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**Towards the prosecution of  
maritime piracy before the  
International Criminal Court**

**Em direção à persecução penal  
da pirataria marítima no âmbito  
do Tribunal Penal Internacional**

Amr Elhow

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THE COMMON HERITAGE OF MANKIND IN  
INTERNATIONAL LAW: PAST, PRESENT AND FUTURE

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# Towards the prosecution of maritime piracy before the International Criminal Court\*

## Em direção à persecução penal da pirataria marítima no âmbito do Tribunal Penal Internacional

Amr Elhow\*\*

### Abstract

Piracy has been a serious threat to the international community throughout history. Considering freedom of navigation as a common human issue, piracy was denounced by customary international law prior to its official codification. Thus, it was acknowledged as an international maritime crime and an infringement upon the principles of international law, as stated in Article 101 of the 1982 United Nations Convention on the Law of the Sea. Indeed, the judicial complexities encountered by criminal justice in punishing the offenders of these crimes despite the establishment of universal jurisdiction make it difficult for international courts to make judicial decisions regarding their perpetrators. Given the absence of a dedicated international court for piracy, prosecutions often take place at the national level, which creates many legal and procedural issues, ultimately hindering the effective punishment of these offenders. Furthermore, the involvement of pirate leaders and the recruitment of young pirates and children present additional legal complexities that could be considered grave infringements of human rights as outlined in international humanitarian law that warrant the jurisdiction of the International Criminal Court (ICC). Since the enactment of the Rome Statute, piracy has increased notably, especially in recent years, which represents the «golden age of piracy». Logistical and judicial challenges have limited criminal accountability for piracy. This study has as its main aim to tackle contemporary issues associated with modern maritime piracy. by the hypothesis of the possibility of the prosecution of maritime pirates before the International Criminal Court prosecuting pirates before the International Criminal Court, given the inadequacy of global judicial jurisdiction and the limitations of national legal systems in addressing maritime piracy. while the sub-objectives focus on specific legal issues, including the absence of a standardised definition of maritime piracy in international agreements and the varied interpretations of legal texts. Additionally, the study aims to elucidate the justification for invoking the jurisdiction of the International Criminal Court, framing piracy as a crime against humanity. depending on the comparative method of the international agreements and the analysis of the private characteristics of these crimes and its commission methods.

**Keywords:** maritime piracy; criminal justice; challenges; interpretation; universal jurisdiction; crime against humanity.

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## Resumo

A pirataria tem representado, ao longo da história, uma grave ameaça à comunidade internacional. Considerando a liberdade de navegação como uma questão comum à humanidade, a pirataria foi condenada pelo direito internacional consuetudinário antes mesmo de sua codificação oficial. Assim, foi reconhecida como crime marítimo internacional e como violação dos princípios do direito internacional, conforme disposto no Artigo 101 da Convenção das Nações Unidas sobre o Direito do Mar de 1982. De fato, as complexidades judiciais enfrentadas pela justiça penal na punição dos autores desses crimes, apesar do estabelecimento da jurisdição universal, dificultam que os tribunais internacionais adotem decisões judiciais contra seus perpetradores. Diante da ausência de um tribunal internacional específico para a pirataria, as perseguições ocorrem, em regra, no âmbito nacional, o que gera numerosos problemas jurídicos e processuais, prejudicando a punição efetiva dos infratores. Ademais, a participação de líderes piratas e o recrutamento de jovens e crianças apresentam complexidades jurídicas adicionais que podem ser consideradas graves violações de direitos humanos, à luz do direito internacional humanitário, e que justificariam a jurisdição do Tribunal Penal Internacional (TPI). Desde a entrada em vigor do Estatuto de Roma, a pirataria aumentou consideravelmente, sobretudo nos últimos anos, o que representa uma “era de ouro” da pirataria. Desafios logísticos e judiciais têm limitado a responsabilização penal por esse crime. Este estudo tem como objetivo principal abordar questões contemporâneas relacionadas à pirataria marítima moderna, partindo da hipótese da possibilidade de perseguição de piratas marítimos perante o Tribunal Penal Internacional, considerando a insuficiência da jurisdição judicial global e as limitações dos sistemas jurídicos nacionais no enfrentamento desse fenômeno. Os objetivos secundários concentram-se em questões jurídicas específicas, como a ausência de uma definição padronizada de pirataria marítima nos acordos internacionais e as interpretações divergentes dos textos jurídicos. Além disso, o estudo busca justificar a invocação da jurisdição do Tribunal Penal Internacional, enquadrando a pirataria como crime contra a humanidade, com base no método comparativo dos acordos internacionais e na análise das características próprias desse crime e de seus métodos de execução.

**Palavras-chave:** pirataria marítima; justiça penal; desafios; interpretação; jurisdição universal; crime contra a humanidade.

## 1 Literature review

**Maggie Gardner (2012)** concluded that the aspects of universal jurisdiction prosecution are applied uniformly and appropriately across domestic jurisdictions, with the necessary legal authority to address piracy, the real difficulties appear in the implementation of this law within national legal systems, particularly in individual cases, compounded by a shortage of case law. The task involves ensuring that early case law within each jurisdiction is analyzed, and international law is applied correctly. **Aaron N. Hannibal (2015)** concluded that the concept of “private purposes” remains vague and ill-defined, particularly since it has not been clear whether this concept extends beyond the actions of rebels to include actions by independent individuals or organizations pursuing political objectives, since only political acts are prohibited from “private purposes.» As a result, subsequent case law have proven to be crucial in defining the parameters of the exception and determining what constitutes exclusively political activities. However, subsequent state practice shows a continuing ambiguity that has failed to clearly define the boundaries of “private purposes.» States have not taken much positive action in this regard, and their views have been divided. The practices of political activists have often been characterized by passivity, negligence, and inaction. This inaction may be driven by a variety of political factors, complicating the process of obtaining a legal opinion that results in positive action that achieves criminal justice. **Yvonne Dutton (2010)** has focused specifically on judicial solutions to contemporary piracy, suggesting that prosecuting pirates by the International Criminal Court (ICC) might help to close the gap in accountability. The international community’s efforts to ensure pirates face justice and held accountable for their crimes could potentially deter at least some individuals from engaging in such activities. Even if not all piracy has stopped, **Elhaw (2024)** deduced that the ambiguity surrounding the notion of piracy in international treaties, coupled with the inadequacy of global judicial authority to prosecute offenders—often due to the incapacity of national courts in certain nations—has undermined

international criminal justice. This deterioration is particularly pronounced as such crimes increasingly contravene the tenets of international humanitarian law, highlighting the necessity of exploring legal grounds for establishing the authority of international criminal justice, epitomized by the ICC.

## 2 Introduction

Understanding and implementing international maritime law in all its aspects has been of great importance throughout the ages, especially in the modern era, where most of global trade takes place via sea routes. The lack of harmony in international maritime law<sup>1</sup> can lead to economic disruptions around the world. This reinforces the necessity for international maritime law governance to guarantee the security for all states all over the world.

Piracy accounts for a significant ancient phenomenon that has been recognized since the early maritime explorations of mankind, coinciding with the emergence of traditional international law theories in both closed and open seas<sup>2</sup>. Since that time, recurring cases have arisen in maritime areas, especially after the codification of international customs as a cornerstone of public international law, which promoted the emergence of crimes that endanger maritime freedom and the flow of international trade across seas and rivers, negatively affecting the global community interests. Accordingly, international jurisprudence has decided that these perpetrators are considered enemies of humanity and must be tried and punished. The prosecution of these criminals falls within the universal jurisdiction, which grant each state the right to try those it can capture in accordance with the stipulations of the 1958 Geneva Convention on the High Seas and the 1982 United Na-

tions Convention on the Law<sup>3</sup> of the Sea (UNCLOS). The scale of piracy and its associated risks have led the International Maritime Organization's Safety Committee to propose several recommendations to states aimed at preventing and addressing maritime armed robbery. The main recommendation advises States to establish and enforce jurisdiction over acts of piracy, stressing the importance of universally applying criminal jurisdiction, thus promoting the adoption of universal criminal jurisdiction over piracy, ensuring that perpetrators do not escape punishment, and applying this principle globally. As outlined in Article 19 of the 1958 Geneva Convention on the High Seas, "the courts of a state that has seized a pirate ship or aircraft shall have jurisdiction to impose penalties and take appropriate measures in respect of the ships, aircraft, and other property."<sup>4</sup>

The definitions of piracy in the 1988 and 2005 Conventions for the Suppression of Unlawful Acts against the Safety of Maritime Navigation are broad and comprehensive and include all types of attacks carried out by a vessel's crew or passengers against the vessel itself. Unlike the 1958 Geneva Convention on the High Seas and the 1982 UNCLOS<sup>5</sup> and included more geographically broad, not restricted to the high seas only, in contrast to the definitions contained in the 1958 Geneva Convention<sup>6</sup> and the 1982 United Nations Convention.<sup>7</sup>

<sup>3</sup> For further details regarding the significance of establishing UNCLOS. LE BRIS, Catherine. The legal implications of the Draft Universal Declaration of the Rights of Mankind. *Revista de Direito Internacional*, v. 14, n. 1, 2017. p. 156.

<sup>4</sup> BLUM, Jeffrey M.; STEINHARDT, Ralph G. Federal Jurisdiction over International Human Rights Claims: the alien tort claims act after *Filartiga v. Pena-Irala*. *Harvard International Law Journal*, v. 22, n. 1, p. 53-60, Winter 1981. (specifying that piracy falls under universal jurisdiction due to its heinous nature); Randall, 66 U Tex L Rev at 793-94 (cited in note 23) (specifying that the justification for universal jurisdiction over piracy stems from its violent and destructive nature, targeting ships of all nations). Additionally, Rear Admiral Brian M. Salerno (cited in note 5) emphasizes that ("Maritime piracy is a universal crime under international law because it places the lives of seafarers in jeopardy and affects the shared economic interests of all nations.").

<sup>5</sup> TIRIBELLI, Carlo. Time to update the 1988 Rome Convention for the suppression of unlawful acts against the safety of maritime navigation. *Oregon Revue of International Law*, v. 8, 2006. p. 133, 136.

<sup>6</sup> "Piracy" means unlawful acts as defined in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)." Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, 2.1 (2001).

<sup>7</sup> KONTOROVICH, Eugene. 'A Guantanamo on the Sea': the difficulties of prosecuting pirates and terrorists. *California Law Review*, v. 98, p. 243-276, 2010. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1371122###](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371122###). Access on: 11 Nov. 2024. (specifying that the SUA Convention has been applied only once.

<sup>1</sup> ATTARD, David Joseph; FITZMAURICE, Malgosia; MARTÍNEZ GUTIÉRREZ, Norman A. (ed.). *The IMLI Manual on International Maritime Law: the law of the sea*. Oxford: Oxford University Press, 2014. v. 1. p. 8.

<sup>2</sup> "Hugo Grotius, Dutch Huigh de Groot, (born April 10, 1583, Delft, Netherlands—died August 28, 1645, Rostock, Mecklenburg-Schwerin), Dutch jurist and scholar whose masterpiece *De Jure Belli ac Pacis* (1625; *On the Law of War and Peace*) is considered one of the greatest contributions to the development of international law. Also, a statesman and diplomat, Grotius has been called the 'father of international law.'" ONUMA, Yasuaki. Hugo Grotius: Dutch statesman and scholar. *Britannica*. Available at: <https://www.britannica.com/biography/Hugo-Grotius>. Access on: 13 Nov. 2024.

Despite the differences in jurisprudence in defining piracy, as well as the differences in definitions of piracy in international conventions, there is a consensus that piracy accounts for a crime under international criminal law, while customary practices and judicial interpretations confirm its classification as a prohibited act that deserves punishment when it occurs.<sup>8</sup> However, some of these laws were issued without scrutiny, and others sparked widespread legal and judicial controversy because of various factors, including the ambiguity in the interpretation of piracy, especially considering the different definitions set by international agreements for the crime of piracy.<sup>9</sup> Hence, the absence of a precise interpretation of the concept of piracy, and reliance on national jurisdiction to prosecute perpetrators of these crimes, according to universal jurisdiction principle. Additionally, difficulties arise when attempting to involve the ICC, given its current lack of jurisdiction over such cases. In addition to many legal aspects, including the difficulty of proving the incapacity of domestic judicial systems to prosecute offenders of these crimes, and the absence of any responsibilities in international agreements on countries that are a scene of preparation for these crimes within their land and sea borders, raise many problems that will be addressed in the study by addressing the shortcomings of the 1982 United Nations Convention on the Prosecution of Pirates, and the international element that characterized these crimes in recent years, in addition to its material element represented in criminal acts and the moral element represented in making a profit, through which they constituted crimes against humanity due to their extensive commission, the recruitment of children, and their regular re-commission by armed individuals, especially since they contradict the international humanitarian law principles, even if they fall outside the jurisdiction of Rome Statu-

te.<sup>10</sup> This study has as its main aim to discuss Challenges of prosecuting pirates by building a hypothesis the possibility of prosecuting the pirates before ICC, More specifically, the study aims to:

- Evaluates the reasons behind the failure of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to achieve effective piracy prosecutions.
- Evaluates differences between international agreements (Geneva Convention and UNCLOS and SUA Conventions) regarding piracy definitions.
- Explore the implementation challenges of applying universal jurisdiction to the piracy cases when used by the International Criminal Court.
- Clarify the most important justifications of requiring the resorting to the ICC jurisdiction to prosecute those severe pirates.

### 3 Methodology

This research follows a qualitative legal research methodology to analyse the procedural and legal system which handles maritime piracy prosecutions. The research undertakes a comprehensive comparison of three major international treaties, which include the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and both versions of the SUA Conventions in 1988 and 2005. The research analyses legal interpretations of the difference between the concepts of maritime piracy under the international agreements while investigating both customary international law together with state practices regarding applying universal jurisdiction. The research evaluates national legal legislation gaps which justify the necessity of resorting to the ICC, especially in light of the methods of its commission, including acts did not mentioned in the international agreements, such as children recruitment and the following the same

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This instance involved a an action initiated by the United States in Hawaii's District Court, targeting a ship's cook who had seized control of a fishing trawler. For more details on the case, refer to *United States v Shi*, 525 F3d 709 (9th Cir 2008).

<sup>8</sup> BASSIOUNI, M. Cherif. Universal jurisdiction for international crimes: historical perspectives and contemporary practice. *Virginia Journal of International Law*, v. 42, p. 81-161, 2001-2002. p. 110, 111.

<sup>9</sup> Regarding their early twentieth-century efforts to aid in codifying international law regarding piracy, the Harvard Research Draft authors observed the absence of consensus on the precise definition of the crime of piracy. Harvard Research in International Law Draft Convention and Commentary on Piracy ("Harvard Research Draft"), 26 *American Journal of International Law* 739, 749, 769 (Supplement 1932).

<sup>10</sup> UNGOED-THOMAS, Jon; WOOLF, Marie. Navy releases pirates caught red-handed: a legal loophole has helped scores of Somali gunmen escape justice. *The Times*, 29 Nov. 2009. Available at: <http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ecc>. Access on: 3 Sept. 2024.

methods of non-state actors, hence considered crime against humanity.

## 4 Study hypothesis

This study is led by the hypothesis of the possibility of the prosecution of maritime pirates before the international criminal court, as the national laws cannot effectively combat maritime piracy when applying universal judicial jurisdiction because of their inadequacy. In light of The absence of standardised definition in international agreements coupled with unclear procedures and challenges from involving the ICC creates major difficulties for global piracy response.

## 5 The golden age of maritime piracy (background)

The piracy golden age, which spanned the late 17th to 18th centuries, was centered in the Caribbean, where its waters and the Antilles emerged as a major arena for American piracy. The many islands and secluded bays served as a haven for adventurers and sea robbers for decades, amid European and American efforts to eradicate piracy within the area. Piracy emerged as a criminal activity in East Asia and South Asia during the 17th century, with European and merchant ships being targeted by various Asian pirates from different seas. Piracy has escalated in various regions, including the Philippines, Thailand, Indonesia, Nigeria,<sup>11</sup> Vietnam, Laos, Somalia, and the Gulf of Aden’ eastern coast, to a great level of danger, threatening the lives of innocent

<sup>11</sup> Piracy has increased off the Nigerian coast due to substantial maritime activity in the oil and gas sector, while land-based factors, such as unemployment, have been intensified by the Covid-19 preventive measures implemented in Nigeria. The increase in piracy in Nigeria is primarily motivated by demands for resource control, sabotage of oil and gas facilities, environmental degradation in Niger Delta communities, and political violence as local politicians vie for oil and gas revenue. The environmental contamination in oil-producing regions has adversely impacted fisheries, agriculture, and public health, hence exacerbating poverty and unemployment, which are precursors to piracy. Piracy along Nigeria’s coast is thus associated with the petroleum sector – which is crucial to the nation’s economy. ANELE, Kalu Kingsley. A critical analysis of the implications of Covid-19 on piracy off the Nigerian coast. *Revista de Direito Internacional*, Brasília, v. 18, n. 2, p. 108-133, 2021. Available at: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/7332/pdf#.> p. 109.

people in local communities. Piracy is no longer limited to stealing valuables from crews and cargo but also includes looting ships, holding hostages for ransom, and hijacking ships, which endangers navigation security across the national, cross-border, and global levels, as well as undermining global stability, highlighting the importance of this issue. The Red Sea holds critical significance in the western zone, specifically around the Strait of Aden and the Somali coast, due to its pivotal role in regional strategy, necessitating an enhanced military presence. This is achieved through the intervention of these countries to protect their interests by deploying naval armed forces.<sup>12</sup>

The International Maritime Bureau recorded 60 vessel-targeted piracy and armed robberies in the first half of 2024. This is down from 65 last year. Although piracy has decreased, the IMB<sup>13</sup> study states that “the concerning rise in violent occurrences underscores the necessity for sustained vigilance by the international community to safeguard all seafarers—especially during this time.” The 60 occurrences included 46 boardings, eight attempted boardings, four hijackings, and gunfire. Overall, attackers boarded 85% of ships. Despite fewer incidents, they have been more violent than pirates lately.

**Table 1** - The table clarifies most successful instances occurred while vessels were anchored or in transit. (IMB Report on Piracy and Armed Robbery: January to March 2024)

Status when attacked	BOARDED	ATTEMPTED	HIJACKED	FIRED UPON	Grand Total
ANCHORED	15	5			
BERTHED	1				
STEAMING	8	1	2	1	12
Grand Total	24	6	2	1	33

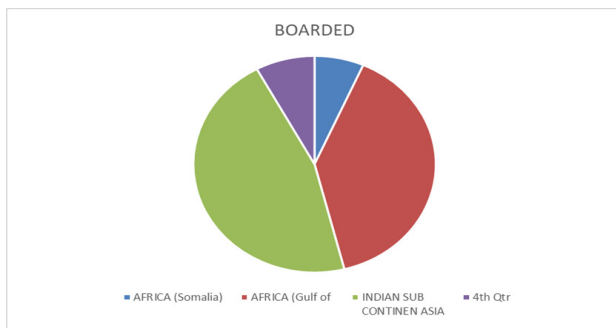
Source: IMB piracy and armed robbery report for January–June 2024. Available at: <https://www.piclub.or.jp/en/news/40048>.

<sup>12</sup> WEIR, Gary E. Fish, family, and profit: piracy and the horn of Africa. *Naval War College Review*, v. 62, n. 3, p. 15-30, Summer 2009.

<sup>13</sup> INTERNATIONAL MARITIME ORGANIZATION. Committees. *IMO*. Available at: <http://www.imo.org/About/Conventions/Pages/Home.aspx>. Access on: 15 Sept. 2013.



**Figure 1** - Clarifies the regions where incidents are reported



Source: REGIONS where incidents reported, IMB piracy and armed robbery report for January. Available at: [https://www.piclub.or.jp/en/etc/news-contact?post\\_id=40048](https://www.piclub.or.jp/en/etc/news-contact?post_id=40048).

## 5.1 Legal framework of piracy

### 5.1.1 The Geneva Convention 1958

The Geneva Convention emerged during the Cold War era. The International Law Commission's work was significantly shaped by the developments of the mid-20th century, during which Taiwanese nationalists frequently targeted vessels on route to harbors in China. These actions constituted a significant challenge to navigational liberty within the Far East. By October 1954, the Soviet authorities presented a proposal aimed to foster global collaboration against piracy in Chinese waters by including the Violation of navigation rights in the Chinese waters on the discussions of the UN General Assembly during its 9th session. The Soviet Union argued, depending upon the terms outlined in the Nyon Convention, that the activities of the Taiwanese fleet ought to be classified as piracy. Under the Soviet Union leadership, communist states like the People's Republic of Poland argued that politically driven actions carried out by both warships and private vessels ought be classified as piracy.<sup>14</sup> According to Article 15 of the 1958 Convention, piracy encompasses any of the aforemen-

<sup>14</sup> FIEDUCIK, Bartosz. The definition of piracy under article 101 of the 1982 United Nations convention on the law of the sea: an attempted legal analysis. *Białostockie Studia Prawnicze*, n. 10, p. 67-79, 2011. DOI 10.15290/bsp.2011.10.02. Available at: [https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/2009/1/BSP\\_10\\_2011\\_Fieducik.pdf](https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/2009/1/BSP_10_2011_Fieducik.pdf). p. 68.

tioned acts performed beyond the territorial jurisdiction of any state:

- Any act of violence or plunder intended to rob, assault, injure, enslave, detain, or kill an individual, or to seize or destroy property for personal gain without a legitimate claim or right, is considered piracy if it involves an attack carried out from or directed toward the sea or air. If an attack originates from aboard a ship, the vessel initiating the attack or any other ship involved must either qualify as a pirate vessel or lack a recognized national affiliation.
- Any act of willingly participating in the management of a ship with the knowledge that it is identified as a pirate vessel.
- Any act of encouraging or deliberately aiding in the commission of the actions outlined in paragraph 1 or 2 of this Article.

### 5.1.2 The UNCLOS 1982

Article 101 of the UNCLOS specifies piracy as a violent or theft-related act intended to gain from the people aboard a privately owned vessel or aircraft in international waters or areas not under the control of any state. This includes targeting ships or aircraft, as well as the individuals and assets present aboard. Engaging in or supporting such activities is also considered a contributing act.<sup>15</sup>

The above definition of piracy has been criticized by many international legal jurisprudence for being limited to attacks for personal gain on the high seas (comprising exclusive economic zones or regions beyond the authority of any state) that involve two ships. Therefore, attacks by pirates or crew members within a coastal state's internal or territorial waters do not constitute piracy under the UNCLOS definition.<sup>16</sup> These include offences carried out aboard ships for national or political motives, as well as maritime hijackings. This contradicts

<sup>15</sup> GUILFOYLE, Douglas. Treaty jurisdiction over pirates: a compilation of legal texts with introductory notes. *UCL*. Available at: [http://www.academia.edu/195470/Treaty\\_Jurisdiction\\_over\\_Pirates\\_A\\_Compilation\\_of\\_Legal\\_Texts\\_with\\_Introductory\\_Notes](http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes). Access on: 17 Sept. 2013.

<sup>16</sup> KAO, M. Bob. Against a uniform definition of maritime piracy. *Maritime Safety and Security Law Journal*, n. 03, p. 1-20, 2016.

with the international law's principles and provisions, as 80% of pirate activities takes place within the authority and control of coastal states. Of interest, the concept of "special purposes" within the piracy UNCLOS definition has historical precedent, as many governments have traditionally used pirates as tools against their adversaries. Their governments have imposed sanctions on these pirates to seize foreign ships to increase their financial resources.<sup>17</sup>

Articles 100 to 107 and 110 of the 1982 UNCLOS form the foundation for addressing piracy within international law, reflecting principles of customary international law. The Security Council has repeatedly asserted that the Convention establishes the legal framework for addressing piracy, maritime armed robbery, and various other maritime offenses. UNCLOS's Article 100 specifies that "all States should collaborate to the maximum extent feasible in the elimination of piracy on the high seas or in any region beyond the jurisdiction of a State." The General Assembly has consistently urged States to collaborate in combating piracy and maritime armed robbery through its resolutions concerning maritime law and ocean policies.<sup>18</sup>

According to UNCLOS, the world's waterways comprise four distinct legal categories: high seas, contiguous zones, exclusive economic zones, and territorial waters.<sup>8</sup> The Division for Ocean Affairs and the Law of the Sea acts as the administrative body for UNCLOS, offering support and guidance on the uniform and standardized implementation of UNCLOS regulations, particularly those related to the piracy suppression.

UNCLOS establishes a legal framework granting States considerable discretion to combat piracy, yet it is incumbent upon States to incorporate UNCLOS principles into their national legislation. States are required to empower their military and law enforcement personnel with the necessary authority, as outlined in national legislation, to facilitate arresting and prosecuting individuals suspected of piracy. Contextually, it is essential to recognize that under UNCLOS, universal jurisdiction is «permissive.» This implies that when states choose to apply this jurisdiction, it is a privilege rather than a requirement.<sup>19</sup>

<sup>17</sup> TODD, P. *Maritime fraud and piracy*. 2. ed. London: Lloyd's List, 2010. p. 329.

<sup>18</sup> United Nations Security Council, Resolution 2077, 2012.

<sup>19</sup> GUILFOYLE, Douglas. Treaty jurisdiction over pirates: a com-

### 5.1.3 (SUA Convention), 1988

This convention aims to establish jurisdiction over piracy acts within international waters. The importance of countering piracy stems from the fact that certain aspects of piracy may also violate several instruments and treaties; also, for some States, regional and bilateral agreements may be pertinent to addressing pirate issues. The primary objective of the convention is to guarantee that suitable measures are implemented against those who perpetrate illegal activities against vessels. These include:

Forcibly seizing ships.

Acts of violence against people aboard ships.

Installing devices on ships designed to cause destruction or damage.<sup>20</sup>

The convention requires contracting governments to extradite or take legal action against those charged with offenses. This approach ensures that individuals who engage in piracy and other violations are prosecuted. When a crime involves a vessel flying a contracting state's flag, or is within its jurisdiction, or by one of its nationals, the convention compels contracting states to either extradite the suspect or initiate prosecution (Article 7). This provides additional assurance that individuals who engage in such conduct will be held accountable. Deliberate and forcible seizure of ships, violent actions against passengers onboard, the installation of destructive equipment onboard a vessel, and any destruction to a ship or its cargo that jeopardizes navigation safety are unlawful under the Convention. Article III22, this convention facilitates the establishment of jurisdiction over piracy in international waterways. The key goal of the convention is to guarantee the enforcement of effective measures against those who engage in unlawful actions targeting vessels.

UNCLOS restricts the definition of piracy through the 'two-ships' criterion, thereby excluding 'internal hijackings'—the coercive seizure of a vessel by individuals

pilation of legal texts with introductory notes. *UCL*. Available at: [http://www.academia.edu/195470/Treaty\\_Jurisdiction\\_over\\_Pirates\\_A\\_Compilation\\_of\\_Legal\\_Texts\\_with\\_Introductory\\_Notes](http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes). Access on: 17 Sept. 2013.

<sup>20</sup> WOLFRUM, Rüdiger. *Fighting terrorism at sea: options and limitations under international law*. Available at: <http://www.virginia.edu/colp/pdf/Wolfrum-Doherty-Lecture-Terrorism-at-Sea.pdf>. Access on: 17 Nov. 2024.

on board, whether crew members or passengers—and cases where a group of passengers holds the crew and others hostage for ransom. Consequently, military interventions against a vessel by warship or other authorized government vessels are not encompassed within UNCLOS provisions.<sup>21</sup>

The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (SUA PROT) are not applicable to territorial waters. Nonetheless, they encompass the actions regardless of purpose and without the ‘two-ships’ stipulations.<sup>22</sup>

The 2005 Protocols expand the range of offenses against maritime navigation safety outlined in the SUA conventions to include the following acts: a) utilizing explosive, radioactive substances, or weapons categorized as biological, chemical, or nuclear (BCN), as well as releasing liquefied natural gas, oil, or other harmful and hazardous materials (HNS) from a vessel, or employing a vessel as a means to inflict fatal harm or injury, and b) transporting radioactive, explosives substances, BCN weapons, or source materials on board a vessel to coerce a population or pressure a state authority or an international body into taking or refraining from specific actions. (Art. 3)<sup>23</sup>

Protocols 2005 also describe a vessel as a destructive entity that inflicts destruction or harm against individuals or property and contain new stipulations allowing the boarding of a vessel registered under the flag of another member State when credible suspicion exists that the vessel or an individual onboard is implicated in an offence punished under the Convention (Art. 8 bis). The procedure for halting and confiscating vessels on the high seas is detailed extensively. Such Protocols constitute the legal foundation for actions pertaining to

the interception and inspecting vessels in international waters.<sup>24</sup>

## 6 International legal characteristics of piracy offences as per Article 101 of UNCLOS and Article 15 of the 1958 Convention on the High Seas

### 6.1 An illegal act of violence

The notion of piracy encompasses four fundamental components that necessitate additional examination. An illegal act of aggression or coercion, or any form of larceny. It is significant because UNCLOS lacks definitions for «**violence**,» «**detention**,» and «**depredation**.» Researchers from the World Maritime University in Malmo, Sweden, assert that the primary issue involves the categorization of harm as either physical or the recognition of psychological injury as a kind of violence. A limited definition of violence encompasses solely physical harm. The broad notion of violence includes psychological harm, such as intimidation and threats. Including psychological injury in the definition of violence aligns with the World Health Organization’s stance. UNCLOS lacks a definitive definition of illegal violence; hence, the responses of various governments to analogous acts of violence may differ, notwithstanding their status as signatories to the treaty. Detention, like assault, is illegal unless authorized by the governing authority. Furthermore, the phrase «detention» should be comprehended in its most expansive interpretation, as it may be executed not alone by governmental entities but also by non-governmental individuals,” specifically, the personnel and passengers of private vessels, as clearly stated in Article 101 of UNCLOS.<sup>25</sup>

<sup>21</sup> ANYANOVA, Ekaterina. Piracy in Modern International Law. In: CHIVASA, Norman (ed.). *Global Peace and Security*. [S. l.]: IntechOpen, 2022. DOI 10.5772/intechopen.108111.

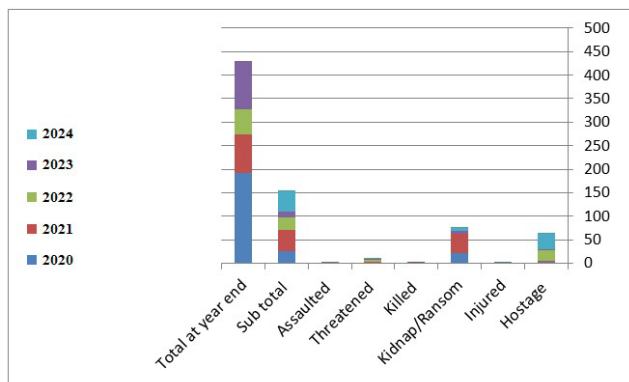
<sup>22</sup> The creation of the SUA documents was prompted by the 1985 incident involving the Italian ship Achille Lauro, where the assailants took hostages to secure the release of Palestinian detainees. These documents were formulated and adopted to ensure that individuals engaging in unlawful acts against ships are held accountable. GUILFOYLE, Douglas. Piracy prosecutions and international law. *BIMCO Bulletin*, v. 106, n. 2, p. 86-88, 2011.

<sup>23</sup> The 2005 Protocol of the SUA (SUA 2005) was established in 2005, came into effect in 2010, and has been endorsed by 52 states.

<sup>24</sup> BORDAHANDY, Pierre-Jean; FORREST, C. Maritime Security and Maritime Law in Australia. *Journal of International Maritime Law*, v. 14, n. 2, p. 162-179, 2008.

<sup>25</sup> CAMPBELL, Penny. A modern history of the international legal definition of piracy. In: ELLERMAN, Bruce A.; FORBES, Andrew; ROSENBERG, David (ed.). *Piracy and maritime crime: historical and modern case studies*. Newport: Naval War College Press, 2010. p. 19-32.

**Figure 2** - Types of violence to crew, January – March 2020-2024



Source: IMB piracy and armed robbery report for January–June 2024. Available at: <https://www.piclub.or.jp/en/news/40048>.

The diagram clarifies the types of crimes and violence. From 2020 to 2024, incidents involving hostage ship personnel rose by 17.5%. By March 2024, the cumulative tally of crimes, including kidnapping, murder, threats, and assaults on maritime crews, amounted to 90 instances, representing 80% of the total crimes documented by the conclusion of 2023. The other instances are expected to transpire over the course of the year if these violations continue.

## 6.2 Private ends

The second factor regards piracy as an action undertaken for personal profit. This viewpoint asserts that the understanding of personal goals will depend on the offender's subjective assessment. The principal objective of this strategy is to completely eradicate any instances of maritime terrorism as outlined by the UNCLOS framework. This strategy is deficient, as individuals within the same gang accountable for a pirate attack may assert divergent motivations for their actions. The alternative viewpoint is utilizing an objective standard to differentiate between private purposes and public objectives (activities acceptable for state execution). Article 101 characterizes this mentality as involving any violent actions undertaken for personal gain without governmental authority. This methodology was corroborated by the International Law Commission's observations. In examining the development of the international legal system, Polish historian Y. Moskovsky highlighted that the conference debated whether piracy is defined exclusively by activities motivated by commercial interests or

also by political objectives. Significant differences over this matter have emerged during the ILC's hearings. The ILC articulated its position in documents concerning the law of the sea, which encompassed observations. Piracy may be committed out of anger or retribution for personal reasons. This position asserts that individual incentives are a crucial element of piracy, embracing various objectives beyond just financial profit. Utilizing an objective standard has been empirically substantiated.<sup>26</sup>

## 6.3 Nature and the scale of commission

A continuous journey that makes port calls at several locations. With «wide networks of investors, negotiators, and associates spanning multiple countries and continents, creating a trans-regional economy deeply intertwined with other privatized enterprises on both land and sea,» piracy has evolved into a conglomerate operation. Thus, maritime piracy constitutes a menace to the security and stability of the world.<sup>27</sup>

Modern piracy Modern piracy is of a considerable global influence. Recorded piracy incidents numbered 410 in 2009, increased to 445 in 2010, slightly decreased to 439 in 2011, and then dropped to 297 in 2012. The incidence of piracy assaults in Asian waterways, specifically in Bangladesh, India, the South China Sea, and Southeast Asia, has varied over the 20th century, peaking till 2005, decreasing from 2006 to 2010, and subsequently rising again. In 2012, Indonesian waters emerged as a significant epicenter for piracy, experiencing more incidents than any other region globally, attributed to weak borders, a multitude of islands, and insufficient national marine resources for surveillance.<sup>28</sup>

The human cost is also significant. Most assaults entail the utilization of weapons, which endanger the ves-

<sup>26</sup> In the 1986 *Castle John v. NV Mabeco* case, the court in Belgium determined that Greenpeace demonstrators who committed violent acts targeting a Dutch ship within international waters, "to advocate a personal viewpoint," engaged in piracy. The appellate court determined that the authority established in the pirate provisions was relevant because the criteria for a private goal was satisfied. Consequently, the Court directed the respondents to avoid engaging in any activities that impede free movement of passage or waste disposal.

<sup>27</sup> IMB October 2009 Report at 27 (cited in note 2) (demonstrating that an organization based in Denmark, Risk Intelligence, estimates around half of all pirate attacks on the oil industry are not reported).

<sup>28</sup> O'BRIEN, Melanie. Where security meets justice: prosecuting maritime piracy in the international criminal court. *Asian Journal of International Law*, v. 4, n. 01, p. 81-102, Jan. 2014. Available at: <http://journals.cambridge.org/AJL>. p. 81, 84.

sel, cargo, and environment, but primarily threaten the safety of seafarers. The International Maritime Bureau indicates that from 2007 to 2012, forty-eight individuals were fatalities in piracy attacks, while 243 sustained injuries. Although the death toll may appear modest, the number of individuals taken prisoner during the same timeframe is astonishing: 4,792. According to the IMB, hostages experience violence post-kidnapping, including beatings, deprivation of sustenance, being targeted with water jets, confinement within the ship's cold storage, shackling under intense heat, solitary confinement, forced nudity, simulated killings, and refusal of medical assistance. Certain seamen were compelled to work alongside the pirates, whereas others were utilized as human shields. Piracy has evolved into a structured criminal enterprise, encompassing a «global network of financial supporters» and impacting thousands across local, regional, and national spheres—referred to by some researchers as the «pirate value chain.» The escalation of criminal activity encompasses crimes like corruption and laundering of funds. The participants extend beyond the pirates to encompass government officials, aligning with the historical context of piracy, which has intermittently involved state-sponsored raids where pirates received funding from governmental or local authorities to execute assaults, particularly during periods of crisis.<sup>29</sup>

Annually, piracy requires the spending of approximately US\$2 billion on naval operations in the waters near Somalia, straining naval resources further. The 2010 OBP report on the Economic Cost of Piracy identified two primary sources of naval costs. The expense is associated with each participating navy vessel. We compute these expenses by estimating the daily operational expenses for a vessel and multiplying this figure by the annual count of vessels in service. This figure encompasses the budgets for administration and personnel across three significant naval operations: Operation Atlanta, Operation Ocean Shield, and the Combined Task Force. Beyond economic expenditures, the global allocation of naval resources by states may diminish their military capabilities, resulting in insecurity and a deficiency in defense proficiency over their own territory. Between December 2010 and March 2022, the UN Security Council enacted seven resolutions addressing Somali piracy, permitting foreign naval

and aerial forces to access and patrol Somali waters, and endorsing the Operation Atalanta, a European Union Naval Forces mission led by US, employing force and all requisite measures to counter piracy and maritime armed robbery. A 2013 World Bank report, frequently referenced, indicates that piracy incurs an annual cost of approximately \$18 billion to the global economy.<sup>30</sup>

Although the UN Security Council Resolutions were appropriate, they appear to have inadequately addressed the issue. They articulated, in conventional diplomatic terminology, and appeared to be exhortative. The resolutions were emphasized to pertain exclusively to the circumstances in Somalia and were not intended to set a precedent in customary international law. The reality is that a scenario in which vessels are routinely ambushed at sea necessitates a substantial and resolute response. It affected world peace and security, and requests for cooperation with the Somali government, which appeared to lack effective control, were inadequate responses. Aggravating conditions that are present in many cases of piracy.

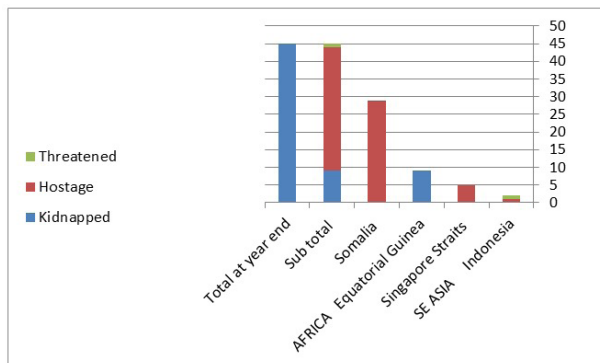
The impact on a global scale highlights how serious piracy is through scale, nature, method of execution, effects on victims, and the presence of aggravating factors (qualitative dimension). Regarding the scope of the crimes, thousands of people have been harmed by piracy, which is perpetrated throughout vast swaths of the world. The regional dispersion further illustrates how pervasive the crimes are. The victims have suffered severe physical and psychological harm because of the acts, including post-traumatic stress disorder. The use of violence and hostage-taking are two aggravating conditions that are present in many cases of piracy.<sup>31</sup>

<sup>29</sup> IMB 2012 Report, *supra* note 6 at 11; ICC International Maritime Bureau, *supra* note 17.

<sup>30</sup> NEW THREAT to global shipping as Somali pirates makes fierce comeback, Piracy costs the global economy \$18 billion annually. *Alarabiya*. Available at: <https://www.alarabiya.net/aswaq/special-stories>.

<sup>31</sup> Referência.

**Figure 3** - Clarifies the type of incidents, in different regions January–March 2020–2024



Source: KONTOROVICH, Eugene; ART, Steven. An Empirical Examination of Universal Jurisdiction for Piracy. *American Journal of International Law*, v. 104, issue 3, p. 436-453, July 2010. DOI 10.5305/amerjintelaw.104.3.0436.

The **forementioned illustrates** the qualitative aspects of marine piracy offences concerning the locations and conditions of their perpetration throughout various continents and nations at both regional and global scales. The diverse consequences arising from the perpetration of these crimes are apparent, encompassing both fatalities and injuries, as well as substantial financial burdens.

## 7 Discussion of the study hypothesis

### 7.1 Justifications for resorting to the jurisdiction of the International Criminal Court

Despite being the first crime with international dimensions, piracy was ultimately omitted by the Rome Statute during the ICC's formation discussions, despite earlier suggestions advocating its inclusion as a crime under its authority. The justification for this is that non-state actors participate in piracy as a criminal enterprise for individual gain. This justification ignored the reality that state and non-state entities have the capacity for committing Rome Statute war crimes such as looting for personal gain.

Additionally, examples from Somalia and Southeast Asia highlight that government officials can participate in piracy without being the principal ones operating vessels. Furthermore, negotiations concentrated on

«core crimes» instead of addressing offences like piracy that are already established in existing treaties. A greater number of suggestions were submitted for the incorporation of terrorism and drug trafficking offences as opposed to piracy; nonetheless, these were similarly dismissed in the ongoing tendency to exclude treaty crimes.

Considering the current increase in piracy, both practitioners and researchers have explored potential strategies for penalizing pirates who operate beyond state jurisdictions. Academics and United Nations organizations have suggested many ways include enhancing regional capacities to combat piracy, as shown by Africa nations through tackling Somali piracy and establishing a separate Somali court governed by a third-party nation. Establishing a specialized chamber within the Kenyan court, creating a regional court, and forming an international court, potentially under the framework of Chapter VII of the Security Council. The ICC is hardly considered a viable alternative, and when it is, it is labelled «not feasible» without comprehensive analysis or clarification of the reasoning behind that conclusion.<sup>32</sup>

Gardner critiques the judgements in his study, stating: «The initial wave of domestic piracy prosecutions indicates that domestic courts have not yet attained the requisite consistency and expertise in addressing pivotal questions of international law in these matters.» Alternatively, some studies highlight solutions for the Somali pirate dilemma, although they neglect to address prosecutorial possibilities for pirates operating in other regions or of different nationalities. Consequently, the ICC offers a prosecuting avenue for piracy offences perpetrated in any jurisdiction<sup>33</sup> because of the below justifications.

#### 7.1.1 Piracy as a Crime Against Humanity: a systematic attack

An extensive or organized attack targeting civilians in a community is considered an aspect of a crime

<sup>32</sup> Analyzing Yvonne Dutton's theory titled 'Bringing Pirates to Account,' it stands as the exploration of the ICC's ability to pursue individuals involved in piracy to date. Dutton points out that during negotiations in Rome there was hesitation around incorporating treaty-based crimes like piracy due to a belief that handling offences at a level would be more appropriate and concerns about potentially overwhelming the Court with cases.

<sup>33</sup> GARDNER, Maggie. Piracy Prosecutions in National Courts. *Journal of International Criminal Justice*, v. 10, p. 797-821, 2012. p. 820.

against humanity when part of a coordinated assault against them. The terms «systematic» and «widespread» are mutually exclusive; thus, the action must qualify as either an attack against civilians or a widespread offensive.

«Widespread» refers to the quantity of victims rather than a specific geographic area. The word has been broadly applied via specialized tribunals to include «the extensive scale of the assault and the number of individuals targeted.» The geographical dispersion of the crimes is important in the case of piracy, although «widespread» does not always mean geographical dispersion. Pirates are becoming more widespread, sufficient to compare to comparable ICC cases and circumstances, which often involve thousands of victims.

A systematic attack refers to «patterns of crimes,» meaning the intentional and repeated occurrence of similar criminal activities, as well as the «organized nature of the acts of violence and the unlikelihood of these acts being random.»<sup>34</sup>

The phrase «reflects the organized nature of the attack, excludes random violence, and does not require a policy or plan,» according to rulings from other courts and tribunals. However, the assault must be «pursuant to or in furtherance of a state or organizational policy to commit such an attack,» as defined by the Rome Statute's Article 7(2)(a). This policy is interpreted to involve either actively endorsing or facilitating such an attack. According to the Court's interpretation, the attack «must be thoroughly organized and follow a regular pattern» and «also be conducted in furtherance of a common policy involving public or private resources,» even though the policy is not required to be specifically articulated. The overall trend of assaults will reveal how organized the crimes are. As an example, the SCSL in the RUF case assessed if peacekeeping troop murder was a crime against humanity. According to other claims, the Trial Chamber found that «the assaults on UNAMSIL personnel were separated in both location and time from the crimes against civilians.» It was discovered that the deaths of the peacekeeping forces were unrelated to offences or other crimes against civilians. The pea-

cekeeping forces were classified differently from Sierra Leonean civilians; although they were civilian peacekeepers, they were not the people who were the focus of the systematic or widespread attack. Therefore, the Trial Chamber specified that the assaults were «distinct from and did not form part of the widespread or systematic attack on the civilian population of Sierra Leone,» even though the peacekeeping soldiers were found to be civilians. Regarding this matter, it is accurate to say that each attacked ship is situated geographically apart from the others, yet these are not distinct groups of citizens. Whether they are passengers or sailors working on ships, the civilian population on all of them is the target of the attack. Given their obvious ability to defend themselves, only military vessels may be seen as not being among the civilians the pirates are targeting. Given that private security has a structured organization and is armed, their status may likewise be in question. They should still be regarded as civilians, though, because they are not in the military. Multinational and multiethnic shipping crews can be included in the attack since the civilians targeted may belong to any ethnicity or nationality or have other distinctive characteristics.<sup>35</sup>

### 7.1.2 Recruitment of children

In September 2002, Thomas Lubanga, a co-founder and head of the Union des Patriotes Congolais (UPC), was charged with three distinct offences by the ICC. The ICC Trial Chamber I determined that the offences of recruiting and registration occur when children younger than 15 years old is recruited or enlisted in an armed group or force, regardless of coercion. Additionally, the evidence conclusively demonstrated that the accused and his co-defendants conspired and engaged in a collective scheme to form an army aimed at securing and sustaining authority and control dominance over Ituri, a province of the Democratic Republic of Congo, which consequently resulted in the conscription of children younger than 15 years old to actively partake in armed conflict.<sup>36</sup>

<sup>34</sup> DEGUZMAN, Margaret McAuliffe. The road from rome: the developing law of crimes against humanity. *Human Rights Quarterly*, v. 22, n. 02, p. 335-403, May 2000. p. 335, 364. (noting that the ICTR was the first authoritative international legal framework to incorporate the phrase «widespread or systematic attack» into its definition).

<sup>35</sup> BUEGER, Christian; EDMUNDS, Timothy. Blue crime: conceptualising transnational organised crime at sea. *Marine Policy*, v. 119, n. 104067, Sept. 2020. Available at: <https://doi.org/10.1016/j.marpol.2020.104067>.

<sup>36</sup> See PROSECUTOR v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Summary Judgment under Article 74 of the Statute, 34-42 (14 March 2012). Available at: <http://www.iccpi.int/iccdocs/doc/doc1379843.pdf>. parag. 37 further states:

The question In the Lubanga Case is, whether the enlisting and utilizing child soldiers exclusively pertain to armed conflict, rendering it an inadequate analogy for the enlistment and exploitation of child pirates?

**Due to the lucrative** nature of piracy, investors form groups of pirates, often recruiting young children, some under the age of fifteen, who are especially susceptible and accessible as a result of the disintegration of familial and governmental structures in Somalia, and who are perceived as fearless, to provide resources aimed at generating profit. The coast of Somalia is inhabited by pirate organizations that persistently and systematically assault innocent mariners.<sup>37</sup> **Consequently**, it is obvious that limiting the prosecution of individuals involved in child recruitment offences only to armed conflicts contravenes international humanitarian law and global treaties concerning children's rights, particularly the 1989 United Nations Convention, which prohibits the employment of children in warfare<sup>38</sup> and inappropriate labour during peacetime or their transfer outside their homeland or their exploitation to achieve economic profits.<sup>39</sup>

### 7.1.3 Organized crimes

Attacks are occasionally planned over several weeks, with pirate crews evaluating the security environment and formulating assault methods beforehand. For example, organizations increasingly utilize «mother ships,» which are large vessels stationed in a fixed location, serving as the «pirate base» from where smaller, swifter boats initiate assaults. This has enabled pirates to broaden their scope;<sup>40</sup> they can seek potential ships

to target throughout extensive oceanic regions. Contemporary pirates own swifter vessels due to enhanced operations and increased successful heists. Negotiators, transportation firms, and victims have all commented on the progressively professional way ransom talks are executed. To avert one faction from encroaching upon another's «territory,» pirate organizations have established informal «codes» among themselves—a form of «honor among thieves.

Rackets are linked to territorial dominance both on land and at sea. Local fishermen and maritime vessels are extorted by pirates for «protection» against attacks when traversing their «territory.» Moreover, some contemporary groups exhibit a hierarchical, often militaristic organization led by formidable figures akin to warlords. These factors collectively provide a systematic framework of pirate offences, which clearly demonstrate an organizational strategy to initiate assaults. Although each pirate faction is obviously well organized, all pirate attacks, not just those by certain factions, should be assessed for their organized structure and pattern.<sup>41</sup>

In the same vein, the ICC has determined that assessing “the capacity of a group to commit acts that violate fundamental human values” is a means of determining an organization. Ultimately, there is a correlation between the inaction or cooperation of a national government in dealing with piracy crimes, as in Somalia. The breakdown of the Somali state has resulted in fragile governance, widespread corruption, and authorities accepting bribes from pirates. Ultimately, this situation reinforces the reluctance to address and eradicate piracy.

While The assault must be comprehensive or meticulously orchestrated. The defendant's unlawful conduct cannot be segregated, confined, or arbitrary; it may comprise a singular act or a restricted series of acts occurring during the assault on a civilian populace. Pirate attacks may be classified as intermittent in the context

<sup>37</sup> GASWAGA, Duncan. Does the International Criminal Court have jurisdiction over the recruitment and use of child pirates and the interference with the delivery of humanitarian aid by Somali Pirates? *ILSA Journal of International & Comparative Law*, v. 19, n. 2, p. 277-304, 2013. Available at: <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1792&context=ilsajournal>. Access on: 15 Nov. 2024.

<sup>38</sup> The forced recruitment of children is one of the most serious violations of internationally recognized international humanitarian law FRISSO, Giovanna Maria. Crianças-soldados no conflito em Serra Leoa: direitos humanos, direito internacional humanitário e/ou direito internacional penal. *Revista de Direito Internacional*, Brasília, v. 9, n. 2, p. 83-91, 2012. Available at: <https://www.publicacoes.uni-ceub.br/rdi/issue/view/148>. p. 86.

<sup>39</sup> UN Convention child rights. AR 11<32.

<sup>40</sup> UNITED NATIONS. Office on Drugs and Crime. *United Nations Convention Against Transnational Organized Crime And The Protocols Thereto*. United Nations: New York, 2004. Available at: <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

<sup>41</sup> Rome Statute, supra note 7, art. 7(2)(a) (outlining a pattern of behavior that involves the repeated commission of such acts. Conversely, Badar, cited in note 28, page 110, highlights a distinction between the Rome Statute and customary international law. While the former mandates the occurrence of multiple acts, the latter does not impose such a requirement. For instance, the Soviet authorities' execution of Imre Nagy, Hungarian leader, was classified as a crime against humanity, even though it involved just a single individual. Although the act was not carried out on a «vast scale,» targeting a political leader demonstrated an intent to harm an entire population).



of armed warfare, but this classification does not apply when addressing crimes against humanity. Despite the crimes geographically separation, each pirate persists in their attacks, indicating that they are not isolated incidents.

## 7.2 The broad definition of piracy<sup>42</sup>

The 1958 Geneva Convention on the High Seas established a criterion whereby an individual's guilt for piracy is contingent upon whether the conduct is executed for «private ends.» The private ends test lacks a definitive description; however, an act is typically considered to have a private end if it is executed without legal authority and is motivated by personal benefit or retribution. Violent actions perpetrated by governments or organizations for political purposes are typically not seen as private endeavors and, thus, do not fulfil the criteria for piracy.<sup>43</sup>

The Geneva Convention is the foremost declaration regarding the law of piracy. However, its provisions present numerous interpretational challenges and uncertainties. The *Mayaguez* case<sup>44</sup> exemplifies the intricacies of piracy and the overarching challenge of codifying a

contentious subject. The Cambodian conduct is presumed to be an «unlawful act of violence.» The *Mayaguez* was not involved in unlawful surveillance of Cambodia or any other activities that could potentially justify or excuse the seizure on the principles of self-defense or necessity.<sup>45</sup> Article 15 mandates that the pirate vessel must be «private» and engaged in the pursuit of «pri.» The Cambodian naval warship was, objectively, a public vessel, not a private one. The United States, however, had not acknowledged the Khmer Rouge regime, under whose authority the seizure occurred. The Convention does not address the matter of recognition, or its absence, in formulating this definition. (Article 15, Geneva).

The drafters failed to distinguish between political factions opposing a singular government and those that directly impacted the interests of multiple States. There was no distinction between the actions of political organizations and those of the States. The «private ends» test was a blunt instrument applied to a highly intricate issue. It overlooked the variations in the extent of State engagement and the characteristics of political organizations and their actions. According to the preparatory documents of the 1958 Geneva Convention and the 1982 Jamaica Convention, Article 101 employs the concept of “private ends” to exclude from the piracy definition actions conducted by rebels who are not acknowledged as a combatant force by the opposing state, as long as their attacks are solely aimed at that state's assets. The architects of this definition aimed to prevent governments engaged in conflict with rebels from categorizing their insurgent activities as piracy.<sup>46</sup>

The «private ends» condition may serve as a loophole for nearly every action undertaken by a State or revolutionary political group. This exception is hardly deemed prudent. The fundamental justifications for

<sup>42</sup> UNCLOS, supra note 8, art. 105. For the comprehensive list of ratifications, see UNITED NATIONS. OCEANS & LAW OF THE SEA. Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements. *UN*, 23 July 2024. Available at: [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea.70.Id.art.101\(a\).AlthoughtheUnitedStateshasnotofficiallyapprovedthelatestversionofUNCLOS,itremainsamemberofanearliereditionthatencompassesthesamepiracy-relatedclauses.SeeConventionontheTerritorialSeaandContiguousZone,April29,1958,516U.N.T.S.205.](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea.70.Id.art.101(a).AlthoughtheUnitedStateshasnotofficiallyapprovedthelatestversionofUNCLOS,itremainsamemberofanearliereditionthatencompassesthesamepiracy-relatedclauses.SeeConventionontheTerritorialSeaandContiguousZone,April29,1958,516U.N.T.S.205.)

<sup>43</sup> CROCKETT, Clyde H. Toward a Revision of the International Law of Piracy. *DePaul Law Review*, v. 26, n. 1, Fall 1976. Available at: <https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2619&context=law-review>. Access on: 15 Nov. 2024. p. 78-79.

<sup>44</sup> On May 1, 1975, Khmer Rouge forces launched an attack on on Phu Quoc, a territory under South Vietnamese administration but claimed by Cambodia. On May 10, the Khmer Rouge seized the Tho Chu Islands, where they forcibly removed and subsequently killed 500 Vietnamese residents. The Vietnamese People's Army initiated a counteroffensive to expel the Khmer Rouge out of Tho Chu and Phu Quoc, and assaulted Cambodia's Pulu Wai Island. During the conflicts over the islands, the Khmer Navy diligently patrolled Cambodian coastal waterways to prevent Vietnamese invasions and to mitigate concerns that the CIA may utilize merchant vessels to support adversaries of the emerging Khmer Rouge rule. The Khmer Navy subsequently apprehended 7 Thai fishing vessels. A South Korean cargo ship was pursued by individuals from Cambodia.

<sup>45</sup> The *Mayaguez* incident occurred in the Gulf of Thailand in May 1975. The incident commenced when Cambodian gunboats intercepted and boarded the American cargo vessel SS *Mayaguez* on 12 May, one month after the conclusion of the Vietnam War. The Cambodians captured the crew and directed the vessel towards Koh Tang Island, located off the Cambodian shores. The U.S. Government classified the incident as piracy, prompting the U.S. military to receive directives to locate the commandeered vessel. BEHUNIAK, Thomas E. The Seizure and Recovery of the S.S. *Mayaguez*: a Legal Analysis of United States Claims. *Military Law Review*, v. 82, p. 41-170, Fall 1978. Available at: [https://maint.loc.gov/law/mlr/Military\\_Law\\_Review/27588F~1.pdf](https://maint.loc.gov/law/mlr/Military_Law_Review/27588F~1.pdf). Public Domain Content from a public domain source has been integrated into this article.

<sup>46</sup> BURGESS, D. R. *The world for ransom: piracy is terrorism, terrorism is piracy*. New York: Prometheus, 2010. p. 136.

state immunity are typically separate from those advocated for the exclusion of insurgent actions from the realm of piracy. The forthcoming part will address the justification and appeal of State immunity from piracy law. The discourse will next focus on the handling of insurgents and other politically affiliated organizations.

A thorough definition should incorporate elements from the definitions in both conventions, even if it does not cover all parts. The UNCLOS definition of piracy highlights theft, assault, and detention, while maritime piracy offences emphasize the risk posed to the safety of sea navigation and the harm or destruction inflicted on a vessel or its cargo. Deliberate damage to a ship can also occur in situations that are not classified as piracy and do not satisfy the requirements for international crime. The crimes of maritime piracy are therefore broad in scope and may independently exceed the International Criminal Court's authority. Any reference to a ship's destruction must therefore be explicitly linked to the involvement of the key elements of piracy, which include acts of "violence, detention, or pillage.» The UNCLOS definitions for both "act of violence" and "any unlawful act of violence or detention" are overly broad and fail to adequately educate the court or the accused about the types of conduct prohibited. A more suitable approach would be to incorporate a clause such as Article 3(1)(g) of the UNCLOS [44], which states that it is unlawful to kill or seriously injure a person while engaging in or attempting to engage in piracy. Furthermore, crimes such as torture, and hostage-taking must be committed. To ensure that all violent actions carried out during their execution are encompassed, the term should remain sufficiently broad and not overly restrictive. Definitions may be informed by other offences outlined in the Rome Statute, including "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health,» to this end.<sup>47</sup>

After the UNCLOS, the alleged deficiencies were swiftly revealed, and the provisions of UNCLOS were subjected to scrutiny. In 1985, the *Achille Lauro*, an Italian-flagged<sup>48</sup> passenger liner traveling from Alexan-

dria to Port Said, was commandeered by militants of the Palestine Liberation Front (PLF), a branch of the Palestine Liberation Organization. The assailants murdered one passenger. Some classified the hijacking as piracy, while others refrained from doing so due to the presumed political intentions of the hijackers and the absence of a secondary vessel involved.<sup>49</sup>

### 7.3 The inefficacy of universal jurisdiction<sup>50</sup>

The 1988 Rome Convention for the Suppression of Unlawful Acts against the Security of Maritime Navigation established the principle of universal jurisdiction to combat piracy. It states that

the duty of the Contracting State in whose territory the offender or alleged offender is found is, if it does not extradite him, to submit the case without delay and without exception, whether or not the offence was committed in its territory.<sup>51</sup>

or regarding the procedures established by its relevant authorities for implementing the public prosecution according to the country's laws.

The seizure must be carried out by warships or public ships owned by the state. This is a natural condition provided that the ships contain the necessary elements for the seizure and pursuit, including military equipment, trained personnel, weapons, and specialized qualifications necessary to carry out the pursuit. Government ships or any ship displaying distinctive marks and signals indicating their mandate to perform the functions

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a considerable number of crew members. On October 7th, the ship arrived at Alexandria, Egypt, where 651 people disembarked to visit the pyramids, planning to reunite with the ship at Port Said that evening. Following the disembarkation of the tourists, four armed men wielding AK-47 assault rifles apprehended the crew and the remaining 97 passengers, compelling the captain to exit the port. The assailants allowed the crew to continue with their duties.

The individuals, masquerading as passengers, were affiliated with a PLF faction led by Mohammed Zaidan, also known by the alias Mohammed or Abu Abbas, and associated with the Palestine Liberation Organization (PLO). Upon seizing the vessel, they insisted that Israel liberate 50 Palestinian detainees. Israel remained unresponsive, and the ship proceeded to Tartus, Syria. Upon its arrival the next day, Syrian officials, acting on requests from the U.S. and Italy, refused to enable the warship to dock.

PALLARDY, Richard. *Achille Lauro hijacking hijacking, Mediterranean Sea* [1985].

<sup>49</sup> AZUBUIKE, Lawrence. International law regime against piracy. *Annual Survey of International & Comparative Law*, v. 15, n. 1, p. 43-59, 2009. p. 56.

<sup>50</sup> Referência.

<sup>51</sup> Referência.

<sup>47</sup> UNITED NATIONS. [United Nations Convention on the Law of the Sea of 10 December 1982]. Part VII: high seas: Section 1. General Provisions. Available at: [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/part7.htm](https://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm).

<sup>48</sup> The *Achille Lauro* departed from Genoa, Italy, on October 3 for a 12-day Mediterranean voyage. Onboard were 748 passengers and

of public authorities, including seizure, supervision of compliance with the law, and arrest of offenders. These specifications and marks are necessary to identify them and subject them to their orders. As a result, merchant ships cannot pursue and fight pirate ships because they do not have the appropriate equipment, their capabilities are not as good as those of armed pirate ships operating in fast craft, and there is a fear that pirates will seize these merchant ships. Therefore, they are prevented from performing these tasks.

Piracy is required to occur in maritime areas or regions that fall beyond the jurisdiction of any nation. The high seas are areas free from state sovereignty but belong to all humanity with common rights. All states have universal jurisdiction to deal with crimes committed within these waters, including slavery, piracy, terrorism, illicit drug trafficking, human trafficking, and unauthorized broadcasting.

Piracy does not acquire the character of an international crime unless it occurs in the high seas. However, when an occurs within a state's territorial waters, it is classified as an internal crime and thus establishes the authority of that sovereign state. Piracy violates international law because it affects the collective interests of the state. Hence, the emphasis on this has been clear in all conventions criminalizing this act and affirming the customary right of all governments to pursue and try the perpetrators of this crime based on the universal jurisdiction's principle.<sup>52</sup>

The state judiciary may occasionally be incapable of prosecuting perpetrators of crimes, as evidenced in Somalia during its civil wars. Despite international agreements, some countries' judiciaries may struggle to prosecute offenders, exemplified by Kenya's attempt to prosecute Somali pirates under its agreements with certain Western nations, resulting in the acquittal of twenty-six defendants due to challenges in managing legal cases stemming from a lack of evidence.<sup>53</sup>

ty-six defendants due to challenges in managing legal cases stemming from a lack of evidence.<sup>53</sup>

One of the key reason states refrain from prosecuting piracy domestically, despite direct impacts on their population, is the substantial financial burden associated with prosecution. In many cases, affected countries are required to transport prisoners across large distances, hold them in pre-trial detention, fund legal representation and translation services, and cover the costs of transporting witnesses to the trial venue. On the other hand, numerous national courts with potential jurisdiction over piracy matters lack the necessary legal framework, judicial infrastructure, and expertise. Numerous other countries may lack national legislation against maritime piracy because they have not formally adopted the Law of the Sea Convention. Furthermore, many countries, including Somalia, located in piracy-prone areas lack the capacity to prosecute piracy incidents despite having adequate legal frameworks.

Numerous national courts with potential jurisdiction over piracy matters lack the requisite legal framework, judicial infrastructure, and expertise. And several nations may lack national legislation against maritime piracy because they have not formally adopted the Law of the Sea Convention. Moreover, numerous nations, including Somalia, situated in pirate-prone regions, lack the capacity to prosecute piracy incidents despite having appropriate legal frameworks. Conversely, others were prosecuted in the past decade by the United States judiciary, receiving harsh penalties of up to eighty years for monitoring an American commercial vessel and discharging firearms at it. It is evident that universal jurisdiction,<sup>54</sup> encompassing the authority of national judicial systems, although referenced in international accords, specifically in the 1982 Law of the Sea Convention (Article 105), may yield results at times and may not succeed at others.

A state may choose not to pursue prosecution for political reasons. This has been true for numerous Western states. They may be averse to the risks associated with piracy suspects asserting asylum upon entering the

<sup>52</sup> See e.g. Lotus, supra note 24, at 71; WOLFRUM, Rüdiger. *Fighting terrorism at sea: options and limitations under international law*. Available at: <http://www.virginia.edu/colp/pdf/Wolfrum-Doherty-Lecture-Terrorism-at-Sea.pdf>. Access on: 17 Nov. 2024.; in MOORE, John Norton; NORDQUIST, Myron H; WOLFRUM, Rudiger (ed.). *Legal challenges in maritime security*. Leiden: Brill, Martinus Nijhoff, 2008. p. 3-40. p. 27. In fact, Article 105 of the UNCLOS is mainly intended to restrict this authority to enforce regulations. The succeeding two articles further limit the types of vessels authorized to exercise this authority to only «warships or military aircraft» and establish liability when such authority is applied unjustifiably. Refer to UNCLOS, supra note 21, arts. 106-107.

<sup>53</sup> GATHII, James Thuo. Kenya's Piracy Prosecutions. *American Journal of International Law*, n. 104, p. 416-436, 2010. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1698768#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698768#). Access on: 11 Nov. 2024.

<sup>54</sup> JOHNSON, D. H. N. Piracy in Modern International Law. *Transactions of the Grotius Society*, v. 43, p. 63-85, 1957. Available at: <http://www.jstor.org/stable/743144>. Access on: 15 Sept. 2013.

prosecuting state, as evidenced by attempts in the Netherlands in 2009 and Denmark in 2023. They may also wish to avoid a scenario in which they cannot repatriate suspects following the court case due to human rights commitments, as suspects frequently originate from unstable regions.<sup>55</sup>

An illustrative example is Denmark, where data on the ratio of apprehensions to prosecutions is accessible. Denmark has undertaken proactive counter-piracy initiatives, resulting in the Royal Danish Navy apprehending 300 pirate suspects from 2008 to 2021. Most detentions occurred off the Somalia's coastline, with one incident in the Gulf of Guinea. Of the 300 suspects, merely 51 faced prosecutions. This illustrates the worldwide context of the Indian Ocean during the initial Somali piracy phase: in 2011, the UN stated that 90% of all detained suspects were freed without trial, a practice referred to as 'catch and release'.

The problem is considerably more pronounced when examining the Gulf of Guinea. Since the escalation of pirate occurrences in the mid-2010s, just three cases have been adjudicated in court. One case was adjudicated in Togo; one in Nigeria; and one in Denmark (however this was not really a piracy-related accusation). It is noted that there were 115 documented piracy occurrences in 2020 alone.<sup>56</sup> The unfavorable ratio of occurrences to prosecutions reveals three primary problems to international counter-piracy initiatives, Capacity to apprehend suspects, find a courtroom, Proving the act of piracy.

**For example**, Denmark declared that it is difficult to penalize the pirates it apprehends. It was among the initial European nations to try Serbian officers for offences perpetrated targeting Bosnian Muslim communities during the Yugoslav civil war.<sup>57</sup> In a similar vein, the Spanish naval forces apprehended a contingent of alleged Somali pirates. However, a judge mandated their release, arguing that prosecuting an offence committed thousands of kilometers abroad would be «somewhat disproportionate. «Merely a week prior, another judge

in Spain initiated an inquiry into an Israeli assault targeting a Hamas leader in Gaza in 2002.<sup>58</sup>

#### **7.4 The extent to which pirates are regarded as non-state actors<sup>59</sup>**

Humanitarian law at the international level applies to all states that have ratified the 1949 Geneva Conventions and their 1977 Additional Protocols, and it also imposes obligations on non-state actors, including ordinary individuals, armed factions, movements for national liberation, and global organizations. International humanitarian law grants specific rights and protections to civilians in conflict scenarios while simultaneously imposing certain responsibilities. This dual role is illustrated by historical cases such as the Nuremberg trials, rulings from international tribunals, and the recent sentencing of Congolese warlord Thomas Lubanga by the ICC to 14 years in prison for employing child soldiers and coercing them to perpetrate atrocities. (As mentioned before)<sup>60</sup>, If international justice cannot effectively tackle «criminal activities perpetrated by lightly armed thugs dispatched from small boats and fishing vessels,» it will struggle to discourage more powerful offenders. If a limited handful of thieves cannot be held accountable by international law, then the war criminals globally have less cause for concern.<sup>61</sup>

<sup>58</sup> WHITLOCK, Craig. Spain's judges cross borders in rights case: high-ranking U.S. Officials among targets of inquiries. *Wash. Post*, 24 May 2009. at A1.

<sup>59</sup> REYDAMS, Luc. *Universal jurisdiction: international and municipal perspectives*. Oxford: Oxford University Press, 2003. p. 128, 129. In European civil law systems, it is essential to have a specific statute to initiate prosecution. The Danish law on universal jurisdiction seems to allow prosecution solely when international law obligates it, rather than merely permitting it. However, such legislative gaps can be readily addressed when there is political will to pursue prosecutions.

<sup>60</sup> Various instruments impose obligations under international humanitarian law on non-state armed organizations or insurgents, including Article 3 common to the Geneva Conventions, Additional Protocol II of 1977, and Article 2, paragraph 8, of the Statute of the ICC.

<sup>61</sup> KONTOROVICH, Eugene. 'A Guantanamo on the Sea': the difficulties of prosecuting pirates and terrorists. *California Law Review*, v. 98, p. 243-276, 2010. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1371122###](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371122###). Access on: 11 Nov. 2024. (stating that the SUA Convention has only been used once—in a case the US See also, PINEAU, Elizabeth. France asks seychelles to help with pirate trials. *Reuters*, 18 Oct. 2009. Available at: <http://www.reuters.com/article/africaCrisis/idUSLI622681>.)

<sup>55</sup> Referência.

<sup>56</sup> LARSEN, Jessica. What shall we do with the suspected pirates? why piracy prosecution doesn't always work. *DIIS Policy Brief*, 30 Mar. 2023. Available at: <https://pure.diis.dk/ws/files/23488739/piracy-final.pdf>.

<sup>57</sup> ISHERWOOD, Julian. Pirates released on beach. *Politiken*, 24 Sept. 2008. Available at: <http://politiken.dk/news/english/article572053.ece>.

Humanitarian law at the international level applies solely to non-international armed conflicts that fulfil specific organizational criteria and attain a requisite level of intensity and possibly duration, rather than to all instances of violence. Individuals engaged in maritime piracy might be classified as armed factions operating within the framework of a localized armed conflict.<sup>62</sup>

## 8 Conclusion

A reassessment of the interpretation of piracy outlined in Article 101 of the 1982 United Nations Convention on the Law of the Sea is necessary to expand the criteria and regulations necessary to commit this crime, to include armed robbery against vessels. Additionally, it is crucial to implement effective measures to address such crimes while adhering to international criminal law, particularly the principle of upholding the sovereignty and territorial wholeness of coastal States. To include «engaging in or facilitating illegal activities that endanger maritime navigation by a ship or aircraft within the territorial waters of States or on the high seas.

It is necessary to consider the results of the criminal acts that define piracy at sea, including its material and moral elements, as well as its international nature. Such acts can only be considered crimes against humanity because they breach international humanitarian law. These include extensive attacks and the involvement of children in armed conflicts, which compromise global harmony and endanger worldwide stability. This highlights the critical role and jurisdiction of the ICC.

The ICC's jurisdiction is confined to crimes stipulated exclusively in Article 5 of the Statute for the Punishment of International Crimes Violating International Humanitarian Law. As a permanent global judicial body, it has established mechanisms for referrals, which can be made by the Security Council or the States Parties, as per the provisions outlined in its Statute. We may often find that the Security Council recognizes in its resolutions that these crimes pose a significant risk to global peace and security. Notable examples include Thomas Lubanga in Nordombourg, Callixte Mbarushimana in Rwanda, and Pol Pot, the Khmer Rouge leader in Cam-

bodia, who was subsequently referred to the ICC for his role in perpetrating crimes against humanity.

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<sup>62</sup> CLAPHAM, A.; GAETA, P. (ed.). *The Oxford handbook of international law in armed conflict*. Oxford: Oxford University Press, 2014. p. 214.

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