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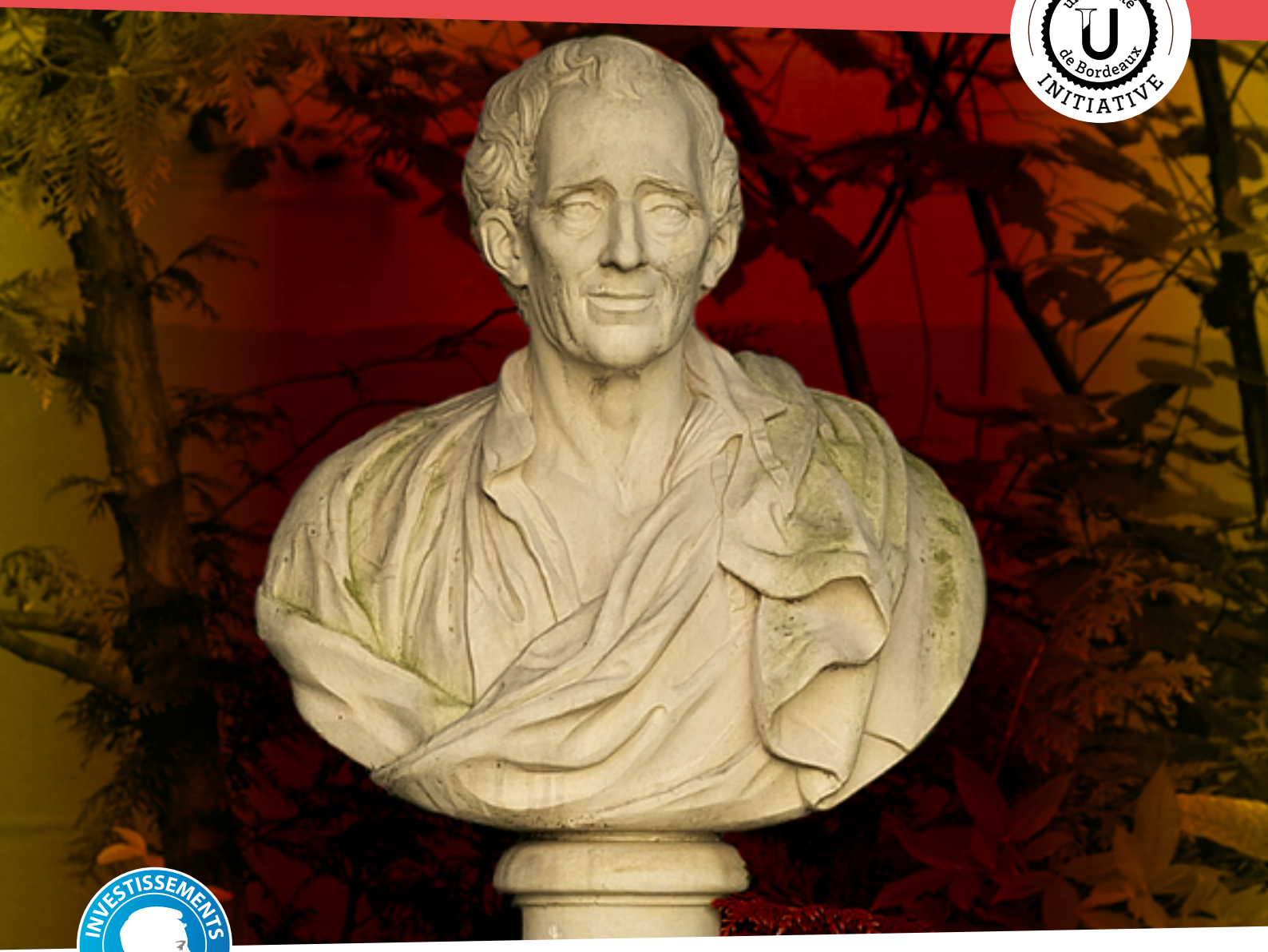

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Maritime piracy captures the collective imagination. Fans of literature are passionate about the adventures of Long John Silver (1) or Red Rackham (2). Those who prefer the big screen delight in the deceits/tricks of Jack Sparrow (3) or Zarina (4). Fans of American football follow the exploits (or misfortunes, depending on the season) of the Pittsburgh Pirates or the Tampa Bay Buccaneers.

The appeal of the world of piracy is further enhanced by its symbols: the famous *Jolly Roger,* the treasure maps, and other hooks and wooden legs.

Despite the folklore, piracy has always been a scourge for vessels of all flags. On the one hand, it represents a danger to the security of crew members. It is not only the vessel that is targeted, but also its crew, whose release must be paid through ransoms (5). On the other hand, piracy is exorbitantly expensive. Its overall economic cost is estimated at between US$ 7 and 12 billion per year (6), linked to the increase in insurance premiums, lower economic activity in some states (Egypt, Seychelles, etc.), the depreciation of goods in the event of the hijacking and detention of the ship, or even to longer routes being taken in order to avoid the areas concerned (increased fuel consumption, freight, etc.) (7).

Where it had once seemed to have been consigned to the annals of maritime history, piracy has once again become a hot topic. In recent years, the International Maritime Bureau (IMB) has identified more than 200 pirate attacks per year. Between 1 January and 2 May 2015, 74 pirate attacks were reported to the IMB.

The most relevant geographical areas are the Gulf of Guinea, part of the Indian Ocean (south of the Red Sea, Gulf of Aden and off the Somali coast) and South-East Asia (South China Sea, the Straits of Malacca and Singapore in particular). In order to gauge the extent of the problem, it suffices to note that 80% of maritime traffic to Europe passes through the Gulf of Aden (8).

A pirate is commonly defined (by Littré) as “a person who has no commission from any government, and roams the seas for plunder”. Cicero viewed pirates as the common enemies of all *(communis omnium hostis)* (9). Sir Edward Coke took up the idea by writing *Pirata hostis humani generis* (10). From those definitions, there emerges the idea that the pirate acts only on his own account, and is a common enemy. Furthermore, it is the latter point that serves to distinguish pirates from corsairs. The corsair is authorised by letter of marque to attack, in wartime only, any merchant vessel flying the flag of an enemy State. The corsair thus performs his task with permission from his government, and in accordance with the laws of war (11).

The United Nations Convention of 10 December 1982 on the Law of the Sea (UNCLOS), defines piracy as 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 on the high seas, against another ship or aircraft, or against persons or property on board such ship or

aircraft, against a ship, aircraft, persons or property in a place outside the jurisdiction of any State (UNCLOS, Article 101).

The characterization of pirates as an enemy of humankind explains why UNCLOS Article 100 *et seq.* provides for universal jurisdiction, affirming in particular that "*all States shall cooperate to the fullest possible extent in the repression of high seas piracy or any other place outside the jurisdiction of any State*".

However, UNCLOS provisions are not directly applicable (12). They cannot be invoked directly by an individual against a State. Consequently, each State must adopt domestic laws implementing the Convention and thus combating piracy.

Confining ourselves to French law, the facts are only moderately exciting. The definition of maritime piracy is flawed (section I), only incomplete repressive responses are provided (section II) and maritime trade law is ill-adapted (section III).

I. A flawed definition of maritime piracy

The definition of piracy under UNCLOS Article 101 renders the qualification of piracy subject to three conditions.

First, the act must be committed on the high seas or "in a place outside the jurisdiction of any State". For the most part, the qualification of piracy is therefore limited to acts perpetrated in international waters. To these waters must be added the exclusive economic zone (EEZ) by reference to UNCLOS Article 58.2. This extension to the EEZ was not self-evident, partly because such areas fall partly under the jurisdiction of the coastal State (Article 56).

Even extended to the EEZ, this geographical delineation of piracy is too restrictive. As a result, the qualification is set aside where the offence is committed in a State's territorial waters. Past experience has shown such theories do exist. For the attacked vessel and its crew – to say nothing of any potential passengers – there is little difference between piracy committed on the high seas and that committed in territorial waters.

Thus the French Court of Cassation considered that "the boarding and plundering of a vessel, even committed by a group and with clear violence, do not constitute [an act of piracy], as those acts were committed in the territorial waters of a sovereign State and that therefore fell within the authority of that State" (13).

Secondly, the act must be committed by the crew or the passengers of a ship against another ship or against persons and property located on board (UNCLOS, Article 101). At its simplest, maritime piracy is committed from a ship against a ship (and whatever is on board). This restriction is, however, misleading.

Admittedly, French case law takes a flexible approach to the concept of "vessel", since crafts such as dinghies (14) or sailboards (15) have been described as vessels. The fact remains that while acts of piracy committed on a sailboard may seem unlikely, the limits established by Article 101 pose difficulties. An act of violence against a ship by persons who were on board (misappropriation by passengers or crew), or on board a helicopter, can only be described as an act of piracy. The same

would likely be said of an act committed against an oil platform (16). Such scenarios are not purely hypothetical: the human, environmental and financial costs of an act of piracy committed against an oil drilling platform would be disastrous.

Lastly, the piracy qualification assumes that the perpetrators have acted “for private ends” (UNCLOS, Article 101). In other words, piracy involves profit (theft, ransom demands, etc.), not a political or religious purpose. The limits are intended to distinguish acts of piracy from acts of terrorism (17).

The result of this combination of conditions is that the act of piracy is too restrictively defined. While this has not prevented French law from providing repressive responses, these remain incomplete.

II. Incomplete repressive responses

The French legislature has long underestimated the problem of maritime piracy. One need only see that the most precise legislation on the matter, the Law of 10 April 1825 for the safety of navigation and maritime trade, was repealed in 2007 (18). A reading of the preparatory work shows that, according to members of the French Parliament, it was necessary to proceed with the “explicit repeal of outdated or obsolete legislative provisions which, as the legal certainty imperative demands, ought to be removed definitively and expressly from our legal order”. Meanwhile, in 2007, the International Maritime Bureau (IMB) counted 263 pirate attacks worldwide.

The initial responses were international. The European Union established the EU NavFor Operation Atalanta, which consists in military vessels and aircraft patrolling the Gulf of Aden and the Indian Ocean, together sending commandos aboard World Food Programme vessels supplying Somalia, and as well as merchant ships passing through that zone. The operation has been extended until at least 12 December 2016.

In 2008 the UN sought, through three resolutions (19), to combat the practice of committing acts of piracy on the high seas and taking refuge in Somali territorial waters in order to prevent vessels from UN Member States pursuing them. Those resolutions have established a "right of hot pursuit" rule (20), which allows these vessels to enter Somalia’s territorial waters to suppress piracy on the high seas and, once there, to use all necessary means to repress these acts of piracy, and this in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law (21).

As regards domestic legislation, the repressive response under French law follows two broad lines.

On the one hand, the Law of 5 January 5 2011 (22) establishes a legal framework that allows French courts to try acts committed outside French territory, where no State has claimed jurisdiction (23). The peculiarity of this Law is that it neither creates an offence of piracy, nor does it even define the concept (24). The legislation refers instead to pre-existing offences that may constitute piracy when committed within the definition given by UNCLOS: this concerns hijacking offences involving sea-going vessels and aircraft (French Penal Code, Article 224-6 *et seq.*), abduction and sequestration (Penal Code, Article 224-1 *et seq.*) and criminal conspiracy (Penal Code, Article 450-1 *et seq.*).

The Law also establishes a legal framework for State intervention and the conditions of detention about sea vessels, in order to comply with the decision in *Medvedyev* (25).

At the investigation stage, the captains of State vessels may proceed with monitoring measures as soon as they have "reasonable grounds" to suspect that an act of piracy has been or will be committed. It is then possible "to proceed with the reconnaissance of the ship, inviting its captain to make the vessel's identity and nationality known". A team may potentially be sent aboard the suspect vessel in order to inspect the ship's papers and proceed with the various checks provided under international law and French law (Defence Code, Article L. 1521-3).

Furthermore, the 2011 Law structures or clarifies the powers held by captains of State vessels in implementing a number of coercive measures, together with precautionary measures with regard to objects or documents that appear to be related to the commission of offences. The captain may order the vessel to be diverted towards an appropriate position or port in order to make thorough findings or to hand those apprehended and the objects and documents which were the subject of provisional measures. Officers from the judicial police or a duly authorized captain may also proceed with the seizure of objects and documents related to the commission of offences, subject to authorization from the relevant prosecutor with territorial jurisdiction. It is interesting to note that this authorization is not required in the event of extreme urgency. Following such seizures, they may also proceed – again subject to prosecutorial authorization – with the destruction of flagless vessels used to commit the offences in question.

Lastly, the 2011 Law amends the *Code de la défense* (Defence Code), in order to guarantee the rights of persons subject to restrictive or custodial measures aboard sea vessels. Masters or captains of State vessels must, in the event of such measures, notify the *préfet maritime* or Maritime Prefect or, overseas, the government delegate for State action at sea, who shall promptly notify the relevant prosecutor with territorial jurisdiction (Defence Code, Article 1521-12). The detainee must initially undergo a health examination within 24 hours. Next, a medical examination must be conducted within the following ten days. These examinations are the subject of a report advising in particular on the detainee's ability to remain in custody. The report is to be sent as soon as possible to the prosecutor (Defence Code, Article 1521-13).

Meanwhile, in the 48 hours following the implementation of the detention or custodial measures, the prosecutor must apply to the *juge des libertés et de la detention* (liberty and custody judge) for a decision on the possible extension of those measures for an further maximum period of 120 hours which may in turn be renewed (Defence Code, Article 1521-14). The judge can then communicate with the detainee.

Upon his arrival on French soil, the detainee is handed over to the judicial authorities (Defence Code, Article 1521-18).

Clearly, French law has learned from the decision in *Medvedyev,* particularly in terms of the intervention on the part of the liberty and custody judge within 48 hours, and not merely that of the prosecutor (26).

On the other hand, such repressive measures having done little to deter pirates, a number of States decided place teams of armed men aboard vessels flying their flag. France initially limited

this ship protection activity to her Navy. However, this solution's limitations were soon revealed. It not only represented a significant cost to the State, but it was also impossible to satisfy all the demands made for such teams (27). The result was difficult to accept on the part of the shipowners, charterers and shippers. The Law of 1 July 2014 ultimately acceded to the protection of vessels by private companies (28).

The Law pursues two objectives: to allow merchant vessels flying the French flag to carry private protection officers, and to provide a framework for that practice. The second objective was considered essential for fear of mercenaries and the abuses on the part of certain companies engaged in similar activities (29).

The *Code des transports* or Transport Code (Article L. 5442-4) now provides that officers aboard a vessel may use force to ensure the protection of persons and property within the scope of provisions on self-defence and necessity. Officers will therefore not face criminal charges if their actions are in line with the conditions established by these scenarios: present or imminent and unjust aggression; necessary and proportionate response in self-defence; existence of a present or imminent danger; necessity and usefulness of offence and without prior fault on the part of the officer for the state of necessity.

The 2014 Law seeks to establish an extremely precise framework for protection/security companies and their officers. The protection company must obtain certification (*Code de securité interne* – Internal Security Code, Article L. 616-1), the approval of its directors and associates, and must keep a record of its activities (Transport Code, Article L. 5442-10). In addition, it must provide proof of professional liability insurance (Internal Security Code, Article L. 612-5). Protection officers must hold a professional card (Internal Security Code, Article L. 616-2). They must, in the performance of their duties, dress in such a manner that does not cause confusion with the uniforms worn by the police, armed forces, French maritime affairs or customs officers (Transport Code, Article L. 5442-3). Very specific checks required regarding compliance of the serial numbers of the weapons aboard, together with embarkations and landings, the stocking and storage of weapons and ammunition (Transport Code, Article L. 5442-11).

Lastly, neither the private protection company nor its officers can interfere in labour disputes, or engage in monitoring relative to the political, philosophical, religious or trade union affiliation of individuals (Internal Security Code, Article L. 621-4). Equally, protection officers aboard cannot perform services unrelated to the protection of persons or property (Transport Code, Article L. 5442-9).

The Law of 1 July 2014 suffers from two weaknesses: it is vague and incomplete.

The Law is vague because it does not address the issue of liability aboard a vessel. It is provided that protection officers are under the authority of the captain (Transport Code, Article L. 5442-9). This is simply an application of Article L. 5531-1 of the same Code, which gives authority to the captain over any person on board, regardless of their nationality and the reason for their presence.

As such officers are under the authority of the captain, who is liable for negligence on their part in the performance of their duties? Is the captain, and therefore the shipowner (30), since he has authority over them? Or is it the private protection company, being their direct principal and

compulsorily insured? The distinction ought certainly to be made: if the damage caused results from the execution of an order issued by the captain, liability falls to the shipowner, whereas if the damage results from a spontaneous act performed by a protection officer aboard, liability would be incumbent on the private protection company.

The law is incomplete because it refers, in many respects, to implementing decrees. Since its enactment, six implementing decrees and a number of orders have been published. Such abandonment of competence on the part of the legislature in favour of the executive is questionable. Furthermore, the quality of the implementing legislation leaves much to be desired. One example is especially convincing: the order dated 28 November 2014 identifies, pursuant to Article L. 5442-1 of the Transport Code, those areas in which private protection companies can operate. This legislation restricts this activity to the African coast (West Africa on the one hand, Indian Ocean and Red Sea on the other). Is the French executive branch unaware that a third of the world's piracy occurs in Asia?

France's repressive responses appear to be incomplete: the 2011 Law does not create an offence of piracy, and that of 2014 is no more than an approximation. Maritime trade law is ill-adapted to the problem of piracy.

III. An ill-adapted maritime trade law

Maritime trade law makes little mention of piracy. Certainly the Hague-Visby Rules that regulate shipping make piracy an excepted peril. Article 4.2.f provides that the carrier is not liable for loss or damage to goods where these result from "acts of public enemies". The expression is obviously covers piracy (31).

Similarly, Article L. 172-16 of the *Code des assurances* or Insurance Code provides that unless otherwise agreed, the facilities insurer does not cover loss and damage suffered by the insured good as a result of an act of piracy.

These provisions notwithstanding, maritime trade law leaves the task of resolving the issue of piracy to its more traditional concepts (32). The most appropriate concept under maritime trade law is general average. This provides that "*where expenditure is voluntarily incurred, or a sacrifice voluntarily made, for the common good of the ship and cargo, expense and sacrifice are supported by the ship and the goods in proportion to their respective value*" (33). The examples most frequently cited are those where the container is thrown into the sea to prevent the ship sinking, or the hold flooded, with the goods contained therein, in order to extinguish a fire.

General average is the solution that international practice has chosen to determine the allocation of costs between the shipowner, the charterer and the owners of the merchandise for the costs incurred by piracy, including the payment of a ransom for the release of the vessel (34). All the conditions of the concept imposed by Rule A of the York Antwerp Rules are in effect fulfilled (35), including intentional sacrifice (payment of ransom) in the common interest to preserve from peril.

General average being effective and well-known to players in the maritime world, its application to piracy issues is sound.

It seems that maritime trade law has finally managed, through its traditional concepts and especially general average, to respond more or less satisfactorily to the problem of piracy. One of the thorniest issues still outstanding is that of the attitude of the captain facing a charterer who wants to send the ship into a high piracy area. Where the contract of charter offers no answers, and despite the captain's acknowledged assessment and decision-making powers in face of danger (36), liability issues may arise. For example, what about the captain, on his own initiative or on the orders of the owner, refuses to go into an area and causes damage to the charterer (delay, perishable goods, etc.), when it then appears no vessel having frequented the area in question has been attacked? It is our view that the solutions identified through the application of safe port clauses could usefully be transposed to this issue (37).

Charter parties may nevertheless have a deviation clause, which allows the owner to change course in the face of a certain number of risks, particularly in the event of piracy.

Whether or not the charter contains a deviation clause, the parties will have to consider ways in which they will address the issue of the burden of the additional operating costs of the diversion.

Finally, it must be stressed that the standard charters do strive to resolve certain difficulties ahead of time. To simplify the task of the parties to a charter agreement, BIMCO (Baltic and International Maritime Council), the largest association of shipowners in the world, provided in its NYPE 93 charter party a clause which stipulates that, should a ship be immobilized due to capture by pirates, the ship will set off hire, that is to say, the payment of the hire will be suspended (38).

BIMCO also developed standard clauses in 2013 (39). These clauses are favourable to shipowners, allowing them to take all measures they deems reasonable to face the risk of piracy: ship deviation, navigation convoy, use of escorts, speed adaptation, day or night navigation only, involvement of security officers, etc. In addition, these clauses provide that the charterer shall compensate the owner for all additional costs, the delays will be at the expense of the charterer, and freight payment is not suspended.

To conclude this study, it appears that maritime trade law, while ill-adapted, is still the best fit for the piracy problem. The real difficulties stem primarily from the definition of piracy adopted by UNCLOS, which is far too restrictive, and French repressive responses, which ought to be improved.

Notes

(1) Robert Louis Stevenson, Treasure Island (published in France as *L'île au trésor*, Young folks, 1881).
(2) Hergé, *Le secret de la Licorne*, Casterman, 1943.
(3) *Pirates of the Caribbean*, Walt Disney Pictures, 2003.
(4) *Tinkerbell and the Pirate Fairy*, DisneyToon Studios, 2014.
(5) O. Purcell, « *La détestable expansion de la piraterie* », Gazette CAMP, n°19, p. 5. See also R. Clift & S. Cordonnier, « *La piraterie somalienne: le prix d'une vie* », DMF 2012, p. 408.
(6) A. Bowden et al., *The economic cost of maritime piracy*, One Earth Future, 2010, p. 2.
(7) For example, in 2011, the price of wheat delivered to Kenya rose by US$16 per tonne due to piracy: S. Miribel, « *La piraterie: aspects économique, géopolitique et juridique* », DMF 2011, p. 588.

(8) R. Broudin, « *Actes de piraterie* », Gazette CAMP, n°28, p. 4.
(9) *De officiis*, III, XXIX, 107.
(10) *Institutes of the Laws of England*, *Third part*, 1644, 113.
(11) Note that the Paris Declaration of 16 April 1856, which brought the race to an end, has has never been signed by the USA or Chine (D. MATHONNET, « *De quelques remèdes à la piraterie maritime* », DMF 2011, p. 534).
(12) CJEU, Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-04057.
(13) Cass. com., 14 February 1989, *Sunny Arabella*, n°87-11012, DMF 1989, p. 419, obs. P. Bonassies: in this case, the Lagos harbour, Nigeria.
(14) Cass. com., 27 November 1972, n°70-12596, *Gipsy II*, DMF 1973, p. 160, note P. Lureau; CA Rennes, 15 March 1983, DMF 1983, p. 739, note Ph. Godin.
(15) CA Rennes, 4 May 1982, DMF 1983, p. 40, notes Y.-M. Le Jean & Y. Tassel.
(16) The status of the oil platform is unclear. Some international conventions qualify the ship, while other set such a qualification aside. One of the criteria generally chosen being ship propulsion autonomy, an oil platform seems likely to be qualified as seagoing vessel, but not as a ship. *Adde*, M. Remond-Gouilloud, « *Quelques remarques sur le statut des installations pétrolières en mer* », DMF 1977, p. 675 et 738.
(17) Which falls under the Rome Convention of 10 March 1988 for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.
(18) *Loi n°2007-1787 du 20 décembre 2007 relative à la simplification du droit (Article 27)* (Law n°2007-1787 of 20 December 2007 on the simplification of the law (Article 27)).
(19) Resolutions n°1816, 1838 and 1851.
(20) P. Bonassis & Ch. Scapel, *Traité de droit maritime*, LGDJ, 2e éd. 2010, n°77 bis.
(21) French vessels have already argued this right of hot pursuit, in two well-known cases: Cass. crim., 16 Sept. 2009, *Le Ponant*, n°09-82777, DMF 2009, p. 932, obs. P. Bonassies; Cass. crim., 17 Feb. 2010, *Carré d'As*, n°09-87254, DMF 2011, p. 569, obs. P. Bonassies.
(22) *Loi n°2011-13 relative à la lutte contre la piraterie et à l'exercice de pouvoirs de police de l'Etat en mer* (Law n°2011-13 on the fight against piracy and the exercise of State police powers at sea). On this legislation, see in particular A. Montas, *in* J.-P. Beurier et al, *Droits maritimes*, Dalloz Action 2015/2016, n°384.26 et seq.
(23) Ph. Delebecque, *Droit maritime*, Précis Dalloz 2014, n°1011.
(24) Such a definition would in any event have been either inconsistent with or left redundant by UNCLOS.
(25) Which decision involved drug trafficking rather than piracy: ECHR, *Medvedyev and others v France*, Application n° 3394/03, 10 July 2008 (Dalloz 2009, p. 600, obs. J.-F. Renucci); 29 March 2010 (DMF 2010, p. 1021, obs. P. Bonassies): the applicants had been arrested at sea, transported aboard a French military vessel and placed in custody 13 days later when the vessel reached Brest. The ECHR ruled that said period of 13 days violated Article 5.1 of the Convention. In the sphere of piracy, see ECHR, *Ali Samatar & others v France* (Applications nos. 17110/10 and 17301/10) and *Hassan & others v. France* (Applications nos. 46695/10 and 54588/10), 4 December 2014 (reported in France: Gaz. Pal., 10 Jan. 2015, n°10, p. 9, note E. Raschel).
(26) The Court considered in *Medvedyev* that the prosecutor is not a judicial authority within the meaning of the Convention.
(27) Approximately 70% of applications were satisfied.
(28) G. Piette, « *Lutte contre la piraterie maritime: la loi n°2014-742 du 1er juill. 2014 relative aux*

activités privées de protection des navires », Lexbase Hebdo, Ed. Affaires, Sept. 2014, n°392.

(29) We need only look at the legal tangles experienced by some Blackwater employees (now Academi).

(30) The captain is only the shipowner's agent: Cass. com., 18 June 1951, *Lamoricière*, Dalloz 1951, p.717, note G. Ripert, DMF 1951, p.429.

(31) The act must, however, have been committed on the high seas, in accordance with UNCLOS requirements: Cass. com., 14 Feb. 1989, *Sunny Arabella*, above.

(32) As to English solutions, see the essential work by P. Todd, *Maritime fraud and piracy*, Informa, 2nd ed. 2010, in particular. pp. 39 et seq.

(33) P. Bonassies & Ch. Scapel, *Traité de droit maritime*, *op. cit.*, n°530.

(34) The payment of a ransom is lawful: London Court of Appeal, January 2011, *Bunga Melati Dua*, LMAA Law Review, p. 5.

(35) Ph. Delelbecque, *Droit maritime*, *op. cit.*, n°1019.

(36) O. Purcell, *« La détestable expansion de la piraterie »*, cited above.

(37) On the details of these solutions, see A. Montas, *in* J.-P. Beurier et al, *Droits maritimes*, *op. cit.*, n°343.49.

(38) For one application, Queen's Bench, 13 March 2012, *Captain Stefanos* [2012] EWHC 571.

(39) *Piracy Clause for single voyage charter parties* and *Piracy Clause for time charter parties*.