

# Pirate States? State responsibility in the context of piracy

An inquiry into the possibility of attributing acts of piracy to States

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## **LIST OF ABBREVIATIONS**

ARSIWA: Articles on Responsibility of States for Internationally Wrongful Acts

BBC: British Broadcasting Corporation

CTF-151: Combined Task Force 151

EEZ: Exclusive Economic Zone

EU NAVFOR: European Union Naval Force Somalia Operation Atalanta

FGS: Federal Government of Somalia

HSC: Convention on the High Seas

ICJ: International Court of Justice

ILC: International Law Commission

IMO: International Maritime Organization

ITLOS: International Tribunal for the Law of the Sea

NATO: North Atlantic Treaty Organization

PCIJ: Permanent Court of International Justice

ReCCAP: Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia

RIB-DELTA: Rapid Intervention Battalion

SUA: Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

TFG: Transitional Federal Government of Somalia

UN: United Nations

UNCLOS: United Nations Convention on the Law of the Sea

UNSC: United Nations Security Council

VCLT: Vienna Convention on the Law of Treaties

## 1. INTRODUCTION

Piracy is a global phenomenon: an International Maritime Organization (IMO) report advances that in 2013 there were alleged incidents of piracy in areas ranging from the Arabian Sea, the South China Sea, and West Africa to South America<sup>1</sup>. Piracy has been attributed to the largely lawless space of the sea, favorable geography, coastal communities that cannot defend themselves, and economic instability. Another factor attributed to piracy is the financial profit stemming whether from ransoms paid in order to free hostages or from the act of selling stolen cargo or vessels. Moreover, corrupt officialdom and weak or compliant States function as breeding grounds for piracy<sup>2</sup>.

Yet, although some States can be like sanctuaries for pirates, it seems inappropriate to refer to them as pirate States<sup>3</sup>. This is because the term “State” evokes an image of authority; while piracy, on the other hand, has been commonly associated with the rejection of State institutions<sup>4</sup>. In the words of a pirate captain: “*I am a free prince and have as much authority to make war on the whole world as he who has a hundred sail of ships and an army of a hundred thousand men in the field*”<sup>5</sup>.

The view stressing that the State cannot be held responsible for acts of piracy seems to be anchored to the above-mentioned aspect of piracy. As one international law commentator argued a long time ago:

Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common: they are done under conditions which render it impossible or unfair to hold any state responsible for their commission. A pirate either belongs to no State or organised political society, or by the nature

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<sup>1</sup> IMO Reports on Acts of Piracy and Armed Robbery Against Ships Annual Report – 2013. MSC. 4/Circ. 208. 1 March 2013. Annex 2. p. 1.

<sup>2</sup> Martin N. Murphy. *Small Boats Weak States Dirty Money. Piracy and Maritime Terrorism in the Modern World*. UK: C. Hurst and Co Ltd. 2010. p. 21.

<sup>3</sup> *Ibid.* p. 54.

<sup>4</sup> Janice E. Thompson. *Mercenaries, pirates and sovereigns: state-building and extraterritorial violence in early modern Europe*. New Jersey: Princeton University Press 1994. p. 46.

<sup>5</sup> Frank Sherry. *Raiders & Rebels A History of the Golden Age of Piracy*. US: Harper Collins. 2008. p. 126. Emphasis on the original.

of his act he has shown his intention and his power to reject the authority of that to which he is properly subject<sup>6</sup>.

Currently, there appears to be a consensus among commentators on the issue that piratical acts cannot be attributed to States under the rules on the responsibility of States for internationally wrongful acts<sup>7</sup>. Such a common ground is based on an interpretation of the private ends requirement within the United Nations Convention on the Law of the Sea (UNCLOS)<sup>8</sup> definition of piracy, excluding all state-sanctioned acts of violence at sea from the category of piratical ones. According to such an interpretation, if there is public interest behind an act of violence at sea, the latter will not be committed for private ends and in turn will not be considered piratical<sup>9</sup>.

### **1.1. Scope and structure of the thesis**

Notwithstanding such an interpretation, State authorities can be directly involved in piracy. Hence, the study has two major objectives:

- a) Investigate why it is impossible to directly attribute piratical acts to States.
- b) Analyze the possibility of indirectly attributing such acts to States.

Bearing this in mind, the thesis is divided in two distinct approaches. One of them does not specifically deal with the issue of the State responsibility regarding acts of piracy and is organized into three chapters. The first of the latter comprises a short presentation of the topic, followed by the statement of the scope of the study, and an explanation on the methodology. In the second chapter, there is an analysis of the UNCLOS definition of piracy, in order to clarify which acts can be reputed as piratical under international law. After defining such acts, attention is drawn not to the acts of pirates, but to that of States in the context of piracy. Thus, the third chapter of the study comprises comments on past and present manifestations of State involvement in piracy.

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<sup>6</sup> William Edward Hall *A Treatise on International Law*. 7<sup>th</sup> edition. ed. Alexander Pearce Higgins. The Clarendon Press. 1917. p. 267.

<sup>7</sup> Alexander Proelss. Piracy and the Use of Force, in *The Law and Practice of Piracy at Sea European and International Perspectives*. ed. Panos Koutrakos and Achilles Skordas. United Kingdom: Hart Publishing. 2014. p. 53.

<sup>8</sup> The United Nations Convention on the Law of the Sea, adopted in Montego Bay, 10 December 1982. UNCLOS, Article 101.

<sup>9</sup> Robin GeiB. Anna Petrig. *Piracy and Armed Robbery at sea The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*. New York: Oxford University Press. 2011. p. 61.

Following this important approach on piracy and States, the second part comprises the fourth and also the longest chapter of the thesis, which is devoted to the responsibility of States under international law in the context of piracy.

The chapter was arranged into five parts. The first gives a presentation on the general aspects governing the responsibility of States for internationally wrongful acts. It is followed by an analysis on the impossibility of directly attributing piratical acts to States. Therein, the focus is on the role that the private ends requirement within the UNCLOS definition of piracy plays in the context of this impossibility. Furthermore, alternatives are suggested in order to hold States responsible for acts of violence at sea which are not piratical. Subsequently, the fourth part addresses the possibility of attributing piratical acts to States in an indirect manner. This happens, for instance, if a State violates the obligation to prevent a pirate attack. In addition, this obligation is analyzed in the context of the use of external help aiming to combat piracy. Finally, concluding remarks on this second approach are given, followed by an overall conclusion on the entire study.

## **1.2. Methodology used in the study**

The study approaches the topic in a legal perspective. That is to say, questions related to international politics were intentionally ignored. Notwithstanding, international law can be influenced by politics<sup>10</sup>. Particularly in the context of State responsibility and politics, for example, an injured State may choose not to bring a claim against another State for failing to prevent a pirate attack, lest straining a stable economic relationship.

Unfortunately, the research on the legal literature concerning State responsibility and piracy revealed a lack of information on the topic. Thus, studies on State responsibility in the context of terrorism and armed opposition groups were used to support the analysis. However, such a support was provided on a general basis. Piracy, terrorism and armed opposition groups are distinct phenomena, but general aspects on State responsibility

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<sup>10</sup> Michael Byers. *Custom Power and the Power of Rules. International Relations and Customary International Law*. UK: Cambridge University Press. 1999. p.4.



concerning non-state actors can be applied to pirates, since they are included in the category of individuals not acting by or on behalf of a State<sup>11</sup>.

Along with these sources, articles and books on piracy were used in order to basis the analysis on the private ends element within the UNCLOS definition of piracy. Few of these texts addressed the State involvement in piratical acts. Even when such sources focused on the political aspects entangled with the issue of State and piracy, attention was drawn only to the legal analysis therein.

The study sought also to interpret legal instruments, such as treaties, to make a distinction between the different types of violence at sea and determine in which cases these acts of violence could be directly or indirectly attributable to States, even where such acts were not considered to be piratical.

These legal instruments also provided the tools to establish the function of the private ends element when assessing the possibility of attributing piratical acts to States. In this context, the crime of genocide was used as an example<sup>12</sup> to illustrate ways of attributing illicit acts to States. Nevertheless, the study kept in mind that genocide and piracy are different acts of violence.

Drafts and declarations are not sources of international law *per se*<sup>13</sup>. Nonetheless, these documents may, for instance, reflect customary international law. Therefore, such instruments composed the material for the study.

Judicial decisions, concerning well-known cases brought to international tribunals, such as the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS), were used either to provide the grounds to the arguments advanced or to reinforce the interpretation of the legal instruments to be found in the thesis.

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<sup>11</sup> Natalie Klein. Maritime Security, in *The Oxford Handbook of The Law of the Sea*. ed. Donald R. Rothwell *et al.* UK: Oxford University Press. 2015. p. 595.

<sup>12</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations 9 December 1948.

<sup>13</sup> According to Article 38 (1) of the Statute of the International Court of Justice, international conventions, international custom and general principles of law are the main sources of international law; the subsidiary ones are judicial decisions and legal doctrine.

To substantiate such a legal insight, adding facts supporting the alleged involvement of States in piracy, the study also resorted to reports produced by international organizations, such as the United Nations (UN) and the International Bank for Reconstruction and Development (The World Bank). Along with these reports, news from different sources complemented the factual basis for the mentioned analysis.

## **2. ON THE DEFINITION OF PIRACY**

### **2.1. The definition of piracy under the Law of the Sea**

According to Article 101 of UNCLOS, which is considered to represent the existing customary law on the topic<sup>14</sup>, piracy can be defined as:

(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).

#### **2.1.1. The elements within the definition of piracy under the Law of the Sea**

It is important to analyze the elements within the definition of piracy under UNCLOS. This is because there have been some misinterpretations, contributing to labeling as piracy acts of violence at sea which could not be reputed as such under international law<sup>15</sup>. Bearing this in mind, it can be stated that this definition consists of five elements:

The first one is the perpetration of “any illegal acts of violence or detention, or any act of depredation”. Although the presence of violence is essential to the definition, there is no

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<sup>14</sup> Yoshifumi Tanaka. *The International Law of the Sea*. United States: Cambridge University Press. 2012. p. 355.

<sup>15</sup> Douglas Guilfoyle. *Shipping Interdiction and the Law of the Sea*. United States: Cambridge University Press. 2009. p. 31.

indication in Article 101 regarding the types of violent conducts that could characterize an act of piracy. Thus, the acts of hijacking ships, along with the crew on board, could be considered piracy under international law. However, it is important to emphasize that attempts do not fall under the definition of Article 101<sup>16</sup>. On the other hand, acts of inciting or intentionally facilitating the conducts aforementioned would be piratical, as well as voluntarily participating in the operation of a ship or aircraft, with knowledge of their use for piracy. Lastly, the reference to an illegality seems unnecessary, since it could be difficult to imagine how these acts could be legal, except perhaps in a situation where force was used in self-defense<sup>17</sup>.

Secondly, these illegal acts of violence, detention or depredation must be perpetrated for “private ends”. Most commentators agree that acts carried out under the authority of States would be excluded from the definition of piracy; others think that also politically-motivated acts, such as terrorism at sea, cannot be deemed piratical<sup>18</sup>. The former view is important for the study and, therefore, is analyzed in depth elsewhere<sup>19</sup>.

Acts of violence at sea are piratical only if committed for private ends and if the perpetrators use private ships or aircrafts. According to Article 102 of UNCLOS, if the crew of a warship or a government ship or aircraft has mutinied and taken control of the ship, the acts of piracy committed by such a crew are assimilated to those perpetrated by a private ship. In other words, the ship does not lose its public nature, but is deprived of its public purpose. In this vein, Article 103 of UNCLOS prescribes that an aircraft or a ship are pirate if they are intended to or have been used to commit acts of piracy by the people in dominant control and for the whole period where this control remains. Furthermore, the rule on Article 102 provides the ground for lifting the immunity of governmental and war vessels, to make Article 105 and Article 110 applicable in these cases<sup>20</sup>. Article 105 deals with the seizure of pirate ships or aircrafts. Article 110 concerns the right to visit.

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<sup>16</sup> Tanaka. *The International Law of the Sea*. p. 355.

<sup>17</sup> Robin Churchill. The Piracy Provisions of the UN Convention on the Law of the Sea – Fit for Purpose? in *The Law and Practice of Piracy at Sea European and International Perspectives*. p. 13.

<sup>18</sup> *Ibid*, p.16.

<sup>19</sup> See Chapter 4, Section 4.2.

<sup>20</sup> Satya N. Nandan C.B.E., Shabtai Rosenne, Neal R. Grandy. *United Nations Convention on the Law of the Sea 1982 a commentary Vol III articles 86 to 132 and documentary annexes*. The Hague: Martinus Nijhoff Publishers. 1995. p. 205.

In addition, the acts of violence must be committed against another ship or aircraft, requiring the involvement of two ships. In an interesting case, which occurred in 1961, the Portuguese liner *Santa Maria* was taken over by members already on board of the ship, led by Captain Galvão, seeking to free Portugal from Salazar's dictatorship. The incident became known as the *Santa Maria affair*<sup>21</sup>. Such an act cannot be piratical under Article 101 of UNCLOS, even if politically-motivated acts are considered to be under the requirement of private ends, because it lacks the two-ship requirement.

Lastly, piracy involves acts of violence committed on the high seas or in a no-jurisdiction zone, such as Antarctica. In this respect, Article 58 (2) of UNCLOS states that Articles 88 to 115 of the treaty, encompassing those relating to piracy, are applicable to the exclusive economic zone (EEZ), provided that they are not incompatible with the EEZ rules. Since there is no incompatibility between the rules on piracy and the ones applicable to the EEZ, acts of violence committed in the latter may be considered piratical. In light of this, acts committed within the internal and archipelagic waters of a State, or its territorial Sea, would be armed robbery<sup>22</sup>, and not piracy, even if such acts fulfill the other requirements.

## 2.2. Concluding remarks

The UNCLOS definition of piracy has been criticized on account of its inadequacy to address all acts of violence at sea<sup>23</sup>. Despite the criticism, this definition is considered to reflect customary international law and has been adopted by regional agreements aiming to combat piracy and armed robbery, such as the Djibouti Code of Conduct<sup>24</sup>, and the ReCCAP<sup>25</sup>. Hence, the study uses this definition when addressing the issue of the international responsibility of States in the context of piracy.

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<sup>21</sup> United Press International Liner's Plight Recalls 1961 Ship Seizure: Crew Member Killed When Portuguese Rebels Staged Hijack. October 08 1985. [http://articles.latimes.com/1985-10-08/news/mn-15288\\_1\\_crew-members](http://articles.latimes.com/1985-10-08/news/mn-15288_1_crew-members).

<sup>22</sup> According the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships (2009). Resolution A.1025 (26). 2.2. (1) (2).

<sup>23</sup> Churchill. The Piracy Provisions of the UN Convention on the Law of the Sea – Fit for Purpose? p. 22.

<sup>24</sup> Article 1 (1) of the Resolution 1, adopted on 29 January 2009, Adoption of the Code of Conduct Concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden.

<sup>25</sup> Article 1 (1) of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCCAP).

Despite the fact that States have been engaged in initiatives to combat piracy, some of them continue to provide a fertile environment for illegal activities such as piracy. Therefore, the following chapter deals with the causes for piracy and the manners in which a State can become involved.

### 3. STATES AND PIRACY

#### 3.1. Pirate States: a thing of the past

In the past, States sponsored acts of violence and plundering at sea and those who committed these acts were not pirates, but privateers. Some of these acts were perpetrated without a license issued by a State, which characterized piracy. Privateering and, in some cases piracy, were an important source of income to Great Britain, for instance. Francis Drake, a famous British privateer, was even knighted by Queen Elizabeth<sup>26</sup>. Although it was significant in the past, privateering has been abolished.<sup>27</sup>

While some States resorted to privateering and benefited from piracy, labeling them pirates would not be accurate. However, there is a historical account of an organization which resembled a pirate state: the “pirate nation” of Madagascar. In the 17<sup>th</sup> Century, pirates settled in the island of Madagascar, and gradually developed their own food, customs, language and flag. Their pirate ships also followed a consistent set of rules, detailing the crew’s rights and duties<sup>28</sup>. The “pirate nation” disappeared around the year 1701, after the British navy was dispatched and most pirates accepted an amnesty offer. Later, by the War of the Spanish Succession, former pirates based in Madagascar became privateers, because at the time Great Britain employed privateering against French and Spanish ships<sup>29</sup>.

Nowadays, whereas piracy is still an issue, neither do “pirate nations” nor privateering exist anymore. It seems more appropriate to argue that instead of pirate states, the modern world deals with States which serve as breeding grounds for piracy.

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<sup>26</sup> Jon Latimer. *Buccaneers of the Caribbean How Piracy Forged an Empire*. United States: Cambridge University Press. 2009. p. 17.

<sup>27</sup> Article 1. The Paris Declaration Respecting Maritime Law. Paris, 16 April 1856.

<sup>28</sup> Thompson. *Mercenaries, pirates and sovereigns: state-building and extraterritorial violence in early modern Europe*. p. 48.

<sup>29</sup> *Ibid*, p. 49.

## **3.2. Piracy today**

### **3.2.1. The root of the problem**

According to UNCLOS, most of the incidents reported are not piracy, because they happen within the territorial waters of States, a few miles from the coast<sup>30</sup>. Thus, in the modern world, armed robbery happens more than piracy. Nonetheless, the causes of both piracy and the former are the same. Among these causes are the wide lawless space of the sea, favorable geography and economic disruption, which opens the market for stolen goods. Also, the financial profit stemming from the act of selling stolen cargo or the ransom paid for hostages taken. Additionally, there is the capacity deficit of some coastal communities to defend themselves. Lastly, corrupt officials, who benefit from piracy and armed robbery, protect pirates and provide a sanctuary for these acts of violence at sea<sup>31</sup>.

#### **3.2.1.1. State involvement in piracy**

State involvement in piracy and armed robbery can occur in ways including financial support for pirates, and opening bank accounts for them and facilitating financial operations. Allowing pirates to invest their money in both legal and illegal activities and launder their money. Furthermore, the local police and the local authorities may protect pirates, shielding the latter against investigations and prosecutions. Finally, local authorities may provide infrastructure, in order for pirates to accommodate the stolen ship, cargo or hostages.

According to a report by the United Nations Monitoring Group on Somalia, financial support for pirates could be coming from local authorities within the Federal Government of Somalia (FGS) and those authorities could also be involved with ransom-payment negotiations<sup>32</sup>. The report has identified money transfers and bank accounts belonging to pirate leaders, investors and facilitators. These financial transactions involve individuals

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<sup>30</sup> Murphy. *Small Boats Weak States Dirty Money. Piracy and Maritime Terrorism in the Modern World.* p. 17.

<sup>31</sup> *Ibid.* p. 21.

<sup>32</sup> UN Documents for Somalia. *The Monitoring's group final report on Somalia.* S/2014/726. 10 October 2014. pp. 106-107.



from both inside and outside Somalia, including holders of senior positions within the FGS<sup>33</sup>.

It is not surprising that local authorities are involved in piracy and armed robbery in Somalia. These activities are lucrative and involve many people. In 2008, for instance, a BBC analyst for Africa, Mary Harper, stressed that the Puntland-based town, Eyl, was a safe-haven where little was done to stop pirates, implying that some local authorities could be involved. The entire community seemed connected to piracy and armed robbery, given that even restaurants were set up to serve food for hostages<sup>34</sup>.

Along with holders of senior positions in a State, other authorities can also become involved in piracy and armed robbery. Police officers can provide protection for pirates. In Belakang Padang, off the coast of Batam, Indonesia, it has been reported that the local police served as bodyguards for pirates. Moreover, local authorities, including the Indonesian Navy, were also involved, and turned a blind eye to the problem<sup>35</sup>.

Naval officers could also be involved in piracy and armed robbery. In Nigeria, it has been alleged that naval officers control a handful of security companies, which in turn assign Nigerian Navy ratings to provide security for visiting foreign cargo vessels. In such arrangements, the officers gain a commission. Some of the officers may also be directly involved in piracy and armed robbery. It has been alleged that Nigerian naval officers own pirate tanker fleets, to where stolen oil cargo is transferred. Following the commitment of crude oil theft, an illegal activity that has taken place in the Gulf of Guinea, off the coast of Nigeria and Benin<sup>36</sup>.

Lastly, port and coastal authorities can also be involved with pirates, living off the rewards gained from the stolen cargo and helping pirates to anchor stolen ships. In Somalia, it has been claimed that hostile clans have taken control of some ports<sup>37</sup>.

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<sup>33</sup> *Ibid.* p. 174.

<sup>34</sup> BBC. Life in Somalia's Pirate Town. 18 of September 2008. <http://news.bbc.co.uk/2/hi/africa/7623329.stm>

<sup>35</sup> Jakarta Post. "Indonesia key to end piracy in Malacca Straits". 6 August 2006. <http://rafflesia.wwf.or.id/library/admin/attachment/clips/2006-08-06-008-0003-001-07-0935.pdf>.

<sup>36</sup> Business Insider. Kremlin seeks London sanctions for Nigerian navy in Myre Seadiver case. 25 March 2013. <http://www.businessinsider.com/kremlin-seeks-london-sanctions-for-nigerian-navy-in-myre-seadiver-case-2013-3>.

<sup>37</sup> Peter Lehr and Hendrick Lehman. Somalia – pirates' new paradise, in *Violence at Sea, Piracy in the Age of Global Terrorism*. ed. Peter Lehr. New York: Routledge. 2007. p. 20.

### **3.3. Concluding remarks**

In the past, States openly sponsored acts of violence at sea, through the practice of privateering, which was eventually abolished. It appears exaggerated to refer to them as pirate States. Privateering was a legal activity and this aspect distinguished it from piracy. The closest example of a pirate State would be the Madagascar-based “pirate nation”, but it also disappeared.

Today, State involvement in armed robbery and piracy can take many forms. It ranges from financial support to the direct participation of state officials in these activities. However, it seems far-fetched to conclude that these activities are part of the structure of these States. Despite the fact that both local authorities and the local community benefit from piracy and armed robbery in the States prone to these activities, labeling them as pirates is inappropriate. Even when local authorities are involved, it is not possible to affirm that these activities are part of the State policy. This is because they involve illegal acts such as taking of property or hostages. In addition, the illegal nature of such acts forces perpetrators and supporters to plan and carry out with these activities in secrecy.

Hence, in cases where States act as breeding grounds for piracy, with the involvement of local authorities, is it possible to hold those States responsible for piratical acts under international law? The next chapter deals with this issue. It assesses whether States can be held directly responsible for piracy. In light of the impossibility of doing so, there will be an insight into the obstacles. The chapter also assesses whether there are alternatives to hold States directly responsible for these acts of violence at sea which are not piratical. Finally, it will analyze the possibility of holding States indirectly responsible for piratical acts.

## 4. STATE RESPONSIBILITY IN THE CONTEXT OF PIRACY

### 4.1. General on State responsibility in international law

Before addressing the issue of the responsibility of States in international law in the context of piracy, it is important to draw attention to what are the general aspects governing this specific responsibility.

The modern framework of the responsibility in question is to be found in a 2001 draft, which contains 59 articles on the matter, prepared by the International Law Commission (ILC)<sup>38</sup>, an organ within the UN. This draft is not *per se* a source of International Law<sup>39</sup>, but its articles are considered to be written customary law, as stated by the ICJ in the *Bosnian Genocide case*<sup>40</sup>. Moreover, its articles do not represent all the existing rules on the international responsibility of States and have a residual nature, rendering them inapplicable where special rules must apply<sup>41</sup>. Lastly, the referred articles do not apply to the acts of international organizations or other non-state actors. Nonetheless, they are applicable where the State owns an obligation whether to an individual, an international organization or another State<sup>42</sup>.

According to the draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the draft or ARSIWA), in order for the State responsibility to arise, the State must have breached an international obligation which is attributable to it under International Law<sup>43</sup>. Furthermore, in order for a breach to happen, the State must be bound by the obligation when the act capable of occasioning the violation occurs<sup>44</sup>. Finally, it is

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<sup>38</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts. 53 UN GAOR Supp. No. 10 at 43, U.N. Doc A/56/10 (2001). ARSIWA.

<sup>39</sup> According to Article 38 (1) of the Statute of the International Court of Justice, international conventions, international custom and general principles of law are the main sources of international law; the subsidiary ones are judicial decisions and legal doctrine.

<sup>40</sup> *The Bosnian Genocide case*. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Rep. 2007 p. 43 para 209.

<sup>41</sup> ARSIWA. Articles 55 and 56.

<sup>42</sup> James Crawford. *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries*. UK: Cambridge University Press. 2002. p.76.

<sup>43</sup> ARSIWA. Article 2 (a) (b).

<sup>44</sup> ARSIWA. Article 13.

stated in the draft that every international wrongful act entails the international responsibility of the State<sup>45</sup>.

Only a breach of an obligation characterized as international gives rise to such a responsibility. It is irrelevant if the conduct behind such breach is legal under domestic law<sup>46</sup>. In this vein, the State cannot use the legality of an act under internal law to escape the rules of international responsibility. By the same token, the sole condition of an act being illegal under internal law does not necessary lead to a breach of an international obligation<sup>47</sup>. Furthermore, as long as the breached obligation is international, it does not matter if it stems from a treaty, a rule of customary nature or a general principle applicable in international law<sup>48</sup>.

Although stating that the obligations breached must be international, the draft does not make reference to the forms which such obligations can take. As a principle of organization, the draft chose to adopt the distinction between primary and secondary rules of international law, conceived by Roberto Ago, who served as Special Rapporteur for the ILC Commission on international responsibility of States<sup>49</sup>. According to this distinction, primary rules would be composed of substantive international obligations, to be found in treaties or customary law, for example. Whereas the secondary rules would relate to state responsibility, seeking to establish if there was a breach of an international obligation, prescribed by a primary rule, and the consequences of such violation<sup>50</sup>.

This distinction has not been immune to criticism: some argue that secondary rules are abstractions, with no practical use; others argue that the dichotomy is simplistic, since some primary rules may generate their own secondary rules<sup>51</sup>. Notwithstanding, such an organization was preferred over one which focused on the content of primary rules, for they are innumerable and impossible to codify. Along with this, such a classification

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<sup>45</sup> *Ibid.* Article 1.

<sup>46</sup> *Ibid.* Article 3.

<sup>47</sup> ARSIWA Commentary. Commentary to the Articles on International Responsibility of States for Wrongful Acts, ILC, Ybk 2001/II (2). p. 36, Article 3, para 1.

<sup>48</sup> *Ibid.*, commentary to Article 12, para 3.

<sup>49</sup> James Crawford. *State Responsibility The General Part*. New York: Cambridge University Press. 2013. p. 36.

<sup>50</sup> *Ibid.* p. 64.

<sup>51</sup> *Ibid.*

allows some rules on state responsibility, of secondary nature, to be developed without reference to a primary rule of international law<sup>52</sup>.

When it comes to the conduct giving rise to a breach of an international obligation, it may consist of an action or an omission; the breach may be due to a singular act or a combination of acts<sup>53</sup>; the obligation may protect the interest of a particular State or that of the international community as a whole<sup>54</sup>; depending on the content of the international obligation at issue. Some obligations may impose a duty of prevention on the State, stating that it must take all the necessary steps to avoid the occurrence of an event; or impose a duty to prosecute perpetrators of an international offence. Thus, in order to assess if a breach occurred, it is necessary to compare the conduct in which the State engaged with the one required by the international obligation<sup>55</sup>.

Had this comparison taken place and it was found that a breach had occurred; being such violation attributable to the State, the existence of negligence or fault on the part of the latter, or damage to another State, is not a necessary condition for the rules on international state responsibility to be applicable<sup>56</sup>. These elements may be relevant in some cases, depending on the content of the obligation breached<sup>57</sup>. For instance, if a State is obliged not to adopt certain measures restraining the exporting of meat and it does so; it would be in breach of such international obligation, regardless of any damage suffered by an exporter. On the other hand, if a State is obliged not to expropriate foreign property without providing compensation and it does so, the damage suffered by the foreign investor is a relevant condition to apply the rules on State responsibility.

However, unlike the elements of fault or damage, assessing if the conduct that caused the breach of the international obligation is attributable to the State is an essential condition for

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<sup>52</sup> *Ibid.* p. 65.

<sup>53</sup> ARSIWA Commentary. p. 55. Article 12, para 2.

<sup>54</sup> Crawford. *State Responsibility The General Part*. p. 66.

<sup>55</sup> ARSIWA Commentary. p. 55, Article 12, para 2.

<sup>56</sup> Crawford. *State Responsibility The General Part*. p. 61.

<sup>57</sup> ARSIWA Commentary. p. 36. Article 2, para 9, para 10.

the rules on the international responsibility of States to apply<sup>58</sup>. In this vein, it is generally accepted that there are three principles for attributing conducts to a State<sup>59</sup>.

The first is that a State acts through the conduct of individuals exercising power and authority. Therefore, conducts of agents, organs, political sub-divisions (such as provinces) or successful revolutionary regimes are attributable to the State in the international order. Also, individuals who are not part of the structure of the State, but act under direct control of those in power or of those functioning as a government, are considered to be *de facto* agents and their acts are attributable to the State controlling them<sup>60</sup>. This principle is stated in the draft<sup>61</sup> and it is applicable where a private company exercises a function delegated by the State, for example.

According to the second principle, if an actor is not part of the structure of the State, such as private persons or associations, and it is also not functioning as a *de facto* agent, its conducts are not attributable to the State<sup>62</sup>. For instance, usually the State will not be responsible under international law if a mob causes damage to foreign property. Nonetheless, the State might be held responsible if it adopts the conduct of the mob as its own<sup>63</sup>.

Finally, the third principle states that while the conduct of a private entity, such as a mob, may not be attributable to the State; it might nevertheless entail the responsibility of the latter under international law, where such an action is a condition to the breach of another obligation. For example, when the State has the duty to prosecute and punish the offenders with due diligence, but fails to do so<sup>64</sup>.

The content of the due diligence standard mentioned is not to be found in the draft, and it may vary according to the primary rule within the international obligation<sup>65</sup>. As the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea stated in its Seabed

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<sup>58</sup> *Ibid.* Article 2, para 9, para 12.

<sup>59</sup> Richard B. Lillich *et al.* Issues in State Responsibility. *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 84, March 28-31. 1990. pp. 51-77. p. 52.

<sup>60</sup> *Ibid.*

<sup>61</sup> ARSIWA. Articles 4 to 11.

<sup>62</sup> Lillich *et al.* Issues in State Responsibility. p. 52.

<sup>63</sup> ARSIWA. Article 11.

<sup>64</sup> Lillich *et al.* Issues in State Responsibility. pp. 52-53.

<sup>65</sup> Crawford. *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries*. p. 82.

Mining Advisory Opinion, the concept of due diligence is also flexible, depending on the circumstances of the case and changing over time<sup>66</sup>. Moreover, it is connected to an obligation of conduct<sup>67</sup>, requiring that the State must do its best to achieve a particular result<sup>68</sup>. Thus, had the State done so, it would not be violating such an obligation, even if it had not been able to achieve a specific result.

For the rules on international responsibility to apply, the State must not have acted in conformity with an international obligation attributed to it. Nevertheless, even when a State commits an act against the primary rule prescribed in an international obligation and this conduct is, in principle attributable to it, this does not necessarily imply that the act is wrongful. There might be a circumstance precluding wrongfulness, shielding the State against an otherwise sound claim for the breach of an international obligation<sup>69</sup>. In this context, the draft contains six circumstances precluding wrongfulness: consent (Article 20), self-defense (Article 21), counter-measures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25).

These circumstances are to be distinguished from the internal elements within an international obligation<sup>70</sup>. For instance, Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide<sup>71</sup>, prescribes that in order for an act to qualify as genocide, there must be intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Along with this, Article IX makes it possible for a State to be responsible for acts of genocide. However, had such an intent to destroy the groups mentioned been absent, the State would not have breached the obligation not to commit genocide<sup>72</sup>, because such a crime would not have taken place.

The issue is distinct when it comes to a circumstance precluding wrongfulness. In the above-mentioned example, there was no violation of the obligation not to commit genocide

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<sup>66</sup> *Seabed Advisory Opinion*. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No 17, 1 February 2011), p. 36, para 117.

<sup>67</sup> *Ibid.* p. 35, para 111.

<sup>68</sup> *Ibid.* p. 34, para 110.

<sup>69</sup> Crawford. *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries*. p. 160.

<sup>70</sup> *Ibid.* p.162.

<sup>71</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations 9 December 1948.

<sup>72</sup> ARSIWA Commentary. p. 34. Article 2, para 3.

due to the conditions set by that obligation. On the other hand, circumstances precluding wrongfulness are external to the obligations. They do not annul or terminate the latter, but provide an excuse not to fulfill them while those circumstances remain<sup>73</sup>. For instance, if a State alleges *force majeure* as a reason not to fulfill an obligation, the obligation nevertheless subsists and such a State has to fulfill its duties the moment the circumstances preventing it from doing so disappear.

Whereas it is correct to affirm that the circumstances precluding wrongfulness may allow the State not to act in conformity with an international obligation, this is not a valid affirmation in all cases. According to the Article 26 of the draft, where the obligation stems from a peremptory norm of general international law, such circumstances do not apply. These norms are defined in Article 53 of the Vienna Convention on the Law of Treaties (VCLT)<sup>74</sup>, as norms accepted and recognized by the international community of States as a whole as being immune to derogation, capable of being modified only by a norm of general international law possessing the same character. For instance, the State cannot allege self-defense as an excuse not to act in conformity with the obligation prohibiting genocide, for this obligation is considered to derive from a peremptory norm of general international law<sup>75</sup>.

Usually, the burden of proof lies with the State which claims the breach of an international obligation. However, when a State invokes a circumstance precluding wrongfulness as a defense, the burden of proof with respect to this circumstance lies with it<sup>76</sup>. If such a State succeeds in proving a circumstance, it is nevertheless obliged, in principle, to pay a compensation for any material loss suffered by the injured State<sup>77</sup>.

As a way of making reparation to an injury, the draft prescribes that a State must provide restitution (Article 35), compensation (Article 36), or satisfaction (Article 37). All these three categories are included in the broad concept of reparation (Article 34). In addition, all of them refer to reparation due to a wrongful act, which is distinct from the compensation

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<sup>73</sup> Crawford. *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries*. p. 160.

<sup>74</sup> Vienna Convention on the Law of Treaties, concluded at Vienna 23 May 1969.

<sup>75</sup> Crawford. *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries*. p. 188.

<sup>76</sup> *Ibid.* p. 162.

<sup>77</sup> ARSIWA. Article 27 (b).



referring to an act not to be considered as such, due to some circumstance precluding wrongfulness<sup>78</sup>. The State is required to make full reparation, which means that these categories can be used separately or in conjunction in order to achieve this goal<sup>79</sup>. Notwithstanding, they are arranged in order of preference. An example of restitution includes the releasing of a detained ship. Compensations may involve a financial sum following the damage to a vessel. Finally, satisfaction could be attained through a public statement recognizing the wrongful act.

Some international obligations target the protection of the interest of a community of States (obligations *erga omnes partes*) or that of the international community as a whole (obligations *erga omnes*). In this vein, an obligation in a multilateral treaty directed to all States parties belongs to the first category, while the obligation not to interfere with the right of self-determination would be directed to the whole international community, belonging to the second category<sup>80</sup>. These obligations usually stem from peremptory norms of general international law and since they concern the interest of the whole international community or that of a group of States, even if a specific State was not directly affected by the violation, it nevertheless can bring a claim against the non-compliant State<sup>81</sup>.

Hence, given the importance of the interests protected by these obligations, the draft allows States other than the one directly affected to claim reparation from the responsible State in the name of the former or in the name of the beneficiaries of the breached obligation. By the same token, it is possible for States not directly affected to claim the cessation and non-repetition of the violation. These provisions provide additional means to protect the community or collective interest at stake<sup>82</sup>.

These mechanisms seek to enforce compliance by the State which violated an international obligation. The most common instrument used for that is retorsion. The latter has been characterized as an “unfriendly” conduct adopted by a State not necessarily in response to an unlawful act. Thus, they are intrinsically lawful and are not to be found in the draft<sup>83</sup>. For instance, an economic embargo can represent a retorsion. On the other hand, although

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<sup>78</sup> ARSIWA Commentary. p. 86, Article.27, para 4.

<sup>79</sup> *Ibid.* p. 95. Article 34, para 1.

<sup>80</sup> Crawford. *State Responsibility The General Part.* p. 370.

<sup>81</sup> *Ibid.* p. 363.

<sup>82</sup> ARSIWA Commentary. p. 127. Article 48, para 12.

<sup>83</sup> Crawford. *State Responsibility The General Part.* p. 676.

counter-measures also seek to enforce compliance with an international obligation, they are necessarily a response to a breach of such obligation by another State. Furthermore, they are also a circumstance precluding wrongfulness (Article 22). Notwithstanding, if a State adopts a counter-measure merely based on an assumption of a breach of an obligation, it may incur in a breach<sup>84</sup>. Furthermore, they are not to be used as a means of punishing the targeted State and must be employed in a way as to allow the resumption of performance of the obligation breached by the latter<sup>85</sup>.

The secondary rules, concerning the State responsibility in the international order are important, since these rules can be seen as a guarantee that the States will comply with their international obligations. In this context, the possibility of holding States responsible for wrongful acts has been described as fundamental for the existence of international law<sup>86</sup>.

The next section focuses on issues of attribution in the context of piracy. In this vein, the requisite of private ends in the definition of piracy under UNCLOS is analyzed in order to establish how this element interferes with the application of the secondary rules on State responsibility to piratical acts.

## **4.2. On the impossibility of attributing piratical acts to States**

Historically, piracy has been characterized as a phenomenon possessing a strong anti-authority aspect attached to it<sup>87</sup>. This view was exposed in the *Lotus case*, by the PCIJ, when it quoted authors who referred to pirates as, among other things, criminals who swear obedience to no flag and reject the State or other similar authority<sup>88</sup>.

Today, it seems beyond controversy that acts of piracy cannot be attributed to States under the modern framework of responsibility of States for internationally wrongful acts set up by the ILC draft<sup>89</sup>. This conception is rooted on the interpretation that the requirement of “private ends” in the definition of piracy under UNCLOS excludes acts of violence or

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<sup>84</sup> *Ibid.* p. 686.

<sup>85</sup> ARSIWA Commentary. p. 130. Article 49, para 1.

<sup>86</sup> Kimberley N. Trapp. *State Responsibility for International Terrorism Problems and Prospects*. New York: Oxford University Press. 2011. p. 2.

<sup>87</sup> Thompson. *Mercenaries, pirates and sovereigns: state-building and extraterritorial violence in early modern Europe*. p. 48.

<sup>88</sup> *The Lotus case*. SS Lotus (Fr. v Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para 249, p. 42.

<sup>89</sup> Alexander Proelss. *Piracy and the Use of Force*. p. 53.

depredation at sea committed by or on behalf of an authority<sup>90</sup>. Such an interpretation is based on an objective criterion, because it draws attention to the fact that there must be no State sanction connected to acts of piracy, without going into the perpetrators personal motivations<sup>91</sup>.

There is another interpretation that also excludes politically-motivated acts such as terrorism, from that definition of piracy. This interpretation has been characterized as subjective, because it addresses the motive behind the actions of the perpetrators<sup>92</sup>.

Since there has not been controversy in the fact that acts of piracy cannot be attributed to States, it seems largely-accepted that the definition of piracy under UNCLOS does not encompass acts of violence or depredation at sea perpetrated on behalf of a State. Nevertheless, it is still debatable if such a definition excludes also politically-motivated acts<sup>93</sup>.

Thus, the next section focus on such an interpretation of the private ends requirement within the definition of piracy under UNCLOS, since it has consequences on the attribution of acts of piracy to States. An explanation on the history of this interpretation is provided. Along with this, the role of the private ends element within the UNCLOS definition of piracy is analyzed, in order to address its precise effects regarding the impossibility of attributing acts of piracy to States.

#### **4.2.1. Excluding state-sanctioned acts from the UNCLOS definition of piracy: the historical path of the pirate ends requirement**

In 1924, the Assembly of the League of Nations sought to convene a Committee of Experts for the Progressive Codification of International Law. Piracy was one of the subjects selected for codification by such committee. A sub-committee composed by Rapporteur

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<sup>90</sup> GeiB. Petrig. *Piracy and Armed Robbery at sea The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*. p. 61.

<sup>91</sup> Guilfoyle. Piracy and terrorism, in *The Law and Practice of Piracy at Sea European and International Perspectives*. p. 37.

<sup>92</sup> *Ibid.* p. 52.

<sup>93</sup> See the reference on note 78.

Matsuda and the Chinese representative Wang Chung-Hui produced a draft treaty on piracy, which became known as the Matsuda Draft<sup>94</sup>.

The first article of the draft excluded from its definition of piracy acts committed with a purely political object. At first glance, it would appear that the goal was to refer to the motivation of the perpetrators behind acts of violence at sea, rather than to the absence of a State sanction backing them. However, in a memorandum, Matsuda argued that according to international law, piracy would consist of acts perpetrated without authorization from the government of any State<sup>95</sup>. The Matsuda Draft was not adopted, and piracy was taken out of the codification list, on account of the difficulty in reaching a universal agreement on the subject<sup>96</sup>.

This initiative carried out under the auspices of the League of Nations influenced the Harvard Law School to elaborate a research project aiming to contributing towards future codification of international law. In 1932, in the wake of such project, the Harvard Draft Convention on Piracy<sup>97</sup> (hereafter the Harvard Draft) was released<sup>98</sup>.

The Harvard Draft prescribes in its Article 3 (1) that in order for a violent act at sea to qualify as piracy, it must have been committed, among other things, for private ends without *bona fide* purpose of asserting a claim of right. It has been stressed that this requirement was included with the express intent of excluding civil war insurgents. Meaning that acts of violence on the high seas committed by insurgents against a vessel belonging to the government they seek to overthrow would be excluded from this definition<sup>99</sup>. Notwithstanding, it could be argued that this definition also excludes State-sanctioned acts, for the examples gathered in the commentaries to the Harvard Draft classify as piracy, among other situations, an act of violence and plundering at sea,

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<sup>94</sup> GeiB. Petrig. *Piracy and Armed Robbery at sea The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*. pp. 37, 38.

<sup>95</sup> Guilfoyle. *Piracy and terrorism*. p. 37.

<sup>96</sup> GeiB. Petrig. *Piracy and Armed Robbery at sea The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*. p. 38.

<sup>97</sup> Harvard Research in International Law, 'Part IV: Piracy' (1932) 26 *American Journal of International Law Supplement* 739.

<sup>98</sup> GeiB Petrig. *Piracy and Armed Robbery at sea The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*. p. 38.

<sup>99</sup> Guilfoyle. *Shipping Interdiction and the Law of the Sea*. pp. 30-31.

provided such act is carried out without the authority of a State or the perpetrators are unrecognized insurgents<sup>100</sup>.

The Harvard Draft had a significant influence on the ILC work on piracy<sup>101</sup>, which was part of the ILC's initiative for preparing a convention on the high seas<sup>102</sup>, which in turn was responsible for bringing about the 1958 Convention on the High Seas<sup>103</sup> (hereafter HSC). Whereas the Article 15 of the HSC does not include the bona fide element within the Article 3 of the Harvard Draft, it nevertheless maintains the private ends requirement for an act of violence or depredation to be reputed as piratical.

There are no explanations in the commentary to the ILC articles regarding why this element was included in the HSC definition of piracy or what this requirement means<sup>104</sup>. During the ILC preparatory works, there was a debate on the possibility of State piracy, prompted by the Nationalist China's seizure of Polish ships. However, this hypothesis was not endorsed<sup>105</sup>.

State piracy seems to be a subject ruled out by the UNCLOS definition of piracy also, since according to its Article 102, if the crew of a warship or a government ship or aircraft has mutinied and taken control of the ship, the acts of piracy committed by the crew are assimilated to those perpetrated by a private ship<sup>106</sup>. Along with this, Article 101 maintains the private ends requirement.

This historical overview was important to emphasize the exclusion of state-sanctioned acts from the modern definition of piracy. Arguably, the private ends element within Article 101 of UNCLOS seems to provide the main basis for such exclusion today. But what role does this element play regarding the possibility of directly attributing piratical acts to

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<sup>100</sup> Kristen E. Boon. Aziz Huq. Douglas C. Lovelace, Jr. *Terrorism commentary on security documents*. Vol. 113. Piracy and International Maritime Security. New York: Oxford University Press. 2011. p. 68.

<sup>101</sup> *Ibid.* p. 169.

<sup>102</sup> GeiB. Petrig. *Piracy and Armed Robbery at sea The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*. p. 39.

<sup>103</sup> Convention on the High Seas, adopted in Geneva April 29 1958.

<sup>104</sup> Kristen E. Boon. Aziz Huq. Douglas C. Lovelace, Jr. *Terrorism commentary on security documents*. pp. 170-171.

<sup>105</sup> Guilfoyle. Piracy and terrorism. p. 44.

States? In what ways this element differs from the others within the UNCLOS definition of piracy, when bringing the discussion to the attribution at issue?

#### **4.2.2. The role of the private ends requirement and of the other requirements within the UNCLOS definition of piracy regarding issues of attribution**

The private ends requirement within the UNCLOS definition of piracy is capable of making it impossible to bring pirates under the structure of a State or to attribute piratical acts to States. The next section elaborates on these effects of such an element and explains why the latter is different from the other elements within the definition at issue.

##### **4.2.2.1. The function of the private ends requirement in the characterization of pirates as non-state actors**

It seems to be common ground that acts of piracy cannot be attributed to States under the framework of the rules on the draft articles concerning the responsibility of States for internationally wrongful acts. This view is based on the interpretation that the private ends element within the UNCLOS definition of piracy leads to the exclusion of state-sanctioned acts. The above-mentioned draft concerns acts carried out either by public agents or *de facto* State agents<sup>107</sup>. The latter are not part of the structure of the State, but act on its behalf. Thus, piratical acts would be excluded from the draft's ambit of application. As a result, pirates are to be placed in the category of non-state actors.

Some commentators argue that pirates cannot be easily equated to non-state actors<sup>108</sup>. Perhaps this could be related to the assumption that if pirates receive some kind of support by the State, then their actions would not be perpetrated for *pure* private ends, since there would be authorities involved in the piratical acts. Therefore, they would not be pirates. However, even if this hypothesis was to be correct and the perpetrators are not pirates, these individuals would still be non-state actors. It is acknowledged that there might be links between the State and a non-state actor. This could be either through the sharing of ideology or in the form of some kind of support. Moreover, the essential characteristic of a

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<sup>107</sup> ARSIWA. Articles 4 to 11.

<sup>108</sup> Malcolm D. Evans. Sofia Galani. Piracy and the Development of International Law, in *The Law and Practice of Piracy at Sea European and International Perspectives*. p. 355.

non-state actor is the fact that they are not agents of the State and do not act on its behalf in any way<sup>109</sup>.

At this point, it is necessary to mention the distinction between State sponsorship and State support given to pirates. The first category would only be used if a State could commit piracy, whether by its organs or by controlling pirates. But the element of private ends within the UNCLOS definition of piracy turns such a situation into a mere conjecture. On the other hand, State support could take the form of financial help, for example. In cases of State sponsorship, the conduct of pirates could entail the direct responsibility of States for piratical acts, if not for the private ends element. Conversely, the conduct of pirates in cases of State support could act as a condition for the breach of another obligation, such as an obligation to prevent. Thus, the acts of piracy would not be directly attributable to the State.<sup>110</sup>

If in these cases the conduct of supporting pirates is not attributable to the State, the acts of the individuals receiving such support would still fulfill the UNCLOS definition requirement of private ends, since there would be no public interest involved in such acts. Therefore, such acts would still be piratical and the perpetrators, in turn, would be pirates. This is in line with the fact that those persons financing, training or helping pirates to sell stolen cargo or accommodate hostages would not be State agents when carrying out these operations, even if they were to hold a position of authority within the structure of the State. This is because their conduct would be entirely private, and not attributable to a State, moving a step further from the category of acts beyond authority (*ultra vires acts*), which can be attributed to a State<sup>111</sup>. Thus, they would not be acting in their official capacity when doing so<sup>112</sup>, particularly taking into account that these activities are frequently carried out in secrecy. Although it is sometimes difficult to establish a distinction between private conducts and *ultra vires acts*<sup>113</sup>.

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<sup>109</sup> Noam Lubell. *Extraterritorial Use of Force Against Non-State Actors*. United States: Oxford University Press. 2010. pp. 14-15.

<sup>110</sup> Trapp. *State Responsibility for International Terrorism Problems and Prospects*. p. 24

<sup>111</sup> ARSIWA Commentary. p. 45. Article.7, para 1.

<sup>112</sup> Crawford. *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries*. p. 108.

<sup>113</sup> ARSIWA Commentary. p. 46. Article 7, para 8.

A piratical act can be turned into a generic act of violence at sea. This would be the case, for instance, if a State adopted the conduct of the pirates as its own, which would consequently entail its responsibility under the rules of the draft<sup>114</sup>. An example of turning the conduct of non-state actors into acts of State would be the situation in the *Tehran Hostages case*. In November 1979, in the wake of the Iranian Revolution which ousted the government of Shah Reza Pahlavi, hundreds of militants seized the US embassy and took the personnel hostage. According to the ICJ, in the beginning, the conduct of the militants was not attributable to Iran, but this situation changed after Iran decided to adopt the conduct of the militants as its own<sup>115</sup>. Had this happened in the context of piracy, the conduct of the perpetrators would cease to be piratical, because the private ends element within the UNCLOS definition of piracy excludes state-sanctioned acts of violence at sea.

#### **4.2.2.2. The other effect of the private ends requirement: is there a specific obligation prohibiting State piracy in international law?**

Although it is true that the private ends element within the UNCLOS definition of piracy leaves acts of piracy outside the draft's reach, due to the impossibility of attributing piratical acts to States<sup>116</sup>, it is also correct to argue that such an element is not the only one making it impossible to attribute piratical acts to States. The reason is that the definition of piracy contains five elements,<sup>117</sup> and the absence of any of them will produce the same result, since the presence of all five elements is essential to qualify an act as piratical.

This happens because the function of a definition is to set boundaries, limiting the possible meanings of a word<sup>118</sup>. If, for instance, an act of violence at sea against another ship were committed without the sanction of any authority, but nevertheless within the territorial waters of a State, this act would inevitably be classified as armed robbery, and not piracy. Consequently, it would not be possible to attribute piratical acts to a State in this case.

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<sup>114</sup> ARSIWA. Article 11.

<sup>115</sup> *The Tehran Hostages Case*. United States Diplomatic and Consular Staff in Tehran. United States of America v. Iran. Judgement, ICJ, GL No 64[1980], ICJ Rep. 3, ICGJ 124 (ICJ 1980), 24 May 1980, International Court of Justice [ICJ]. p. 35, para 74.

<sup>116</sup> Guilfoyle. *Shipping Interdiction and the Law of the Sea*. p.34.

<sup>117</sup> See Chapter 2, Section 2.1.2.

<sup>118</sup> John E. Noyes. Interpreting the 1982 Law of the Sea Convention and Defining its terms, in *Definitions for The Law of the Sea Terms not Defined by the 1982 Convention*. George K Walker. General editor. The Netherlands: Martinus Nijhoff Publishers. 2012. p. 50



If the absence of any of the other four elements within the UNCLOS definition of piracy makes it impossible to attribute acts of piracy to States, is the role of the private ends element special when it comes to the hypothesis of State piracy? Yes, it is. Along with interfering with the possibility of attributing piratical acts to States, this element also functions as a barrier blocking the *naissance* of an international obligation *specifically* prohibiting State piracy. In other words, currently in international law, there is no obligation with the following content: States are prohibited from committing piracy.

An example could clarify this affirmation: Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide<sup>119</sup> prescribes that in order for an act to be classified as genocide; there must be intent to destroy, in whole or in part, a national, ethnical, racial or religious group. If this element of intent within this definition is absent from an act of violence against any of these groups, such a crime would not have taken place and thus it could never be attributed to a State in this case. Nevertheless, the rule on Article IX of the convention, making it possible to attribute genocide to States, would remain intact, meaning that if the element of intent is present, such acts of violence towards these groups could be attributed to a State. In this context, the rule on Article IX permits the interpretation that there is an obligation in international law prohibiting State genocide, which exists separately from the definition of genocide, despite the fact that the latter is an essential part of the content of that obligation.

This is possible because there is no element within the definition of genocide excluding state-sanctioned acts from its meaning. Conversely, when it comes to the largely-accepted interpretation of the private ends element within the definition of piracy, it is arguable that the latter makes it impossible in today's international law for an obligation prohibiting State piracy to exist. This is because under the UNCLOS definition, which reflects customary international law, if there is a mark of authority behind acts of violence at sea, even if they fulfill all the other four requirements within this definition, acts of piracy would not have taken place.

This implies that these acts would not be piratical if they contain a trace of authority and, therefore, could not be attributed to the State *as such*. Thus, in order for these acts to be

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<sup>119</sup> Convention on the Prevention and Punishment of the Crime of Genocide. adopted by the General Assembly of the United Nations 9 December 1948.

attributed to the State, it is necessary to find an international obligation making this possible, for in this case there would be a breach of an obligation to be attributable to the State.

### **4.3. Alternatives for holding the State directly responsible for acts that would be piratical, if not for the mark of authority**

Due to the private ends element within UNCLOS definition of piracy, the presence of State sanction makes it impossible to characterize an act of violence at sea as piratical. As a result, piratical acts cannot be attributable to the State. By the same token, there is no international obligation specifically prohibiting State piracy. Notwithstanding, such acts would still fall under the generic category of acts of violence at sea. Arguably, given the fact that international law prohibits unauthorized acts of violence as such, these acts would still be attributable to States, but not as piratical ones.

#### **4.3.1. Grounds for the prohibition of unauthorized acts of violence at sea in international law**

In the case that became known as the *SS Mayaguez* incident, the US-flagged merchant vessel *SS Mayaguez* was fired upon, seized and boarded by Cambodian naval forces on the high seas near the Poulo Wai islands in 1975. President Gerald Ford declared that the incident was an act of piracy<sup>120</sup>. The Cambodian authorities, in turn, stated that the merchant vessel was being used for espionage. This incident could not be classified as piracy under the UNCLOS definition because of the absence of the private ends element due to the mark of authority behind the act<sup>121</sup>. In such cases, these acts would be classified as generic acts of violence at sea. Thus, it is necessary to determine if the State can be held directly responsible for these acts under international law.

Violence at sea can take the form of unauthorized use of force, for example. The latter is not directly regulated by UNCLOS, but general international customary law prohibits the

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<sup>120</sup> GAO US Government Accountability Office. *The Seizure of the Mayaguez: a case study of crisis management*. B-133001. Published: May 11, 1976. Publicly released: May 11, 1976. p. 63.

<sup>121</sup> P. W. Birnie. *Piracy Past, present and Future*, in *Marine Policy*. 1987. Vol 11. Issue 3. Pages 163-183. pp. 176-177.

use of force in an inconsistent manner<sup>122</sup>, as it is stated in Article 2 (4) of the UN Charter<sup>123</sup>. In this vein, as ruled by ITLOS in the *case M/V Saiga*, although UNCLOS does not contain express provisions on the use of force concerning the seizure of ships, international law can be applied to these situations, according to Article 293 of the convention<sup>124</sup>. This case concerned a claim brought by Saint Vincent and the Grenadines against Guinea before that tribunal. This was on account of the seizure of the *M/V Saiga*, an oil tanker registered pursuant to the laws of Saint Vincent and the Grenadines<sup>125</sup>. The tribunal considered that Guinea used excessive force when seizing the vessel in its exclusive economic zone. The reason is that the Guinean authorities resorted to gunfire without issuing any previous warning, and they also engaged in unauthorized use of force when boarding the tanker, violating the rights of Saint Vincent and the Grenadines under international law<sup>126</sup>. In its decision, the tribunal also took into account the fact that the *M/V Saiga* was an unarmed vessel, almost fully laden with gas and oil, with a maximum speed of 10 knots<sup>127</sup>.

According to international law, not only an act of unauthorized use of force is prohibited, but also acts of unjustified damage against ships. For instance, according to the Convention on Intervention on the High Seas in the Case of Oil Pollution Casualties<sup>128</sup>, States parties may take measures to prevent harmful consequences stemming from oil pollution. But the measures adopted must be proportional and necessary, taking into account the threat or the actual damage. Moreover, the State which engages in an excessive and unauthorized use of such measures is obliged to pay compensation for the damage caused<sup>129</sup>. Hence, according to the convention, a patrol vessel of a coastal State might take measures that could cause

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<sup>122</sup> Dale G. Stephens. The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations, in *Law of the Sea*. ed. Donald R. Rothwell. UK: Edward Elgar. 2013. p. 714.

<sup>123</sup> Charter of the United Nations. adopted in San Francisco 26 June 1945.

<sup>124</sup> *The M/V Saiga case*. Saint Vincent and the Grenadines v. Guinea. ITLOS Case No 2 (Official Case No) ICGJ 336 (ITLOS 1999), para 155.

<sup>125</sup> *Ibid.* para 31.

<sup>126</sup> *Ibid.* para 157-159.

<sup>127</sup> *Ibid.* para 153.

<sup>128</sup> Convention on Intervention on the High Seas in the Case of Oil Pollution Casualties, adopted in Brussels 29 November 1969.

<sup>129</sup> *Ibid.* Articles V and VI.

damage to a ship on the high seas, but these measures would not be necessarily unlawful, depending on the context<sup>130</sup>.

However, even if such measures were considered to be unlawful, such acts would not be characterized as piratical, since the private ends requirement within the UNCLOS definition of piracy would be absent. This is because the patrol vessel at issue would still be acting in order to prevent the pollution of the coastal State waters, which denotes the presence of public interest.

In light of these examples, it can be stressed that international law prohibits unlawful acts of violence at sea perpetrated by or on behalf of States. Thus, if an act, as such, fulfills all the other elements within the UNCLOS definition of piracy, except for the private ends requirement, a State could be held responsible, but not for acts of piracy. The same would be true if an act of violence, despite falling outside the ambit of the mentioned definition, interfered with the freedom of navigation of another State, provided that the conduct of the perpetrators could be attributed to the State or that the State failed with its obligation to prevent<sup>131</sup>. The freedom of navigation is recognized as a general principle of international law<sup>132</sup> and according to UNCLOS, it applies to both the high seas and the EEZ<sup>133</sup>.

Another reason for holding States directly responsible for unlawful acts of violence at sea, which would not consist of piracy because of State sanction, is that piracy is a sub-category of these acts, because the first element within the UNCLOS definition of piratical acts makes reference to any illicit act of violence or detention or any act of depredation<sup>134</sup>.

The other four elements within such definition narrow down these acts of violence, so as to place them in a sub-category of unlawful acts of violence at sea. This explains why, for instance, according to the IMO, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)<sup>135</sup> can be applied to piratical acts<sup>136</sup>.

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<sup>130</sup> I. A. Shearer. Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels, in *Law of the Sea*. ed. Donald R. Rothwell. UK: Edward Elgar. 2013. pp. 662-663.

<sup>131</sup> Tullio Treves. *The International Tribunal for the Law of the Sea and the Oil and Gas Industry*. Second International Oil and Gas Conference – Managing Risk – Dispute Avoidance and Resolution. London 20-21 September 2007. p. 9.

<sup>132</sup> Tanaka. *The International Law of the Sea*. p.16.

<sup>133</sup> UNCLOS. Articles 87 (1) and 58 (1).

<sup>134</sup> See Chapter 2. Section 2.1.

<sup>135</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), adopted in Rome 10 March 1988.

Hence, it is important to assess if this convention could also be an alternative for holding States directly responsible for acts of violence at sea that are not piratical, on account of State sanction behind such conducts.

#### **4.3.2. Is SUA an alternative in this context?**

On October 7, 1985, the *Achille Lauro*, an Italian-flagged cruise ship, was hijacked by four Palestinians who were on board the ship, posing as tourists. These men held the passengers hostages and threatened to kill them in order to compel Israel to release 50 Palestinian prisoners. One of the passengers was killed in the incident and the cruise ship was on the high seas when the passengers were being held by the Palestinians<sup>137</sup>. This incident prompted the adoption of the SUA convention<sup>138</sup>, because it highlighted that the UNCLOS definition of piracy was inapplicable to this case, since the offence was not committed against another ship<sup>139</sup>.

Although the preamble of this convention refers to terrorism, and it does not make explicit reference to piracy, SUA has a much broader scope that allows it to be applicable to piratical acts. Its provisions cover unlawful and intentional acts ranging from the seizure of a ship by intimidation or the commitment of violence against a person on board a ship, to the placing of a substance in a ship with intent to either destroy the ship or its cargo, which are committed on one ship only, or against another ship, and threaten the safety of navigation of the vessel<sup>140</sup>. Not only the commission of such acts, but also attempts, acts of incitation and complicity are covered by the convention<sup>141</sup>.

SUA does not require that these offences must be committed against another ship, on the high seas or for private ends. Nevertheless, the convention does not have an unlimited scope: it is only applicable to ships navigating or scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a single State, or beyond the lateral limits of its territorial sea with adjacent States. In addition, the convention is also

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<sup>136</sup> IMO circular letter No.3180 Concerning information and guidance on elements of international law related to piracy. 17 May 2011. Annex. LEG 98/8. 18 February 2011. p. 2, para 9.

<sup>137</sup> Helmut Tuerk. Combating Terrorism At Sea – The Suppression Of Unlawful Acts Against the Safety Of Maritime Navigation, 15 U, *Miami Int'L & Comp. L. Rev.* v. 15. 337-367. 2008. p. 338.

<sup>138</sup> *Ibid.* p. 337.

<sup>139</sup> *Ibid.* p. 342.

<sup>140</sup> SUA. Article 3.

<sup>141</sup> *Ibid.* Article 3 (2) a, b.

applicable in cases where the offender is found in the territory of a State party to the convention, even if the former territorial condition does not apply<sup>142</sup>.

Moreover, SUA is inapplicable to war ships or to ships own or operated by a State, when being used as a naval auxiliary or for customs or police purposes. Along with this, the convention prescribes that nothing on it will affect the immunity of warships or government ships operated for non-commercial purposes<sup>143</sup>. These rules deal only with matters of jurisdiction, it looks inaccurate to interpret them in a way as to draw the conclusion that state-sanctioned acts fall outside the scope of the convention.

Notwithstanding, during the preparatory works for SUA, Kuwait advanced a proposal to include the possibility of applying the convention to a person who perpetrates an offence on behalf of a State, but this proposal was rejected. Iran, Nicaragua and Saudi Arabia proposed that the convention should deal with offences committed by governments, but this hypothesis was also not included in the convention<sup>144</sup>. Nonetheless, it does not imply that an act carried out by or on behalf of States, which is neither piracy under UNCLOS, nor an offence under SUA, because of the mark of authority behind it, could not be attributable to a State. For instance, in a situation similar to the *Achille Lauro* incident, if the conducts of the perpetrators were adopted by their State of nationality afterwards, such acts would be attributable to the latter, according to customary international law<sup>145</sup>. On the other hand, it means that although SUA does not contain a private ends element, it seems that this was meant to include only politically-motivated acts, and not state-sanctioned ones.

#### **4.3.3. The Hostages Convention alternative**

Unlike SUA, the Hostages Convention<sup>146</sup> can be applied to acts that would be attributable to the State, if not for the private ends element within the UNCLOS definition of piracy. According to this convention, any person who seizes, or detain, or threatens to injure or to kill another individual in order to compel a third party to act in a certain way, so as to

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<sup>142</sup> *Ibid.* Article 4.

<sup>143</sup> *Ibid.* Article 2.

<sup>144</sup> Tuerk. *Combating Terrorism At Sea – The Suppression Of Unlawful Acts Against the Safety Of Maritime Navigation* p. 348.

<sup>145</sup> ARSIWA. Article. 11.

<sup>146</sup> International Convention against the Taking of Hostages, adopted in New York 17 December 1979.

release the victim, commits the offence of taking of hostages. Attempts and complicity are also covered by the convention<sup>147</sup>. But the convention is not applicable where these acts are committed in the territory of a single State, the alleged offender and the victims are nationals of that State and the offender is found within the territory of that State<sup>148</sup>.

Given the fact that piratical acts might involve the taking of a foreign crew as hostage in order to compel a third party to pay a ransom, this convention can be applied in the context of piracy<sup>149</sup>. For instance, in February 2015, the *Kalamos*, a Greek supertanker was attacked by Nigerian pirates, some 60 nautical miles east of Bonny, Nigeria. The armed pirates boarded the ship armed, killed one person and took three hostages, two of them Greeks<sup>150</sup>. What if similar acts were sanctioned by a State?

Although this convention does not contain an explicit provision on the possibility of the perpetration of these offences by or on behalf of a State<sup>151</sup>, the expression “any person” within the definition of the hostage taking offence<sup>152</sup> encompasses acts committed whether by *de facto* or *de jure* State agents and the draftsmen intended to include this interpretation<sup>153</sup>. Hence, if an act of violence at sea, resulting in hostage taking, is carried out by or on behalf of a State, the latter can be held directly responsible under the Hostages Convention.

These lines dealt with alternatives to hold States directly responsible, under international law, for acts that would be piratical, if not for the absence of the private ends element within the UNCLOS definition of piracy. The following sections address the possibility of holding States *indirectly* responsible for piratical acts.

#### **4.4. Attributing piratical acts to States in an indirect manner**

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<sup>147</sup> *Ibid.* Article 1 (1) (2) a, b.

<sup>148</sup> *Ibid.* Article 13.

<sup>149</sup> *GeiB. Petrig. Piracy and Armed Robbery at sea The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden.* p. 43.

<sup>150</sup> Maritime Bulletin. Supertanker *Kalamos* attacked by pirates, 3 taken hostages, 1 killed, Nigeria. 04 February 2015. <http://www.news.odin.tc/index.php?page=view/article/1945/Supertanker-Kalamos-attacked-by-pirates-3-taken-hostages-1-killed-Nigeria>.

<sup>151</sup> Joseph J Lambert. *Terrorism and Hostages in International Law – A Commentary on the Hostages Convention 1979.* Cambridge: Grotius Publications Ltd. 1990. p. 22.

<sup>152</sup> Hostages Convention. Article 1 (1).

<sup>153</sup> Lambert. *Terrorism and Hostages in International Law – A Commentary on the Hostages Convention 1979.* p. 80.

It seems impossible to attribute piratical acts to States under current customary international law due to the private ends element within the UNCLOS definition of piracy. Nonetheless, alternatives can be used to hold the state directly responsible for state-sanctioned acts of violence at sea. Those acts cannot be attributed to the State as piracy, because of the mark of authority they bear. Still, in these situations, the conduct of the offenders would be directly attributed to the State, provided these individuals acted as *de jure* or *de facto* State agents.

Notwithstanding, piratical acts can be indirectly attributed to States. In these situations, the conduct of the pirates would not be attributed to the States in a direct manner, but would be a condition to assess the breach of another obligation imposed on the State. Thus, the piratical acts would function as a catalyst, allowing the attribution to the State of a conduct committed by the latter, and not in conformity with an international obligation<sup>154</sup>. For instance, if the State has a duty to prevent an illicit activity and its organs fail to comply with this obligation, the conduct of such organs will be directly attributed to that State. However, in order for the breach of such an obligation to take place, the conduct of the individuals engaged in the illicit activity is also relevant, despite not being attributable to the State<sup>155</sup>. In this context, is there any international obligation capable of making it possible to hold States indirectly responsible for piracy?

#### **4.4.1. Grounds for holding States indirectly responsible for piracy**

Under international law, States are obliged not to allow their territory to be used for acts contrary to the rights of other States, as the ICJ stated in the *Corfu Channel case*<sup>156</sup>. In 1946, the British warships *Saumarez* and *Volage* were sailing through a channel previously swept for mines in the North Corfu Strait, within Albanian territory, when mines exploded. As a result, some British men lost their lives and the ships were severely damaged<sup>157</sup>. Although the court could not infer that Albania was responsible for placing the mines in the channel<sup>158</sup>, it nevertheless concluded that the Albanian authorities knew about the

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<sup>154</sup> Luigi Condorelli. 'L' imputation à l'état d'un fait internationalement illicite: solutions classiques et nouvelles tendances', in *Recueil des Cours de l'Académie de Droit International de la Haye* (1984 – VI) Vol 189, London: Martinus Nijhoff Publishers. 1988. p. 96.

<sup>155</sup> *Ibid.* pp. 100-101.

<sup>156</sup> *The Corfu Channel Case*. Corfu Channel, United Kingdom v Albania, Judgement, Merits, ICJ, GL, No 1, [1949], ICJ Rep 4, ICGJ 199 (ICJ 1949), 9<sup>th</sup> April 1949, International Court of Justice [ICJ]. p. 22.

<sup>157</sup> *Ibid.* pp. 12-15.

<sup>158</sup> *Ibid.* p. 17.



existence of such a minefield. Among other things, the ICJ stated that the Albanian government kept a close watch over the waters of the North Corfu Channel on a regular basis when the explosions took place. In this context, the court advanced that the minelaying could not have taken place without the knowledge of Albania, for the presence of some look posts in its coast made it possible to see an operation as such<sup>159</sup>. Hence, the ICJ held Albania responsible for breaching the international obligation of notifying, for the benefit of shipping in general, about the minefield in the channel, and of warning the approaching British warships about the imminent danger to which they were exposed when sailing through those waters<sup>160</sup>.

In this case, Albania was not held directly responsible for the explosions, as it would have been the situation had the court found the State responsible for the minelaying. Instead, the latter functioned as a catalyst for the breach of the obligation to prevent the damage and loss of life caused by the explosions. The ICJ acknowledged that it would have been difficult or perhaps impossible for Albania to notify all States before the time of the explosions, but still pointed out that the Albanian authorities should have immediately taken all the necessary steps to warn ships near the danger zone<sup>161</sup>.

In view of the ruling of the ICJ in the above-mentioned case, it seems possible to affirm that the obligation to prevent the damage to the warships consists of an obligation of conduct, subject to a due diligence standard. The latter imposes on the State the duty to take all the necessary steps to avoid a certain result. In these cases, the State is not obliged to absolutely guarantee that a certain event will not occur, but instead it must exercise its best efforts in order to avoid a particular outcome<sup>162</sup>.

The general obligation stated by the ICJ in the *Corfu Channel case*, imposing on States the duty not to allow knowingly their territories to be used for activities that may harm the rights of other States is applicable to piracy. This is because the latter, despite happening outside the territorial waters of the State, requires the presence of an infrastructure on

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<sup>159</sup> *Ibid.* pp. 18-22.

<sup>160</sup> *Ibid.* p. 22.

<sup>161</sup> *Ibid.* p. 23.

<sup>162</sup> Riccardo Pisillo Mazzeschi. The Due Diligence Rule and the Nature of International Responsibility of States, in *German Yearbook of International Law*, Vol. 35 (1992), Berlin: Duncker & Humblot. 1993. pp. 9-51. p. 30.

land<sup>163</sup>. Additionally, pirate attacks can have an effect on both the property and the freedom of navigation of other States, along with the physical integrity of their nationals. If, for instance, the State exercises due diligence in patrolling its territorial waters, it can prevent both piracy and armed robbery.

#### **4.4.2. The due diligence standard and the obligation to prevent in the context of piracy**

A State is not obliged to prevent the commission of illicit activities in its territory in absolute terms. Rather, the standard of due diligence requires that the State must do its best to avoid the commission of illicit activities that may affect the rights of other States, taking into account what the State knew (or ought to have known), and its capacity to act, given the circumstances in a particular case. In other words, the due diligence standard comprises two elements: knowledge and capacity<sup>164</sup>.

The first imposes on the State the obligation to act diligently once it has knowledge that harm could be caused to the rights of other States<sup>165</sup>. In the *Corfu Channel case*, for instance, Albania should have warned the shipping in general and the British warships once it had knowledge of the minefield in the channel. This requirement is not one of subjective knowledge, meaning that the Albanian State agents, for example, knew about the minefield; but the proof of knowledge is objective in the sense that, among other things, constant surveillance and the presence of lookout posts in the Albanian coast allowed the ICJ to infer that the Albania knew, or ought to have known, of the minefield<sup>166</sup>.

In order to establish the breach of the obligation to prevent, along with knowledge, the State must have the capacity to act in a way as to avoid a particular outcome. This element encompasses three different aspects: institutional, resource and territorial capacity<sup>167</sup>.

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<sup>163</sup> The Pirates of Somalia: Ending the Threat, Rebuilding a Nation. The World Bank Regional Vice-Presidency for Africa. International Bank for Reconstruction and Development/The World Bank. 2013. pp. 108-109.

<sup>164</sup> Trapp. *State Responsibility for International Terrorism Problems and Prospects*. pp. 64-65.

<sup>165</sup> *Ibid.* p. 67.

<sup>166</sup> *Ibid.* p. 69.

<sup>167</sup> *Ibid.* p. 70.

Institutional capacity involves the legal regime and criminal law enforcement framework that the State possesses in order to prevent a result<sup>168</sup>. In the context of piracy, it is important to mention that the offence of piracy is defined in UNCLOS<sup>169</sup>, but the penalty for committing such an offence is to be found within the domestic laws of States<sup>170</sup>. Moreover, UNCLOS does not impose on States the obligation to enact laws on piracy. In this vein, the domestic laws of some countries follow the UNCLOS definition of piracy; in other States, piratical acts are subsumed in categories like kidnapping, robbery, abduction and violence against persons<sup>171</sup>. Nevertheless, once the State has knowledge that its national, to be found in its territory, has committed such an offence according to its domestic law, it has the duty to act diligently so as to prosecute and punish the offender<sup>172</sup>.

Along with having the necessary legal framework to act, the State must have the financial, technical and human resources to put its institutional *apparatus* to good use<sup>173</sup>. In the Gulf of Guinea, for instance, it is acknowledged that some coastal States lack the financial and technical resources to patrol their coasts. Cameroon, for instance, has established a public-private partnership, with a private outfit, the Rapid Intervention Battalion (RIB-Delta), in order to provide protection for ships and oil platforms within its maritime domain<sup>174</sup>. This initiative can curb both piracy and armed robbery. Nonetheless, a State will be in breach of the obligation to prevent piracy if, for example, despite not having the resources to diligently patrol its territorial waters, it nevertheless turns a blind eye to the fact that its naval forces are involved in piracy or its police is giving protection to pirates<sup>175</sup>.

Lastly, the capacity element also involves a territorial aspect. Whenever the State exercises a sufficient degree of control over its territory, including its territorial waters, it is obliged to act diligently in order to prevent acts of piracy. However, in the extreme situation where

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<sup>168</sup> *Ibid.* p. 71.

<sup>169</sup> UNCLOS, Article. 101.

<sup>170</sup> Robert C. Beckman. The piracy regime under UNCLOS: problems and prospects for cooperation, in *Piracy and International Maritime Crimes in ASEAN prospects for cooperation*. ed. Robert C. Beckman. Ashley J. Roach. UK: Edward Elgar. 2012. p. 18.

<sup>171</sup> *Ibid.* p. 33.

<sup>172</sup> Mazzeschi. The Due Diligence Rule and the Nature of International Responsibility of States. p. 29.

<sup>173</sup> Trapp. *State Responsibility for International Terrorism Problems and Prospects*. p. 71.

<sup>174</sup> Charles Ukeje. Wullson Mvomo Ela. African Approaches to Maritime Security – The Gulf of Guinea. Nigeria: Friedrich-Ebert-Stiftung. 2013. p. 21.

<sup>175</sup> See Chapter 3, Section 3.2.1.1.

it lacks control over any part of its territory, the State cannot be held responsible for its failure to prevent an illicit activity, as long as this situation persists<sup>176</sup>.

Notwithstanding, the State may have control over part of its territory and may be held responsible for acts committed therein, provided it failed to act diligently<sup>177</sup>. An example is Somalia, a country considered to be a fragile State<sup>178</sup>, where the degree of stability and State control varies among different regions. In Somaliland, there is a relatively high degree of stability. In Puntland and Central Somalia, such a degree is intermediary. Finally, in Southern Somalia, absolute instability remains<sup>179</sup>. Since piracy needs infrastructure, coupled with a certain degree of stability to flourish, areas such as Puntland and Central Somalia function as the ideal pirate anchorage<sup>180</sup>. In these pirate anchorages, local authorities would be under a less strict standard of due diligence to prevent acts of piracy than it would have been the case if such acts happened in Somaliland. Whereas it could be argued that the authorities based in Southern Somalia would not have the necessary capacity to act, due to Somalia's lack of control over this part of its territory.

All the same, this would not imply that even in these more instable regions, Somalia would not be in breach of the obligation to prevent if, for example, local authorities are participating in organizing or financing pirates. In 2013, President Hassan Mohamud granted amnesty to low-level pirates, but not to the financiers or organizers of acts of piracy<sup>181</sup>. This gesture signalizes that Somalia considers such conducts intolerable. However, Somalia would violate its duty to prevent pirate attacks if authorities in these regions, although not acting in their official capacity or on behalf of the State, are directly involved in such activities. This is because these individuals would be supporting pirates<sup>182</sup>.

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<sup>176</sup> Liesbeth Zegveld. *Accountability of Armed Opposition Groups in International Law*. UK: Cambridge University Press. 2002. p. 208.

<sup>177</sup> *Ibid.* p. 211.

<sup>178</sup> *Pirate Trails Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa*. International Bank for Reconstruction and Development/The World Bank. 2013. p. 26.

<sup>179</sup> *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation*. The World Bank Regional Vice-Presidency for Africa. p. 142.

<sup>180</sup> *Ibid.*

<sup>181</sup> Reuters. Somali president grants amnesty to pirates, but not kingpins. 28 February 2013. <http://uk.reuters.com/article/2013/02/28/uk-somalia-piracy-amnesty-idUKBRE91R14220130228>.

<sup>182</sup> Trapp. *State Responsibility for International Terrorism Problems and Prospects*. p. 45.

#### 4.4.2.1. Distinguishing between general obligations of conduct subject to a due diligence standard and pure obligations to prevent

Obligations of conduct subject to a due diligence standard require that the State must employ its best effort in order to avoid a particular outcome. Thus, there would be a breach even if the event did not occur, provided that the State did not take the necessary steps to avoid the result. On the other hand, although pure obligations to prevent also require a standard of due diligence, the State would not commit a violation unless the event to be avoided occurs. Thus, in these cases, the State would only be in breach of such an obligation if it failed to act diligently and the outcome to be avoided occurred<sup>183</sup>. Such a distinction was stated by the ICJ in the *Bosnian Genocide case*<sup>184</sup>.

An example of a due diligence standard obligation of conduct is that enshrined in UNCLOS, requiring States to cooperate to the fullest possible extent to repress piracy on the high seas or no-jurisdiction zones<sup>185</sup>. The expression “fullest possible extent” means that States must employ their best effort to cooperate and act diligently to repress piracy. In this context, a State would arguably be in breach of such an obligation if, for instance, it does not share information with other States in an area prone to piracy and fails to inform another State about a possible pirate attack, even if such attack does not occur<sup>186</sup>. During the preparatory works for UNCLOS, the delegation of Malta proposed that the duty to prevent should be included in such provision, but this proposal was rejected<sup>187</sup>.

A pure obligation to prevent can be found in SUA, requiring all States parties to take all practicable measures to prevent preparations in their territories, aiming to perpetrate the offences established in the convention within or outside such territorial boundaries<sup>188</sup>. The expression “all practicable measures” imposes a due diligence standard on States, requiring the latter to employ their best effort. Nevertheless, unless a State failure to act diligently results in the commission of one of the offences enshrined in the convention, it would not be in breach of this obligation. Although this provision in SUA has been criticized on

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<sup>183</sup> Crawford. *State Responsibility The General Part*. p. 227.

<sup>184</sup> *The Bosnian Genocide Case*. pp. 221-222, para 430-431.

<sup>185</sup> UNCLOS. Article 100.

<sup>186</sup> Yaron Gottlieb. Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing, in *Case Western Reserve Journal of International Law*, 2013, Vol. 46, issues 1 & 2, pp. 304-332. p. 312.

<sup>187</sup> Satya. Shabtai. Grandy. *United Nations Convention on the Law of the Sea 1982 a commentary Vol III articles 86 to 132 and documentary annexes*. p. 183.

<sup>188</sup> SUA. Article 13 (1).

account of its vagueness, organizing, financing or training pirates are among the conducts which can be considered preparations for the commitment of the offences enshrined in the convention<sup>189</sup>.

Arguably, even if a State prone to piracy has not ratified SUA, it is nevertheless obliged under customary international law to prevent the preparations for the commitment of illicit activities within its territory which may violate the rights of other States, as the ICJ ruled in the *Corfu Channel case*. Piracy occurs outside the territorial boundaries of a State. However, the preparations aiming to commit piracy are land-based and are also suitable for the perpetration of armed robbery. Additionally, both illicit activities can cause harm to other States. Moreover, under customary international law, the State is obliged to safeguard, on its territory, including its territorial waters, the security of aliens and their property<sup>190</sup>. In this vein, a State not only has the duty to refrain from taking measures that could jeopardize the security of foreigners, but it also has the duty to protect aliens from harm stemming from non-state actors, such as pirates<sup>191</sup>.

Thus, it could be argued that the States which are not parties to SUA are obliged, under international law, to exercise due diligence in order to prevent preparatory acts within their territories aiming to perpetrate acts of violence at sea. In some cases, the acts of organizing and financing pirates are not crimes under domestic law<sup>192</sup>. Nonetheless, the obligation to prevent is international, meaning that the legality or illegality of the conduct giving rise to the breach must be assessed in light of the sources available in international law<sup>193</sup>.

#### **4.4.2.2. The due diligence standard and the counter-piracy operations off the Somali Coast: are States obliged to accept external help?**

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<sup>189</sup> Malvina Halberstam. Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, in *The American Journal of International Law*, 1988, Vol 82, No. 2, pp. 269-310. pp. 307-308.

<sup>190</sup> Mazzeschi. The Due Diligence Rule and the Nature of International Responsibility of States. p. 22.

<sup>191</sup> Tammy M. Sittnick. State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take additional steps to secure the Strait, in *Pacific Rim Law & Policy Journal Association*. 2008. Vol. 14. pp. 743-769. p. 763.

<sup>192</sup> Halberstam. Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety. pp. 307-308.

<sup>193</sup> Crawford. *State Responsibility The General Part*. p.101.

Currently, naval operations in Somalia function as counter-piracy initiatives. The North Atlantic Treaty Organization (NATO) contributes to providing maritime security in the region through Operation Ocean Shield, for instance. Other similar initiatives include the European Union-led Operation Atalanta (EU NAVFOR), the multinational Combined Task Force 151 (CTF-151) and individual contributors, such as China, India and South Korea<sup>194</sup>.

These operations act according to the legal framework set up by some resolutions of the United Nations Security Council (UNSC), under Chapter VII of the United Nations Charter, which deals with threats to the peace, breaches of the peace and acts of aggression<sup>195</sup>. Two of them need further comments: these are the UNSC resolution 1816 and the UNSC resolution 1851.

Resolution 1816 was adopted in 2008, following a request of the Transitional Federal Government of Somalia (TFG), in the wake of Somalia's lack of capacity to deter pirate attacks. In this vein, the resolution authorizes states and regional organizations cooperating with the TFG for the repression of piracy to enter the territorial waters of Somalia, so as to repress acts of piracy and armed robbery, for a period of six months from its adoption. On the other hand, this resolution explicitly prescribes that such measures are applicable only to the situation in Somalia and must neither affect the rights of other States, nor establish customary international law<sup>196</sup>.

A few months later, the UNSC adopted resolution 1851, which reaffirmed all the provisions within resolution 1816 and authorized land operations in Somalia, for a period of twelve months from the date of adoption of resolution 1846. The latter renewed the UNSC resolution 1816<sup>197</sup>.

On November 2014, the UNSC resolution 2184, renewed such authorizations for a period of twelve months from its adoption, and, again, advanced that its provisions are applicable

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<sup>194</sup> NATO. Counter-piracy operations. 26 Mar 2015 [http://www.nato.int/cps/en/natohq/topics\\_48815.htm](http://www.nato.int/cps/en/natohq/topics_48815.htm).

<sup>195</sup> United Nations Charter. Article 39.

<sup>196</sup> U.N. Security Council Resolution 1816, adopted by the Security Council in its 5902nd Meeting on 2 June 2008, para 7 and 9.

<sup>197</sup> U.N. Security Council Resolution 1851, adopted by the Security Council in its 6046th Meeting on 16 December 2008, para 6 and 10.

only to the situation in Somalia and cannot be considered as establishing customary international law<sup>198</sup>.

In this context, would a State be in breach of the obligation to prevent pirate attacks if it lacks capacity to comply with such an obligation and yet refuses to accept external help, as it was once stated by a legal commentator<sup>199</sup>?

Not surprisingly, the lack of capacity of a State can contribute to increasing the number of pirate attacks and to jeopardizing the lives of seafarers. In this context, a 2013 World Bank report suggests that as many as 3.741 crewmembers of 125 different nationalities were victims of Somali pirates, some of these victims were reportedly held in captivity for periods as long as 1.718 days. It also stated that 82 to 97 seafarers have died as a consequence of such attacks<sup>200</sup>. Notwithstanding, it seems hard to argue that a Somali refusal to accept external help could amount to a breach of its obligation to prevent these attacks.

As the ICJ stated in the *Bosnian Genocide case*, if the obligation to prevent is one of conduct, subject to a due diligence standard, a State is not obliged to succeed in avoiding a particular result, irrespective of the circumstances. Rather, a State is obliged to employ all means available, and within its power to avoid a particular outcome<sup>201</sup>. Thus, in order to assess if a State breached its obligation to prevent a pirate attack, attention must be drawn to that State's own particularities. Therefore, a State would never violate the obligation to prevent pirate attacks because it refused external help to curb them. If, for instance, a State lacks the capacity to effectively patrol its territorial waters, it would not violate the obligation to prevent if a pirate attack occurs. This would be the case whether a State chooses to accept external help or not.

Arguably, holding States responsible for breaching the obligation to prevent on account of their refusal to accept external help despite their lack of capacity to avoid an undesired outcome, would contribute to eroding the element of capacity within the due diligence

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<sup>198</sup> U.N. Security Council Resolution 2184, adopted by the Security Council in its 7309th Meeting on 12 November 2014, para 13 and 14.

<sup>199</sup> Tammy M. Sittnick. *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take additional steps to secure the Strait*. p. 767.

<sup>200</sup> *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation*. The World Bank Regional Vice-Presidency for Africa. p. xxii.

<sup>201</sup> *The Bosnian Genocide Case*. p. 221, para 430.



standard. Moreover, this could be an incentive for fragile States, like Somalia, to distrust not only international law, but also the whole international community. This situation would not be in line with the goal behind the UNSC resolutions authorizing the naval operations off the Somali coast. For instance, the preamble of resolution 1816 reaffirms the respect for the sovereignty, territorial integrity, political independence and unity of Somalia. It also takes into account the request of the TFG, asking for the international community's assistance to address the issue of the escalating pirate attacks<sup>202</sup>. Hence, it could be inferred from the resolution's preamble that the goal behind its adoption is the cooperation between a fragile State and the international community.

This cooperation would be inevitably weakened if a State were to be held responsible irrespective of the circumstances and regardless of its particular situation. Along with this, holding States responsible for more than they in reality are can contribute to diminishing the function of the rules on State responsibility to act as a mechanism to ensure the efficacy of international law<sup>203</sup>.

#### **4.4.2.3. The dry aspect of piracy: external help from naval operations does not discharge a State from the obligation to prevent pirate attacks**

Piracy happens on the high seas and the EEZ, but the occurrence of pirate attacks is connected to a network on land. Pirates need an infrastructure to organize piratical acts, and to anchor hijacked ships or accommodate hostages. For example, it has been suggested that in Central Somalia, as soon as a hijacked vessel was brought to the coastal waters of a given district, pirates had to pay an anchorage fee. Allegedly, the receivers of such fees were city administrators, businessmen, militia leaders and regional government officials<sup>204</sup>.

Thus, a State, such as Somalia, would be obliged to exercise its duty to diligently prevent pirate attacks, not only by patrolling its territorial waters, but also by addressing the network of pirates on land. Hence, the external help that naval operations offer only tackles part of the problem. This could explain why it has been reported that there could be a new

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<sup>202</sup> UNSC Resolution 1816.

<sup>203</sup> Trapp. *State Responsibility for International Terrorism Problems and Prospects*. p. 61.

<sup>204</sup> The Pirates of Somalia: Ending the Threat, Rebuilding a Nation. The World Bank Regional Vice-Presidency for Africa. p. 143.

outbreak of pirate attacks off the Somali coast in spite of the naval operations therein<sup>205</sup>. In this context, the other half of the issue could be addressed through the enhancement of the country's capacity, through improving its infrastructure and institutions. Nevertheless, corruption within the Somali State, and particularly the involvement of local authorities with pirates, can undermine capacity-building initiatives and the goal to successfully repress piracy<sup>206</sup>.

A State's lack of capacity, bringing about the need for external help, such as in the case of Somalia, could shield that State against a claim for violating the obligation to diligently act to prevent pirate attacks. This capacity deficit, on the other hand, cannot be regarded as a barrier, blocking, for example, the possibility of holding Somalia responsible for breaching the obligation to prevent if Somali authorities engage in direct cooperation with pirates, although not acting in their official capacity when doing so<sup>207</sup>.

#### **4.5. Concluding remarks**

The interpretation leading to the conclusion that the private ends element within the UNCLOS definition of piracy<sup>208</sup> excludes state-sanctioned acts seems to be well accepted<sup>209</sup>. However, some commentators criticize such an approach, arguing that under many past interpretations of customary international law, some acts of violence at sea committed by States would have been piracy<sup>210</sup>. Notwithstanding, there seems to be room to affirm that state-sanctioned acts cannot be considered piratical. Many previous interpretations of the private ends requirement, in different situations, sought to exclude acts bearing the mark of authority from the category of piratical ones<sup>211</sup>. As a result of these interpretations, state-sanctioned acts of violence at sea can never be attributed to a State as piracy.

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<sup>205</sup> BBC. Piracy: Outbreak off Somalia despite international effort. 31 August 2015. <http://www.bbc.com/news/world-africa-34105277>.

<sup>206</sup> The Pirates of Somalia: Ending the Threat, Rebuilding a Nation. The World Bank Regional Vice-Presidency for Africa. p. 162.

<sup>207</sup> Trapp. *State Responsibility for International Terrorism Problems and Prospects*. p. 45.

<sup>208</sup> UNCLOS. Article 101.

<sup>209</sup> Alexander Proelss. *Piracy and the Use of Force*. p. 53.

<sup>210</sup> Murphy. *Small Boats Weak States Dirty Money. Piracy and Maritime Terrorism in the Modern World*. p. 55.

<sup>211</sup> See Chapter 4, Section 4.2.1.

All the same, as it has been argued in the study<sup>212</sup>, the absence of any element within the UNCLOS definition of piracy can contribute to the impossibility of attributing acts of violence at sea as piracy to a State. In this vein, the difference between the private ends element and the other elements within this definition is that the former blocks the *naissance* of an international obligation specifically prohibiting States from committing piracy. This means that: on the one hand, the rules on State responsibility are not affected by this interpretation of the private ends element. On the other hand, it nevertheless brings about the necessity of an extra effort of interpretation, in order to find which international obligation has been violated by the State. However, this situation could be altered through the adoption of bilateral or multilateral agreements and the inclusion of state-sanctioned acts in their definition of piracy. However, this option does not seem to reflect the current trend, since regional agreements aiming to combat piracy, such as the ReCCAP and the Djibouti Code of Conduct follow the UNCLOS definition<sup>213</sup>.

States can be held responsible for acts of violence at sea which would fall under the category of piratical acts, if not for the private ends requirement within the UNCLOS definition of piracy. These acts could, for instance, consist of unauthorized use of force, which could be attributed to the State. This was the situation in the *M/V Saiga case* where ITLOS held Guinea responsible for using excessive force during the seizure of a Saint Vincent and the Grenadines-flagged vessel<sup>214</sup>. Along with this, some treaties, such as the Hostages Convention, could be used to hold a State responsible in cases where the kidnapping of crew members is carried out by or on behalf of a State<sup>215</sup>. Such acts are not attributed to the State as piratical under UNCLOS, but as acts of violence prescribed in another convention or under customary international law.

Nevertheless, piratical acts can be indirectly attributed to States, where these acts function as a catalyst for the violation of another international obligation, such as an obligation to prevent pirate attacks<sup>216</sup>. Obligations to prevent are subject to a due diligence standard, meaning that the State is not required to succeed in avoiding an undesired result, but must

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<sup>212</sup> See Chapter 4, Section 4.2.2.2.

<sup>213</sup> See Chapter 2, Section 2.2.

<sup>214</sup> *The M/V Saiga Case*, para 159.

<sup>215</sup> Lambert. *Terrorism and Hostages in International Law – A Commentary on the Hostages Convention*. p. 22.

<sup>216</sup> Trapp. *State Responsibility for International Terrorism Problems and Prospects*. p. 45.

employ its best efforts in order to avoid a particular outcome<sup>217</sup>. In order to assess if a State acted diligently, one must analyze if a State had knowledge and available means in order to fulfill its duty<sup>218</sup>. In this vein, a State is required to put its capacity to good use. If a State lacks the capacity to act, it will not be in breach of the obligation to prevent a pirate attack. By the same token, that State will never violate such an obligation if, despite its capacity deficit, it refuses to accept external help coming from the international community. Furthermore, it is important to bear in mind that the function of the rules on the international responsibility of States is to promote stability and respect for international law. This goal will hardly be achieved if States are held responsible for more than they in fact are<sup>219</sup>.

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<sup>217</sup> Crawford. *State Responsibility The General Part*. p. 227.

<sup>218</sup> Trapp. *State Responsibility for International Terrorism*. pp. 64-70.

<sup>219</sup> *Ibid.* p. 61.

## **5. CONCLUSION**

The study sought to analyze the possibility of attributing acts of piracy, either directly or indirectly to States according to the rules on State responsibility in international law. In this vein, it can be argued that due to the private ends element within the UNCLOS definition of piracy, States can never commit piratical acts in today's international law. Nevertheless, such acts can, for example, be indirectly attributed to States, if the latter violate an obligation to prevent pirate attacks.

Such an attempt draws attention to the dry aspect of piracy, because pirates need a land network in order to carry out with their operations. In this context, as it was shown in the study, there have been reports concerning the involvement of some State authorities with pirates. Therefore, assessing in which ways States can be held responsible for acts of piracy is of great importance not only for international and maritime law practitioners, but also for those involved in the shipping industry.

## TABLE OF REFERENCES

### JURISPRUDENCE

#### *Permanent Court of International Justice*

*The Lotus Case* SS Lotus (Fr. v Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

#### *International Court of Justice*

*The Bosnian Genocide Case* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Rep. 2007.

*The Corfu Channel Case* Corfu Channel, United Kingdom v Albania, Judgement, Merits, ICJ, GL, No 1, [1949], ICJ Rep 4, ICGJ 199 (ICJ 1949), 9th April 1949, International Court of Justice [ICJ].

*The Tehran Hostages Case* United States Diplomatic and Consular Staff in Tehran. United States of America v. Iran. Judgement, ICJ, GL No 64[1980], ICJ Rep. 3, ICGJ 124 (ICJ 1980), 24 May 1980, International Court of Justice [ICJ].

#### *International Tribunal for the Law of the Sea*

*Seabed Advisory Opinion* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No 17, 1 February 2011).

*The M/V Saiga Case* Saint Vincent and the Grenadines v. Guinea. ITLOS Case No 2 (Official Case No) ICGJ 336 (ITLOS 1999).

### BOOKS & ARTICLES

- Beckman, Robert C. Beckman, Robert C. The piracy regime under UNCLOS: problems and prospects for cooperation, in *Piracy and International Maritime Crimes in ASEAN prospects for cooperation*. pp. 17-37. ed. Beckman, Robert. C. Roach, Ashley J. UK: Edward Elgar. 2012.
- Birnie, P.W. Birnie, P.W. Piracy Past, present and Future, in *Marine Policy*. 1987. Vol 11. Issue 3. pp. 163-183.
- Boon, Kristen E. Boon, Kristen E. Huq, Aziz. Lovelace Jr, Douglas C. *Terrorism commentary on security documents*. Vol. 113. Piracy and International

- Huq, Aziz. Lovelace Jr, Douglas C. Maritime Security. New York: Oxford University Press. 2011.
- Byers, Michael. Michael. *Custom, Power and the Power of Rules. International Relations and Customary International Law*. UK: Cambridge University Press. 1999.
- C.B.E. Satya N. Nandan. Rosenne, Shabtai. Grandy, Neal R. C.B.E. Satya N. Nandan. Rosenne, Shabtai. Grandy, Neal R. *United Nations Convention on the Law of the Sea 1982 a commentary Vol III articles 86 to 132 and documentary annexes*. The Hague: Martinus Nijhoff Publishers. 1995.
- Churchill, Robin. Churchill, Robin. The Piracy Provisions of the UN Convention on the Law of the Sea – Fit for Purpose?, in *The Law and Practice of Piracy at Sea European and International Perspectives*. pp. 9-32. ed. Koutrakos, Panos. Skordas, Achilles. United Kingdom: Hart Publishing. 2014.
- Condorelli, Luigi. Condorelli, Luigi. 'L' imputation à l'état d'un fait internationalement illicite: solutions classiques et nouvelles tendances', in *Recueil des Cours de l'Académie de Droit International de la Haye (1984 – VI) Vol 189*, pp. 11-221. London: Martinus Nijhoff Publishers. 1988.
- Crawford, James. Crawford, James. *State Responsibility The General Part*. New York: Cambridge University Press. 2013
- Crawford, James. Crawford, James. *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries*. UK: Cambridge University Press. 2002.
- Evans, Malcolm D. Galani, Sofia. Evans, Malcolm D. Galani, Sofia. Piracy and the Development of International Law, in *The Law and Practice of Piracy at Sea European and International Perspectives*. pp. 343-365. ed. Koutrakos, Panos. Skordas, Achilles. United Kingdom: Hart Publishing. 2014.
- GeiB, Robin. Petrig, Anna. GeiB, Robin. Petrig, Anna. *Piracy and Armed Robbery at sea The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*. New York: Oxford University Press. 2011.
- Gottlieb, Yaron. Gottlieb, Yaron. Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing, in *Case Western Reserve Journal of International Law*, 2013. Vol. 46, issues 1 & 2, pp. 304-332.

- Guilfoyle, Douglas. Piracy and terrorism, in *The Law and Practice of Piracy at Sea European and International Perspectives*. pp. 33-52. ed. Koutrakos, Panos. Skordas, Achilles. United Kingdom: Hart Publishing. 2014.
- Guilfoyle, Douglas. Guilfoyle, Douglas. *Shipping Interdiction and the Law of the Sea*. United States: Cambridge University Press. 2009.
- Hall, William Edward. Hall, William Edward. *A Treatise on International Law*. 7th edition. ed. Alexander Pearce Higgins. The Clarendon Press. 1917.
- Halberstam, Malvina. Halberstam, Malvina. Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, in *The American Journal of International Law*, 1988, Vol 82, No. 2, pp. 269-310.
- Klein, Natalie. Klein, Natalie. Maritime Security, in *The Oxford Handbook of The Law of the Sea*. pp. 582-603. ed. Rothwell, Donald R. Elferink, Alex Goude. Scott, Karen, N. Stephens, Tim. UK: Oxford University Press. 2015.
- Lambert, Joseph J. Lambert, Joseph J. *Terrorism and Hostages in International Law – A Commentary on the Hostages Convention 1979*. Cambridge: Grotius Publications Ltd. 1990.
- Latimer, Jon. Latimer, Jon. *Buccaneers of the Caribbean How Piracy Forged an Empire*. United States: Cambridge University Press. 2009.
- Lehr, Peter. Lehr, Peter. Lehman, Hendrick. Somalia – pirates’ new paradise, in *Violence at Sea Piracy in the Age of Global Terrorism*. pp. 1-22. ed. Lehr, Peter. New York: Routledge. 2007.
- Lillich, Richard B. Christenson, Gordon A. Chalmers, Jane. Caron, David. Dupuy, Pierre M. Issues in State Responsibility. *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 84, March 28-31. 1990. pp. 51-77.
- Lubell, Noam. Lubell, Noam. *Extraterritorial Use of Force Against Non-State Actors*. United States: Oxford University Press. 2010.
- Mazzeschi, Riccardo Pisillo. The Due Diligence Rule and the Nature of



- Ricardo Pisillo. International Responsibility of States, in *German Yearbook of International Law*, pp. 9-51. Vol. 35 (1992), Berlin: Duncker & Humblot. 1993.
- Murphy, Martin N. *Small Boats Weak States Dirty Money. Piracy and Maritime Terrorism in the Modern World*. UK: C. Hurst and Co Ltd. 2010.
- Noyes, John E. Interpreting the 1982 Law of the Sea Convention and Defining its terms, in *Definitions for The Law of the Sea Terms not Defined by the 1982 Convention*. pp. 45-78. ed. Walker, George K. The Netherlands: Martinus Nijhoff Publishers. 2012.
- Proelss, Alexander. Piracy and the Use of Force, in *The Law and Practice of Piracy at Sea European and International Perspectives*. pp. 53-66. ed. Koutrakos, Panos. Skordas, Achilles. United Kingdom: Hart Publishing. 2014.
- Shearer, I. A. Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels, in *Law of the Sea*. pp. 645-668. ed. Rothwell, Donald R. UK: Edward Elgar. 2013.
- Sherry, Frank. *Raiders & Rebels A History of the Golden Age of Piracy*. US: Harper Collins. 2008.
- Sittnick, Tammy M. State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take additional steps to secure the Strait, in *Pacific Rim Law & Policy Journal Association*. 2008. Vol. 14. pp. 743-769.
- Stephens, Dale G. The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations, in *Law of the Sea*. pp. 705-733. ed. Rothwell, Donald R. UK: Edward Elgar. 2013
- Tanaka, Yoshifumi. *The International Law of the Sea*. United States: Cambridge University Press. 2012.
- Thompson, Janice E. *Mercenaries, pirates and sovereigns: state-building and extraterritorial violence in early modern Europe*. New Jersey: Princeton University Press. 1994.
- Trapp, Kimberley N. *State Responsibility for International Terrorism Problems and Prospects*. New York: Oxford University Press. 2011.

- Tuerk, Helmut. Combating Terrorism At Sea – The Suppression Of Unlawful Acts Against the Safety Of Maritime Navigation, 15 U, *Miami Int’L & Comp. L. Rev.* v. 15. pp. 337-367. 2008.
- Zegveld, Liesbeth. *Accountability of Armed Opposition Groups in International Law*. UK: Cambridge University Press. 2002.

## DOCUMENT IN BOOK

Harvard Research in International Law, ‘Part IV: Piracy’ (1932) 26 American Journal International Law Supplement 739. Harvard Draft Convention on Piracy. Available at: Bo Kristen E. Huq, Aziz. Lovelace Jr, Douglas C. *Terrorism commentary on security documen* Vol. 113. Piracy and International Maritime Security. New York: Oxford University Pre 2011. pp. 9-168.

## INTERNET DOCUMENTS, LAST VISITED 12 OCTOBER 2015

- |  |   |
|--|---|
| International Court of Justice (ICJ)                                   | Statute of the International Court of Justice.<br><a href="http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf">http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf</a> .   |
| International Law Commission (ILC).                                    | Commentary to the Articles on International Responsibility of States for Wrongful Acts, ILC, Ybk 2001/II(2).<br><a href="http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf">http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf</a> .   |
| International Law Commission (ILC).                                    | Draft articles on Responsibility of States for Internationally Wrongful Acts. 53 UN GAOR Supp. No. 10 at 43, U.N. Doc A/56/10. 2001.<br><a href="http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf">http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf</a> .   |
| International Bank for Reconstruction and Development (The World Bank) | Pirate Trails Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa. International Bank for Reconstruction and Development/The World Bank.2013.<br><a href="http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Pirate_Trails_World_Bank_UNODC_Interpol_report.pdf">http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Pirate_Trails_World_Bank_UNODC_Interpol_report.pdf</a> . |

- International Bank for Reconstruction and Development (The World Bank) [The Pirates of Somalia: Ending the Threat, Rebuilding a Nation. The World Bank Regional Vice-Presidency for Africa. International Bank for Reconstruction and Development/The World Bank. 2013. https://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf](https://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf)
- International Maritime Organization (IMO). [Circular letter No.3180 Concerning information and guidance on elements of international law related to piracy. 17 May 2011. Annex. LEG 98/8. 18 February 2011. http://www.un.org/depts/los/piracy/circular\\_letter\\_3180.pdf](http://www.un.org/depts/los/piracy/circular_letter_3180.pdf)
- International Maritime Organization (IMO) [Reports on Acts of Piracy and Armed Robbery Against Ships Annual Report – 2013. MSC. 4/Circ. 208. 1 March.2013. http://www.imo.org/en/OurWork/Security/SecDocs/Documents/PiracyReports/208\\_Annual\\_2013.pdf](http://www.imo.org/en/OurWork/Security/SecDocs/Documents/PiracyReports/208_Annual_2013.pdf)
- Treves, Tullio. [The International Tribunal for the Law of the Sea and the Oil and Gas Industry. Second International Oil and Gas Conference – Managing Risk – Dispute Avoidance and Resolution. London 20-21 September 2007. https://www.itlos.org/fileadmin/itlos/documents/statements\\_of\\_president/wolfrum/treves\\_oil\\_gas\\_200907\\_eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/treves_oil_gas_200907_eng.pdf)
- Ukeje, Charles. Ela, Wullson Mvomo. [African Approaches to Maritime Security – The Gulf of Guinea. Nigeria: Friedrich-Ebert-Stiftung.2013. http://library.fes.de/pdf-files/bueros/nigeria/10398.pdf](http://library.fes.de/pdf-files/bueros/nigeria/10398.pdf)
- United Nations (UN) [UN Documents for Somalia. The Monitoring’s group final report on Somalia. S/2014/726. 10 October 2014. http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S\\_2014\\_726.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2014_726.pdf)
- US Government Accountability Office (GAO) [GAO US Government Accountability Office. The Seizure of the Mayaguez: a case study of crisis management. B-133001. Published: May 11, 1976. Publicly released: May 11, 1976. http://www.gao.gov/assets/240/233910.pdf](http://www.gao.gov/assets/240/233910.pdf)

## **ONLINE NEWS, LAST VISITED IN 12 OCTOBER 2015**

BBC. Life in Somalia's Pirate Town. 18 of September 2008. Accessible at: <http://news.bbc.co.uk/2/hi/africa/7623329.stm>

BBC. Piracy: Outbreak off Somalia despite international effort. 31 August 2015. Accessible at: <http://www.bbc.com/news/world-africa-34105277>.

Business Insider. Kremlin seeks London sanctions for Nigerian navy in Myre Seadiver case. 25 March 2013. Accessible at: <http://www.businessinsider.com/kremlin-seeks-london-sanctions-for-nigerian-navy-in-myre-seadiver-case-2013-3>.

Jakarta Post. "Indonesia key to end piracy in Malacca Straits". 6 August 2006. Accessible at: <http://rafflesia.wwf.or.id/library/admin/attachment/clips/2006-08-06-008-0003-001-07-0935.pdf>.

Maritime Bulletin. Supertanker Kalamos attacked by pirates, 3 taken hostages, 1 killed, Nigeria. 04 February 2015. Accessible at: <http://www.news.odin.tc/index.php?page=view/article/1945/Supertanker-Kalamos-attacked-by-pirates-3-taken-hostages-1-killed-Nigeria>.

NATO. Counter-piracy operations. 26 Mar 2015. Accessible at: [http://www.nato.int/cps/en/natohq/topics\\_48815.htm](http://www.nato.int/cps/en/natohq/topics_48815.htm).

Reuters. Somali president grants amnesty to pirates, but not kingpins. 28 February 2013. Accessible at: <http://uk.reuters.com/article/2013/02/28/uk-somalia-piracy-amnesty-idUKBRE91R14220130228>.

United Press International Liner's Plight Recalls 1961 Ship Seizure: Crew Member Killed When Portuguese Rebels Staged Hijack. October 08 1985. Accessible at: [http://articles.latimes.com/1985-10-08/news/mn-15288\\_1\\_crew-members](http://articles.latimes.com/1985-10-08/news/mn-15288_1_crew-members).

## **DECLARATION**

The Paris Declaration Respecting Maritime Law. Paris, 16 April 1856.

## **TREATIES**

Charter of the United Nations, adopted in San Francisco 26 June 1945.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), adopted in Rome 10 March 1988.

Convention on Intervention on the High Seas in the Case of Oil Pollution Casualties,

adopted in Brussels 29 November 1969.

Convention on the High Seas, adopted in Geneva 29 April 1958.

Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations 9 December 1948.

International Convention against the Taking of Hostages, adopted in New York 17 December 1979.

The United Nations Convention on the Law of the Sea, adopted in Montego Bay 10 December 1982.

Vienna Convention the Law of Treaties, concluded at Vienna on 23 May 1969.

## **RESOLUTIONS OF INTERNATIONAL ORGANIZATIONS**

IMO Assembly Resolution A.1025 (26), adopted 2 December 2009.

U.N. Security Council Resolution 1816, adopted by the Security Council in its 5902nd Meeting on 2 June 2008.

U.N. Security Council Resolution 1851, adopted by the Security Council in its 6046th Meeting on 16 December 2008.

U.N. Security Council Resolution 2184, adopted by the Security Council in its 7309th Meeting on 12 November 2014.

## **REGIONAL AGREEMENTS:**

Code of Conduct Concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct), adopted in Djibouti 29 January 2009.

Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCCAP), adopted in Tokyo 11 November 2004.