreign ships on the high seas. The accused were released without conviction, even though it was clear that they had not sailed with more than six tons of drugs solely for their personal consumption[152].

It is implied that all acts of piracy are wilful. A ship that, due to the fault of its commander or crew, is responsible for a collision at sea and for the consequent sinking of another ship, is not a pirate ship.

The Harvard Draft was more specific in pointing out the types of acts of violence or depredation:

> *"Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:*
> *1. Any act of violence or of depredation committed with the intent to rob, rape, wound, enslave, imprison or kill a person or with the intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. (...)"*[153].

[151] In *Rivista di Diritto Internazionale*, 1992, p. 1081.
[152] Of course, the dual condition (see *infra*, para. 7.G) also lacked in the *Fidelio* case.
[153] Art. 3.

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Art. 3 of the *Institut* Resolution could follow the path of the Harvard Draft and try to be more specific in pointing out, without being exhaustive, possible instances of acts violence, detention or depredation, as follows:

> *1. The illegal acts of violence, detention or depredation provided for in Article 101 of the UNCLOS include acts such as killing, wounding, torturing, raping, enslaving, holding for ransom or imprisoning persons, as well as robbing, stealing, destroying, damaging or ransoming ships, aircraft or property on board.*

It may be remarked that an attempt to commit piracy does not explicitly fall under the definition provided by Art. 101 UNCLOS[154].

In 1934, the Judicial Committee of the Privy Council of the British Empire, in the already mentioned *In Re Piracy Jure Gentium*, addressed a question relating to an attempt to commit acts of piracy. The answer was that actual robbery is not an essential element in the crime of piracy *jure gentium* and that a frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*"[155]. During the Geneva Conference, the United Kingdom, recalling this decision, which "had never been challenged", proposed to include in the notion of piracy "any attempt to commit such acts"[156]. The proposal was rejected by 22 votes to 13 with 17 abstentions[157].

However, it seems implicit in the obligation to co-operate to the fullest possible extent in the repression of piracy that an attempt, where the intention of committing the act is sufficiently clear, should be included in the definition of piracy and should be criminalized by States. It can be assumed that an attempt to commit piracy falls indirectly under the definition of piracy given by Art. 101, sub-para. (b), UNCLOS[158], as acts of "voluntary participation in the operation of a ship or aircraft with knowledge of facts making it a pirate ship or aircraft". Even more clearly, it can also be assumed that it falls under Art. 103 UNCLOS, stating 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 Art. 101. These provisions may easily be used to enable States to criminalize the attempt to commit an act of piracy, whether or not people are in fact victimized by the pirates.

In any case, the question of attempts could be addressed directly in the *Institut* resolution. As national legal systems already contain technical provisions making

[154] See FRIMAN & LINDBORG, *Initiating Criminal Proceedings with Military Force: Some Legal Aspects of Policing Somali Pirates by Navies*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 176.
[155] LAUTERPACHT (ed.), *Annual Digest* cit. (*supra*, note 46), p. 213. According to the relevant facts, on 4 January 1931, people on board two Chinese junks attacked on the high seas and pursued a cargo junk which was also a Chinese ship. Two steamships intervened in defence of the pursued ship and finally the pursuers were taken in charge by the commander of a British warship, which had arrived following a wireless request.
[156] Doc. A/CONF.13/C.2/L.83 (*United Nations Conference on the Law of the Sea*, IV, Geneva, 1958, p. 137).
[157] *Ibidem*, p. 84.
[158] *Infra*, para. 7.A.

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the planning, preparations for and attempting serious crimes an offence, it does not seem useful to enter into more details in the *Institut* resolution. A second sentence could thus be added in Art. 3, para. 1, as follows:

They also include attempts to commit such acts.

7.B. The Ends

Different from the nature of the act committed is its end, which is linked to the purpose of the individual who is acting. Acts of piracy are committed "for private ends".

Here, general international law, as reflected in Art. 15 H. S. Conv.[159] and Art. 101 UNCLOS, makes a fundamental distinction between acts committed for private ends and acts committed for other ends. The latter are excluded from the scope of piracy.

The only instance in which a different approach has apparently been taken was the 1937 Nyon Arrangement[160], adopted during the Spanish civil war, that qualified military attacks in the Mediterranean Sea by unknown submarines against merchant ships not belonging to either of the conflicting Spanish parties as "acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy"[161]. However, the Nyon Arrangement is a remote and isolated case, more related to the law of warfare than to the law of the sea[162] and was not considered by the International Law Commission as relevant for piracy[163].

The consolidated rule is that piracy can be committed only by private ships for private ends[164]. Warships, military aircraft and, more generally, government ships and aircraft cannot commit acts of piracy. Nor can ships operated by insurgents

[159] The French official text changed from from "buts personnels", in Art. 15 of the H. S. Conv., to "fins privées" in Art. 101 of the UNCLOS. But this does not seem a substantive change.
[160] League of Nations, *Treaty Series*, vol. 181, p. 137.
[161] Preamble.
[162] In fact, the consequence of the "acts of piracy" to which the Nyon Arrangement applied was different from universal jurisdiction: "Any submarine which attacks such a ship in a manner contrary to the rules of international law referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on 22 April 1930, and confirmed in the Protocol signed in London on 6 November 1936, shall be counter-attacked and, if possible, destroyed" (Art. II).
[163] "(…) the Commission is aware that there are treaties, such as the Nyon Arrangement of 14 September 1937, which brand the sinking of merchant vessels by submarines, against the dictates of humanity, as piratical acts. But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private vessels. The questions arising in connexion with acts committed by warships in the service of rival Governments engaged in civil war are too complex to make it seem necessary for the safeguarding of public order on the high seas that all States should have a general right, let alone an obligation, to repress as piracy acts perpetrated by the warships of the parties in question. In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such vessels on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community. The Commission was unable to share the view held by some of its members that the principle laid down in the Nyon Arrangement endorsed a new right in the process of development" (*Report of the International Law Commission to the General Assembly*, in *Yearbook of the International Law Commission*, 1955, II, p. 25).
[164] For the special case of mutiny see infra, para. 8.

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and acting against an enemy government[165]. According to the commentary to the Harvard Draft,

> *"(…) the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons property for political ends, whether they are made on behalf of states, or of recognized belligerent organizations, or of unrecognized revolutionary bands"*[166].

As explained by the International Law Commission,

> *"In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such ships on suspicion of piracy might involve the gravest consequences"*[167].

Some well-known cases, such a those relating to the Italian steamer *Cogne* (1920)[168], the Portuguese liner *Santa Maria* (1961)[169] and the Italian cruise ship *Achille Lauro* (1985)[170], show that the seizure of ships by insurgents, rebels or even terrorists cannot be considered as an instance of piracy, whenever they act for achieving a political objective[171]. No doubt, such action is likely to entail the commission of crimes, even serious ones. They are subject to the jurisdiction of the flag State or other competent national jurisdiction, as provided by the relevant treaties (in particular, the SUA or the International Convention against the Taking of Hostages), but they do not fall under universal jurisdiction relating to piracy.

An open and thorny question is how far the notion of "private ends" does go and how its contrary should be called (public ends? political ends? ends put forward

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[165] As pointed out by HALL, *A Treatise on International Law*, 8th ed. by PEARCE HIGGINS, Oxford, 1924, p. 312: "Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state. (…) The true view then would seem to be that acts which are allowed in war, when authorised by a politically organised society are not piratical".

[166] *American Journal of International Law*, 1932, Suppl., p. 786.

[167] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 282.

[168] In 1920, the Italiam liner *Cogne* was taken over by political rebels who were on board and was compelled to call to the port of Fiume (now Rijeka, in Croatia), at that time occupied by the rebels. The shipowner agreed to pay a ransom to free the ship. The Italian courts that decided the civil cases between the shipowner and the insurance companies held that the facts could not be qualified as piracy, because of the political motives of the rebels. See the decisions in *La giurisprudenza di diritto internazionale*, I, *1921 – 1925*, and II, *1925 – 1930*, Napoli, 1997, respectively p. 402 and 799.

[169] In 1961, the passenger ship *Santa Maria*, flying the Portuguese flag, was taken over by a group armed men who had boarded the ship at ports of call. The group was led by a Portuguese opposition leader. As the ship was taken over by some of its own passengers who acted as insurgents, it was considered that the rules on piracy were not applicable. On the incident see WHITEMAN, *Digest of International Law*, IV, Washington, 1965, p. 665.

[170] In 1985, the Italian cruise ship *Achille Lauro* was taken over off the coast of Egypt by men who had boarded the ship at the port of Genoa and belonged to the Palestine Liberation Front. The hijackers murdered one of the passengers and, threatening to kill other people, asked that a number of Palestinians held in the prisons of Israel be freed. In 1986 the Italian courts convicted some of the hijackers for various crimes, but not for the crime of piracy. On the incident see CASSESE, *Terrorism Politics and Law – The Achille Lauro Affair*, Cambridge, 1989. For the relevant documents see *International Legal Materials*, 1985, p. 1509.

[171] In all the three mentioned cases, also the dual ship condition (see *infra*, para. 7.G) was not met.

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by a State?). It appears that "private ends" was mentioned in the Harvard Draft for the sole purpose of excluding from the scope of piracy insurgents and independence movements that attack the ships flying the flag of the State against which they are fighting and not indiscriminately any ship. What about people who are prompted by other political, ideological, religious or environmental ends? In such cases, all the requirements for piracy can be met, but for the conditions of "private ends" that remains questionable, since the precise boundaries of "private ends" remain ill-defined[172].

Some national court decisions in cases where the plaintiffs asked for a preliminary injunction against alleged pirates are interesting in this regard. By the decision of 19 December 1986 in *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, the Court of Cassation of Belgium found that activists – members of the non-governmental association *Greenpeace* – who on board a ship prevented two other ships from dumping hazardous wastes on the high seas were pirates. According to the court,

> *"The applicants do not argue that the acts at issue were committed in the interest or detriment of a State or State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective (...). The Court of Appeal was entitled to decide that the acts at issue were committed for personal ends within the meaning of Article 15(1) of the Convention [= H. S. Conv.]"*[173].

It thus appears that the Belgian court equated private ends to acts not taken on behalf of a State, even if such ends reflected a "political perspective".

The same conclusion in another "environmental" case, relating to the conflictual matter of hunting for whales, was reached by the decision of 25 February 2013 by the United States Court of Appeal for the Ninth Circuit[174] in the *Sea Shepherd Conservation Society et al. v. The Institute of Cetacean Research et al*. Reversing the decision of 19 March 2012 by the District Court for the Western District of Washington[175] and granting the requested preliminary injunction, the Court of Appeal espoused the following notion of private ends:

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[172] For different views on this question see TEULINGS, *Peaceful Protests against Whaling on the High Seas – A Human Rights-Based Approach*, in SYMMONS (ed.), *Selected Contemporary Issues in the Law of the Sea*, Leiden, 2011, p. 221; KANEHARA, *So-Called "Eco-Piracy" and Interventions by NGOs to Protest against Scientific Research Whaling on the High Seas: An Evaluation of the Japanese Position*, *ibidem*, p. 195; HONNIBALL, *Private Political Activists and the International Law Definition of Piracy: Acting for "Private Ends"*, in *Adelaide Law Review*, 2015, p. 279; ADEMUNI-ODEKE, *The Evolution, Nature and Application of "Private Ends" in Piracy Definition*, in *Ascomare Yearbook on the Law of the Sea*, 2021, p. 165. According to DUBNER, *The Law* cit. (*supra*, note 57), p. 63, "one method of avoiding 'touchy' political questions of immunity (as well as extradition, political asylum, insurgency and belligerency) was to provide for the 'private ends' limitation in draft convention".

[173] *International Law Reports*, vol. 77, 1988, p. 540 (English translation). The action by the activists included boarding, occupying and causing damage to the two other ships.

[174] See *American Journal of International Law*, 2013, p. 666.

[175] *Federal Supplement*, 2nd series, vol. 860, p. 1216. The relevant facts are described by the District Court as follows: "Sea Shepherd characterizes its Southern Ocean campaigns as 'aggressive

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> *"You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without doubt, a pirate, no matter how high-minded you believe your purpose to be".*

According to the Court,

> *"the district court construed 'private ends' as limited to those pursued for 'financial enrichment'. But the common understanding of 'private' is far broader. The term is normally used as an antonym to 'public' (e.g., private attorney general) and often refers to matters of a personal nature that are not necessarily connected to finance (e.g., private property, private entrance, private understanding and invasion of privacy). (...) We give words their ordinary meaning unless the context requires otherwise. (...) The context here is provided by the rich history of piracy law, which defines acts taken for private ends as those not taken on behalf of a state. (...)*
>
> *"We conclude that 'private ends' include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public".*

Again, private ends is equated to acts not taken on behalf of a State. The same idea appears in the judgment of 14 July 2011 of the Supreme Court of Seychelles in *The Republic v. Abdukar Ahmed and five others*, even if incidentally and as the basis for the distinction between piracy and (past) privateering:

protests'; the whalers characterize them as 'terrorism'. (…) Sea Shepherd throws glass bottles filled with paint or butyric acid at the whaling ships. Often, its crew throws the glass projectiles by hand, but they also use large slingshots and other launching devices. Butyric acid is a foul-smelling but not particularly caustic acid. Sea Shepherd uses it to make the odor on the whaling ships' decks unbearable for the whaling crew, and also to ruin any whale meat on deck. (…) The whalers hang nets strategically above and alongside the decks of their ships to protect them from the glass projectiles. Sea Shepherd in turn throws or launches safety flares, sometimes modified with metal hooks, hoping that they will catch on the nets and burn holes in them. (…) Sea Shepherd also hurls smoke bombs at the whaling ships. It is not clear what purpose this serves, other than to annoy the whalers and perhaps slightly obstruct their vision. (…) Sea Shepherd points what appears to be a high-powered laser at various parts of the whaling ships. Again, it is not clear what purpose this serves, other than to distract or annoy the whaling crew. (…) Sea Shepherd pilots its ships and boats across the bow of the whaling ships while towing lines in an effort to foul the rudder or propeller of the ships. (…) Finally, Sea Shepherd either intentionally pilots its ships to collide with the whaling ships or pilots them in such a way that a collision is highly likely. (…) The whalers admit to using countermeasures against Sea Shepherd. They frequently use high-powered water cannons aboard their ships to repel Sea Shepherd ships that come within range. They have used concussion grenades against Sea Shepherd. When Sea Shepherd boats towing lines approach, the whalers use grappling hooks to fend them off. They use the same hooks to fend off Sea Shepherd zodiacs that collide with or come within a few feet of their ships. (…) The whalers also use long-range acoustic devices ("LRADs"), which produce a sound so loud that it is disabling within a certain range".

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> *"So, in common parlance, piracy is generally understood as violence or depredation or detention on the seas for private ends without authorization by public authority"*[176].

In addressing this complex question, the best solution seems to hold that peaceful protests at sea cannot be considered as piracy, as long as they do not entail acts of violence or detention, or any act of depredation. In certain cases, demonstrations and protests might interfere with high seas activities (for example, interposing a ship between the harpoon gun and the targeted whale), but such non-violent forms of freedom of expression have nothing to do with the typical acts of piracy. As remarked in the arbitral award of 14 August 2015 in the *Arctic Sunrise* case (Netherlands v. Russian Federation),

> *"protest at sea is an internationally lawful use of the sea related to the freedom of navigation. The right to protest at sea is necessarily exercised in conjunction with the freedom of navigation. The right to protest derives from the freedom of expression and the freedom of assembly, both of which are recognized in several international human rights instruments to which the Netherlands and Russia are parties, including the ICCPR [= International Covenant on Civil and Political Rights]. The right to protest at sea has been recognized by resolutions of international organisations.*
> *The right to protest is not without its limitations, and when the protest occurs at sea its limitations are defined, inter alia, by the law of the sea. Article 88 of the Convention [= UNCLOS] provides that 'the high seas shall be reserved for peaceful purposes (...)'"*[177].

By contrast, illegal acts of violence or detention, or any act of depredation, even if inspired by a "good cause", can constitute piracy. Further, if crimes against the safety of navigation are committed, they can be subject to the jurisdiction of the relevant flag States or other competent national jurisdiction and should not call for universal jurisdiction, which is the exceptional consequence of acts of piracy. In fact, the SUA Convention was adopted for the purpose to apply to politically motivated violence, including terrorism, which was thought not to be covered by the generally accepted definition of piracy.

Opposition to acts of violence at sea in any form can be seen in positions taken by States and international organisations. IMO Maritime Safety Committee Resolution MSC 303(87) of 17 May 2010, without entering into the question of piracy, condemned any actions that intentionally imperil human life, the marine environment, or property during demonstrations, protests or confrontations on the high seas. This resolution calls upon governments to urge "all vessels entitled to fly their flag to comply with the applicable instruments adopted by this Organization [= IMO] directed at safety of navigation, security and safety of life at sea"[178] and "to take such measures as may be necessary to establish jurisdiction

[176] Available on the internet.
[177] Paras 227 and 228 of the award.
[178] Para. 3.2.

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over any offences set forth in the SUA Convention and its 1988 Protocol"[179]. In Resolution 2011-2 on safety at sea, the International Whaling Commission and States parties to the International Convention for the Regulation of Whaling (Washington, 1946) refused to condone and in fact condemned "any actions that are a risk to human life and property in relation to the activities of vessels at sea".

In a joint statement on whaling and safety at sea, issued on 19 December 2016[180], Australia, the Netherlands, New Zealand and the United States, while "respecting the right to freedom of expression, including through peaceful protests on the high seas, when protests are conducted lawfully and without violence", unreservedly condemned "dangerous, reckless, or unlawful behavior by all participants on all sides, whether in the Southern Ocean or elsewhere". The four States declared themselves "prepared to respond to unlawful activity in accordance with relevant international and domestic laws".

From this practice the conclusion may be reasonably drawn that States, while determined to preserve human life and safety of navigation from violence at sea, do not consider that peaceful protests at sea meet the requirements for constituting piracy and entail universal jurisdiction, provided that such protests remain within the proper limits of the right to freedom of expression. It is a matter of fact that the consolidated definition of piracy is based on three alternative elements (violence, detention or depredation). It is quite broad and, as already remarked[181], encompasses not only robbery, but also acts of hatred, revenge or abuse of power. An interpretation of the notion of "private ends" to exclude any kind of action by private individuals motivated by political, ideological, religious or environmental reasons could easily open the way to undue justifications of acts of violence at sea. It seems thus appropriate to make clear in the *Institut* Resolution that protest at sea cannot be considered as piracy, provided that it does not involve illegal acts of violence, detention or depredation.

A second and third paragraph could accordingly be included in Art. 3 of the *Institut* Resolution, stating as follows:

> *2. Acts committed by or under the authority of a State do not constitute piracy under Article 101 of the UNCLOS.*
> *3. Acts, including acts of peaceful protest at sea, that do not involve illegal acts of violence or detention, or any act of depredation, do not constitute piracy under Article 101 of the UNCLOS.*

7.C. Aircraft

Under Art. 15, sub-para. 1, H. S. Conv. and Art. 101, sub-para. a, UNCLOS, piracy may be committed by the crew or passengers of aircraft and can be directed against an aircraft. Four cases are envisaged to complete the picture of vehicles involved in piracy: a ship against a ship; a ship against an aircraft; an aircraft

[179] Para. 4.
[180] Available on the internet.
[181] *Supra*, para. 7.A.

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against a ship; an aircraft against an aircraft[182]. Practice has shown that only the first situation is likely to occur[183].

The extension to aircraft on the active side of the crime was proposed in 1926 by Romania in a draft for the suppression of piracy submitted in reply to the questionnaire of the League of Nations already mentioned[184]:

> *"Acts of piracy can only be committed by private vessels or aircraft"*[185].

As explained by Romania,

> *"it is quite possible that piracy may be practised in the future by means of hydro-planes"*[186].

The extension to aircraft was retained in the Harvard Draft[187] under the following explanation:

> *"The pirate of tradition attacked on or from the sea. Certainly today, however, one should not deem the possibility of similar attacks in or from the air as too slight or too remote for consideration in drafting a convention on jurisdiction over piratical acts. With rapid advance in the arts of flying and air-sailing, it may not be long before bands of malefactors, who now confine their efforts to land, will find it profitable to engage in depredations in or from the air beyond territorial jurisdiction"*[188].

The same approach was followed by the International Law Commission[189]. During the discussion, Mr. Spiropoulos suggested to restrict the draft articles "to acts of piracy committed by vessels", wondering "whether any cases were known of acts of piracy committed by aircraft" and adding that "it would be a mistake further to complicate an already controversial subject"[190]. This suggestion was not retained because, as pointed out by Sir Gerald Fitzmaurice, "it was not difficult to conceive of piracy being committed by an aircraft, particularly a flying-boat"[191].

As regards aircraft on the passive side on the crime, during the negotiations for the H. S. Conv., Italy, to fill a gap, proposed to extend the scope of piracy also to

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[182] If piracy occurs in a place outside the jurisdiction of any State, there is no need of having a ship or aircraft against which the acts of piracy are directed (see *infra*, para. 7.E).
[183] According to DUBNER, *The Law* cit. (*supra*, note 57), p. 52, "the aircraft provision was later inserted into the 1958 conventional articles on piracy. However, it is a virtually useless provision when applied to aviation because (a) the definition calls which defies the imagination unless one of the aircraft is totally destroyed; (b) it is impossible to force a plane to land without shooting it down unless the pilot agrees to do so; and (c) the type of act referred to by the 1958 conventional articles happens only where aircraft are used to capture vessels at sea".
[184] *Supra*, par. 3.
[185] Art. 3 of the draft, in LEAGUE OF NATIONS, Committee of Experts for the Progressive Codification of International Law, *Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation*, doc. C.196.M.70.1927.V of 20 April 1927, p. 220.
[186] *Ibidem*, p. 211.
[187] Art. 3.
[188] *American Journal of International Law*, 1932, Suppl., p. 809.
[189] ILC Draft, Art. 39.
[190] United Nations *Yearbook of the International Law Commission*, 1956, I, p. 47.
[191] *Ibidem*.

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acts committed against aircraft[192]. The proposal was adopted by 18 votes to 16, with 19 abstentions[193] and became Art. 15, sub-para. 1, H. S. Conv.

Although devoid of practical applications, the extension of piracy to aircraft was confirmed by Art. 101, sub-para. a, UNCLOS and has not raised any subsequent objections.

It seems that the *Institut* Resolution should not deal with a subject that has not raised any practical problem.

7.D. Remotely-Operated Ships or Aircraft

The UNCLOS does not envisage the case of remotely-operated ships or aircraft being involved in acts of piracy, either on the active or the passive side. This is due to evident chronological reasons, technological advances in that direction having developed only in the last decades, when the use of autonomous vehicles has increased for various activities.

While no cases of piracy involving remotely-operated vehicles have been reported so far, it cannot be excluded that they will occur in the future[194]. A remotely-operated ship or aircraft could become the target of a piratical attack and, conversely, could be used to perform such an attack[195]. As the notion of ship or aircraft includes unmanned vehicles, the principle should be followed that the rules applicable to ships, including submarines, and aircraft generally apply also to remotely-operated vehicles[196]. Even if Art. 101, a, UNCLOS requires the attack to be committed by "the crew or passengers of a private ship or a private aircraft", it could be broadly understood that the notion of "crew" includes those who operate an unmanned vehicle[197]. In this case, universal jurisdiction could be

[192] Doc. A/CONF.13/C.2/L.80 (*United Nations Conference on the Law of the Sea*, IV, Geneva, 1958, p. 136 and 79).
[193] *Ibidem*, p. 84.
[194] "When referring to autonomous vessels, the main advantages are lower costs (crew and insurance premiums) and some believe a reduced risk of piracy attack. While this could be true in terms of hostage-taking, it is argued that with autonomous vessels pirates will find another way to take advantage of the vessels and the concept of piracy will be revised rather than becoming extinct, so to speak" (CORCIONE, *Maritime Piracy and New Technologies*, in BEVILACQUA (ed.), *Human Security in Navigable Spaces: Common Chllenges and New Trends*, Napoli, 2021, p. 156).
[195] Taking a step forward, the case could be envisaged of a remotely-operated vehicle that attacks another remotely-operated vehicle.
[196] "The general expectation appears to be that rules relating to surface vessels, submarines, and aircraft apply regardless of whether there are humans on board or not" (KLEIN, *Maritime Autonomous Vehicles within the International Law Framework to Enhance Maritime Security*, in *International Law Studies*, 2019, p. 251).
[197] "The word 'depredation' also implies that causing harm to moveable property alone – the ship or any type of chattel on board – is sufficient to amount to an interference with freedom of navigation that the provision seeks to prevent and repress. It thus seems tenable to argue that unmanned crafts may constitute a victim ship in the sense of UNCLOS' piracy definition. This is somewhat more difficult to claim for offender ships given the provision's explicit reference to persons. Concretely, it requires that the harmful act is 'committed … by the crew or the passengers of a private ship'. While a 'passenger' has, perforce, to be aboard the ship, the term 'crew' could be interpreted as covering a remote crew – at least if the perpetrators use remote-controlled crafts, thus exercising contemporaneous control over the device causing harm at sea": PETRIG, *Unmanned Offender and Enforcer Vessels and the Multi-dimensional Concept of 'Ship' under the United Nations Convention on the Law of the Sea*, 2021, p. 11 (available on the internet).

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exercised over them if they operate from another ship or aircraft on the high seas or if they operate from the territory of any State.

It seems thus useful to emphasize in the *Institut* Resolution the possibility that remotely-operated vehicles, whether or not flying the flag of a State or registered by a State, can be used to commit acts of piracy or become the target of such acts. Art. 3 could accordingly include a paragraph stating as follows:

> *4. Whether the acts are committed by or against an autonomous or remotely-operated craft does not, mutatis mutandis, affect the application of Article 101 of the UNCLOS.*

7.E. On the High Seas

Acts of piracy take place on the high seas. As remarked by the International Law Commission,

> *"(…) 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 the State affected to take the necessary measures for the repression of the acts committed within its territory"*[198].

Seizing a ship within the territorial sea of another State, and arresting people on board who have committed acts corresponding to piracy, whether or not the acts occurred in that territorial sea, would be a violation of the sovereignty of that State[199].

Unless an agreement for this purpose is in place, there is no right of hot pursuit of pirates from the high seas into the territorial sea of a third State. While such a right was provided for in the Harvard Draft[200], the approach was not retained in the ILC Draft and, consequently, in the H. S. Conv. and the UNCLOS. Under Art. 111, para. 3, UNCLOS, "the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third States". By the same token, it is also clearly implied in the UNCLOS regime that nothing prevents a State from seizing in its own territorial sea a ship that has committed an act of piracy on the high seas. It seems that the two points do not need to be explicitly stressed in the *Institut* Resolution.

It also is sufficiently clear from Art. 58, para. 2, UNCLOS[201] that the provisions on piracy apply not only on the high seas, but also within the exclusive economic

[198] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 282.

[199] The draft Resolution on "Piracy (Sea and Air)" discussed in 1970 by the International Law Association (*supra*, note 61) disregarded the high seas condition: "The crime of piracy (sea and air) under general international law is committed by: (i) any person who unlawfully seizes or takes control of a ship or aircraft, or who attempts to do so through violence, threat of violence, surprise, fraud or other means; (…)" (Art. 3). According to DUBNER, *The Law* cit. (*supra*, note 57), p. 160, because many coastal States do not maintain a navy or coastguard of sufficient strength to deal with the problem of piracy, "it is recommended that the international crime of sea piracy be extended to include areas outside the 'normal baselines'".

[200] Arts 7 and 8.

[201] "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".

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zone of coastal States. According to the already quoted 2020 award on *The Enrica Lexie Incident*,

> *"The Arbitral Tribunal observes that Article 58, paragraph 2, of the Convention provides that Articles 88 to 115 'apply to the exclusive economic zone'. That reference extends specific rights and duties of States as regards the repression of piracy to the exclusive economic zone. The repression of piracy by States in the exclusive economic zone is thus not only sanctioned by the Convention but also, pursuant to Article 100 of the Convention as incorporated into Article 58, paragraph 2, a duty incumbent on all States"*[202].

If the repression of piracy takes place in the exclusive economic zone of a third State, due regard must be given to the rights and duties of the coastal State in such a zone (Art. 58, para. 3, UNCLOS). Again, this point does not need to be stressed in the *Institut* Resolution.

As already remarked[203], since 2008 and up to the end of 2021 the United Nations Security Council, acting under Chapter VII of the Charter, adopted a number of resolutions relating to piracy and armed robbery in the waters off Somalia. Under the first resolution, the Security Council decided that States co-operating with Somalia may:

> *"enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and*
> *Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery"*[204].

Mutatis mutandis, an analogous authorization was granted by the subsequent resolutions. The latter resolutions became richer and more nuanced as the Security Council became progressively aware of the practices of pirates and the needs of counter-piracy operations. It also took into account the increasing capacity of the Somali authorities to exercise the powers that coastal States normally exercise in the territorial sea. The basic effect of these provisions is to make the rules of international law dealing with piracy on the high seas applicable to the Somali territorial sea, permitting, *inter alia*, pursuit from the high seas into these waters[205].

Furthermore, following an episode in which French troops pursued pirates onto the Somali mainland, Resolution 1851 (2008) of 16 December 2008 included an

[202] Para. 979.
[203] *Supra*, para. 4.
[204] Para. 7 of Resolution 1816 (2008) of 2 June 2008.
[205] See TREVES, *Piracy and the International Law of the Sea*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 117; TREVES & PITEA, *Piracy, International Law and Human Rights*, in BHUTA (ed.), *The Frontiers of Human Rights*, Oxford, 2016, p. 93.

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additional authorization to take, for a period of twelve months, "all necessary measures that are appropriate in Somalia for the purpose of suppressing acts of piracy and armed robbery at sea"[206]. The expression "in Somalia" clearly alludes to action undertaken inside all the territory of this country.

A question raised by the Security Council resolutions concerning piracy off the coast of Somalia is whether they have an impact on general international law as codified in UNCLOS, in particular on the rule that piracy can only take place on the high seas and not in waters subject to the regime of coastal State sovereignty. A negative answer should be given to this question.

The resolutions explicitly state that the authorizations granted 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 [UNCLOS] with respect to any other situation"[207]. They underscore in particular that they "shall not be considered as establishing customary international law"[208]. These disclaimers, together with interventions on the same line made in the debates of the Security Council, make clear that, when adopting the resolutions, the members of the Security Council had no intention to contribute to a practice that has the effect of changing existing customary law as regards the prohibition of counter-piracy interventions within the territorial sea of a coastal State without its consent. As stated by the representative of Indonesia,

> *"Actions envisaged in the draft resolution shall only apply to the territorial waters of Somalia, based upon its prior consent. Secondly, the draft resolution must address solely the specific situation of piracy and armed robbery off the coast of Somalia, as requested by the Somali Government. (...) Thus, it is our duty to voice strong reservations if there are actions envisaged by the Council or any other forum that could lead to modifying, rewriting or redefining UNCLOS, of 1982"* [209].

According to the representative of South Africa,

> *"In negotiating and agreeing to the resolution, we were guided by the fact that it limits itself to the situation in Somalia. We should be clear that it is the situation in Somalia, not piracy in and of itself, that constitutes a threat to international peace and security. Piracy is a symptom of the situation in Somalia. Furthermore, the resolutions of this Council must respect the United Nations Convention on the Law of the Sea. The Convention remains the basis for cooperation between States on the issue of piracy"* [210].

In fact, the authorization was granted by the Security Council to "States and regional organizations cooperating with Somali authorities"[211] with the consent of

[206] Para. 6.
[207] Para. 9 of Resolution 1816 (2008).
[208] See, for instance, Resolution 2077 (2012) of 21 November 2012, para. 13. See also *supra*, para. 5.
[209] Doc. S/PV.5902.
[210] *Ibidem*.
[211] Resolution 2608 (2021), para. 14.

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the Somali Government, that "would welcome international assistance to address the problem"[212]. This situation would make lawful the repression of piracy in the Somali territorial sea even in the absence of a Security Council resolution. The authorization granted to other States to suppress piracy also within the territorial sea of Somalia was strictly linked to the reduced capacity of the Somali authorities to exercise their police functions[213], and such an authorization had no reason to be maintained once the said authorities were able to resume the full exercise of their powers. In the case of piracy in different waters, namely in the Gulf of Guinea, the Security Council, while reiterating that UNCLOS is "the legal framework applicable to countering piracy and armed robbery at sea"[214], did not authorize other States to intervene inside the territorial sea of States bordering the gulf.

It should also be underlined that the departures from the UNCLOS regime of piracy authorized by the Security Council's resolutions on piracy off Somalia had a temporary nature, needed to be periodically renewed and, in fact, ended as soon as the exceptional situation that determined them ceased to occur.

These *ratione loci* and *ratione temporis* limitations confirm that, while exercising in one particular case the primary responsibility for the maintenance of international peace and security granted to it by the United Nations Charter[215], the Security Council did not aim at creating a precedent for departing from the general international rules on piracy, as reflected in the UNCLOS. Nor did any State find it desirable to initiate such a departure. Apart from the localized and temporary situation of Somalia, States are careful to preserve one of the fundamental aspects of the present regime of piracy, that is to preserve their jurisdiction over crimes committed in their territorial sea and to prevent interventions therein by other States to exercise universal jurisdiction[216].

For the reasons specified above, it seems that the *Institut* Resolution should not recommend to extend the application of the rules of piracy to the territorial sea. Nor should the words "a place outside the jurisdiction of any State" (Art. 101 UNCLOS, sub. para. a, ii) be understood as including the territorial sea of a State lacking the capacity to repress piracy, absent an explicit authorization of the Security Council or consent from that State.

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[212] Preamble of Resolution 1816 (2008).

[213] "Taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia's territorial waters", as stated in the preamble of Resolution 1816 (2008). "Emphasizing that peace and stability within Somalia, the strengthening of State institutions, economic and social development, and respect for human rights and the rule of law are necessary to create the conditions for a durable eradication of piracy and armed robbery at sea off the coast of Somalia", as stated in the preamble of Resolution 2608 (2021) of 3 December 2021.

[214] Preamble of Resolution 2018 (2011) of 31 October 2011.

[215] Art. 24, para. 1.

[216] "None of the multilateral agreements have altered the long-standing zonal approach. States have common interests in information sharing, financial contributions, technical assistance, and joint training. However, they do not allow a foreign State to enter into its territorial seas on a multilateral basis": ISHII, *International Cooperation on the Repression of Piracy and Armed Robbery at Sea under the UNCLOS*, in *Journal of East Asia and International Law*, 2014, p. 350.

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7.F. In a Place outside the Jurisdiction of Any State

It has been said that

> *"piracy is, and always has been, a crime against the safety of traffic on the open sea, and therefore it cannot be committed anywhere else than in the open sea"*[217].

However, the instruments for the codification of international law of the sea departed from this assumption, enlarging the territorial scope of piracy to cover instances that seem rather unlikely to occur.

Such a process started with the proposal made in 1926 by Romania, in a draft submitted in reply to the already mentioned League of Nations questionnaire[218], to envisage piracy as committed not only on the high seas, but also "in a place not subject to the sovereignty of any State"[219]. The intention was to include in the territorial scope of piracy also "unowned territories":

> *"though, of course, they are becoming rarer, they still exist. Supposing, for example, that a band of brigands in some unowned territory attacks and plunders a convoy or caravan and escapes capture by its victims"*[220].

It is important to remark that the Romanian draft added that

> *"any warship or war aircraft or any public authority of a State shall have the right, in the places indicated in Article 1, to arrest persons who have committed acts of piracy and to seize vessels, aircraft or any other corpus delicti"*[221].

Given that ships are not the most common means of transportation on land, such a proposal was a complete departure from the customary and "maritime" notion of piracy: yet, a pirate without a ship is hardly conceivable. In any case, the words "any public authority of a State" saved the logic of the proposal, being they referred to any State agents detached in expedition in a place, different from the high seas, beyond the sovereignty of any State. In short, the extreme case was assumed that, in unowned territories, pirates (with or without a ship) attacked their victims (without a ship) and were chased by the agents of any State (with or without a ship)[222].

In the Harvard Draft, the notion of "any place not within the territorial jurisdiction of any state" was retained. However, it was subject to the condition that the act of piracy "is connected with an attack which starts on or from the sea

[217] OPPENHEIM, *International Law* cit. (*supra*, note 148), p. 505.
[218] *Supra*, par. 3.
[219] Art. 1 of the draft, in LEAGUE OF NATIONS, Committee of Experts for the Progressive Codification of International Law, *Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation*, doc. C.196.M.70.1927.V of 20 April 1927, p. 220.
[220] *Ibidem*, p. 204.
[221] Art. 6.
[222] The example proposed by HALL, *A Treatise* cit. (*supra*, note 165), p. 313, confirms the outdated character of the instance: "Usually piracy is spoken of as occurring upon the high seas. If however a body of pirates land upon an island unappropriated by a civilised power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy".

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or in or from the air"[223]. Here there is a requirement of having at least one ship or aircraft (the pirate ship or aircraft). This approach was followed by the International Law Commission, as it can be inferred by the commentary:

> *"In considering as 'piracy' acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories escaping all penal jurisdiction"*[224].

Consistently, in the case of places outside the jurisdiction of any State, Art. 15, sub-para. 1 *b*, H. S. Conv. and Art. 101, sub-para. (a) (ii), UNCLOS do not require that the persons or property against which piracy is directed are on board a ship or aircraft, provided however that the act of piracy is committed by a ship or aircraft.

It may be asked what is the practical use of the extension of the territorial scope of piracy, considering that land territories on the Earth outside the jurisdiction of any State[225] exist today only on the Antarctic continent[226]. In those territories and in their adjacent waters, which have the legal condition of high seas, piracy does not seem a promising activity[227]. Equally unlikely are acts or piracy on the Moon, on celestial bodies and in outer space, even though the starting of activities therein by private persons carries the possibility of acts of violence, detention and depredation against persons or property.

However contradictory and practically useless it might be, the extension of the territorial scope of piracy to places outside the jurisdiction of any State does not seem to cause any harm or discussion within the present regime of piracy. Thus the *Institut* Resolution should not touch on this question.

7.G. The Dual Condition

According to Art. 15, sub-para. 1 *a*, H. S. Conv. and Art. 101, sub-para. (a) (i), UNCLOS, acts of piracy must, except when they occur in a place outside the jurisdiction of any State[228], be directed by a ship or aircraft against another ship or

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[223] Art. 3, para. 1.
[224] *Yearbook of the International Law Commission*, II, 1956, p. 282. The exemple of "piracy committed on desert islands, which were not under the jurisdiction of any State", was put forward by Fitzmaurice (*ibidem*, I, 1956, p. 46).
[225] Completely different is the case of territories claimed by two or more States, to which the rules on piracy clearly do not apply.
[226] Apart from the sectors claimed by seven States (Argentina, Australia, Chile, France, New Zealand, Norway and United Kingdom), but considered *terra nullius* by other States, there is still a sector in Antarctica which is not claimed by any State.
[227] Incidentally, Art. 8, para 2, of the Antarctic Treaty (Washington, 1959) is likely to apply also in cases of piracy: "Without prejudice to the provisions of paragraph 1 of this Article, and pending the adoption of measures in pursuance of subparagraph 1(e) of Article IX, the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution".
[228] *Supra*, para. 7.F.

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aircraft (so-called dual condition), irrespective of their kind and size[229]. Crimes of violence, detention or depredation do not constitute acts of piracy where they occur inside one single ship or aircraft[230], even where they result in hijacking a ship or holding people to ransom.

As explained by a distinguished author,

> *"(…) that is too wide a definition which would embrace all acts of plunder and violence, in degree sufficient to constitute piracy, simply because done on the high seas. As every crime may be committed at sea, piracy might thus be extended to the whole criminal code. If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under authority, and the offender were secured and confined by the master of the vessel, to be taken home for trial, – this state of things would not authorize seizure and trial by any nation that chose to interfere, or within whose limits the offender might afterwards be found"*[231].

Despite some uncertainties in the past, the dual condition is coherently confirmed by the Harvard Draft, the ILC Draft, the H. S. Conv.[232], the UNCLOS and by well-known international practice, such as the already mentioned *Cogne*, *Santa Maria*, *Achille Lauro*[233] and *Fidelio*[234] cases. Seizure of a ship flying a foreign flag in such cases would constitute a violation of the exclusive jurisdiction of the flag State (Art. 92 UNCLOS). It is also because attacks taking place on board a single ship are not covered by the rules on piracy that specific instruments of international co-operation in criminal matters have been adopted, in particular the SUA.

Attacks directed against artificial islands, installations and structures existing on the high seas or, more likely, in the exclusive economic zone are also excluded from the scope of piracy. As remarked in the already mentioned 2015 *Arctic Sunrise* award as regards the charge of piracy against environmental activists who

[229] "Junks, rowboats, motor boats, and even rafts may be used by pirates": commentary to the Harvard Draft (cit. *supra* note 57), p. 768.
[230] The draft Resolution on "Piracy (Sea and Air)" discussed in 1970 by the International Law Association (*supra*, note 61) disregarded the dual condition: "The crime of piracy (sea and air) under general international law is committed by: (i) any person who unlawfully seizes or takes control of a ship or aircraft, or who attempts to do so through violence, threat of violence, surprise, fraud or other means; (…)" (Art. 3). According to the rapporteur, Haroldo Valladão, "(…) the Geneva Convention of 1958, although it punishes piracy both in the air and on aircraft, defined it restrictively, only covering it in an incomprehensible outdated fashion, *i. e.* in the case of an act when it is performed by one vessel or aircraft against another vessel or aircraft": International Law Association, *Report* cit. (*supra*, note 61), p. 745.
[231] WHEATON, *International Law*, 8th ed. by DANA, Boston, 1866, p. 194.
[232] A proposal by China to add to Art. 15, para. 1, H. S. Conv. a sub-paragraph, stating "on the high seas, against the persons or property on board the ship if, for these ends, the person or persons committing such act take over the navigation or command of the ship", was withdrawn (doc. A/CONF.13/C.2/L.45, in *United Nations Conference on the Law of the Sea*, *Official Records*, IV, Geneva, 1958, p. 128 and 84).
[233] *Supra*, para. 7.B.
[234] *Supra*, para. 7.A.

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were on board a private Dutch ship that staged a protest against the Russian offshore oil platform *Prirazlomnaya* and were suspected of piracy:

> *"An essential requirement of Article 101 is that the act of piracy be directed 'against another ship'. The Prirazlomnaya is not a ship. It is an offshore ice-resistant fixed platform. This appears also to be the view of the Russian authorities. Both the Russian version of the Notice to Mariners No. 21/2014 and the 2014 Order of the Ministry of Transport specify that the Prirazlomnaya is a 'fixed' platform. In a communication to Greenpeace dated 5 December 2012, the Russian Ministry of Transport described Prirazlomnaya as a 'fixed platform'. The understanding that the Prirazlomnaya is not a ship was the reason for the requalification of the charges against the Arctic 30 as hooliganism*[235].

It seems that the *Institut* Resolution should not subvert a requirement, such as the dual condition, that is deeply rooted in international practice.

7.H. Participation, Incitement and Facilitation

Sub-paras. 2 and 3 of Art. 15 H. S. Conv. and sub-paras. (b) and (c) of Art. 101 UNCLOS have their basis in paras. 2 and 3 of Art. 3 of the Harvard Draft[236].

The purpose of these provisions is to include within the crime of piracy the activities, other than direct commission of acts of violence, detention and depredation, of those people who intentionally participate in operating a pirate ship (for example, a sailor or a motor engineer) or in performing services on board (for example, a cook) or otherwise in making piratical acts easier (for example, a seller of weapons or ladders, a banker lending money or a negotiator of ransom on behalf of pirates)[237]. In almost all cases, since piracy is the crime of a class of persons, someone can be a pirate even if he or she has never directly depredated or exercised violence. If a person participates in the operation of a ship or aircraft or

[235] Para. 238. Having concluded that the *Prirazlomnaya* was not a ship, the Tribunal did not elaborate on the other elements required to show piracy within the meaning of Art. 101 UNCLOS (see para. 240).

[236] "2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship. 3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article".

[237] An interesting case was decided by the United States Court of Appeals for the District of Columbia Circuit on 11 June 2013 (*United States of America vs. Ali Mohamed Ali, also known as Ahmed Ali Adan, also known as Ismail Ali*, in *Federal Reporter*, 3rd Series, vol. 718, p. 929). On 9 November 2008 the accused came on board a hijacked Danish ship, anchored at Ras Point Binna, Somalia, and assumed the role of interpreter and negotiator for the release of the hostages and the ship. For his services he received 100,000 $ out of a ransom of 1,700,000 $. In June 2010, he was appointed Director General of the Ministry of Education for the Republic of Somaliland, a self-proclaimed State within Somalia. In March 2011 he received an invitation to attend an education conference in Raleigh, North Carolina, United States. The invitation was a ruse and, when he arrived at Washington, Dulles International Airport, he was arrested and indicted for conspiring to commit and aiding and abetting two offenses: piracy on the high seas and hostage taking. The Circuit Court concluded that persons can be prosecuted for piracy based on acts that facilitate piracy. Further, the Court found that persons who aid and abet piracy need not commit their acts on the high seas, so long as the piracy itself occurs on the high seas. By contrast, the Court concluded that UNCLOS is silent on conspiratorial liability and therefore the defendant could not be charged for conspiracy to commit piracy.

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incites or facilitates its activities being aware of the facts making it a pirate ship or aircraft[238], that person is responsible for piracy[239].

There is a legal question hidden in Art. 101: where are the activities of participation, incitation and facilitation to be performed to allow the exercise of universal jurisdiction? Notably, the specification "on the high seas" appears in sub-para. (a) of Art. 101 UNCLOS and is not repeated in sub-paras. (b) and (c), which do not define any geographic scope. This can be understood in the sense that such activities can be carried out anywhere, including on land[240], to be qualified as piratical activities[241].

In the light of Art. 105 UNCLOS, participants in piracy or incitators and facilitators of it can be subjected to universal jurisdiction if they are arrested on the high seas or on board the seized pirate ship or aircraft, which seems unlikely in several situations[242], or if they are found in the territory of any State. Art. 105 grants no right to enter the territory of other States for the purpose of arresting suspected participants, incitators or facilitators and submit them to the jurisdiction of the arresting State. However, Art. 100 UNCLOS would be fully applicable also to participants, incitators and facilitators who remain on land, binding their national State or the State in whose territory they operate to adopt legislation to sanction their illegal activities.

A clarification in this direction on the content of Art. 101, sub-paras. (b) and (c), could usefully be made in the *Institut* Resolution. Art. 3 could accordingly include the following paragraph:

> *5. For the purpose of defining piracy, Article 101, sub-paragraphs (b) and (c), of the UNCLOS should be taken to mean that acts of participation, incitement or intentional facilitation do not need to be committed on the high seas or in a place outside the jurisdiction of any State.*

[238] Willingness is implied in incitation.
[239] "One could safely assume that all of the crew members have the same intentions or at least know what the majority of the others intend": FRIMAN & LINDBORG, *Initiating Criminal Proceedings with Military Force: Some Legal Aspects of Policing Somali Pirates by Navies*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 179.
[240] Participation in the operation of a ship or an aircraft can also be done from land, particularly in the case of remotely operated vehicles.
[241] The commentary to the Harvard Draft reached a different conclusion: "The act of instigation or of intentional facilitation is not subjected to the common jurisdiction unless it takes place outside territorial jurisdiction": commentary to the Harvard Draft (cit. *supra* note 57), p. 822.
[242] For example, it is unlikely that a banker who lends money to pirates sails on the pirate ship. A drone-operator could be located either on land or on board the pirate ship.

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8. MUTINY (ART. 102 UNCLOS)

According to Art. 102 UNCLOS,

> *"The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft".*

Art. 102 UNCLOS corresponds in its substance to Art. 16 H. S. Conv.[243] and Art. 40 ILC Draft. The provision is a logical consequence of the assumption that acts of piracy can be committed only by private ships or aircraft. Wrongful acts committed by government ships or aircraft incur State responsibility under the relevant rules of customary international law.

From Art. 102 UNCLOS it can be inferred that mutiny in itself is not included in the definition of piracy because of the lack of the dual condition. As explained in the commentary on the Harvard Draft,

> *"Even though a mutiny succeeds, the common jurisdiction would not attach. It should attach, however, if the successful mutineers then set out to devote the ship to the accomplishment of further acts of violence or depredation (...) on the high sea or in foreign territory"*[244].

As remarked by the International Law Commission,

> *"clearly, the article ceases to apply once the mutiny has been suppressed and lawful authority restored"*[245].

No cases relevant for Art. 102 UNCLOS can be found in recent international practice. It does not seem that the *Institut* Resolution should add anything to Art. 102 UNCLOS.

9. PIRATE SHIP OR AIRCRAFT (ART. 103 UNCLOS)

According to Art. 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".*

Art. 103 UNCLOS corresponds in its substance to Art. 17 H. S. Conv.[246] and Art. 41 ILC Draft.

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[243] It was adopted by 55 votes to 10 with 1 abstention (*United Nations Conference on the Law of the Sea*, *Official Records*, II, Geneva, 1958, p. 21).
[244] Commentary to the Harvard Draft (cit. *supra*, note 57), p. 810.
[245] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 283.
[246] It was adopted by 59 votes to 9 with 2 abstentions (*United Nations Conference on the Law of the Sea*, *Official Records*, II, Geneva, 1958, p. 21).

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The provision aims at allowing the repression of piracy against ships intended to be used for piracy, even if a piratical attack has not yet occurred, or ships which have in fact been used for piracy, even if they are no longer intended for such a use. What is important is that they are effectively controlled by potential or former pirates. As explained in the commentary on the Harvard Draft, which included a more elaborate provision[247] having the same purpose as Art. 103 UNCLOS,

> *"The salient characteristic of a pirate ship is its actual control by persons who are devoting it to the sort of acts which are stigmatized as piracy. (...) It would be inexpedient (...) to give immunity against seizure on the high sea under the common jurisdiction, to a ship which has made a piratical attack, merely because its possessors decided definitely to end its piratical career with the success or failure of the attack"*[248].

According to the commentary to the ILC Draft,

> *"Two cases of pirate ships must be distinguished. First, there are ships intended to commit acts of piracy. Secondly, there is the case of ships which have already been guilty of such acts"*[249].

It does not seem that the *Institut* Resolution should add anything to Art. 103 UNCLOS[250].

10. NATIONALITY OF A PIRATE SHIP OR AIRCRAFT (ART. 104 UNCLOS)

According to Art. 104 UNCLOS,

> *"A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived".*

Art. 104 UNCLOS[251] literally corresponds to Art. 18 H. S. Conv.[252] and substantively corresponds to Art. 42 ILC Draft. The provision implies the assumption that piracy is a question of fact, irrespective of the flag of the ship, if any. As explained in the commentary to the Harvard Draft, which included a quite similar provision[253],

> *"Traditional law assigns to the common jurisdiction not only offenses committed on or from an unregistered ship, whose officers and crew scorn*

[247] Art. 4.
[248] Commentary to the Harvard Draft (cit. *supra*, note 57), p. 823.
[249] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 283.
[250] The English official text of Art. 103 UNCLOS ("persons in dominant control") does not fully correspond to the French ("les personnes qui les contrôlent effectivement") and the Spanish ("las personas bajo cuyo mando efectivo se encuentran") official texts. But the differences do not seem to have a substantive nature.
[251] The words "by the law of the State from which such nationality was derived" may be better understood in the light of the French official text: "par le droit interne de l'Etat qui l'a conférée [= la nationalité]".
[252] It was adopted by 62 votes to 9 with 1 abstention (*United Nations Conference on the Law of the Sea*, *Official Records*, II, Geneva, 1958, p. 21).
[253] Art. 5.

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> *all national allegiance, but also offences committed on or from a ship legally entitled to fly the flag of a certain state but devoted by those in control of it to a private plundering enterprise"*[254].

According to the commentary to the ILC Draft,

> *"It has been argued that a ship loses its national character by the fact of committing acts of piracy. The Commission does not share this view. (...) Even though the rule under which a ship on the high seas is subject only to the authority of the flag State no longer applies, the ship keeps the nationality of the State in question and (...) that State can apply its law to the ship in the same way as to other ships flying its flag. A pirate ship should only be regarded as a ship without nationality where the national laws of the State in question regard piracy as a ground for loss of nationality"*[255].

If the pirate ship retains its nationality, the flag State has the right to exercise the right of diplomatic protection in disputes entailing the seizure and forfeiture of it. Likewise, the national State of pirates has the right to exercise the diplomatic protection in criminal proceedings against them.

It does not seem that the *Institut* Resolution should add anything to Art. 104 UNCLOS.

11. UNIVERSAL JURISDICTION (ART. 105 UNCLOS)

According to Art. 105 UNCLOS,

> *"On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith".*

Art. 105 UNCLOS, which corresponds in substance to Art. 19 H. S. Conv.[256] and Art. 43 ILC Draft[257], has its basis in three provisions of the Harvard Draft, stating respectively as follows:

> *"In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board"*[258].

[254] Commentary to the Harvard Draft (cit. *supra*, note 57), p. 822.
[255] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 283.
[256] It was adopted by 60 votes to 9 with 1 abstention (*United Nations Conference on the Law of the Sea*, *Official Records*, II, Geneva, 1958, p. 22).
[257] In fact, Art. 19 H. S. Conv. and Art. 43 ILC Draft were incomplete, insofar as they referred only to "a ship taken by piracy and under the control of pirates", without adding "or aircraft".
[258] Art. 6.

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> *"A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy"*[259].
> *"A state which has lawful custody of a person suspected of piracy may prosecute and punish that person"*[260].

Art. 105 UNCLOS establishes universal jurisdiction against pirate ships and pirates. Every State, irrespective of any link with the flag of the pirate ship or the attacked ship or any link with the nationality of the pirates or the victims, has the right to arrest and bring the pirates to trial and seize the pirate ship or aircraft and property on board. This is the essential part of the international regime of piracy.

It should be noted that the arrest of the suspected pirates can take place only when they are on board the pirate ship or aircraft or a ship or aircraft under the control of pirates and not when they happen to be on board any other ship or aircraft.

It seems clear from the text of Art. 105 and, in particular, from the repeated use (four times) of the permissive verb "may" – "may seize", "(may) arrest", "may decide" and "may (…) determine" – that the intention of the drafters was not to establish an obligation to exercise jurisdiction over pirates[261].

As explained in the commentary to the Harvard Draft,

> *"Many states do not undertake to punish a pirate who has not offended against its peculiar interests, and it would be difficult to obtain a general consent of all states to a treaty provision that they owe each other mutual duties to prosecute all pirates before their tribunals, or even to pursue and capture them on the high sea or in their own territory, for the imposition of such a duty would imply international liability if the duty were not fulfilled in a particular case"*[262].
> *"Properly speaking, (...) piracy is not a legal crime or offence under the law of nations. (...) International law piracy is only a special ground of state jurisdiction – of jurisdiction in every state. This jurisdiction may or may not be exercised by a certain state. It may be used in part only. How far it is used depends on the municipal law of the state, not on the law of nations. The law of nations on the matter is permissive only. It justifies state action within the limits and fixes those limits. It goes no further"*[263].

In other words, the international rules on piracy impose on States "only a general discretionary obligation to discourage piracy by exercising their rights of prevention and punishment as far as is expedient"[264]. These rules permit action,

[259] Art. 13, para. 1.
[260] Art. 14, para. 1.
[261] A different conclusion could be drawn from a proposal submitted by Albania and Czechoslovakia to the Geneva Conference, stating that "all States are bound to take proceedings against and to punish acts of piracy, as defined by present international law, and to co-operate to the fullest possible extent in the repression of piracy" (doc. A/CONF.13/C.2/L.46, in *United Nations Conference on the Law of the Sea*, *Official Records*, IV, Geneva, 1958, p. 128). However, the proposal was rejected (*ibidem*, p. 84).
[262] Commentary to the Harvard Draft (cit. *supra*, note 57), p. 755.
[263] *Ibidem*, p. 759.
[264] *Ibidem*, p. 760.

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but do not prescribe that such action is effectively taken. The decision to prosecute remains a sovereign one and States are rather reluctant to commit themselves to prosecute pirates.

However, it is open to discussion whether this conclusion is still generally acceptable today. As confirmed by the Security Council resolutions adopted in the last years, piracy, far from being a relic of the past, is a recurrent criminal practice that, in some seas, is of substantial concern for the safety of commercial maritime navigation and the related activities (for example, in the case of Somalia, the delivery of humanitarian aid), as well as for the security and economic development of States in the regions affected. It would seem illogical if a State, which has arrested people suspected of piracy, were to release them without submitting the matter to prosecution (so-called catch-and-release practice).

According to what is reported, catch-and-release instances have occasionally taken place. In 2008, after some days of detention on board the Danish navy ship *Absalom* and confiscation of their weapons and other tools, Denmark released ten pirates putting them ashore on a Somali beach. The seizing State, which was not prepared to submit them to prosecution in Denmark, was also moved by human rights considerations, as the alleged pirates risked torture and the death penalty if surrendered to local authorities[265]. In 2010 a ship of the Russian navy, having captured ten pirates that had hijacked the Russian tanker *Moscow University*, reportedly released them 300 n. m. from the Somali coast in an inflatable boat without navigational equipment[266].

It is a matter of fact that, once taken on board the seizing ships, pirates do not dematerialize. It now appears that one of the greatest challenges in fighting piracy has been to determine where to try and, if convicted, incarcerate alleged pirates. There may be indeed many practical obstacles to the submission of suspected pirates to the domestic jurisdiction of the seizing State, such as the cost of the transportation of suspects, witnesses and evidence, the difficulty of proceedings far from the place where the alleged crime has been committed, including the difficulty of interpretation of statements and documents, the cost of the detention of convicted wrongdoers, the potential request of asylum by them, etc. Nevertheless, the release of suspects without submission to prosecution seems in contradiction with the *bona fide* understanding of the obligation to cooperate to the fullest possible extent in the repression of piracy, set forth in Art. 100

[265] See TREVES, *Piracy and the International Law of the Sea*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 133. Due to a second incident – the attack in 2009 of the *Samanyulo*, a Dutch-Antilles flagged cargo ship – the *Absalom* detained five suspected pirates. After forty days of uncertainty, an agreement was reached with the Dutch authorities for their tranfer to the Netherlands to stand trial: see MURDOCH & GUILFOYLE, *Capture and Disruption Operations: The Use of Force in Counter-piracy off Somalia*, *ibidem*, p. 162.

[266] See MURDOCH, *Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia*, in SYMMONS (ed.), *Selected Contemporary Issues in the Law of the Sea*, Liden, 2011, p. 151: "The Russian Navy announced that after they were released, contact was lost and they were presumed to have perished. While details are somewhat sparse, the apparent circumstances of their release created, rather than prevented, a situation which put them in danger of being lost at sea".

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UNCLOS[267]. Piracy cannot be repressed and, hopefully, eradicated without justice. The purpose of universal jurisdiction is to enlarge the number of States that can take a decision on the criminal responsibility of alleged pirates rather than allowing chances of impunity for suspected criminals[268].

In a report issued in 2010 on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia[269], the United Nations Secretary-General identified seven options:

> *"Option 1: The enhancement of United Nations assistance to build capacity of regional States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia;*
> *Option 2: The establishment of a Somali court sitting in the territory of a third State in the region, either with or without United Nations participation;*
> *Option 3: The establishment of a special chamber within the national jurisdiction of a State or States in the region, without United Nations participation;*
> *Option 4: The establishment of a special chamber within the national jurisdiction of a State or States in the region, with United Nations participation;*
> *Option 5: The establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation;*
> *Option 6: The establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations;*
> *Option 7: The establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations".*

Only option 1 has proved to be a feasible path, even if still in 2021 the Security Council reiterated

> *"its concern over persons suspected of piracy having been released without facing justice or released prematurely, reaffirming that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts"*[270].

In the light of all the practice that has developed after the adoption of the UNCLOS in the field of repression of piracy, the preferable interpretation of Art. 105 seems to be that the provision grants a right to the seizing State to submit

[267] See *supra*, para. 6.
[268] It has been remarked that evidence "suggests that the nominal availability of universal jurisdiction for piracy does not translate in practice into ending impunity for the crime. In the absence of a reasonable prospect of being implemented, universal jurisdiction for piracy is unlikely to provide significant deterrence" (KONTOROVICH & ART, *An Empirical Examination of Universal Jurisdiction for Piracy*, in *American Journal of International Law*, 2010, p. 453).
[269] Doc. S/2010/394 of 26 July 2010.
[270] Resolution 2608 (2021), 6th preambular para.

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alleged pirates to prosecution, it being understood that such a State always remains under an obligation to cooperate to the fullest possible extent in the repression of piracy as provided for in Art. 100 UNCLOS. Accordingly, if for whatever reason the seizing State does not wish to submit the alleged pirates to prosecution, it appears consistent with the object and purpose of the regime on piracy to conclude that it is bound to transfer[271] them to another State where that may be done.

It is implied in the wording of Art. 105 UNCLOS, and it has been confirmed by recent practice, that the seizing State is not the only one that can bring suspected pirates to trial. Art. 105 UNCLOS indicates what the seizing State "may" do. It does not specify what other choices are available to it. Transferring alleged pirates to another State for prosecution is a choice that achieves the general objective of the repression of piracy. As any State is entitled to arrest pirates, it seems consequent that any State is also entitled to submit them to prosecution. In deciding the *Cygnus* case on 17 June 2010, the District Court of Rotterdam (Netherlands), found that the language of Art. 105 UNCLOS does not, either explicitly or implicitly, vest exclusive jurisdiction in the seizing State (Denmark in the specific case), so as to preclude the exercise of universal jurisdiction by another State[272].

The *aut dedere, aut iudicare* is a common practice in many treaties for co-operation in criminal matters, including the SUA:

> *"Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 3, 3bis, 3ter and 3quater in cases where the alleged offender is present in its territory and it does not extradite the alleged offender to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article"*[273].

A difference between the regime established in such treaties and the regime applying to piracy, as it will be proposed in the *Institut* Resolution, would be that the former provides for extradition towards States which have a given substantive link with the crime, while the latter would allow transfers towards any other State. However, as already remarked, this is a mere corollary of the universal jurisdiction that is a typical aspect of piracy. In any case, nothing would prevent the seizing State from transferring suspected pirates for trial to a State that has a personal or material link with the crime (for example, the State of which the pirates or the victims are nationals or the flag State of the pirate or the attacked ships).

The practice of transfers is reflected in the agreements concluded by the European Union and some East African States, namely, the exchange of letters with Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer (Nairobi,

[271] The word "transfer" implies that there is no need for a formal procedure of extradition.
[272] *International Law Reports*, vol. 145, 2010, p. 491.
[273] Art. 6, para. 4.

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2009)[274], the exchange of letters with Seychelles on the conditions and modalities for the transfer of suspected pirates and armed robbers from EUNAVFOR to the Republic of Seychelles and for their treatment after such transfer (2009)[275] and the agreement with Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after the transfer (Port Louis, 2011)[276]. For example, under the first instrument,

> *"Kenya will accept, upon the request of EUNAVFOR, the transfer of persons detained by EUNVAFOR in connection with piracy and associated seized property by EUNAVFOR and will submit such persons and property to its competent authorities for the purpose of investigation and prosecution"*[277].

Other agreements of this kind have been concluded by the United States and, probably, by other States. They are not publicly available. Indeed, if the receiving States are developing countries, a transfer agreement could require forms of economic assistance, such as financing the construction or refurbishing of courts and prisons or providing legal training.

Taking into account that the obligation to adopt national legislation and conclude international agreements and arrangements for the repression of piracy is already covered by Art. 2 of the *Institut* resolution[278], the fourth article of it could thus state as follows:

> *1. Article 105 of the UNCLOS shall be interpreted in the light of the duty to cooperate in the repression of piracy provided for in Article 100 of that Convention.*
> *2. A State that has detained a person it suspects of piracy shall investigate and submit the case to its competent authorities for the purpose of prosecution, unless it transfers that person to another State for the purpose of investigation and prosecution.*

12. THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS

Art. 105 UNCLOS, as well as Art. 19 H. S. Conv. and Art. 43 ILC Draft, do not say very much about fundamental human rights in cases of piracy. In the second sentence of the provision, it is stated that "courts" shall determine penalties to be imposed and action with regard to seized property, subject to the rights of parties acting in good faith. This implies that there is a need for a judicial decision for adopting sanctions against pirates and that the accessory sanction of confiscation of property in possession of pirates cannot be adopted against lawful owners of it who

[274] *Official Journal of the European Union*, No. L 79 of 25 March 2009. See GATHII, *Kenya's Piracy Prosecutions*, in *American Journal of International Law*, 2010, p. 416.
[275] *Official Journal of the European Union*, No. L 315 of 2 December 2009.
[276] *Ibidem*, No. L 254 of 30 September 2011.
[277] Art. 2, *a*.
[278] *Supra*, para. 6.

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have suffered a piratical attack[279]. Of course, the property of pirates (ships, weapons, ladders, supplies of food and fuel etc.) can be confiscated by the seizing State.

The International Law Commission limited its comments to the remark that

> *"the Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts"*[280].

Strangely, the commentary on the Harvard Draft, although prepared in a period when human rights were not a core issue in international law, was much more specific on the subject of human rights both of the victims and of suspected pirates[281].

The developments in international human rights law suggest that there is a need to orient the *Institut* Resolution in this direction. Human rights have important implications also in the field of piracy.

12.A. Human Rights of the Victims

The Harvard Draft takes into consideration the rights of the victims, including the right of access to justice and the right to property:

> *"1. A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.*
> *2. The law of the state must conform to the following principles:*
> *(a) The interests of innocent persons are not affected by the piratical possession or use of property, nor by seizure because of such possession or use.*
> *(b) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims.*
> *(c) A claimant who establishes the validity of his claim is entitled to receive the property or compensation therefor, subject to a fair charge for salvage and expenses of administration"*[282].

Human rights different from the right to property were considered by the already mentioned 2017 Revised Djibouti Code of Conduct[283]. It points out that the participant States, consistent with their available resources and related priorities, their respective national laws and the applicable rules of international law, intend

[279] Another possibility is to understand "third parties" as referred to those who may have in good faith bought property depredated by pirates. If this were the case, Art. 105 UNCLOS would not grant any rights to victims. It seems preferable to leave the conflict between two opposed principles – *beati possidentes* and *nemo plus iuris transferre potest quam ipse habet* – to be solved according to the applicable law of the State exercising the jurisdiction.
[280] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 283.
[281] The point was raised by the Netherlands in the comments to the ILC Draft: "In the Harvard Draft (…) more detailed regulations concerning piracy are given than in the present draft. As instances may be adduced article 13 concerning the rights of third parties acting in good faith and article 14 concerning a fair trial. The concise nature of the present draft precludes the laying down of detailed regulations on these points. It might be desirable, however, to draw attention to the obligation of States to observe the principles just mentioned" (*United Nations Conference on the Law of the Sea*, *Official Records*, I, Geneva, 1958, p. 109).
[282] Art. 13.
[283] *Supra*, para. 7.B.

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to cooperate to the fullest possible extent in the repression of illegal activities at sea with a view towards

> *"(…) facilitating proper care, treatment and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to transnational organized crime in the maritime domain, maritime terrorism, IUU [= illegal, unreported and unregulated] fishing and other illegal activities at sea, particularly those who have been subjected to violence".*

It seems appropriate that the two first paragraphs of Art. 5 of the *Institut* resolution underline the position of the victims of piracy, putting emphasis on their human rights of access to justice, in particular to receive compensation from those liable for piratical acts and to restitution of property, as well as on their right to receive assistance by States:

> *1. States shall respect and ensure the human rights of victims of acts of piracy, including the right of access to justice to seek reparation and the right to compensation for damage and to restitution of depredated property.*
> *2. States shall ensure proper care, treatment and repatriation for crews and passengers who have been subjected to acts of piracy.*

12.B. Human Rights of the Suspected Pirates

The Harvard Draft took into consideration also the right of the suspected pirates, in their capacity of individuals accused of a crime or convicted to a penalty:

> *"1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.*
> *2. Subject to the provision of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.*
> *3. The law of the state must, however, assure protection to accused aliens as follows:*
> *(a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.*
> *(a) The accused person must be given humane treatment during his confinement pending trial.*
> *(c) No cruel and unusual punishment may be inflicted.*
> *(d) No discrimination may be made against the nationals of any state.*
> *4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state"*[284].

According to the commentary to the Harvard Draft, although it would be difficult to obtain agreement on uniform penalties,

[284] Art. 14.

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> *"probably no state would insist today on summary trial and punishment of pirates, even when seized red-handed, by military procedure on board the capturing vessel or police boat"*[285].

It is a matter of fact that criminals of any kind, including pirates, have fundamental human rights[286]. The already mentioned agreements between the European Union and three East African States[287] provide a quite extensive list of human rights that are applicable to the suspected pirates transferred. In fact, the exchange of letters between the European Union and Kenya is more specific on fair trial rights than Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950; so-called European Convention on Human Rights) itself. These rights, that do not need to be specifically indicated in the *Institut* Resolution, can be summarized in the following provision taken from the same exchange of letters:

> *"The signatories confirm that they will treat persons transferred under this Exchange of Letters, both prior to and following transfer, humanely and in accordance with human rights obligations, including the prohibition against torture and cruel, inhumane or degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial"*[288].

In addition, it should be recalled that, according to a consolidated human rights rule, a State is responsible for a wrongful act if it surrenders an individual to another State where there are substantial grounds for believing that he or she faces a real risk of being subjected to a violation of fundamental human rights (for example, torture)[289].

The third and fourth paragraphs of the *Institut* resolution could consequently be the following:

> *3. States shall also respect and ensure the human rights of persons suspected of acts of piracy or convicted for such acts, including the prohibition of torture and of cruel, inhumane or degrading treatment or punishment, the prohibition of unreasonably prolonged detention and the right to a fair trial.*

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[285] Commentary to the Harvard Draft (cit. *supra*, note 57), p. 853. In fact, in past centuries pirates (and privateers) could quite easily be "launched into eternity" by anyone.

[286] See PETRIG, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects*, Leiden, 2014. On an Italian decision involving questions of human rights of suspected pirates (judgment of 20 June 2013 of the Court of Cassation in the *Montecristo* case, see the comments by BEVILACQUA, in *Italian Yearbook of International Law*, 2013, p. 442.

[287] *Supra*, para. 12.A.

[288] Art. 2, *c*. Notably, under Art. 4 of the Exchange of letters, "no transferred person will be liable to suffer the death sentence. Kenya will, in accordance with the applicable laws, take steps to ensure that any death sentence is commuted to a sentence of imprisonment" (Art. 4).

[289] "In November 2011 a German court ruled that the transfer of Somali piracy suspects to Kenya was illegal due to poor prison standards (it also noted, in passing, possible concerns regarding fair trial right": FRIMAN & LINDBORG, *Initiating Criminal Proceedings with Military Force: Some Legal Aspects of Policing Somali Pirates by Navies*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 194.

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4. States shall not transfer, expel or extradite a person suspected of acts of piracy or convicted of such acts to another State where there are substantial grounds for believing that this would violate that person's human rights referred to in paragraph 3.

12.C. Limits to the Use of Force

The modalities and limits of the use of force in taking counter-piracy measures should be carefully taken into consideration, also to protect the human rights due not only to pirates, but also to innocent victims of piracy and hostages, if any, on board.

As already remarked[290], the fight against piracy is a question of law enforcement and not an operation of war. In police actions at sea the use of force is a last resort. States are bound to avoid the use of force as far as possible and must never go beyond what is reasonable and necessary in view of the specific circumstances. As stated by the International Tribunal for the Law of the Sea in the judgment of 1st July 1999 on the *M/V "Saiga" (No. 2)* case (Saint Vincent and the Grenadines *v.* Guinea),

> *"in considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention [= the UNCLOS] does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law"*[291].

The Tribunal specified what is the normal practice in arresting ships:

> *"These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered"*[292].

According to the SUA 2005 Protocol,

> *"When carrying out the authorized actions (...), the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not*

[290] *Supra*, para. 3.
[291] Para. 155.
[292] Para. 156.

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> *exceed the minimum degree of force which is necessary and reasonable in the circumstances"*[293].

Moreover, under the same instrument, where a State party takes measures against a ship, it shall, *inter alia*,

> *"ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law*[294]*"*.

In the light of the considerations developed above, Art. 5 of the *Institut* Resolution should include a fifth paragraph covering in general the limits of use of force for the repression of piracy. It could state as follows:

> *5. The use of force for the repression of piracy, shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.*

13. PRIVATE OR STATE-SPONSORED VESSEL PROTECTION DETACHMENTS

The question of self-defence of ships subject to potential piratical attacks should also be addressed. As noted in the already mentioned 2009 IMO Guidance to Ship Owners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships[295],

> *"ship security plans or emergency response procedures should ensure that masters and crews are made fully aware of the risks involved during attacks by pirates or armed robbers. In particular, they should address the dangers that may arise if a crew adopts an aggressive response to an attack. Early detection of a possible attack may often be the most effective deterrent. Aggressive responses, once an attack is underway and, in particular, once the attackers have boarded the ship, could significantly increase the risk to the ship and those on board"*.

Particular concerns are raised by the use of armed protection on board private ships, under the two models of private or State-sponsored vessel protection detachments[296]. Specific questions, which should not be addressed in the *Institut* resolution, relate, *inter alia*, to the division of authority between master and detachments aboard, to legal difficulties when a ship carries weapons into foreign ports and, more generally, to the possibility that this practice leads to an escalation of violence[297].

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[293] Art. 8-bis, para. 9.
[294] Art. 8-bis, para. 10, a, i.
[295] *Supra*, para. 6.C.
[296] The question of whether state-sponsored vessel protection detachments enjoy sovereign immunity will not be addressed in this report.
[297] "Particularly for states that do not have a widespread culture or acceptance of firearms, the profusion of privately contracted armed security is, at minimum, disquieting": KRASKA, *International and*

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The Security Council adopted Resolution 2077 (2012) of 21 November 2012 commending

> *"the efforts of flag States for taking appropriate measures to permit vessels sailing under their flag transiting the High Risk Area to embark vessel protection detachments and privately contracted armed security personnel, and encouraging States to regulate such activities in accordance with applicable international law and permit charters to favour arrangements that make use of such measures"*[298].

According to the already quoted 2020 award on *The Enrica Lexie Incident*, the international rules on piracy permit arrangements to embark military detachments and privately contracted armed security personnel to ensure protection against potential piratical attacks[299]. The Tribunal remarked that

> *"it clearly follows from the articles of the Convention [= UNCLOS] related to the fight against piracy that all States can take the necessary measures, including enforcement measures consistent with the Convention and the Charter of the United Nations, to protect their vessels against pirate attacks. Such measures cannot be viewed as a violation of Article 88 of the Convention or as an infringement on the rights of the coastal State in its exclusive economic zone. This is confirmed by Resolution 2077, which is cited by both Parties"*[300].

In the specific case, the Tribunal found that the Italian State-sponsored marines embarked on the *Enrica Lexie* acted under the apprehension that the ship was under a piratical attack[301] and therefore took an action that resulted in the killing of two Indian fishermen on board another ship:

> *"It follows from the available factual information that under the circumstances the Marines and the 'Enrica Lexie' crew believed that the vessel was under a pirate attack and took actions, the appropriateness of which will be determined by a competent criminal court, to protect the 'Enrica Lexie' against a perceived pirate attack"*.

The Arbitral Tribunal did not evaluate the proportionality of the marines' response to a putative piracy threat, as it was not for it, but for the competent domestic court, to decide on this matter[302], in particular to decide on whether the

Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 249.

[298] 10th preambular para.

[299] Para. 1075. On the case see BEVILACQUA, *Counter Piracy Armed Services, the Italian System and the Search for Clarity on the Use of Force at Sea*, in *Italian Yearbook of International Law*, 2012, p. 39.

[300] Para. 1074.

[301] "In the present case, the marines did not target the 'St. Antony' as a fishing vessel, but on the suspicion that it was a pirate vessel intending to board the 'Enrica Lexie'" (para. 955).

[302] Para. 952; see also para. 980. By a judgment of 22 January 2022, the Tribunal of Rome found that the two marines acted in the situation of putative self-defence and that, in any case, an indictement for manslaughter was barred by the Italian legislation on statute of limitations (in *Rivista di Diritto Internazionale*, 2022, p. 629).

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action of the marines exceeded what was reasonable and necessary in the circumstances of the case[303].

It is evident that such detachments, when using force in self-defence situations, should not go beyond what is reasonable and necessary in view of the specific circumstances. If they are State-sponsored, their action falls under Art. 5, para. 5, of the *Institut* resolution. If they are private-sponsored, they should comply with generally accepted international standards for ensuring the safety and security of vessels at sea, such as the International Code of Conduct for Private Security Service Providers, signed by 58 private security companies in Geneva on 9 November 2010 and amended on 10 December 2021.

The *Institut* resolution could consequently include the following Art. 6:

> *1. The UNCLOS provisions on piracy do not prejudice the right of self-defence of any person under threat of acts of piracy, including self-defence through the employment on board ships and aircraft of governmental protection detachments or privately contracted armed security personnel.*
> *2. Flag States shall ensure that privately contracted armed security personnel act in conformity with generally accepted international standards for maintaining the safety and security of vessels and aircraft at sea.*

14. LIABILITY (ART. 106 UNCLOS)

According to Art. 106 UNCLOS,

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

Art. 106 UNCLOS literally corresponds, with the exception of a comma, to Art. 20 H. S. Conv.[304] and Art. 44 ILC Draft. The Harvard Draft included a similar provision:

> *"If a ship seized on suspicion of piracy outside the territorial jurisdiction of the state making the seizure is neither a private ship nor a ship taken by*

[303] The Tribunal described the facts as follows: "When the 'St. Antony' was at a distance of approximately 500 metres from the 'Enrica Lexie', Sergeant Latorre and Sergeant Girone each fired four rounds of a mix of tracer and ordinary bullets. According to the testimony of Sergeant Latorre, the purpose of these shots was to 'deter the craft from continuing to keep its course heading toward the Enrica Lexie'. Sergeant Latorre noted in his Action Report that this 'first burst of warning shots' did not succeed in 'persuading the craft to drift away'. When the 'St. Antony' was at a distance of 300 metres from the 'Enrica Lexie', Sergeant Latorre fired four rounds of a mix of tracer and ordinary bullets. Sergeant Latorre noted further in his testimony that 'the second burst of warning shots did not achieve the desired effect, the craft ignored the warning shots and kept its course, heading toward the MV at constant speed'. When it was at a distance of approximately 80-100 metres from the 'Enrica Lexie', Sergeant Latorre and Sergeant Girone, each fired four further rounds of a mix of tracer and ordinary bullets. Following this third burst of shots, the 'St. Antony', after being approximately 30 metres away from the 'Enrica Lexie', changed its course away from the 'Enrica Lexie' (para. 1039).
[304] It was adopted by 60 votes to 9 with 1 abstention (*United Nations Conference on the Law of the Sea*, *Official Records*, II, Geneva, 1958, p. 22).

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> *piracy and possessed by pirates, and if the ship is not subject to seizure on other grounds, the state making the seizure shall be liable to the state to which the ships belongs for any damage caused by the seizure"*[305].

Unjustified interferences on the high seas with ships flying a foreign flag constitute a breach of Art. 92 UNCLOS that establishes the exclusive jurisdiction of the flag State on the high seas. They entail an obligation to provide reparation on the basis of the customary rules on internationally wrongful acts.

There is an evident inconsistency between Art. 106 UNCLOS (or Art. 20 H. S. Conv.) and Art. 110, paras. 1 and 3, UNCLOS (or Art. 22, para. 1 and 3, H. S. Conv.):

> *"1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (...).*
> *3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained"*[306].

Under Art. 106 UNCLOS, liability for loss or damage caused by the unfounded seizure of a ship or aircraft is due to the State of nationality of it. Under Art. 110 UNCLOS, compensation for any loss or damage arising from an unfounded visit is due to the visited ship. This difference in drafting comes from the H. S. Conv. and the ILC Draft, where no explanation was given[307]. Considering that, in several cases, the seizure is the consequence of a visit, this fragmentation of the compensation seems highly unpractical.

The inconsistency, although evident, does not create unsurmountable problems and could be resolved on the basis of the assumption that, in both cases, compensation should reach the shipowner and other claimants through the exercise of diplomatic protection by the flag State[308]. It seems thus preferable to leave aside such a question in the *Institut* Resolution.

[305] Art. 10.
[306] Another inconsistency between Art. 106 and Art. 110, para. 1, is the need of "adequate grounds" for seizing a ship or aircraft in the former and the need of "reasonable grounds" for visiting a ship in the latter. Here the difference seems more terminological than substantive.
[307] See GUILFOYLE, *Article 106*, in PROELSS (ed.), *United Nations Convention on the Law of the Sea – A Commentary*, München, 2017, p. 755. During the Geneva Conference, Norway made a proposal to bring in line the wordings of the two provisions of the (future) H. S. Conv. (doc. A/CONF.13/C.2/L. 84, in *United Nations Conference on the Law of the Sea*, *Official Records*, IV, Geneva, 1958, p. 137). However, the proposal was rejected by 19 votes to 13 with 20 abstentions (*ibidem*, p. 84).
[308] After all, Art. 100 is manifestly wrong is assuming that a ship can be compensated.

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15. THE SEIZING SHIP OR AIRCRAFT (ART. 107 UNCLOS)

According to Art. 107 UNCLOS,

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

Art. 107 UNCLOS is an enlarged version of Art. 21 H. S. Conv.[309]:

> *"A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect".*

In its turn, Art. 21 H. S. Conv. is an enlarged version of Art. 45 ILC Draft[310]:

> *"A seizure on account of piracy may only be carried out by warships or military aircraft".*

All the provisions above find their origin in the Harvard Draft:

> *"A seizure because of piracy may be made only on behalf of a state, and only by a person who has been authorized to act on its behalf"*[311].

The purpose of Art. 107 UNCLOS is explained by the International Law Commission as follows:

> *"State action against ships suspected of engaging in piracy should be exercised with great circumspection, so as to avoid friction between States. Hence it is important that the right to take action should be confined to warships, since the use of other government ships does not provide the same safeguards against abuse"*[312].

The substance of the provision does not change if "other ships or aircraft on government service and authorized to that effect", as provided for in Art. 21 H. S. Conv., are added to "warships or military aircraft", in order to allow the police, the coast guard or other law enforcement services to be used for seizing pirate ships and aircraft. The fact that the vehicles used for the seizure of pirate ships or aircraft are required to be clearly marked and identifiable, as provided for in Art. 107 UNCLOS, does not add very much to the picture.

Art. 107 implicitly prohibits the seizure of a pirate ship or aircraft by a private ship or aircraft. However, it does not prevent the exercise of self-defence by ships or aircraft attacked by pirates[313], as allowed under general principles of criminal law; nor does it exclude that, in a situation of emergency and in the temporary absence of public authorities, their functions can be accomplished by someone else who is in a position to do so.

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[309] It was adopted by 60 votes to 9 with 2 abstentions (*United Nations Conference on the Law of the Sea*, *Official Records*, II, Geneva, 1958, p. 22).

[310] The enlargement was proposed by Thailand (doc. A/CONF.13/C.2/L.10, in *United Nations Conference on the Law of the Sea*, *Official Records*, IV, Geneva, 1958, p. 117) "to include the use of police and customs patrol boats" (*ibidem*, I, p. 112).

[311] Art. 12.

[312] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 283.

[313] See *supra*, para. 13.

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Furthermore, as explained by the International Law Commission with regard to a rather hypothetical case,

> *"clearly this article does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State. This is not a 'seizure' within the meaning of this article"*[314].

As it seems appropriate for the *Institut* Resolution to stress the self-defence aspects related to Art. 107 UNCLOS, a seventh article could be included in the *Institut* Resolution and state as follows:

> *Article 107 of the UNCLOS does not prejudice the right of persons onboard an attacked private ship to detain suspected pirates and to seize an attacking pirate ship in order to hand them over to a warship, military aircraft or authorized representative of a State as soon as practicable.*

16. ARMED ROBBERY AT SEA

Security Council Resolution 1816 (2008) and the subsequent resolutions pertaining to Somalia and to the Gulf of Guinea refer to piracy and "armed robbery at sea" (or "robbery at sea")[315]. Nowhere in the UNCLOS is the term "robbery at sea" used and in the Security Council resolutions the term is not defined. However, the relevant notion can be drawn from IMO Assembly Resolution A.1025(26) (Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships), adopted on 2 December 2009:

> *"'Armed robbery against ships' means any of the following acts:*
> *- 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;*
> *- any act of inciting or of intentionally facilitating an act described above"*[316].

It appears that armed robbery at sea consists of those acts which, while being in their nature the same as those constituting piracy[317], take place inside the territorial sea, archipegagic waters or internal maritime waters[318] or do not involve two

[314] United Nations, *Yearbook of the International Law Commission*, II, 1956, p. 283.
[315] The resolutions do not apply to piracy and armed robbery against aircraft, as this was not the case in the situation of Somalia or the Gulf of Guinea.
[316] Annex, Art. 2.2.
[317] It has been remarked that "these geographical or jurisdictional distinctions at public international law exist for a number of reasons (…), but may only serve to divide a single phenomenon into a number of artificial legal categories. Somali pirates cruising for prey are engaged in one criminal enterprise whether they strike in the territorial sea or on the high seas": GUILFOYLE, *Policy Tensions and the Legal Regime Governing Piracy*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 327.
[318] Piracy must take place on the high seas (see *supra*, para. 7.E). In the case of Somalia, Security Council references to armed robbery at sea may also be due to the fact that Somalia had a 200-mile

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ships[319]. The IMO definition is limited to acts against ships and does not relate to aircraft.

This is also the meaning in which the concept of "robbery against ships" is understood in the already mentioned 2004 Tokyo Agreement:

> *"For the purposes of this Agreement, 'armed robbery against ships' means any of the following acts: (a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party's jurisdiction over such offences;*
> *(b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships;*
> *(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)"*[320].

A conceptually similar definition is given by the already mentioned 2017 Revised Djibouti Code of Conduct:

> *"'Armed robbery against ships' consists of any of the following acts:*
> *(a) unlawful acts 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 States's internal waters, archipelagic waters and territorial sea;*
> *(b) any act of inciting or of intentionally facilitating an act described in subparagraph (a)"*[321].

Given the assumption that the *Institut* Resolution should not envisage a radical change in the customary international rules on piracy, as reflected in the UNCLOS, it does not seem appropriate to suggest that the regimes of piracy and armed robbery at sea should be assimilated. The situation off Somalia is a particular and temporary case of lack of capacity of the coastal State to effectively fight pirates and patrol its territorial waters. In this regard, Security Council Resolution 2608 (2021) underlines the "primary responsibility" of the Somali authority in the fight against piracy and armed robbery at sea off the coast of Somalia[322]. Both the 2004 Tokyo Agreement and the 2017 Revised Djibouti Code of Conduct can be seen as not derogating from the rules of piracy, while calling for a strengthened co-operation among parties or participants in fighting armed robbery at sea as well.

Accordingly, the *Institute* Resolution should confine itself to a call on States and international organizations to establish appropriate forms of co-operation wherever there is a need to repress armed robbery at sea, in particular where coastal States lack the capacity to prevent armed robbery at sea and to patrol sea

territorial sea (Law No. 37 of 10 September 1972). Only in 2014 did Somalia establish a 200-mile exclusive economic zone (Presidential Proclamation of 30 June 2014).
[319] Piracy must involve two or more ships (see *supra*, para. 7.G).
[320] Art. 1, para. 2.
[321] Art. 1, para. 2.
[322] Para. 4.

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lanes off their coast. It should also point out that the SUA, to which many States are parties[323], as well as other treaties of co-operation in criminal matters, are already applicable to crimes that, in several cases, would fall under the definitions of "piracy" or "armed robbery at sea", providing for useful legal tools for addressing unlawful acts against the safety of maritime navigation.

An eighth article could thus be included in the *Institut* Resolution, stating the following:

> *1. For the purposes of this Resolution, "armed robbery at sea" means any of the following acts:*
> *(a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship or against persons or property on board such ship, in a place within a State's territorial sea, internal waters or archipelagic waters;*
> *(b) any act of voluntary participation in the operation of a ship with knowledge of its use to commit one or more acts referred to in sub-paragraph (a), irrespective of where the act is committed;*
> *(c) any act of incitement or of intentional facilitation of an act described in subparagraphs (a) or (b), irrespective of where the act is committed.*
> *2. States and international organizations are called upon to strengthen their co-operation in the repression of armed robbery at sea through the conclusion of appropriate regional agreements and instruments and through participation in, and application of, existing multilateral treaties for co-operation in criminal matters, such as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocols.*
> *3. For the purposes of paragraph 2, States and international organizations shall take into particular consideration the exceptional situation of States that lack the capacity to repress armed robbery at sea and to patrol sea lanes off their coast.*

17. CONDITIONS CONDUCIVE TO PIRACY

While being a criminal activity, piracy is sometimes the product of economic dislocation and is carried out by groups that have been marginalized by changes in the economic order[324]. Pirates aim clearly at a personal gain, but their action could also be inspired by a sense of alienation shared by a certain number of people in the wider population that provides them with local support"[325]. Forms of assistance to development are also ways to address the so-called root causes of piracy that have been identified in weak state governance, poor law enforcement capacities,

[323] 166 are the States parties to the SUA, 156 to its 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Paltforms on the Continental Shelf, 52 to the 2005 SUA Protocol and 45 to the 2005 Protocol to the 1988 Protocol.
[324] See MURPHY, *Petro-piracy: Predation and Counter-predation in Nigerian Waters*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 68.
[325] *Ibidem*, p. 75.

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corruption, lack of economic and social development[326]. As it has been remarked, a successful counter-piracy strategy "requires both adequate law enforcement ashore and viable alternative livelihoods for those who might engage in it"[327].

Security Council Resolutions 2608 (2021) and 2634 (2002) emphasize, respectively, that

> *"peace and stability within Somalia, the strengthening of State institutions, economic and social development, and respect for human rights and the rule of law are necessary to create the conditions for a durable eradication of piracy and armed robbery at sea off the coast of Somalia (...)"*[328].
> *"that regional peace and stability, the strengthening of democracy, State institutions, national capacity- building, addressing underlying causes of piracy and armed robbery at sea, sustainable development, including opportunities for women and youth, respect for human rights, and the rule of law and good governance, are all critical for long-term peace and stability and to create the conditions for a durable eradication of piracy and armed robbery at sea in the Gulf of Guinea, especially following the multifaceted repercussions of the COVID- 19 pandemic"*[329].

The *Institut* Resolution could invite States and international organizations to make all possible efforts to address the situations of instability that create in certain areas of the world conditions conducive to piracy. This would also include the elaboration of strategies for the protection and conservation of the marine environment and the sustainable management of living marine resources. However, it should be clearly pointed out that instability cannot act as reasons to justify criminal responsibility. The ninth article of the *Institut* Resolution could state as follows:

> *1. States and international organizations should seek to alleviate situations of instability that may create conditions conducive to piracy and armed robbery at sea, with a view to promoting respect for human rights and the rule of law, to strengthening State institutions and to ensuring economic and social development.*
> *2. Such situations of instability shall not constitute grounds for excluding the criminal responsibility of a person suspected of committing acts of piracy or armed robbery at sea.*

[326] BUEGER, *Responses to Contemporary Piracy: Disentangling the Organizational Field*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 109.
[327] GUILFOYLE, *Policy Tensions and the Legal Regime Governing Piracy*, in GUILFOYLE, *Modern Piracy* cit. (*supra*, note 49), p. 329.
[328] 16th preambular paragraph of Resolution 2608 (2021).
[329] 6th preambular paragraph of Resolution 2608 (2021).

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18. MEASURES BY THE UNITED NATIONS SECURITY COUNCIL

Finally, the *Institut* Resolution could recall that the regime on piracy and armed robbery at sea does not affect any measures that the Security Council adopts in discharging its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations. Pursuant Art. 103 of the United Nations Charter, in the event of a conflict between the obligations under the Charter and the obligations under any other international agreement, the obligations under the Charter shall prevail. The tenth article of the *Institut* Resolution could state as follows:

> *The rules on piracy and armed robbery at sea do not affect any measures that the Security Council may adopt in discharging its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations.*

19. PREAMBLE OF THE *INSTITUT* RESOLUTION

After having defined the substantive content of the *Institut* Resolution, its preamble can be drafted. It could be limited to recalling the gravity and the recurrent nature of the crime of piracy, the relevant international instruments and the main objectives of the *Institut* Resolution, referring also to the previous 2009 Naples Declaration:

> *The Institute of International Law,*
> *Deeply concerned by acts of piracy and armed robbery at sea which put at risk the life and freedom of seafarers and endanger the safety of international navigation and trade;*
> *Aware that piracy and armed robbery at sea are recurrent, criminal activities, as confirmed by several United Nations Security Council Resolutions that have addressed the subject in recent years;*
> *Acknowledging that the provisions on piracy of the 1982 United Nations Convention on the Law of the Sea (hereinafter: UNCLOS) reflect customary international law and that such provisions, whenever appropriate, can be interpreted and applied in light of subsequent international practice and relevant rules of international law;*
> *Commending the adoption of cooperative agreements and arrangements to address piracy and armed robbery at sea, including operational responses and the establishment of measures of assistance to coastal States;*
> *Stressing that the fight against piracy and armed robbery at sea can be rendered more effective by broad participation in treaties on co-operation in criminal matters, such as the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 1979 International Convention against the Taking of Hostages;*

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Concerned over the persistent lack of uniformity and sometimes the inadequacy of domestic laws and policies relating to pirates and perpetrators of other acts of violence at sea and to jurisdiction over them;
Calling upon States to ensure respect for the human rights of the victims and of the other persons involved;
Recalling the "Naples Declaration on Piracy" adopted by it on 11 September 2009;
adopts the following Resolution

20. CONCLUSION

Relying on the learned advice of the other Commission 11 members, the rapporteurs are confident that the draft *Institut* Resolution here annexed addresses in a reasonable way all the relevant issues posed by present problems of piracy and can be the basis for a fruitful discussion during the forthcoming 81st session of the *Institut*.

The subject deserves due attention. Not by chance, in 2022, the topic of "prevention and repression of piracy and armed robbery at sea" has been included in the programme of work of the International Law Commission[330]. In a study on the topic, the special rapporteur, Yacouba Cissé, identified a number of issues to be addressed, such as the definition of piracy in the context of the UNCLOS provisions and taking into account the current and evolving aspects of piracy, the cooperation in the suppression of piracy and the exercise of jurisdiction over the crime of piracy[331].

DRAFT ARTICLES OF THE *INSTITUT* RESOLUTION ON "PIRACY, PRESENT PROBLEMS"

The Institute of International Law,

Deeply concerned by acts of piracy and armed robbery at sea which put at risk the life and freedom of seafarers and endanger the safety of international navigation and trade;

Aware that piracy and armed robbery at sea are recurrent criminal activities, as confirmed by several United Nations Security Council Resolutions that have addressed the subject in recent years;

Acknowledging that the provisions on piracy of the 1982 United Nations Convention on the Law of the Sea (hereinafter: UNCLOS) reflect customary international law and that such provisions, whenever appropriate, can be interpreted and applied in light of subsequent international practice and relevant rules of international law;

[330] See United Nations, *Report of the International Law Commission*, *Seventy-third Session*, 2022, doc. A/77/10, p. 341.
[331] See CISSÉ, *Prevention and Repression of Piracy and Armed Robbery at Sea*, in United Nations, *Report of the International Law Commission*, *Seventy-first Session*, 2019, doc. A/74/10, p. 378 (a rich bibliography, including articles, monographies, national legislation, international and national court decisions, international legal instruments and United Nations documents, is annexed to the study).

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Commending the adoption of cooperative agreements and arrangements to address piracy and armed robbery at sea, including operational responses and the establishment of measures of assistance to coastal States;

Stressing that the fight against piracy and armed robbery at sea can be rendered more effective by broad participation in treaties on co-operation in criminal matters, such as the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 1979 International Convention against the Taking of Hostages;

Concerned over the persistent lack of uniformity and sometimes the inadequacy of domestic laws and policies relating to pirates and perpetrators of other acts of violence at sea and to jurisdiction over them;

Calling upon States to ensure respect for the human rights of the victims and of the other persons involved;

Recalling the "Naples Declaration on Piracy" adopted by it on 11 September 2009;

Adopts the following Resolution

Article 1

1. This Resolution is based on the provisions of the UNCLOS and other rules of international law bearing on the problems of piracy and armed robbery at sea.

2. The UNCLOS provisions on piracy reflect customary international law. This Resolution concerns the interpretation and application of such provisions, particularly in the light of subsequent practice and relevant rules of international law.

Article 2

The duty to co-operate to the fullest possible extent in the repression of piracy, provided for in Article 100 of the UNCLOS, includes, *inter alia*:

a) the adoption of national legislation implementing all the obligations arising from the UNCLOS provisions on piracy, in particular in order to subject those who are convicted of the crime of piracy to appropriate penalties which take into consideration its gravity, to promote international assistance in proceedings relating to piracy and to facilitate extradition or transfer of suspected or convicted pirates, as appropriate;

b) the conclusion of appropriate bilateral and multilateral agreements or arrangements providing for measures of international co-operation in the prevention and repression of piracy, such as the surveillance and escorting of ships, the establishment of safe transit corridors, the early disruption of attacks, the sharing of police information, the boarding of law enforcement officials of other States, training in avoidance, evasion and defensive techniques, the drawing up of maritime security plans and the establishment regional anti-piracy centers;

c) the conclusion of appropriate bilateral and multilateral agreements or arrangements addressing international legal assistance in proceedings relating to piracy, including extradition and transfer of suspected or convicted pirates;

d) co-operation with and within competent intergovernmental institutions;

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e) as far as reasonable and practicable, urgent action by ships or aircraft referred to in Article 107 of the UNCLOS, such as seizing a pirate ship, arresting suspected pirates and rescuing victims of piracy, where necessary to prevent or repress acts of piracy.

Article 3

1. The illegal acts of violence, detention or depredation provided for in Article 101 of the UNCLOS include acts such as killing, wounding, torturing, raping, enslaving, holding for ransom or imprisoning persons, as well as robbing, stealing, destroying, damaging or ransoming ships, aircraft or property on board. They also include attempts to commit such acts.

2. Acts committed by or under the authority of a State do not constitute piracy under Article 101 of the UNCLOS.

3. Acts, including acts of peaceful protest at sea, that do not involve illegal acts of violence or detention, or any act of depredation, do not constitute piracy under Article 101 of the UNCLOS.

4. Whether the acts are committed by or against an autonomous or remotely-operated craft does not, *mutatis mutandis*, affect the application of Article 101 of the UNCLOS.

5. For the purpose of defining piracy, Article 101, sub-paragraphs (b) and (c), of the UNCLOS should be taken to mean that acts of participation, incitement or intentional facilitation do not need to be committed on the high seas or in a place outside the jurisdiction of any State.

Article 4

1. Article 105 of the UNCLOS shall be interpreted in the light of the duty to cooperate in the repression of piracy provided for in Article 100 of that Convention.

2. A State that has detained a person it suspects of piracy shall investigate and submit the case to its competent authorities for the purpose of prosecution, unless it transfers that person to another State for the purpose of investigation and prosecution.

Article 5

1. States shall respect and ensure the human rights of victims of acts of piracy, including the right of access to justice to seek reparation and the right to compensation for damage and to restitution of depredated property.

2. States shall ensure proper care, treatment and repatriation for crews and passengers who have been subjected to acts of piracy.

3. States shall also respect and ensure the human rights of persons suspected of acts of piracy or convicted for such acts, including the prohibition of torture and of cruel, inhumane or degrading treatment or punishment, the prohibition of unreasonably prolonged detention and the right to a fair trial.

4. States shall not transfer, expel or extradite a person suspected of acts of piracy or convicted of such acts to another State where there are substantial grounds for believing that this would violate that person's human rights referred to in paragraph 3.

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5. The use of force for the repression of piracy, shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

Article 6

1. The UNCLOS provisions on piracy do not prejudice the right of self-defence of any person under threat of acts of piracy, including self-defence through the employment on board ships and aircraft of governmental protection detachments or privately contracted armed security personnel.

2. Flag States shall ensure that privately contracted armed security personnel act in conformity with generally accepted international standards for maintaining the safety and security of vessels and aircraft at sea.

Article 7

Article 107 of the UNCLOS does not prejudice the right of persons onboard an attacked private ship to detain suspected pirates and to seize an attacking pirate ship in order to hand them over to a warship, military aircraft or authorized representative of a State as soon as practicable.

Article 8

1. For the purposes of this Resolution, "armed robbery at sea" means any of the following acts:

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship or against persons or property on board such ship, in a place within a State's territorial sea, internal waters or archipelagic waters;

(b) any act of voluntary participation in the operation of a ship with knowledge of its use to commit one or more acts referred to in sub-paragraph (a), irrespective of where the act is committed;

(c) any act of incitement or of intentional facilitation of an act described in subparagraphs (a) or (b), irrespective of where the act is committed.

2. States and international organizations are called upon to strengthen their co-operation in the repression of armed robbery at sea through the conclusion of appropriate regional agreements and instruments and through participation in, and application of, existing multilateral treaties for co-operation in criminal matters, such as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocols.

3. For the purposes of paragraph 2, States and international organizations shall take into particular consideration the exceptional situation of States that lack the capacity to repress armed robbery at sea and to patrol sea lanes off their coast.

Article 9

1. States and international organizations should seek to alleviate situations of instability that may create conditions conducive to piracy and armed robbery at sea, with a view to promoting respect for human rights and the rule of law, to strengthening State institutions and to ensuring economic and social development.

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2. Such situations of instability shall not constitute grounds for excluding the criminal responsibility of a person suspected of committing acts of piracy or armed robbery at sea.

Article 10

The rules on piracy and armed robbery at sea do not affect any measures that the Security Council may adopt in discharging its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations.

PROJET DE RÉSOLUTION DE L'INSTITUT SUR LA « PIRATERIE, PROBLÈMES ACTUELS »

L'Institut de Droit International,

Profondément préoccupé par les actes de piraterie et de vol à main armée en mer qui mettent en danger la vie et la liberté des marins, ainsi que la sécurité de la navigation et du commerce internationaux ;

Conscient que la piraterie et le vol à main armée en mer sont des activités criminelles récurrentes, comme confirmé par plusieurs Résolutions du Conseil de Sécurité des Nations Unies qui se sont adressées à ce sujet dans les dernières années ;

Reconnaissant que les dispositions sur la piraterie de la Convention des Nations Unies sur le droit de la mer de 1982 (ci-après: CNUDM) correspondent au droit international coutumier et que ces dispositions peuvent, si approprié, être interprétées et appliquées à la lumière de la pratique internationale ultérieurement suivie et des règles pertinentes de droit international ;

Saluant l'adoption d'accords et arrangements de coopération concernant la piraterie et le vol à main armée en mer, qui incluent des réponses opérationnelles et l'établissement de mesures d'assistance au Etats côtiers ;

Soulignant que la lutte contre la piraterie et le vol à main armée en mer peut être rendue plus efficace à la suite d'une large participation aux traités sur la coopération en matière pénale, tels que la Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime de 1988 et la Convention internationale contre la prise d'otages de 1979 ;

Préoccupé par le persistent manque d'uniformité et parfois l'insuffisance des lois et politiques nationales relatives aux pirates et aux auteurs d'autres actes de violence en mer et à la jurisdiction à leur égard;

Invitant les Etats à assurer le respect des droit humains des victimes et des autres personnes impliquées ;

Rappelant « la Déclaration de Naples sur la piraterie » adoptée par l'Institut le 11 septembre 2009 ;

Adopte la Résolution suivante

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Article 1

1. Cette Résolution se fonde sur les dispositions de la CNUDM et sur les autres règles de droit international concernant les problèmes de la piraterie et du vol à main armée en mer.

2. Les dispositions de la CNUDM sur la piraterie correspondent au droit international coutumier. Cette Résolution concerne l'interprétation et l'application de ces dispositions, en particulier à la lumière de la pratique ultérieurement suivie et des règles pertinentes de droit international.

Article 2

Le devoir de coopérer dans toute la mesure du possible, prévu à l'article 100 de la CNUDM, inclut notamment :

a) l'adoption de lois nationales mettant en œuvre les obligations découlant des dispositions de la CNUDM, en particulier dans le but d'assujettir ceux qui sont condamnés pour le crime de piraterie à des peines appropriées qui tiennent compte de sa gravité, de promouvoir l'assistance internationale dans les procédures concernant la piraterie et de faciliter d'extradition de pirates soupçonnés ou condamnés, le cas échéant ;

b) la conclusion d'accords ou arrangements appropriés, bilatéraux ou multilatéraux, établissant des mesures de coopération internationale dans la prévention et répression de la piraterie, telles que la surveillance et l'escorte de navires, la détermination de couloirs de transit sûr, le repoussement rapide d'attaques, le partage d'informations de police, la prise à bord d'agents d'autres Etats chargés de l'application de la loi, l'entraînement dans les techniques de prévention, évasion et défense, la préparation de plans de sécurité maritime et l'établissement de centres régionaux contre la piraterie ;

c) la conclusion d'accords ou arrangements appropriés, bilatéraux ou multilatéraux, concernant l'assistance juridique internationale dans les procédures relatives à la piraterie, y compris l'extradition et le transfert de pirates soupçonnés ou condamnés ;

d) la coopération dans ou avec les institutions intergouvernementales compétentes ;

e) dans la mesure du raisonnable et praticable, les actions d'urgence par les navires et aéronefs mentionnés à l'article 107 de la CNUDM, telles que la saisie d'un navire pirate, l'appréhension de pirates soupçonnés et le secours aux victimes, si nécessaire pour prévenir ou réprimer des actes de piraterie.

Article 3

1. Les actes illicites de violence, détention ou déprédation, prévus à l'article 101 de la CNUDM, incluent les actes tels que le meurtre, les blessures, la torture, le viol, l'esclavage, la détention pour rançon ou l'emprisonnement de personnes, ainsi que le vol à main armée, le vol, la destruction, l'endommagement ou la détention pour rançon de navires, aéronefs ou biens à bord. Ils incluent aussi les tentatives de commettre de tels actes.

2. Les actes commis par un Etat ou sous son autorité ne consituent pas de piraterie selon l'article 101 de la CNUDM.

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3. Les actes, y compris les actes de protestation pacifique en mer, qui n'impliquent pas des actes illicites de violence ou détention ou tout acte de déprédation, ne constituent pas de piraterie selon l'article 101 de la CNUDM.

4. Le fait que les actes soient commis par ou contre un navire ou aéronef autonome ou manœuvré à distance ne préjuge pas, *mutatis mutandis*, l'application de l'article 101 de la CNUDM.

5. Aux fins la définition de piraterie, l'article 101, sous-paragraphes (b) et (c), de la CNUDM doit être entendu dans le sens que les actes de participation, incitation ou facilitation intentionnelle ne nécessitent pas d'être commis en haute mer ou dans un lieu au-delà de la juridiction de tout Etat.

Article 4

1. L'article 105 de la CNUDM doit être interprété à la lumière du devoir de coopérer dans la répression de la piraterie prévu à l'article 100 de ladite Convention.

2. Un Etat qui a arrêté une personne qu'il soupçonne de piraterie doit faire une enquête et soumettre l'affaire aux autorités compétentes aux fins de poursuite, à moins qu'il ne transfère cette personne à un autre Etat aux fins d'enquête et de poursuite.

Article 5

1. Les Etats doivent respecter et assurer les droits humains des victimes d'actes de piraterie, y inclus le droit d'accès à la justice pour obtenir réparation et le droit au dédommagement et à la restitution des biens pillés.

2. Les Etats doivent assurer l'attention, les soins et le rapatriement appropriés à l'équipage et aux passagers qui ont été soumis à des actes de piraterie.

3. Les Etats doivent aussi respecter et assurer les droits humains des personnes soupçonnées d'actes de piraterie ou condamnées pour de tels actes, y inclus l'interdiction de torture et de peines ou traitements cruels, inhumains ou dégradants, l'interdiction de détention déraisonnablement prolongée et le droit à un procès équitable.

4. Les Etats ne doivent pas transférer, expulser ou extrader une personne soupçonnée ou condamnée pour des actes de piraterie vers un autre Etat où il y a des raisons substantielles pour croire qu'une telle action violerait les droits humains de cette personne mentionnés au paragraphe 3.

5. L'emploi de la force pour la répression de la piraterie ne doit pas excéder le niveau minimal de force qui est nécessaire et raisonnable.

Article 6

1. Les dispositions de la CNUDM sur la piraterie ne préjugent pas le droit de légitime défense de toute personne sous menace d'actes de piraterie, y inclus la légitime défense par l'emploi à bord de navires et aéronefs de détachements gouvernementaux de protection ou de personnel de protection engagé à titre privé.

2. L'Etats de pavillon doivent assurer que le personnel de protection engagé à titre privé agisse en conformité avec les normes internationales généralement acceptées pour maintenir la sécurité des navires et aéronefs en mer.

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Article 7

L'article 107 de la CNUDM ne préjuge pas le droit des personnes à bord d'un navire privé attaqué de détenir des pirates soupçonnés et de saisir un navire pirate ayant attaqué en vue de les livrer à un navire ou aéronef militaire ou à un représentant autorisé d'un Etat aussitôt que possible.

Article 8

1. Aux fins de la présente Résolution, « vol à main armée en mer » signifie chacun des actes suivants :

(a) tout acte illicite de violence ou de détention ou tout acte de déprédation commis à des fins privées et dirigé contre un navire ou contre des personnes ou biens à bord de tel navire, dans un lieu situé à l'intérieur de la mer territoriale, des eaux intérieures ou des eaux archipélagiques d'un Etat ;

(b) tout acte de participation volontaire à l'utilisation d'un navire avec connaissance de son emploi pour commettre un ou plusieurs des actes mentionnés au sous-paragraphe (a), indépendamment du lieu où l'acte est commis ;

(c) tout acte d'incitation ou de facilitation intentionnelle d'un acte indiqué aux sous-paragraphes (a) ou (b), indépendamment du lieu où l'acte est commis.

2. Les Etats et les organisations internationales sont invites à renforcer leur coopération dans la répression du vol à main armée en mer par la conclusion d'accords et instruments régionaux appropriés et par la participation à, et l'application de, traités multilatéraux existants pour la coopération dans les affaires pénales, tels que la Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime et ses Protocoles.

3. Aux fins du paragraphe 2, les Etats et les organisations internationales doivent prendre en considération particulière la situation exceptionnelle des Etats qui ne disposent pas de la capacité de réprimer le vol à main armée en mer et de patrouiller les voies de navigation au large de leurs côtes.

Article 9

1. Les Etats et les organisations internationales devraient s'efforcer d'alléger les situations d'instabilité qui peuvent créer les conditions déterminant la piraterie, dans le but de promouvoir le respect de droits humains et de l'Etat de droit, de renforcer les institutions de l'Etat et d'assurer le développement économique et social.

2. De telles situations d'instabilité ne doivent pas constituer une raison pour exclure la responsabilité pénale d'une personne soupçonnée de commettre d'actes de piraterie ou de vol à main armée en mer.

Article 10

Les règles sur la piraterie et le vol à main armée en mer n'affectent pas les mesures que le Conseil de Sécurité peut adopter dans l'exercice de sa responsabilité principale du maintien de la paix et de la sécurité internationales d'après la Charte des Nations Unies.

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