UDK: 341.225.5:343.712.2
1.02 pregledni znanstveni članek

Paolo Malaguti
doktor prava (Verona, Italija), docent za mednarodno in ustavno pravo (Fakulteta za pravo in poslovne vede, Katoliški inštitut) (Ljubljana)

The Legal Framework of Piracy under International Law

Abstract: Maritime piracy is the so-called treaty crime or behavior perceived as a crime by the international community and therefore classified as a crime through specific treaties. The reprobation of the international community towards piracy, in reality, is much older than its codification, pirates having been seen as *hostes humani generis* since the most remote ages and civilizations, because they are disturbers of a fundamental interest of the people: the freedom of navigation of the seas. We can therefore speak of piracy as a crime against *ius gentium*, even before that of a treaty crime. Currently, the definition of piracy in force is described by the article 101 of the United Nations Convention on the Law of the Sea (UNCLOS), signed in Montego Bay in 1982, which provides for a series of specific behaviors, but not sufficient to cover the multiplicity of cases that occur in practice.
Key words: piracy, United Nations Convention on the Law of the Sea, UNCLOS, Montego Bay, counter-piracy operations, The Geneva Convention on the High Seas, League of Nations, Harvard Draft Convention on Piracy.

Pravni okvir piratstva po mednarodnem pravu

Izvleček: Pomorsko piratstvo je t. i. zločin po sporazumu oz. obnašanje, ki ga kot zločinsko dojema mednarodna skupnost, zaradi česar je razglašeno za zločin v skladu s posameznimi sporazumi. Zavračanje piratstva s strani mednarodne skupnosti je pravzaprav veliko starejše od njegove kodifikacije, saj so na pirate že v najstarejših časih in civilizacijah imeli za »sovražnike človeškega rodu« (*hostes humani generis*), ker so posegali v temeljne interese ljudi – svobodo morske plovbe. Na tej podlagi lahko o piratstvu govorimo že kot o zločinu proti običajnem pravu (*ius gentium*) pred njegovo umestitvijo v različne sporazume. V sedanjem času je veljavna opredelitev piratstva navzoča v 101. členu Konvencije OZN o pomorskem pravu (UNCLOS), ki je bila leta 1982 podpisana v zalivu Montego in ki predvideva različne vidike piratskih dejanj, vendar kljub temu ni zadostna za pokrivanje raznolikosti primerov, ki se pojavljajo v praksi.
Ključne besede: piratstvo, Konvencija OZN o pomorskem pravu (UNCLOS), zaliv Montego, protipiratske operacije, Ženevska konvencija o odprtih morjih, Društvo narodov, Harvardski osnutek konvencije o piratstvu.

Introduction

Maritime piracy is the so-called treaty crime or behavior perceived as a crime by the international community and therefore classified as a crime through specific treaties. The reprobation of the international community towards piracy, in reality, is much older than its codification, pirates having been seen as *hostes humani generis* since the most remote ages and civilizations (Braccesi 2004, 29), except in specific

historical cases (Rediker 2004, 12), because they are disturbers of a fundamental interest of all the people: the freedom of navigation of the seas (Kraska 2011, 3). We can therefore speak of piracy as a crime against *ius gentium*, even before that of a treaty crime (Leeson 2009), given that it was foreseen and pursued as such by international customary law on the basis of the principle of universal jurisdiction. Currently, the definition of piracy in force is that given by the United Nations Convention on the Law of the Sea, signed in Montego Bay in 1982, which provides for a series of specific behaviors, but not sufficient to cover the multiplicity of cases that occur in practice (Conférence des Nationes Unies sur le droit de la mer 1982).

Article 101 of the UNCLOS states that:

> "Piracy consists of any of the following acts:
> (a) any illegal act 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)."

This definition, which only apparently seems detailed and exhaustive, is influenced by its birth in an era in which the

phenomenon of piracy seemed to have been eradicated for several decades. The need, in fact, for a codification of the case was mostly felt as due only for the strong historical significance that the problem had had in the centuries preceding the nineteenth, and the desire to make it clear how the phenomenon was unequivocally condemned by the international community. Not only that, other factors have affected the difficulty of formulating an exhaustive notion of piracy and an exhaustive legal regime.

It is worth mentioning the past existence of a piracy considered lawful: the raid. In its dual form of public raid and state raid, it had the task of drawing the lines of demarcation between what was to be considered a "pirate act" (rather difficult and ambiguous), in all respects condemned and criminally prosecuted according to the principle of universal jurisdiction, and what, on the other hand, was the lawful exercise of boarding, pillaging and seizure of ships, goods and individuals, by virtue of a protected public interest. In the fifteenth century, following the identification of the characters of the raid and its regulation, it began, as a result, to define piracy in the negative sense, including all the offenses committed on the high seas in the absence of government authorization, without specifying the additional elements characterizing the crime. (Kluber 1861, 376) Ultimately, therefore, the legal notion of travel did not eliminate, once and for all, any doubts as to precisely what all the material conducts covered by the piracy case were, but it provided only a criterion for distinguishing, on the level of legal legality (Hefter 1873, 203), materially identical conduct based on different motivations: the public interest or the private end, thus also demonstrating the ambiguities and contradictions of the institution of the raid.

Another problem, which complicated the elaboration of a legal notion of exhaustive and universal piracy, is the existence of numerous regulatory solutions, mostly different from each other, accepted in the various internal systems of the international community states. (Fiore 1890, 210) Here, an international solution, valid almost everywhere, emerged: the principle of universal repression. According to this principle, the pirate, enemy of mankind, can be captured and prosecuted by any state, despite the origin of the pirate himself or the victim of the attack. In the past, apart from the agreement on the need for universal repression, there was always a lack of a consistent practice and of a strong majority's opinion over the concept of piracy itself, as well as over means and methods of repression of this phenomenon. Therefore, each state had elaborated its own definition of the case, also calibrated on the interests that it specifically intended to protect. (Pella 2008, 165) Consequently, very rarely there was a coincidence in the various state laws and, on the contrary, it was common to find numerous regulatory variations on every single element of the case. In more recent times, another factor further complicated this issue: until the mid-thirties, certain "pirate acts" were considered simple criminal acts, because of the lack of a legal framework of the piracy.

Among the obstacles to a universal discipline of piracy, the lack of a decisive contribution of the legal doctrine, having not been able to find points of agreement, was not irrelevant. In any case, despite the difficulties in finding a universal consensus on the discipline to adopt and the fact that authoritative exponents of the doctrine deemed the stipulation of an international agreement on the sup-

pression of piracy unnecessary, being the customary law considered sufficiently comprehensive, in the early twentieth century the idea of giving an organic and universal arrangement on this issue began to spread among governments. Under the pressure of the League of Nations, a path was undertaken that, over more than half a century, has seen the succession of studies, researches, debates and international agreements, to finally reach the codification of piracy contained in articles 101 and following items of the Convention on the Law of the Sea signed in Montego Bay in 1982 under the guidance of the United Nations and ratified by many states of the international community. Although these articles represent the point of arrival of international consensus, and a decisive step forward with respect to the chaotic disorganization that had reigned for centuries on the subject, following the recent events that have seen the revival of piracy, in particular in the Strait of Malacca and the off coast of Somalia, new needs for further development of the matter seem to be making headway. New pirates, new attack strategies and more advanced technologies are now making the phenomenon increasingly complex and difficult to pursue and to frame, so that even the definition of piracy given by article 101 of UNCLOS is no longer sufficient to include the contemporary methods of piracy. (Graziani 2009, 63)

The road to a shared definition of piracy

If the article 101 of the UNCLOS turns out to be the point of arrival of the consensus on the definition of piracy, the process that led to its adoption begins well before 1982. (Conférence des Nationes Unies sur le droit de la mer 1982)

A first step was taken already in 1924, when the League of Nations commissioned the League Council to gather a committee of experts, giving them a mandate to identify the "subjects of international law, the regulation of which by intentional agreement would seem the most desirable and realizable at the present moment." (League of Nations, Fifth Assembly Recordings, Plenary Session 1924) Piracy was also included among the subjects that the committee deemed important to codify.

The result of this choice was the so-called *Matsuda Draft*, a two-hand text elaborated by the Japanese speaker Matsuda and the Chinese representative Wang Chung Hui, which, however, was not followed: the text was abandoned and piracy was ousted from the list of subjects to be codified, because it was believed that finding a universal agreement on the subject would have been too difficult and that, in any case, the threat deriving from piracy was not large enough to require a codification. (S. A. 1926, 229)

An important role was plaid by the charismatic figure of the representative of the Romanian delegation, Mr. Vespasian Pella, who in 1928 decided to deepen the thesis on the repression of piracy, already exposed two years earlier in a report presented to the Committee of Experts of the League of Nations. According to this report, piracy consists of all acts of violence against people and depredation against objects carried out by a private person acting with *animus furandi*, in places not subject to jurisdiction of any state, undermining the security of the navigation. From the renewed analysis of Pella, the peculiarity and relevance of maritime piracy in international law emerged, because destined to be a point of

reference for the repression of all infringements of common law. (Pella 2008, 260)

Pella's reflections were placed at the basis of a new Convention Draft drawn up in 1932 by the prestigious Harvard Law School, which proposed to collect and summarize the state provisions and the doctrine on piracy. (Dubner and Green 2010, 441) Although the work done by the Harvard research team did not culminate directly in the adoption of a convention, the results of the research conducted were of great inspiration to the Commission of International Law, previously charged with drawing up a draft article on piracy. The result achieved after the Second World War was subject of the scrutiny of the United Nations Conference on the Law of the Sea in Geneva. But in this context, the identification of a unique definition of the case was complicated by the difficulty with finding a vision shared by most of the states present on what the constitutive elements of the crime should be.

There were different points of discussion about the concept of piracy, particularly about who could be considered the author of a piracy act, about the purposes of the piracy act and where the piracy act could be considered. Only later they come to discuss the means by which the crime of piracy should be committed. Further contrasts arose, even on the very usefulness of proceeding with a codification of the matter. The countries of the communist bloc, following the proposal of Czechoslovakia and Albania, tried to oppose the project of regulating piracy, believing that the results of the work carried out so far had not led to adequate results. They therefore proposed to exclude all the articles elaborated by the Commission, and in its place they required the insertion

of a single article formulated by the *Conférence des Nationes Unies sur le droit de la mer, Documents Officielles* as follows: "Tous les États sont tenus de porsuivre et de punir les actes de piraterie, tels qu'ils sont définis par le droit international actuel, et de coopérer, dans toute la mesure du possible, à la repression de la piraterie." (Convention des Nations Unies sur le droit de la mer 1982)

What these countries intended to object was the choice made by the Commission not to include crew members of foreign military ships among the possible perpetrators of piracy. The critics became so harsh that, when signing, ratifying and joining, many states denounced the set up established by the rules of the new Convention as not suitable for ensuring freedom of navigation, because it did not include some actions that they would have, in their view, had to fall under the piracy case. Despite all the difficulties that emerged during the preparatory work, in 1958 the Intergovernmental Conference managed, at the end, to transform into a Convention a codification project of the law of the high seas including a widely shared notion of maritime piracy, inclusive of all constituent elements of the case listed in detail, and a regime of repression of the phenomenon (articles 14 to 21). The Convention on the High Seas, opened for signature in Geneva on April 29, 1958, entered into force on September 30, 1962. (Koutrakos 2014, 56)

The success of the Convention adopted, regarding the eight articles dealing with maritime piracy, is testified by the fact that another convention, more than twenty years later, has faithfully taken up its contents: the United Nations Convention on Law of the sea adopted in Montego Bay in 1982, in fact, presents almost the same articles, except for the

replacement of some terms. (Graziani 2009, 65) Let us now analyze in detail the contents of the most significant stages of the coding path in the field of piracy: starting from the Harvard Draft Convention on piracy of 1932, passing through the Geneva Convention on the High Seas of 1958, we will finally reach United Nations Convention on the Law of the Seas of 1982.

The Harvard Draft Convention on Piracy

Harvard's faculty of law, following the declared intent of the League of Nations to proceed to a codification of international law by means of an Expert Committee, in 1930 decided to undertake a research project in support of the Expert Committee. The ultimate goal that the Harvard Law School set itself was to form a draft convention for each topic and, for this purpose, a special Advisory Committee was set up within the faculty to be placed at the helm of the project with a Rapporteur appointed to every single topic. Maritime piracy was also included among the various subjects to be researched. Despite the failure of the Matsuda Draft, the strong resonance of the Vespasian Pella's thesis affirming the importance of piracy as a criminal offense suitable to become a point of reference for the future development of international criminal law, was a great stimulus for researchers.

The Rapporteur responsible for following the work on piracy was Professor Bingham of the Stanford University, who, together with a group of technical collaborators on the subject, managed to develop a text that later became known as the Harvard Draft Convention on Piracy. The merit of the

work carried out by the research team was to elaborate a much more detailed text than Matsuda's in various aspects. The draft agreement was accompanied by a document that exhaustively illustrated what the most relevant piracy laws at the time were, and a report that summarized the whole doctrinal debate on piracy until 1932, while Matsuda Draft did not mention any doctrinal opinion, only various national practices or jurisprudential cases were listed. (Geiss and Petrig 2009, 38) The articles of the Draft Convention on Piracy (S. A. 1932, 26) were 19 in total and the definition of the behaviors that integrate the case of piracy was given in article 3:

> "Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
> 1) Any act of violence or of depredation committed with intention to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without *bona fide* purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
> 2) Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
> 3) Any act of instigation or of an intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article."

In the following article, the convention provides the definition of a pirate ship:

> "A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of article 3, or to the purpose of committing any similar act within the territory of a state by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of article 3, or after the commission of any similar act within the territory of a state by descent from the high sea, as long as it continues under the same control."

The articles 3 and 4 have inspired the current definition of piracy (Ellerman and Forbes 2011, 24), contained in article 101 of UNCLOS. In fact, compared to the previous attempt of the *Matsuda Draft*, the behaviors that now went to integrate the case were specifically listed and the hypothesis of attacks "in the air" or "coming from the air" was also included, as also foreseen by article 101 of UNCLOS, where we speak of "aircraft."

The work carried out by the group of researchers of the Harvard Law School proved to have great value and did not go unnoticed: in the mid-1950s, in fact, it would be placed at the basis of the work carried out by the Commission on International Law which then will lead to the Convention of the High Sea of 1958, which, in turn, will be fundamental for the adoption of UNCLOS.

The Geneva Convention on the High Seas

In 1954 the United Nations General Assembly commissioned the International Law Commission to lay the foundations for a future international agreement on the law of the sea. The resulting text was prepared by the Dutch speaker François and published in the same year under the title of *Regime of the High Seas*. The six articles on international piracy that the text contained were mostly a French translation of the 1932 *Harvard's Draft Convention on Piracy*. In 1958 the General Assembly decided to hold a conference on the Law of the Sea, which took place in Geneva from February 24 to April 27 of the following year. 86 states participated in the conference, in addition to specialized United Nations agencies and other intergovernmental organizations, but the attention paid to the legal regime of piracy was not particularly relevant. Piracy was, in fact, more than anything else now perceived only as a historical phenomenon, and not as a potential and dangerous threat, and even a proposal emerged from the Uruguayan delegation, which was then not accepted, to omit any provision in the matter, justifying that piracy "no longer constituted a general problem." (United Nations 1958, 78) An amendment was also subsequently submitted by the delegations of Czechoslovakia and Albania, to the unapproved final, with which an attempt was made to group all the forecasts regarding the phenomenon in a single article stating that "All states are bound to take proceedings against and to punish acts of piracy, as defined by present international law, and to cooperate to the full possible extent in the repression of piracy." (United Nations 1958, 78) To justify the proposed amendment, it was alleged that it would be disproportionate to introduce eight articles

in the draft text concerning a problem no longer perceived as contemporary, and the Romanian delegation also demonstrated the same opinion.

Despite the unfavorable views expressed by these delegations, the majority of states participating in the conference, however, remained firm on the need to provide for a detailed regime of piracy and the eight articles of the draft were voted on and therefore included, partially amended, in the Convention on the Law of the High Seas of April 29, 1958, to numbers 14 and following. But the path to obtaining the approval of these eight articles was not easy: there were numerous problems that the conference had to face, given the great confusion that had prevailed for centuries on the subject and the huge variety of forecasts in the individual national laws so that the debate touched on all the crucial issues of the case. Regarding possible material perpetrators of the fact, the doubt was raised whether, in addition to the acts committed by simple individuals, the violence and depredations by the crew of military ships should also be included in the concept of piracy. (Munari 2009, 336) Great supporters of the inclusion thesis were the Soviet Union and the entire block of the communist countries, also following an episode that occurred in the China Sea: in 1954, military units of the Nationalist government of Formosa captured some commercial ships, and the communist block reacted to the news with a harsh piracy charge against the Chinese government in exile. The final choice of the Geneva Conference, however, moved in the sense of not including among the material authors of the fact also members of crews of state military forces, because it was believed that this was contrary to international maritime custom.

As for the purposes of piracy, it was discussed whether the acts of the case should be carried out exclusively for *animus furandi*, therefore for the exclusive purpose of plundering and plundering, or if they could include different purposes, both private and politically subversive. The doubts about the place where the crime was committed were opposed to the thesis of the understanding of acts carried out only on the high seas or in places not subject to the jurisdiction of any state, to the thesis of the prosecution of acts of violence and depredation committed also in territorial waters. Although in Geneva, at the end, the first thesis prevailed, it is worth mentioning, as it will be discussed in greater detail later, that the problem re-emerges today very lively and is concrete especially in the Somali seas, where the new pirates, equipped with small fast boats, prefer far offshore attacks. On the other hand, as regards to the nature of the command envisaged by international law on piracy, it was debated whether states should be considered obliged to repress the phenomenon or if there was only a generic duty to cooperate in law enforcement.

Finally, with the progress of the works, they also came to discuss what means could be used to carry out piracy: in particular, the need was felt to establish whether, in addition to ships, aircraft could also be included. In this second direction, the work of the Commission ultimately developed. The balance between the positions of the multiple delegations involved led to a result in the regulation of the matter that did not differ much from Pella's thesis, but above all from the Harvard Law School paper under the guidance of Professor Bingham. Article 15 of the Convention states:

"Piracy consists of any of the following acts:

1) Any illegal act of violence, 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:

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

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.

2) 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.

3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article."

The influence of the Harvard Draft is immediately evident, but with respect to the definition of piracy provided therein, in addition to any act of violence and depredation, acts of detention are included among the material conduct. Instead, the references to the intent with which the acts must be carried out disappear ("intent to rob, rape, wound, enslave, imprison or kill a person or with the intent to still or destroy property"), only the need remaining that the perpetrators of the facts act by pursuing private ends.

In article 17 of the Convention, a definition of a pirate ship is given, which is also similar to that contained in the Harvard Draft, but the provision is lacking here that a ship remains a pirate even if the commission of acts falling under the piracy case occurs in territorial waters following the descent from the sea: "A ship or aircraft is considered a pirate ship or

aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act."

The Geneva Convention then provides that who commits the acts described in article 15 is the member of the crew of a ship or a state aircraft or who mutinied and have taken total control of the vehicle—such acts must be assimilated to those carried out by a private vehicle. Regarding the conservation of the nationality of the ship or aircraft responsible for piracy, the provisions established by the laws in force in the state of origin of the vehicle are valid: therefore, there is no mandatory loss of the nationality of origin when carrying out piracy acts and this will happen only if contemplated by internal laws. The Convention, then, in article 19, transposes the principle of universal jurisdiction establishing that, it is up to any state to capture pirate vehicles on the high seas or in places not subject to any state jurisdiction. This capture, according to article 21, however, can only be carried out by military ships or aircraft, or by means in government service and authorized for these purposes. The decision of the penalties that must be imposed on those responsible for piracy and any measures that must be applied with regard to captured ships, is still, according to article 19, and as a corollary of the principle of universal jurisdiction, to the courts of the bad state, held to judge, however, in respect of the rights of any third parties in good faith. In the event that a state proceeds to capture a vehicle, suspecting that it is a pirate ship or aircraft, but without such suspicion being supported by appropriate circumstances, it will then be liable to compensate for any

damage thus caused to the state of nationality of the ship or aircraft illegitimately caught.

The provisions of the Convention, and not only those relating to piracy, were immediately met with general success, confirmed by the fact that, after entering into force on September 30, 1962, it has 63 participating states and has been almost totally resumed by the Convention on the Law of the Sea adopted in Montego Bay in 1982.

Piracy under the United Nations Convention on the Law of the Sea (UNCLOS)

Between 1973 and 1982, the Third United Nations Conference on the Law of the Sea was held, which led to the adoption, on December 10, 1982, in Montego Bay, of the United Nations Convention on the Law of the Sea (UNCLOS). The attention paid to piracy was, as for the Geneva Convention on the High Sea, rather marginal: the articles dedicated to the problem remained eight, from 100 to 107, and mostly reproduced the content of those of the Geneva Convention. However, some slight changes, compared to the codification of 1958, were reported, thus giving the new discipline a firmer approach, already evident from the letter of article 100 of the UNCLOS. With respect to the same provision foreseen in article 14 of the Geneva Convention, the programmatic provision contained therein calls the states to collaborate in fighting piracy with a greater tone decision: if previously the states were only required to cooperate "within the limits of possible" (Geiss and Petrig 2009, 38), the new article 100 now refers to "maximum collaboration" in tackling the phenomenon (Graziani 2009, 70).

To better understand the discipline of the matter according to the Montego Bay convention, it is useful to proceed separately to an analysis of the definition of piracy and half pirate, contained in articles 101 and 103 of the UNCLOS. From this point, it is necessary to go into the merits of the discipline provided by the remaining articles, and, finally, to analyze in detail what is the legal position of ships on the high seas and the powers attributable to states in the fight against piracy, having regard also to other articles of the convention.

In article 101, UNCLOS provides a definition of piracy, almost entirely taken from the analogous article 15 of the Geneva Convention:

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

To fully understand the case as envisaged by the Convention in question, it is useful to analyze its individual constituent elements in detail.

The material conduct that integrates piracy is made up of all illegal acts of detention or violence to things or people or acts of dispossession or depredation (such as robbery and looting). The concept of violence, as understood by the Convention, does not only include material violence, but also moral violence, carried out with serious threats against the life or integrity of the passive subjects of the crime. If there is no violence, however, for example in the case of subtraction, from one individual to another, of a ship or its cargo, there is no piracy: in this case we speak of fraudulent conduct, not an integral piracy. Another circumstance not covered by this case is the simple possession of a ship or its cargo, when they have emerged from the sphere of possession of the owner following events independent of the will of those who appropriate it (for example, due to the occurrence of a shipwreck, or due to the loss of cargo of the ship underway, etc.).

In order to distinguish piracy from other materially similar criminal figures (e.g. maritime terrorism), it is also essential to have regard to the private nature of the acts committed, which can emerge from the same points of view. Firstly, it requires that material perpetrators of the crime are members of the crew of a private ship, acting on their own behalf and not in execution of a government delegation. In this context, we should regard the debate that took place during the work for the Geneva Conference on the possibility that the authors could also be equipped with military ships, and on its solution in the negative, already mentioned in the previous paragraph. Another element in which the private nature of the act must be manifested is the good: the perpetrators of the fact must not act with subversive political purposes

but for private purposes. According to the traditional order, the requirement is integrated when the acts are carried out with *animus furandi*, that is, with the intent to rob for profit. It seems, however, that it cannot be excluded from the private ends required by article 101, even if the perpetrators of the acts do act for private purposes other than profit: this is the case, for example, of the robbery, kidnapping or violence committed for hatred or revenge. (Munari 2009, 336)

Proceeding then in the analysis of the elements that make up the case of piracy according to article 101, it is necessary to mention the need for the presence of two ships: the one that attacks, or the pirate ship, and the one victim of the attack, which can in this case be both private and public. The criterion of the two ships allows to distinguish the case of piracy from simple acts of violence, robbery or kidnapping, carried out on board of a single ship on the high seas. The only exception admitted to the criterion of the two ships, results from letter (a) of article 101: the hypothesis of piracy committed by the crew or passengers of a ship (or an aircraft) to the detriment of people or goods located in a territory not under the jurisdiction of any state, and therefore not on board of a second ship (or of a second aircraft).

Finally, to complete the analysis of the constituent elements of the case in points of the article 101, the *locus commissi delicti* is essential: in order to speak of piracy according to UNCLOS, the acts must be carried out on the high seas or in a territory not subject to the jurisdiction of any state. Pursuant to this provision, therefore, the same material conduct held on the high seas (or in a place outside the jurisdiction of any state) or in territorial waters, integrates different cases. In the first case, it is actually piracy according to *iuris*

gentium, to which the discipline of UNCLOS refers (and the Geneva Convention), in the second case there are, instead, acts of armed robbery at sea, otherwise defined as piracy by analogy, whose prosecution is left to the power of the state in whose territorial waters they are committed, according to the rules in force therein.

If the constituent elements of the case are those analyzed above and contained in letters (a), (c) and (b) of article 101, they identify two other behaviors similar to piracy: the conscious and voluntary participation in the realization of pirate acts and every action which aims to instigate, encourage and encourage its commission. With these forecasts it was intended to create a sort of opening of the case to the case in which, in practice, a real act of piracy has not yet been completed, but a ship and the people on board are sailing with the intention of committing one. To be better understood, this provision should be read in conjunction with article 103 of the Convention, which provides a definition of pirate ships: "A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act." It is undoubtedly evident the practical usefulness of these forecasts providing states with important tools for the prevention of piracy: in fact, they have the right to stop the ship before the act is completed as well as a valid legal title to proceed to the indictment of the people on board. (Graziani 2009, 70)

The new concept of Piracy under UNCLOS

It has already been mentioned that the Montego Bay Convention dedicates eight articles, from 100 to 107, to piracy, which are largely an almost faithful reproduction of the same articles of the 1958 Geneva Convention. It has already been seen that, in article 100, there is a programmatic provision on the need for cooperation between states in the fight against piracy, while in articles 101 and 103 there is a detailed description of the conduct that integrates the actual case of piracy and the half pirate. In the previous paragraph, it was specified that, according to UNCLOS, the pirate vehicle can only be made up of private ships or aircraft. This is generally true, although there is an exception, foreseen by article 102. This exception, however, confirms the general rule: according to this article, if the acts integrating the material conduct pursuant to article 101 are committed by a public ship or aircraft, if the crew on board has mutinied and taken control of them, they equate to acts committed by private vehicles. In such a circumstance, we want to free the flag state of the vehicle from responsibility for the crimes committed by the staff and the persons on board, who have rebelled and acted on their own behalf, thus carrying out real piracy. As for the loss or preservation of the nationality of the ship or aircraft, article 104 intervenes, which does not differ from what was previously provided for in the Geneva Convention in this regard. If the vehicle assumes the status of pirate vehicle, the nationality of origin of this is preserved, if required by the laws of the flag state. Finally, the last three articles of UNCLOS regarding piracy provide for the regime for the seizure of pirate vehicles.

Article 105, reproducing the text of article 19 of the Geneva Convention, sets out the principle of universal jurisdiction which is applied to piracy as a crime *iuris gentium* with respect to the normal regime from the high seas. The seizure of a pirate ship on the high seas (or in a place outside the jurisdiction of any state), and the consequent arrest of the subjects on board, is incumbent on any state indiscriminately by the flag or nationality of the guilty of piracy. Furthermore, article 105 prescribes that the courts of the bad state must decide the penalties to be imposed and the measures to be applied against the seized means (taking into account the rights of third parties in good faith).

Article 106 is also the almost complete reproduction of the text of an article of the Geneva Convention, number 20, and provides for the case (not at all impossible in practice) of the capture of a ship unfoundedly suspected of piracy by a vehicle in public service. In this circumstance, lacking sufficient evidence to deduce that the ship is committing or is about to commit the acts described in article 101, the captive state is liable towards the flag state of the seized ship for the damage caused.

Finally, at the end of the discipline concerning piracy, article 107 of the UNCLOS clarifies what are the means authorized to accomplish the capture of pirate ships and to conduct operations to combat piracy: only state ships and aircraft, particularly warships and military aircraft. In fact, the article in question reads: "A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."

The measures given to States to combat piracy under UNCLOS

As we have seen, the Geneva Convention on the High Seas first, and the Montego Bay Convention on the Law of the Sea then, transpose and codify, in the matter of piracy, a principle already in force at international level, that is, the principle of universal jurisdiction. This principle represents, however, an exception to the normal legal regime valid for the high seas. In fact, there is no particular territorial sovereignty and respect for the law must be guaranteed by the individual states, called to govern on ships flying their flag. The registration of a ship thus becomes the technical means of identifying which state from time to time, in practice, is legitimized to exercise its jurisdiction. (Reale 2018, 37) The corollary of this system is that, under international law, no state is normally authorized to interfere with the freedom of navigation of a vessel flying another flag, unless the master of that vessel, or the state of origin of the same, does not grant the right to visit and control. This exclusivity of police powers on national ships, however, sometimes finds exceptions, given by the need to contrast and punish the damage to fundamental interests of the international community.

Piracy, as already mentioned, is one of those behaviors that harm fundamental interests and, in contrast to it, international law confers states with a series of powers: some specifically concerning only it (i.e. the right to seize the pirate vehicle and of the assets aboard and the right to arrest those responsible for piracy), others instead concerning, in general, various criminal cases (in this case it is the right to visit and the right to pursue). Article 110 of the UNCLOS entitles right of visit (in English right of visit) and provides

that a ship in government service, which in the high sea is faced with other means, can suspect, based on reasonable circumstances, that said vehicle is a pirate vehicle. First of all, the governmental ship has the right to approach it and proceed with the control of the documents and its nationality (flag investigation right). Secondly, if the suspicions persist, further checks can be carried out with the utmost respect. If at the end, however, these suspicions are unfounded, the ship that has undergone the checks must be compensated for any damage or loss caused. If, on the other hand, it emerges that the ship is pirated, the content of the article 105 UNCLOS will be applied.

Basically, it is possible to affirm that the right of visit granted to military ships or government services of a state actually consists of three different faculties: the right to order the arrest of the suspect vehicle in order to make a visit, to board that vehicle and, finally, to carry out the necessary checks on it. As for the right of hot pursuit, however, article 111 establishes that a coastal state has the right to have foreign flags flying and pursued and stopped even on the high seas, when it has founded reason to suspect that they have violated laws or regulations in force within its territory. In this case, however, essential requirements are that the pursuit begins in inland waters, in the territorial sea or in the contiguous area of the state whose right is allegedly infringed and that it is continuous and never interrupted. In order for the pursuit to begin, it is also required that the coastal state authorities have issued a stop order with a visual or sound signal at a sufficient distance for it to be perceived by the foreign ship ordered and that the operation is carried out by military ships or in government service enabled for this. If the right of visit and the right

of pursuit are attributed to the states for the (suspected) commission of a multiplicity of criminal hypotheses, article 105 of the UNCLOS then sets out a series of powers provided specifically only for the fight against piracy: (a) the power to seize the pirate vehicle (or vehicle captured by piracy and kept under pirate control); (b) the power to arrest persons held responsible for piracy; (c) the power to requisition items on board the pirate ship.

Finally, it is important to note that the alarm generated by piracy in the international community is such as to allow states to take preventive measures: that is, a state has the right to act not only against a pirate ship caught in the commission of piracy or immediately after, but also when (there is legitimate suspicion that) the means is about to perform such acts, although it has not yet put them into practice.

References

Braccesi, Lorenzo. 2004. Pirateria nell'adriatico antico. Venice: Hesperia.

Conférence des Nationes Unies sur le droit de la mer. 1982. United Nations. https://un.org/depts/los/convention_agreements/texts/unclos/unclos_f.pdf (accessed 14th February 2020).

Convention des Nations Unies sur le droit de la mer. 1982. United Nations. https://https://treaties.un.org (accessed 12th February 2020).

Dubner, Barry; Green, Karen. 2010. On the Creation of a New Legal Regime to try Sea Pirates. Journal of Maritime Law & Commerce 41, no. 3, 439–464.

Ellerman, Bruce A.; Forbes, Andrew. 2011. Piracy and Maritime Crime: Historical and Modern Case Studies. Newport: Naval War College Press.

Fiore, Pasquale. 1890. Le droit international codifié et sa sanction juridique. Paris: Hachette.

Geiss, Robert; Petrig, Anna. 2011. 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.

Graziani, Francesca. 2009. Il contrasto alla pirateria marittima nel diritto internazionale. Naples: Editoriale Scientifica.

Hefter, Andre. 1873. Le droit international de l'Europe. Paris: Cotellon Editor.

Kluber, J. L. 1861. Droit de gens moderne de l'Europe. Paris. EL Editor.

Koutrakos, Panos. 2014. The Law and Practice of Piracy at Sea: European and International Perspectives. Oxford: Hart Publishing.

Kraska, James. 2011. Contemporary Maritime Piracy. Santa Barbara: Praeger.

League of Nations. 1924. League of Nations Fifth Assembly Recordings, Plenary Session 1924. United Nations. https://archive.unu.edu (accessed 9th February 2020).

Leeson, Peter T. 2009. The Invisible Hook: The Hidden Economics of Pirates. Princeton: Princeton University Press.

Munari, Francesco. 2009. La "nuova" pirateria e il diritto internazionale. Spunti per una riflessione. Rivista di Diritto Internazionale 92, no. 2, 325–362.

Pella, Vespasien. 1928. La répression de la piraterie. Leiden: Brill.

Reale, Giuseppe. 2018. La moderna pirateria marittima. Problematiche giuridiche, proposte, possibili soluzioni. Campobasso: Edizioni Scientifiche.

Rediker, Marcus. 2004. Villians of All Nations: Atlantic Piracy in the Golden Age. Boston: Beacon Press.

S. A. 1926. Supplement to the American Journal of international Law. New York: Cambridge University Press.

S. A. 1932. Harvard Research in International Law, Draft Convention and Comment on Piracy. American Journal of International Law 26. Supplement. New York: Cambridge University Press.

Scharf, Michael P. 2015. Prosecuting Maritime Piracy: Domestic Solutions to International Crimes. New York: Cambridge University Press.

United Nations. 1958. Conference on the Law of the Sea, 24 February–27 April. Official Records. https://legal.un.org/diplomaticconferences/1958_los/ (accessed 14th February 2020).

United Nations. 1958. Summary Records of the International Law Commission, 327th Meeting 1955. New York: United Nations.