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### International cooperation in combating modern forms of maritime piracy: Legal and policy dimensions

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**Publication date**

2017

**Document Version**

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**Citation for published version (APA):**

Gottlieb, Y. (2017). *International cooperation in combating modern forms of maritime piracy: Legal and policy dimensions*.

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## 2

### CHAPTER ONE:

#### DEFINING PIRACY UNDER INTERNATIONAL LAW

##### 2.1. INTRODUCTION

Domestic counter-piracy laws often vary from one State to another,<sup>16</sup> yet they typically contained certain common elements. Originally, the two common elements were: 1) the existence of the felony of robbery; 2) committed on the high seas.<sup>17</sup> Interestingly and uniquely, national laws and case law have earlier on made reference to piracy under the “law of nations”.<sup>18</sup> Under international law, however, that “law of nations” have been first developed in customary international law,<sup>19</sup> and was not codified before the middle of the 20<sup>th</sup> century.

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<sup>16</sup> Lucas Bento, *Towards an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 Berkeley J. Int'l L. 399, 429-430, (giving examples of various approaches to what constitute piracy under different national laws); AALCO report, *supra* note 6.

<sup>17</sup> See Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 Va. J. Int'l L. 723, 724 (fn2), 1985-1986 [hereinafter “Note: The Achille Lauro Incident”].

<sup>18</sup> Cf. in the United States (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life”) – 18 U.S.C. section 1651 (1982). Similar reference to “piracy as defined by the law of nations” was made under U.S. legislation already in 1819 – see the Act of Congress of March 3, 1819, 18 U.S. (5 Wheat.) 153 (1820). Other countries whose contemporary national legislation defines piracy by reference to the “law of nations” are Canada, New Zealand, and Singapore - see Samuel Shnider, *Universal Jurisdiction Over "Operation of a Pirate Ship": The Legality of the Evolving Piracy Definition in Regional Prosecutions*, 38 N.C.J. Int'l L. & Com. Reg. 473, 524, 2012-2013 [hereinafter “Shnider, Universal Jurisdiction”]

<sup>19</sup> M. Kashubsky, *Can an Act of Piracy be Committed against an Offshore Petroleum Installation?*, 26 A&NZ Mar LJ, 163.

The first major development in that direction was the project carried out on the topic by the Harvard Law School, which resulted in the Harvard Research Draft of 1932.<sup>20</sup> Though the Draft was never formally adopted, it served as the doctrinal foundation for later work on the definition of piracy.<sup>21</sup> Indeed, the principal elements contained in the definition of piracy, provided in Article 3 of the Harvard Research Draft,<sup>22</sup> have been incorporated in the text adopted by the International Law Commission (ILC) on the law of the sea,<sup>23</sup> which became the basis for the 1958 High Seas Convention (HSC).<sup>24</sup> UNCLOS merely duplicated the substance of the

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<sup>20</sup> *Harvard Research In International Law, Draft Convention on Piracy*, 26 AM. J. INT'L L. 741 (Supp. 1932) [hereinafter "Harvard Research Draft"]. On the importance of the Harvard Research Draft see MYRA WILLIAMSON, *TERRORISM, WAR, AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001*, at 95 (2009) (describing the Harvard Research Draft as seminal because it comprehensively discussed all angles of maritime piracy, which were later incorporated by the ILC and HSC).

<sup>21</sup> Terence Fokas, *The Barbary Coast Revisited: The Resurgence of International Maritime Piracy*, 9 U. S. F. Mar. L. J. 427 1996-1997, at 438; Note: The Achille Lauro Incident, *supra* note 17, at 732.

<sup>22</sup> Article 3 of the Harvard Research Draft defined piracy as follows:

"Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
2. Any act or voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article." – see Harvard Research Draft, *supra* note 20, Article 3.

<sup>23</sup> *Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. No. 9, art. 38, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 253, 282, U.N. Doc. A/CN.4/SER.A/1956/Add.1 [hereinafter 1956 ILC Report].

<sup>24</sup> Geneva Convention on the High Seas Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter "HSC"]. Article 15 of the HSC defines piracy as follows:

"Piracy consists of any of the following acts"

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends on board such ship or aircraft;

definition as provided in the HSC.<sup>25</sup> UNCLOS is considered as the governing treaty under international law and as declaratory of customary international law with regard to the piracy provisions.<sup>26</sup> Consequently, UNCLOS' piracy definition is applicable also to the relative few States not party to either UNCLOS or the HSC.<sup>27</sup>

The definition of piracy provided in Article 101 of UNCLOS reads as follows:

“Piracy consists of any of the following acts:

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- (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
  - (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
  - (3) Any act of inciting or intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.”

<sup>25</sup> Samuel Pyeatt Menefee, *The New “Jamaica Discipline”: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 Conn. J. Int'l L. 127 1990-1991 [hereinafter “Menefee, Jamaica Discipline”], at 140-1. The author noted that the minor changes introduced in the piracy section of UNCLOS did not address any substantive points of contention. He further explained that the piracy articles were incorporated in UNCLOS almost verbatim, “apparently to avoid re-opening old controversies.” See also *United States v. Hasan* 747 F.Supp.2d 599, 620 (“*Hasan I*”) [UNCLOS “defines piracy in exactly the same terms as the [the HSC], with only negligible stylistic changes”].

<sup>26</sup> Ivan Shearer, Piracy, in *Max Planck Encyclopedia of Public International Law* ¶ 13 (2010); see also Mikhail Kashubsky, *supra* note 19, at 166 (“The common view is that the positions taken [by UNCLOS] are declaratory of customary international law with regard to piracy.”). As explained in Chapter 3, this view of UNCLOS is also supported in UNSC Resolutions. Another indication of the status of the piracy provisions as representing customary international law is found in U.S. courts' decisions in piracy cases— see *Hasan I*, at 639 [“it is apparent today that UNCLOS...reflects the definitive modern definition of general piracy under customary international law”]; confirmed by *United States v. Dire*, 680 F.3d 446, 467–68 (4th Cir. 2012) [“*U.S. v. Dire*”]. These findings by the U.S. Courts are important considering that the U.S. is not a State Party of UNCLOS.

<sup>27</sup> Presently, 8 States are party to the HSC but not to UNCLOS. In addition, 23 other States are party to neither HSC nor UNCLOS.

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>28</sup>

The main elements of piracy as originally defined in article 3 of the Harvard Research Draft and now incorporated in article 101(a) of UNCLOS are: (1) An illegal act of violence or depredation (2) committed for private ends; (3) by the crew or the passengers of a private ship (or aircraft); 4) directed on the high seas or in a place outside the jurisdiction of any state; 5) against another ship (or aircraft).

The prevailing view regarding the piracy section of UNCLOS (Articles 100-107) is that it creates a jurisdictional regime, which is not predicated on the existence of an international criminal substantive law.<sup>29</sup> Put differently, while UNCLOS defines piracy, it alone does not

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<sup>28</sup> UNCLOS, Article 101.

<sup>29</sup> Jose Luis Jesus, *Forward*, 59 Am. U. L. Rev. 1212, 1214, 2009-2010. See also Guilfoyle, *Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes, Compendium*, Working Group 2 Toolbox [hereinafter “WG2 Compendium”] [on file with author], at 3 (“Piracy has always been an international crime enforced by national laws, the exact terms of which have varied between jurisdictions. It may be difficult to give these words [of Article 101(a)(i), UNCLOS] the kind of clear and precise meaning that would accord with modern

create criminal liability; to prosecute piracy suspects, a corresponding national law is required.<sup>30</sup> Such national laws may define piracy in a manner broader than UNCLOS; if so, however, they would not allow exercising universal jurisdiction under UNCLOS.<sup>31</sup>

Nevertheless, the importance of understanding what constitutes an act of piracy under international law and specifically under UNCLOS exceeds beyond the jurisdictional aspects of the piracy section since national legislations have frequently borrowed the UNCLOS definition directly into their national legislation<sup>32</sup> or made a reference to the concept of piracy as viewed by

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expectations that criminal offences should be precisely defined in advance. It is perhaps better to consider Article 101(a)(i) as setting out the jurisdiction of all States to: (1) prescribe and enforce a national criminal law of piracy; and (2) take action to suppress and prosecute piratical acts of violence on the high seas”).

<sup>30</sup> See Samuel Shnider, *Maritime Piracy: Pursuing Pirate Ships and All Who Board Them*, 21 ILSA Quart. 29, 32, 2012-2013 [hereinafter “Shnider, Maritime Piracy”] (“UNCLOS itself defines piracy, but it is debatable if it alone creates criminal liability like the genocide convention or other instruments. The Security Council, the IMO, and the UNODC have emphasized that for states to effectively punish piracy there must be a national penal law criminalizing the conduct and providing for punishment. Thus, Kenya, Seychelles, Mauritius and Tanzania have rewritten their laws under the supervision of UNODC and the Working Group I to be almost identical to the UNCLOS definition, and then applied these laws (at least in Kenya and Seychelles) to convict pirates under their respective national codes.”); see also Jesus, *supra* note 29, 1214 (“if the arresting State does not have penal legislation allowing for the punishment of pirates, or if the arresting State does not want to try them in its own territory for political or other convenience, then the legal regime as codified in UNCLOS is of little use.”).

<sup>31</sup> Cf. Yvonne Dutton, *Maritime Piracy and the Impunity Gap: Domestic Implementation of International Treaty Provisions*, MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE (ed. Struett, Carlson, and Nance), 73-74 (“for the exercise of universal jurisdiction to be proper, the state’s domestic legislation should not exceed the scope of the customary international law”). See also Shnider, Universal Jurisdiction, *supra* note 18, at 483-4 (recalling that “universal criminal jurisdiction over piracy is justified only over conduct “which constitutes piracy by international law.” Since every jurisdiction may have municipal definitions of the crime of piracy that extend beyond the definition of piracy under international law, a state’s competence to apply its municipal definition must be limited to traditional bases of jurisdiction”). The author further raise concerns of domestic case law where the court appeared to have asserted universal jurisdiction to an entirely domestic definition of attempted piracy – see his discussion over the piracy cases before the courts of Seychelles at 541-4).

<sup>32</sup> See, for example, Mauritius’ Piracy and Maritime Violence Bill (No. XXVIII of 2011); Seychelles Penal code, Article 65 (amended via Bill 2010); and Somalia’s Law on Combatting Piracy (Law No. 52/2012).

the international community.<sup>33</sup> The UNCLOS piracy definition therefore has concrete implications not only to questions evolving international cooperation in combating piracy, such as jurisdictional issues, extradition and mutual legal assistance, but also to the outcome of criminal proceedings before national courts.

Questions of interpretation and application have arisen already shortly after the adoption of UNCLOS. The perception viewing all various acts of violence at sea as piracy often collided with the legal hurdles and ambiguities posed by the definition of piracy. This was exemplified in the *Achille Lauro* incident, where members of the Palestinian Liberation Front (PLF) hijacked an Italian cruise liner 30 miles off the coast of Egypt and executed one of its passengers, an American citizen. In a news conference that followed the capture of the hijackers, U.S. President Reagan stated his belief that the hijackers would be tried, *inter alia*, for piracy.<sup>34</sup>

As it turned out, though, meeting the definition's criteria would have been difficult.<sup>35</sup> The limitations in the UNCLOS definition and the difficulties they presented in the *Achille Lauro* incident served as the impetus for the conclusion of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the "SUA Convention").<sup>36</sup> The case law and scholarly debate that followed the spike in piracy incidents in recent years manifested

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<sup>33</sup> See the examples mentioned in *supra* note 18.

<sup>34</sup> 24 ILM at 1515; N.Y. Times, Oct. 12, 1985, at A6, cols. 1-6; Note: The Achille Lauro Incident, *supra* note 17, at 746-7.

<sup>35</sup> Specifically, the "two ships" requirement of UNCLOS definition and, according to some commentators, also the "private ends" element, were not met in this case - see discussion of these elements *infra* 2.2.2 and 2.2.5.

<sup>36</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221. See further discussion regarding the application of the SUA Convention to combating maritime piracy *infra* Part 2.7.

that the piracy definition under UNCLOS continues to pose challenges, for example with regard to “dry land piracy”.<sup>37</sup>

This chapter will first examine the elements of the UNCLOS’ piracy definition and the interpretational difficulties they pose. The discussion will then turn to the definition of acts of piratical nature committed entirely in areas under state jurisdiction, typically referred to as “armed robbery at sea”, and to the manner in which piratical acts have been addressed through other international or regional instruments.

## **2.2. THE ELEMENTS OF PIRACY AS DEFINED BY ARTICLE 101(A) OF UNCLOS**

### **2.2.1. “any illegal acts of violence or detention, or any act of depredation”**

Some difficulties of interpretation are found already within the very first element of the definition. To begin with, the use of the term “illegal” in a definition of a crime may imply that some acts of violence or detention at sea may be “legal”. It has been noted that: “Read carefully it seems to revive the law of privateering by its reference to “illegal” acts, implying that some depredations for private ends might be “legal”, and leaving no explanation of how sense is to be made of a purported definition of a “crime” that rests on an undefined and unreferenced concept of prior “illegality”: Illegal under what law? By whose determination?”<sup>38</sup>

In that context, a question arises whether the illegality of the act is to be defined under national or international law. In the former case, discrepancies may arise in the interpretation of the provision by different States; in the latter, certain acts might remain unpunished due to a lack

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<sup>37</sup> See further discussion *infra* Parts 2.2.4 and 2.3.2.

<sup>38</sup> See Alfred Rubin P. Rubin, *The Law of Piracy* (1988), 333, quoted in Menefee, *Jamaica Discipline*, *supra* note 25, at 142 (fn 73).

of universality.<sup>39</sup> A possible explanation for the use of the term “illegal” in the definition is that it was meant to differentiate piratical acts from lawful acts of war,<sup>40</sup> though such distinction is arguably addressed by the element requiring the act to be conducted for “private ends”.<sup>41</sup>

Another difficulty pointed to is that it is unclear whether there is a meaningful difference between the use of the words “acts of violence” (in plural) and “act of depredation” (in singular).<sup>42</sup> This discrepancy, however, is unlikely to pose practical difficulties since it can hardly be argued today that the crime of piracy requires more than one act.<sup>43</sup>

More challenging than the last point might be to view attacks with no physical violence as conforming to the requirement of the first element of the definition. Both “acts of violence” and “depredation” normally require some use of force, hence where only threaten violence is used by the perpetrators this requirement may not be met.<sup>44</sup> This ambiguity in the definition of piracy was perhaps the reason for the explicit inclusion of “threats” in the definition of “armed robbery against ships” adopted by the IMO, a definition which is otherwise structured similarly

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<sup>39</sup> Menefee, Jamaica Discipline, *supra* note 25, at 142.

<sup>40</sup> In that regard, it was noted that in 1934 the British Privy Council concluded that piracy has evolved to include ‘any armed violence at sea which is not a lawful act of war’ – see Efthymios Papastavridis, *The Interception of Vessels on the High Seas – Contemporary Challenges to the Legal Order of the Oceans* (Oxford and Portland, Oregon, 2013), at 162-163.

<sup>41</sup> See discussion of this element *infra* Part 2.2.2.

<sup>42</sup> See Guilfoyle, WG2 Compendium, *supra* note 29, at 3.

<sup>43</sup> This point was addressed by the Harvard Research Draft, where the drafters stated that even a single act could be an act of piracy – see Note: The Achille Lauro Incident, *supra* note 17, at 731 (fn 35), explaining that the drafters rejected a previous position that viewed piracy as a “manner of life or sort of enterprise.” See more generally Guilfoyle, WG2 Compendium, *supra* note 29, stating that “the ordinary meaning, object and purpose of these words [“acts of violence” and “act of depredation”] would suggest a broad approach should be taken.”

<sup>44</sup> See Rosemary Collins and Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40 J. Mar. L. & Com. 89, 96 (2009) (considering that “threatened violence could be characterised as an ‘act of violence’ under Art. 101 if the term is interpreted broadly . . . [but alternatively] may be classed as an act of depredation.”).

to the UNCLOS definition of piracy.<sup>45</sup> A similar difficulty arises with clandestine attacks, which are quite common in the South-East Asia region, where the attackers board a vessel to steal cargo, equipment or cash without any engagement with the crew,<sup>46</sup> or with acts considered as “white-collar” piracy.<sup>47</sup>

Another challenge is posed by the fact that attempts to commit illegal acts of violence (or depredation) are not explicitly included in the definition of piracy under article 101(a).<sup>48</sup> National courts have previously held that a frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*.<sup>49</sup> However, if the pirates failed to board a vessel, such failure might be

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<sup>45</sup> See discussion of the definition of “armed robbery at sea” *infra* Part 2.6.

<sup>46</sup> See discussion on both types of acts in the context of South-East Asia in Collins and Hassan, *supra* note 44, at 96-97 (the authors consider that “[T]he lack of clarity in this area reveals a deficiency in this element when applied to Southeast Asian attacks, which could become problematic in the successful prosecution of pirates”).

<sup>47</sup> On “white-collar” piracy see Ian Urbina, “Maritime ‘Repo Men’: A Last Resort for Stolen Ships”, *NYTIMES*, 28 December 2015, available at [http://www.nytimes.com/2015/12/29/world/americas/maritime-repo-men-a-last-resort-for-stolen-ships.html?\\_r=0](http://www.nytimes.com/2015/12/29/world/americas/maritime-repo-men-a-last-resort-for-stolen-ships.html?_r=0) (“The public perception of modern piracy usually involves Somalis in fast-boats capturing tankers on the high seas. “More often overlooked but just as prevalent is white-collar piracy,” Admiral Parry said. Buccaneers in business suits hijack ships in port through opportunistic ruses rather than at sea with surprise shows of force”).

<sup>48</sup> See Hakan Friman & Jens Lindborg, *Initiating Criminal Proceedings with Military Force: Some Legal Aspects of Policing Somali Pirates by Navies*, in *Modern Piracy: Legal Challenges and Responses* 172, 176 (Douglas Guilfoyle ed., 2013); YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* (2012) (mentioning that a proposal to include attempts in the definition was defeated during the negotiations at the United Nations Conference on the Law of the Sea); Collins and Hassan, *supra* note 44, at 101.

<sup>49</sup> See *In re Piracy Jure Gentium*, [1934] A.C. 586. In one recent U.S. case, the Federal Court took a more conservative approach, dismissing the piracy charge based on its view that piracy is to be understood as robbery at sea, thereby excluding frustrated attempts to board a ship – see *United States v. Said*, 757 F.Supp.2d 554. This narrow interpretive approach was, however, later rejected in *U.S. v. Dire*, at 468 (which also made a reference to the *Piracy Jure Gentium* case and highlighted the dynamic and evolving nature of the crime of piracy). Similarly, the Mauritius Intermediate Court concluded that “[T]here is no need for the attack to be completed and the shipping vessels hijacked and robbed by the alleged pirates for the act of piracy to be completed” – see *Police v. Mohamed Ali Abdeoukader and others*, Cause No. 850/2013, judgement of the Intermediate Court of Mauritius, 6 November 2014. ¶ 53. A similar view was also adopted by the Seychelles courts dealing with piracy cases, cf. *Republic of*

considered as piracy only if the attempted boarding is characterized as an act of violence. A failed attempt due to an evasive action by the crew is unlikely to satisfy the violence element and might fall outside the definition of piracy under article 101(a).<sup>50</sup>

In the same vein, planning for or making preparations for piracy are not expressly criminalized by UNCLOS, unless the actions in question fall within the specific provisions on incitement and facilitation.<sup>51</sup> This raised difficulties in the context of combating piracy off the coast of Somalia, where skiffs carrying out piracy suspects were frequently identified before any actual attack took place.<sup>52</sup> The report of Mr. Jack Lang, Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia, which was submitted to the UNSC in January 2011, raised concerns over the difficulties posed by the UNCLOS definition of piracy regarding the mere intention to commit piracy: “[A]rticle 103 of the United Nations Convention on the Law of the Sea, concerning the definition of a pirate ship, includes the intention to commit an act of piracy. However, the constituent elements of that offence are not clearly defined. Unless the perpetrators are caught in the act, many acts of piracy are not prosecuted.”<sup>53</sup>

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*Seychelles v. Mohamed Ahmed Dahir & Ten Others* ("Topaz"), Judgment, ¶ 55-59, Crim. Side No. 51 of 2009, (July 26, 2010) (Seychelles) (noting that robbery is not an essential element of the crime of piracy).

<sup>50</sup> Collins and Hassan, *supra* note 44, at 101 (noting, however, that a failed attempt may qualify as voluntary participation in the operation of a pirate ship – see also discussion regarding Article 101(b) of UNCLOS *infra* Part 2.3).

<sup>51</sup> Friman and Lindborg, *supra* note 48, at 176.

<sup>52</sup> To address this problem, scholars proposed adopting under national legislation "equipment articles" which create a presumption of criminal intent when certain listed equipment is uncovered aboard ship – cf. Eugene Kontorovich, *Equipment Articles for the Prosecution of Maritime Piracy*, ONE EARTH FUTURE (May 17, 2010), <http://oceansbeyondpiracy.org/publications/equipment-articles-prosecution-maritime-piracy>.

<sup>53</sup> See U.N. Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, para. 24, annexed by U.N. Secretary-General, Letter dated Jan. 24, 2011 from the Secretary-General to the President of the Security Council, U.N. Doc. S/2011/30 (Jan. 25, 2011) [hereinafter *Lang Report*].

To successfully address at least some of the conundrums arising with regard to the first element, a broad interpretive approach of Article 101 ought to be applied.<sup>54</sup> This view is supported by the wording of the first element, highlighting twice the contours of the crime as including *any* act of violence or detention or any act depredation.<sup>55</sup>

A broad interpretive approach was espoused by the U.S. Court of Appeals of the 9<sup>th</sup> Circuit in one case. In that matter, the appellate Court overturned a District Court decision to dismiss piracy claims in a civil case brought by Japanese whalers against the Sea Shepherd Society, an environmental group.<sup>56</sup>

The Court rejected a number of findings of the District Court, including its conclusion that the Sea Shepherd does not target people, only ships and therefore “it is not apparent that the nations of the world would agree that tactics that resemble malicious mischief amount to piratical violence.”<sup>57</sup> The appellate Court found that this holding of the first instance “runs afoul of the UNCLOS itself, which prohibits “violence . . . against another ship” and “violence . . . against persons or property.”<sup>58</sup> On the means used by the Sea Shepherd to prevent whaling, the Court of Appeals also commented that “You don’t need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other

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<sup>54</sup> In this regard, see Collins and Hassan suggesting that threatened violence could be characterized as an act of violence under Article 101 if the term is interpreted broadly – Collins and Hassan, *supra* note 44, at 96.

<sup>55</sup> See D. Guilfoyle, *SHIPPING INTERDICTION AND THE LAW OF THE SEA* (Cambridge University Press, 2009) [hereinafter “Guilfoyle, Shipping Interdiction”], 42-43 (“The words ‘[a]ny...act’ were clearly intended to broaden, not narrow, the range of conduct captured by the definition”).

<sup>56</sup> *Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y*, 708 F.3d 1099 (9th Cir. 2013), amended by 725 F.3d 940 (9th Cir. 2013) [“Sea Shepherd Case”].

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.”<sup>59</sup> The Court therefore rejected Sea Shepherd’s argument that to meet the standards of the piracy definition, a high threshold of violence must be met.

### 2.2.2. “committed for private ends”

One of the most controversial and potentially consequential elements of the crime of piracy as defined by UNCLOS is the requirement that the illegal acts of violence shall be “committed for private ends.”<sup>60</sup>

There should be little doubt that the phrase “for private ends” is an element of the offence of piracy.<sup>61</sup> The term, however, is not defined in UNCLOS or the HSC.<sup>62</sup> Scholarly debate generally presents two points of view regarding the interpretation of this phrase.<sup>63</sup> The first focuses on the distinction between private as opposed to politically motivated acts, and it often considers “private ends” to mean pecuniary goals. According to this view, the interpretation of private ends will rely primarily on the subjective appreciation of the offender.<sup>64</sup> The most

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<sup>59</sup> *Id.*

<sup>60</sup> UNCLOS, art. 101(a).

<sup>61</sup> See Mauritius Cause No. 850/2013, *supra* note 49, ¶ 107 (the court stating that “We are of the view that ‘for private ends’ is an element of the offence of ‘act of piracy’ similar to ‘illegal act of violence’, ‘high seas’ and ‘directed against [the MSC Jasmine]’”). Though the decision of the Intermediate Court was overturned by the Mauritius Supreme Court, the latter held the point on the ‘private ends’ element as an element of the offence (“It is common ground that “for private ends” is a constitutive element of the offence of piracy under customary international law and under article 101 of UNCLOS”) – see *Director of Public Prosecutions v. Ali Abeoukader Mohamed & ORs*, 2015 SCJ 452, P. 15, 18 December 2015.

<sup>62</sup> Dutton, MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE, *supra* note 31, at 74.

<sup>63</sup> TANAKA, *supra* note 48, at 355–56.

<sup>64</sup> *Id.* at 355.

significant result of applying that approach is the exclusion of all acts of maritime terrorism from the scope of UNCLOS definition. Indeed, it has been argued that attacks of shipping for political reasons are automatically excluded from the definition of piracy.<sup>65</sup>

Conversely, the second interpretive approach is based on an objective test which distinguishes the term “private” from the term “public” (in the meaning of state sanctioned acts), thereby viewing all acts of violence that lack a State’s authority as those committed for “private ends” within the meaning of Article 101.<sup>66</sup> According to this view, where State involvement exists, the act will not be considered piracy, even if it is aimed at enriching the government that authorized the attack.<sup>67</sup>

For both legal and policy reasons, the latter point of view appears to have the better argument. The understanding of the term “private” – as opposed to “public” or “official” –

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<sup>65</sup> Malcom Shaw, *International Law* 615 (6th ed. 2010); Shearer, *supra* note 26, ¶ 16.

<sup>66</sup> Tanaka, *supra* note 48, at 355–56; Guilfoyle, *Shipping Interdiction*, *supra* note 55, at 36–37. This approach can be seen in earlier writings, as well. See, e.g., Pearce Higgins, *Hall’s International Law* 310–11 (8th ed. 1924) [hereinafter Hall]. In Hall, it was stated that all acts of piracy have one thing in common, namely that “they are done under conditions which render it impossible or unfair to hold any State responsible for their commission.” *Id.* Accordingly, a “pirate either belongs to no State or organized political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject.” *Id.* When the “distinctive mark of piracy is seen to be independence or rejection of state or other equivalent authority,” definitions are inadequate because they only embrace “depredations or acts of violence done *animo furandi*.” *Id.* “[A] satisfactory definition must expressly exclude all acts by which the authority of the State or other political society is not openly or by implication repudiated.” *Id.* Support to this interpretation of the ‘private ends’ element can also be drawn from the decision of the Mauritius Supreme Court in the case of Ali Abeoukader Mohamed & ORs (the Court stating that “This element [‘private ends’] is in contra distinction with acts which are undertaken for the State”) - Ali Abeoukader Mohamed & ORs, *supra* note 61, P. 18.

<sup>67</sup> See Eugene Kontorovich, *Yes, Sea Shepherd Engages in Piracy under International Law*, THE VOLOKH CONSPIRACY, (Feb. 27, 2013, 12:22PM), <http://www.volokh.com/2013/02/27/yes-sea-sheperd-engages-in-piracy-under-international-law/>.

corresponds to other areas of international law.<sup>68</sup> More specifically for the law of the sea purposes, it is in line with the overall approach of the piracy section in UNCLOS, which excludes state sanctioned activities from the scope of the definition<sup>69</sup> while making no reference to a possible distinction between private and politically motivated acts. In that regard, the “private ends” element is not simply overlapping with the “private ship” requirement of Article 101, as has been suggested<sup>70</sup> since it ensures that private ships or aircrafts operating upon the authorization of a state shall not be qualified as pirates; rather, these acts of “privateering” may generate state responsibility.<sup>71</sup>

The private/public test is further supported by the commentary of the ILC to the articles it adopted on the law of the sea, which served as the basis for the HSC. The ILC stated that “[T]he

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<sup>68</sup> Cf. the area of immunity of state officials from criminal jurisdiction and the test defined by the International Court of Justice in the “*Arrest Warrant*” case, distinguishing between acts of officials committed in the context of exercising public duties (therefore subject to immunity) as opposed to acts committed in “private capacity” – see Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of The Congo v. Belgium), *Judgment, I.C.J. Reports 2002*, para. 61. The distinction between acts committed in private capacity – as opposed those in public (or official) capacity – is common in other aspects of immunity under international law.

<sup>69</sup> See the reference to private ship or aircraft in Article 101(a) as well as the inclusion in that term of governmental ships or aircraft whose crew has mutinied (Article 102).

<sup>70</sup> See Tanaka, *supra* note 48, at p. 355 (stating that “[A]ccording to this [the private/public view], in essence, the private ends requirement seems to overlap with the private ship requirement”).

<sup>71</sup> See Article 5 of the ILC Draft Articles on State Responsibility, according to which the conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. See also Guilfoyle, *Shipping Interdiction*, *supra* note 55, at 37 (noting that the essence of piratical acts is that it neither raises immunity of states nor engages state responsibility); Papastavridis, *supra* note 40, at 164 (noting that “Historically, the requirement that a pirate act has to be committed for ‘private ends’ has its origin in the distinction between piracy and privateering”). The view that privateering is ought to be excluded from the definition of piracy is also supported by the Commentary to the Harvard Research Draft and the position expressed by the Special Rapporteur of the ILC referring to the “private ends” requirement – see M. Halberstan, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 Am. J. Int’l L. 269 1988, p. 278 and 280.

intention to rob (*animus furandi*) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain.”<sup>72</sup> Thus, the subjective motivation behind the act and the fact that the perpetrator seeks goals other than pure pecuniary gain do not exclude the act from being considered as piracy.

No less important, by presenting a clear and objective criterion to be applied, the private/public test prevents speculations and difficult assessments where the motives are mixed and not transparent.<sup>73</sup> In contrast, applying the subjective private/political test can result in completely different outcomes of criminal proceedings, for instance where an individual who belongs to a group that carried out a piratical attack confesses that his main goal was financial gain (hence a pirate under the subjective test), while his fellow to the attack contends that a desire to change the political system was paramount in his case, hence potentially excluding his acts from the piracy definition.<sup>74</sup> Moreover, any identifiable political goal – remote as it is from the actual acts and the demands posed by the attackers – might exclude a case from the scope of the definition under the private/political test, thereby undermining the international efforts to curb illegal acts of violence at sea. As shown in the context of Somalia, possible political motivation – specifically, Somalis’ disgruntlement with illegal fishing and dumping in Somali’s

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<sup>72</sup> ILC, commentary to article 39, [1956] II YbILC, 282.

<sup>73</sup> See Kontorovich, *supra* note 67.

<sup>74</sup> See similarly Douglas Guilfoyle, *Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts*, 57 Int’l&Comp. L. Q. 690 2008, at 699 [hereinafter “Guilfoyle, *UN Security Council Resolution 1816*”] (noting that “if the view that politically motivated violence cannot be piracy is correct then Somalians attacking shipping beyond territorial waters have a simple defence. They may claim to be acting as civil war insurgents and not for private gain, or to be fulfilling a necessary public function in the absence of effective government by preserving fishing grounds from foreign over-exploitation”).

waters – had no impact on the position of the UNSC and the International Maritime Organization (IMO) in viewing the acts as piracy under international law.<sup>75</sup>

The private/public test is also supported by the primary policy reasoning for criminalizing the act of piracy, namely for the purpose of “protecting the freedom of navigation and the safety of persons upon the high seas.”<sup>76</sup> This test better corresponds to the need to adopt a broad interpretation to the piracy definition and can prevent a situation where individuals who committed acts of violence on the high seas will go unpunished or shall escape States jurisdiction due to their alleged subjective motivation.

In that respect, the private/public test has proven useful in addressing violent acts at sea referred to as “eco-terrorism”. In one reported case before a national court, the Belgian court found that Greenpeace protestors, who took violent action against a Dutch vessel in international waters ‘in support of a personal point of view’ committed an act of piracy.<sup>77</sup> Their motive – a ‘personal point of view,’ which does not aim at obtaining pecuniary gain and could have very well been regarded as a political motive (in the broader sense of the term), was thus not considered as a reason to exclude the act from the scope of the definition.

A similar position was held by the U.S. Court of Appeals in the “Sea Shepherd Case.” The appellate court dismissed the conclusion of the first instance according to which “private ends” under Article 101(a) of UNCLOS meant actions that led to “financial enrichment.” The Court concluded that the private ends requirement often refers to matters of a personal nature that are not necessarily related to finance. Further, it found “rich history of piracy law, which defines acts taken for private ends as those not taken on behalf of a state.” The Court concluded

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<sup>75</sup> See Guilfoyle, *id.*, at 699.

<sup>76</sup> Guilfoyle, *Shipping Interdiction*, *supra* note 55, at 38.

<sup>77</sup> *Castle John v. NV Mabeco* (Belgium, Court of Cassation, 1986) 77 ILR 537.

that because someone believes their actions serve the public good is not enough to render their ends public.<sup>78</sup>

The private/political distinction is also less convincing from the standpoint of international cooperation, which is at the heart of the UNCLOS piracy section:<sup>79</sup> In the field of extradition and mutual legal assistance (MLA), the scope of the political offence exception, which may serve as a legitimate reason for denying a request for cooperation<sup>80</sup> has significantly narrowed in recent decades. It is well-accepted today that an individual who committed a violent act cannot rely on political or ideological motives to justify the act<sup>81</sup> and that the political offence exception may not be invoked in such a case to deny extradition or MLA requests.<sup>82</sup>

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<sup>78</sup> See “Sea Shepherd Case”, *supra* note 56. For a different view, excluding eco-terrorism from the piracy definition, see Hugh Williamson, *New Thinking in the Fight Against Marine Piracy: Financing and Plunder Pre-Emptying Piracy Before Prevention Becomes Necessary*, 46 Case W. Res. J. Int’l L. 335, 337-8, 2013 (The author’s view reflects the subjective test by specifically excluding environmental activism (ecoterrorism) from the contours of the piracy definition for the purpose of his study).

<sup>79</sup> See Article 100, UNCLOS.

<sup>80</sup> See Article 3(a) of the United National Model Treaty on Extradition, A/RES/45/116 (14 December 1990); Article 4(b) of the United Nations Model Treaty on Mutual Legal Assistance, A/RES/45/117 (14 December 1990). “Pure” political offences such as prohibited speech, for which extradition/MLA request may be denied, would in any event fall outside the definition of piracy since they will not meet the first element of committing an act of violence or depredation.

<sup>81</sup> See also Guilfoyle, *Shipping Interdiction*, *supra* note 55, at 42 (stating that “as seen in international treaty practice, a violent act’s political motivation should not be seen as relevant to its characterization as an ordinary law crime”).

<sup>82</sup> See Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Para. 42, available at [https://www.unodc.org/pdf/model\\_treaty\\_extradition\\_revised\\_manual.pdf](https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf) (stating that “The same degree of international acceptance cannot be found with respect to refusals to extradite based upon the political offence exception when the conduct in question is violence committed for asserted political goals, and which therefore contains all of the elements of common crimes such as bombing and murder. The history of the political offence exception is an interesting study in the progression of efforts to accommodate legitimate political change, while increasingly denying sanctuary to perpetrators of violence... international law and public opinion are becoming progressively more intolerant of political violence, and treaty provisions to an increasing extent exclude

Consequently, even if at its origins the definition of piracy was meant to exclude certain politically-motivated acts, a contemporary interpretation of Article 101, which reflects the changes under international law in the fields of extradition and MLA, the importance of international cooperation, and the general view of UNCLOS as a living document<sup>83</sup> would render a test based on the subjective (or political) motivation of the offender inadequate and obsolete.

To conclude, the interpretation of the “private end” element through the application of a legal test that distinguishes between private as opposed to public (in the meaning of state sanctioned) acts is a sound approach from both legal and policy perspectives. If this test is indeed implemented, it would also avoid the need to amend Article 101(a) to include politically-motivated acts of violence, as has been proposed in the past<sup>84</sup> since such acts already fall within the scope of the definition.

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violent conduct from the benefit of the exception”). In the field of counter-terrorism, this approach was reflected in recent international conventions such as the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, TIAS No. 13,075, 39 ILM 270 (2000) [the “Terrorism Financing Convention”]. Article 6 of the Convention provides that “[E]ach State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.” Article 14 explicitly excludes the offences defined by the Convention from the scope of the political offence exception for purposes of extradition or MLA. See similarly Articles 6 and 15 of the International Convention for the Suppression of Acts of Nuclear Terrorism New York, adopted by the General Assembly of the United Nations on 13 April 2005.

<sup>83</sup> Tanaka, *supra* note 48, at 3 (“like international human rights law and international environmental law, the law of the sea is a dynamic field of international law”).

<sup>84</sup> Cf. Note: The Achille Lauro Incident, *supra* note 17.

### 2.2.3. “by the crew or the passengers of a private ship or a private aircraft”

This element aims at excluding from the scope of the definition attacks carried out by governmental ships or aircrafts. The discussion over viewing attacks by warships as piratical acts was revived following German submarine attacks during World War I and the sinking of neutral ships by unidentified submarines during the Spanish Civil War.<sup>85</sup> This gave rise to the Nyon Accord of 1937, which analogized such attacks with acts of piracy.<sup>86</sup> The ILC, in its preparatory work on the HSC, rejected this analogue, noting in its commentary that “it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private ships.”<sup>87</sup>

At the same time, the 1956 ILC Report introduced in its article 40 (equivalent to Article 102 of UNCLOS) the concept of viewing an attack by a governmental ship or aircraft, whose crew has mutinied and taken control of the ship or aircraft, as assimilated to acts of piracy in the meaning of Article 101. This corresponds to the view that so long as the governmental ship or aircraft is no longer under the government’s control, it is perceived as a private one and hence an attack carried out by such a vessel falls within the definition of piracy.<sup>88</sup> It further supports those advocating for the view that the “private ends” element is met when an act is not sanctioned by

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<sup>85</sup> Note: The Achille Lauro Incident, *supra* note 17, at 736 (fn 56).

<sup>86</sup> International Agreement for Collective Measures Against Piratical Attacks on the Mediterranean by Submarines, signed September 14, 1937, 1937 Gr. Brit. T.S. No. 38 (Cmd. 5568).

<sup>87</sup> 1956 ILC Report, *supra* note 23, commentary to draft article 39.

<sup>88</sup> 1956 ILC Report, commentary to draft article 40 (indicating that “the article ceases to apply once the mutiny has been suppressed and lawful authority restored”). In that respect, see also Omer Elagab, *Somali Piracy and International Law: Some Aspects*, 24 Austl.&N.Z. Mar.L.J. 59 2010, at 62 (“One can imagine, however, that this restriction [on attacks by governmental ships or aircrafts] must be waived in a situation where a state-owned ship or aircraft has been taken over and employed for piratical purposes”).

States' authorities.<sup>89</sup> Situations that do not fall under the exception provided for in Article 102, that is where the attack is considered to be carried out by a governmental vessel, will be a matter of State responsibility rather than the law of piracy.<sup>90</sup>

The term “ship” is not defined in UNCLOS but it calls for a broad interpretation that includes all types of marine vessels. Thus, for example, motorboats or speedboats should be considered as falling within this term.<sup>91</sup> In contrast, attacks carried out from a fixed installation are unlikely to meet the definition.<sup>92</sup> It is also suggested that the term “crew” should be interpreted broadly to include individuals operating an unmanned vessel or aircraft (e.g. a drone) attacking another vessel or aircraft.<sup>93</sup>

One challenge related to criminal prosecution of Somali piracy arose with regard to the difficulty in identifying the role of each suspect, for instance who among the suspects actually participated in the illegal act of violence (e.g. shooting against the attacked vessel). In cases

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<sup>89</sup> See above discussion on the “private ends” element; see also Kontorovich, *supra* note 67 (stating that “[T]he “private” ends requirement of the UNCLOS Art. 101 (which defines piracy) has to be read in conjunction with Art. 102, which distinguishes between “warship” or “government ship” – which cannot commit piracy while under governmental control and “private” ships, which are the kind that can be pirates. Thus “private” clearly means “non-governmental,” rather than selfish or not selfish”).

<sup>90</sup> Douglas Guilfoyle, WG2 Compendium, *supra* note 29, at 3.

<sup>91</sup> See Kashubsky, *supra* note 19, at 170.

<sup>92</sup> See Kashubsky, *idem*; See also further discussion below on whether an attack against offshore installations may be considered as piracy. If, as has been argued, attacks against such installations may be considered piracy where the installation was in motion, a similar approach should be applied to attacks carried out from an installation that was moving at the time the piratical act took place.

<sup>93</sup> If the individual operating the unmanned vessel or aircraft is not found on the high seas during the attack (e.g. he operates a drone from the shore), this might raise doubts on the existence of a piracy offence within the meaning of Article 101(a) – see further discussion regarding the ‘high seas’ requirement *infra* Part 2.2.4. If concluded that the ‘high seas’ requirement is essential with regard to the location of the attacking vessel or its crew, then the individual operating the unmanned vessel or aircraft may be held responsible for piratical acts under Article 101(b), namely as voluntary participants “in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft” – see further discussion *infra* Part 2.3.2.

before the courts of Seychelles, the court addressed this challenge through applying a concept of ‘common intention’ ascribed to a Piracy Action Group (“PAG”), namely a group of perpetrators of whom all members can be equally guilty of piracy in the meaning of Article 101(a).<sup>94</sup> For example, in the ‘Talenduic’ case all defendants were charged with piracy based only on circumstantial evidence since no link could be established between each individual and a particular action. The court nonetheless convicted all defendants for piracy (equivalent to Article 101(a)) after concluding that there was a “division of labor between all suspects, but all aimed at one common result.”<sup>95</sup> Similarly, in a more recent case of ‘Nave Atropos’ before Seychelles Supreme Court, the Court held that based on the doctrine of ‘common intention’, “when more than one person are involved in the commission of an offence there can be equal participation or

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<sup>94</sup> The PAG concept, based on Seychelles Criminal Code, can be compared with the paradigm of Joint Criminal Enterprise employed by international tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY). Comparison can also be made to the notion of “organized criminal group” as defined in Article 2(b) of the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13,127, 2225 U.N.T.S. 209 [UNTOC]. Though the PAG does not necessarily have to meet the requirement of UNTOC that the “organized criminal group” be a “structured group”, namely “a group that is not randomly formed for the immediate commission of an offence” (Article 2(c), UNTOC), it appears that most if not all PAGs would meet that criterion.

<sup>95</sup> Republic v. Mohamed Ahmed Ise & Four Others (“Talenduic”), Judgment, Crim. Side No. 75 of 2010 (June 30, 2011) (Seychelles), ¶ 37 (“[I]t is immaterial if the prosecution does not point out who specifically did what from the PAG [Piracy Action Group], as long as it is proved that an accused was party to the joint accomplishment of this criminal object, and that his will contributed to the wrong doing which in law makes him responsible for the whole crime as though performed by himself alone. Basically the evidence shows that there was a division of labor, but all aimed at one common result and for private ends. Others were maneuvering the skiff while some were firing, and those on the mother skiff taking care of the supplies and keeping a lookout to avoid any surprises. Therefore, each is equally culpable for the actions of his confederates”). The individuals were also convicted for voluntary participation in operating a pirate ship (equivalent to Article 101(b), UNCLOS).

unequal participation but what counts is not the degree of participation but the mindset of the participants.”<sup>96</sup>

A different question is whether individuals operating a ‘mother ship’ can be considered as part of the “crew” for the purposes of Article 101(a). In the above mentioned ‘Talenduic’ case, the three operators of the ‘mother ship’ were convicted for piracy (equivalent to Article 101(a)) in application of the ‘common intention’ doctrine. It appears, however, that a better approach would be to require for the purpose of Article 101(a) that the crew or passengers of the piracy vessel were those physically present on it or alternatively directly operating it (e.g. the “crew” of a drone). Accordingly, the crew or passengers of a “mother ship” that facilitate the piracy act should not be considered as pirates under sub-paragraph (a), though their participation in the criminal activity can be addressed under the other two sub-paragraphs of Article 101.<sup>97</sup>

The distinction between the crew of the attacking vessel and that of the ‘mother ship’ was among the questions raised in the piracy case before the courts of Mauritius: The Intermediate Court (the first instance) concluded that while all the operators of the attacking skiff can be viewed as “co-authors”, those operating the whaler (the ‘mother ship’) can be considered, at best, as accomplices and can therefore be prosecuted only as aiders and abettors (equivalent to Article 101(c)). The problem that arose was that there was no evidence as to who among the 12 defendants was on the skiff at the material time so as to be sure that they were co-authors and not “mere” facilitators. The Intermediate Court therefore concluded that “it would be most unreasonable and unfair to find all twelve accused parties guilty as co-authors when we have

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<sup>96</sup> Republic v. Mohammed Ali Hussein and Four Others (“Nave Atropos”), Judgment, COCR6/2014, (June 10, 2016) (Seychelles), ¶ 57.

<sup>97</sup> See discussion *infra* regarding sub-paragraphs (b) and (c).

clear evidence that not all of them formed part of the illegal act of violence, since some were in the whaler at significant distance from the skiff.”<sup>98</sup>

On appeal, however, the Supreme Court held differently, concluding that the Intermediate Court erred in suggesting that the occupants of the ‘mother ship’ were accomplices at best and in requiring the prosecution to identify the role of each suspect. In the view of the Supreme Court, all are to be considered as ‘co-authors’, whose participation was necessary for the commission of the offence.<sup>99</sup> The reversal by the Supreme Court has critical implications beyond the particular case: It has been correctly noted that had the decision of the Intermediate Court stood, “it would mean that a positive identification of exactly who performed each role would be necessary where suspected pirates were apprehended in 2 or more vessels, as is generally the case when operating far from shore. Such identifications would be next to impossible in practical conditions.”<sup>100</sup>

#### 2.2.4. “directed...(i) on the high seas...(ii) in a place outside the jurisdiction of any State”

This segment of the definition concerns the geographical scope of the offence. It was meant to distinguish piracy from acts committed in an area subject to state’s jurisdiction, including its

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<sup>98</sup> See Mauritius Cause No. 850/2013, *supra* note 49, ¶ 84.

<sup>99</sup> See case of Ali Abeoukader Mohamed & ORs, *supra* note 61, P. 10 (“If the evidence and version of the prosecution are retained, it is amply proved that the occupants of the whaler [the ‘mother ship’] and those of the skiff had to act together to carry out the PAG and they were on a ‘common enterprise’, the participation of each member of the group being essential to the commission of the attack. In view of the nature of the operation on the high seas and the involvement of each member of the group, be it on board of the whaler or the skiff, in the perpetration of the alleged attack, they could only be co-authors and not mere accomplices. The trial Court erred in concluding that the occupants of the whaler are “at best accomplices...”)

<sup>100</sup> See Charlie Brown, *Recent Piracy Decision in the Supreme Court of Mauritius*, Jan. 5, 2016, available at <https://www.linkedin.com/pulse/recent-piracy-decision-supreme-court-mauritius-charlie-brown>.

territorial sea,<sup>101</sup> and to ensure that criminals directing attacks outside the jurisdiction of any state will neither be considered “outlaws” (in the meaning of “outside the law”<sup>102</sup>) nor beyond the reach of States that wish to bring them to justice. This criterion raises a number of interpretive challenges, which will be discussed in this Part and further below in this Chapter.<sup>103</sup>

#### 2.2.4.A. *Questions arising from UNCLOS zoning system*

The first derives from the new zoning system of UNCLOS. Specifically, with the introduction of the Exclusive Economic Zone (EEZ), a question arises whether acts committed within this area may qualify as piracy within the meaning of Article 101(a). The piracy provisions are found in Part VII of the Convention, which concerns the “high seas.” Article 86, the first article of this Part, states that “the provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”<sup>104</sup> This might lead to the conclusion that acts of piratical nature committed within the EEZ do not meet the UNCLOS definition under article 101(a)(i), thereby significantly limiting the geographical scope of the piracy provisions.

It is widely-accepted, however, that this potential difficulty can be addressed through the application of article 58(2) of UNCLOS, according to which “Articles 88 to 115 and other

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<sup>101</sup> 1956 ILC Report, *supra* note 23, commentary to draft article 39. UNCLOS lists areas that are deemed to be part of a state’s sovereign territory. *See, e.g.*, UNCLOS, at art. 8 (a state’s internal waters and ports); UNCLOS, at art. 2 (territorial sea of a state); UNCLOS, at art. 49 (archipelagic waters of a state); UNCLOS, at art. 34 (regarding parts of straits used for international navigation that are within the territorial sea of a state)

<sup>102</sup> See Nicholas Onuf, *Forward, MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE*, *supra* note 31, at xx (noting that “[I]n the 16<sup>th</sup> century and for a long time afterwards, pirates were treated as outlaws – *outside* the law, entirely beyond any public’s body jurisdiction”).

<sup>103</sup> Additional questions related to “dry land” piracy will be addressed *infra* Part 2.3.2.

<sup>104</sup> Article 86, UNCLOS.

pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.”<sup>105</sup> Considering that the rights conferred upon States in the EEZ concern only the management of natural resources,<sup>106</sup> the piracy provisions and their enforcement a priori appear to be compatible with the EEZ provisions.<sup>107</sup>

In the *U.S. v. Ali* case, the Court of Appeal found that Article 86 does not impose a strict high seas requirement on all provisions in Part VII of UNCLOS as this would have resulted in numerous redundancies throughout UNCLOS where the high seas requirement is mentioned in addition to article 86 (e.g. in article 101(a)).<sup>108</sup> Article 86, the Court held, “makes the most sense as an introduction to Part VII, which is titled “High Seas”, and not as a limit of jurisdictional scope.”<sup>109</sup> A similar conclusion of viewing the EEZ as part of the ‘high seas’ for the purpose of the piracy section was reached by the courts of Seychelles.<sup>110</sup>

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<sup>105</sup> Article 58(2), UNCLOS.

<sup>106</sup> Article 6, UNCLOS. In that respect, see also Tanaka, *supra* note 48, at 6-7 (viewing the EEZ as a zone with “limited spatial jurisdiction”).

<sup>107</sup> See Collins and Hassan, *supra* note 44, at 97; Kashubsky, *supra* note 19, at 168; Guilfoyle, WG2 Compendium, *supra* note 29, at 2 (mentioning, however, that when acting in another States’ EEZ a government vessel engaged in suppressing piracy must have “due regard” for the coastal State’s rights as provided by Article 8(3), UNCLOS). See similarly T.A. Clingan Jr., *THE LAW OF PIRACY*, in *PIRACY AT SEA* (Eric Ellen, Ed. 1989), 170, quoted in Menefee, *Jamaica Discipline*, *supra* note 25, at 146, fn. 88 (explaining that “since enforcement against a pirate, in normal circumstances, could not be viewed as impinging upon any rights reserved to the coastal states, the law of piracy in the EEZ must be viewed as identical to those applying beyond”). The position according to which the geographic scope of article 101(a) should be read to include the exclusive economic zone of any State is also supported by IMO – see *IMO, Circular Letter Concerning Information and Guidance on Elements of International Law Relating to Piracy, Annex, Uniform and Consistent Application of the Provisions of International Conventions Relating to Piracy*, 21, IMO Circular Letter No. 3180, LEG 98/8 (May 17, 2011) [hereinafter “IMO Circular Letter”].

<sup>108</sup> *United States v. Ali*, 718 F.3d 929, 941–42 (D.C. Cir. 2013).

<sup>109</sup> *id.*

<sup>110</sup> See the ‘Topaz’ case, *supra* note 49, ¶ 57 (the court concluded that the EEZ is essentially concerned with resources and therefore that “others than as regards resources, EEZ’s are counted as the high seas”). This position

In the piracy case brought before the Mauritius Court, the court of first instance (the Intermediate Court) held that under Mauritian law, the ‘high seas’ includes only the Mauritius EEZ. Since in that case the attack had taken place in the Somali EEZ and not the Mauritian EEZ, the Court found that the prosecution had failed to satisfy the “high seas” requirement under Mauritian law.<sup>111</sup> This conclusion was sharply criticized<sup>112</sup> and was overturned on appeal by Mauritius Supreme Court, which held that the EEZ is indeed part of the ‘high seas’.<sup>113</sup>

A similar reasoning to the one of the EEZ applies with regard to the “contiguous zone”, namely the marine space contiguous to the territorial waters where a State may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.<sup>114</sup> This zone confers upon States only limited enforcement jurisdiction with regard to the aforementioned laws and therefore has no implications for the question of piratical acts that occur outside the territorial

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was reiterated in the case of the Republic v. Dahir ("Happy Bird"), Judgment, IT 22-25, Crim. Side No. 7 of 2012 (July 31, 2012) (Seychelles), ¶ 7 (the court rejected the defendants’ argument that the alleged attacks took place in the EEZ of Oman and therefore not on the ‘high seas’).

<sup>111</sup> See Mauritius Cause No. 850/2013, *supra* note 49, ¶ 93.

<sup>112</sup> Cf. the following comment: “The ruling in relation to the “high seas” does seem remarkable. Clearly pirates being brought by foreign navies accused of attacks near Somalia or elsewhere in the Indian Ocean are most likely to have committed a piracy attack outside the Mauritian EEZ – but trying those pirates in Mauritius is precisely the reason for the agreement with Mauritius.” - See Mauritian Piracy Trial, 21 November 2014, available at <http://www.waltonsandmorse.com/mauritian-piracy-trial/>.

<sup>113</sup> See case of Ali Abeoukader Mohamed & ORs, *supra* note 61, P. 7 [the Supreme Court concluding with regard to the ‘high seas’ requirement that “Since articles 100 to 107 of UNCLOS deal with piracy and its repression, pursuant to article 58(2), the provisions regarding piracy and its repression are expressly stated to apply to the exclusive economic zone which a coast state may claim. We agree therefore with the submission made on behalf of the appellant to the effect that the accepted definition of the high seas in international law is that it includes the EEZ for the purposes of repressing and prosecuting piracy. The high seas therefore start outside the territorial seas i.e. at a point that is 12 NM from the baseline of the coastal state”]. In addition to this important general conclusion, the Supreme Court also noted that at the time the piratical attack took place, Somalia had no EEZ.

<sup>114</sup> Article 33(1), UNCLOS.

waters. This conclusion is supported by Article 111(1), UNCLOS, concerning “hot pursuit”: The provision allows coastal states to carry out the “hot pursuit” after a foreign ship which was within the contiguous zone only when “there has been a violation of the rights for the protection of which the zone was established.”<sup>115</sup>

In conclusion, it appears safe to conclude that despite the rezoning introduced by UNCLOS, for the purpose of the definition of piracy under part (i) of Article 101 the concept of the high seas area has not changed, namely it includes the entire area that stretches seaward beyond territorial waters.<sup>116</sup>

#### *2.2.4.B. Different scenarios related to the high seas requirement*

No less intriguing is the question whether the “high seas” condition is met only where both the attacking and the attacked vessels (or aircrafts) are found on the high seas. At first glance, this question may appear as somewhat academic since most known piracy attacks had involved boarding or similar physical interaction between two vessels found outside territorial waters, hence fulfilling the “high seas” requirement for both vessels. Indeed, the view of classical piratical acts traditionally divided them into two groups, namely those occurring **entirely** on the high seas, thereby constituting piracy, and those occurring **entirely** within the area subject to a coastal state jurisdiction, frequently referred to as “armed robbery against ships” or “armed robbery at sea”.<sup>117</sup> This traditional view was also reflected in the ILC commentary to the articles

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<sup>115</sup> Article 111(1), UNCLOS.

<sup>116</sup> While, for the purposes of defining piracy, the concept of the “high seas” has not changed in UNCLOS, in practical terms the geographical scope has changed with the expansion of the breadth of the territorial waters from the previously 3-mile limit to the 12-miles limit (Article 3, UNCLOS).

<sup>117</sup> See further discussion with regard to acts of piratical nature committed in areas under states’ jurisdiction *infra* Part 2.6.

it adopted on the law of the sea, where the ILC stated that “Piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any State, and cannot be committed *within* the territory of a State or in its territorial sea.”<sup>118</sup> With regard to the latter case, the ILC noted that “despite certain dissenting opinions, where the attack takes place *within* the territory of a State, including its territorial sea, the general rule should be applied that it is a matter for the State affected to take the necessary measures for the repression of the acts committed *within* its territory.”<sup>119</sup>

Nonetheless, with the advancement of modern technology, one cannot exclude a hypothetical situation where, for example, the perpetrator is found in territorial waters and through the use of threats (e.g. via radio communication) combined with violent acts (e.g. shooting a long-range missile) he forces a vessel on the high seas to give up its cargo. Similarly, this scenario may occur in the opposite direction, namely where the attacking vessel is on the high seas and the attacked ship is within an area subject to a coastal state jurisdiction. Altogether, there are five potential scenarios:

- (A) Both vessels/aircrafts are in an area subject to state jurisdiction (undoubtedly not piracy under Article 101(a));
- (B) Both vessels/aircrafts are on the high seas throughout the illegal act of violence or depredation (undoubtedly piracy under Article 101(a));
- (C) The attacked vessel/aircraft is on the high seas, the attacking vessel/aircraft is in an area subject to state jurisdiction;
- (D) The attacked vessel/aircraft is in an area subject to state jurisdiction, the attacking vessel/aircraft is on the high seas;

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<sup>118</sup> 1956 ILC Report, *supra* note 23, commentary to article 39 [emphasis added].

<sup>119</sup> *Id* [emphasis added].

(E) The vessels/aircrafts, or one of them, move during the attack between the high seas and an area subject to state jurisdiction.

From a pure jurisdictional standpoint, it may appear that only “scenario B”, describing the traditional form of piracy, may fall within the scope of Article 101(a) since in the other scenarios the coastal state may potentially exercise jurisdiction over the case. Such a narrow interpretation of Article 101(a), however, merits reconsideration.

First, while issues of jurisdiction are at the heart of the UNCLOS piracy section, Article 101 concerns a definition of the crime rather than a jurisdictional clause.<sup>120</sup> Thus, the question of whether states may exercise universal jurisdiction depends on the outcome of the definitional assessment (i.e. whether the case constitutes piracy under Article 101). In addition and as previously noted, the interpretation of Article 101 has direct implications to piracy cases before national laws, whether in light of the direct incorporation of the UNCLOS definition or due to the indirect application through a reference of domestic laws to the “law of nations”. The interpretation of Article 101 may also be relevant to establish State responsibility and liability where allegations of wrongly exercising the ‘right of visit’ or of a wrongful seizure of a ship are made.<sup>121</sup>

Further, the wording of the provision do not suggest a clear-cut answer as Article 101(a) does not state that the act shall be “committed” or shall “occur” on the high seas, which would have led to the conclusion that the entire act must take place on the high seas. Rather, the provision requires that the illegal acts shall be “*directed*, on the high seas, against another ship or

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<sup>120</sup> The matter of exercising jurisdiction (specifically – universal jurisdiction) is addressed in Article 105, UNCLOS.

<sup>121</sup> Articles 110 and 106, UNCLOS. The adequate grounds of exercising the ‘right of visit’ or of a seizure may therefore hinge on the interpretation of what constitutes piracy under Article 101.

aircraft...”<sup>122</sup> This enables a possible broader interpretation of the provision according to which it may suffice that either the ship directing the attack or the ship against which the attack is directed shall be on the high seas.

Moreover, assessing the abovementioned scenarios in light of the object and purpose of the provision,<sup>123</sup> namely the importance of ensuring the freedom of navigation and the safety of persons and property upon the high seas, suggests that all scenarios that include a high seas component (i.e. “scenarios B-E”) can potentially be considered as piracy within the meaning of Article 101 and for the purpose of the piracy section as a whole. Indeed, it would certainly defeat the purpose and object of the piracy section if states will be prevented from exercising the powers allowed under UNCLOS, notably boarding the pirate ship or seizing it while it is on the high seas,<sup>124</sup> where an innocent ship is targeted while navigating on the high seas (“scenario C”) or where a ship uses the high seas to attack innocent vessels elsewhere (“scenario D”).

The mere fact that a coastal state may – and probably should – enforce its sovereign powers to prevent attacks directed from its territorial waters (“scenario C”) and to exercise its jurisdictional powers over offenders does not automatically entail that no piracy act has occurred. Indeed, a different conclusion will fail to address a situation where coastal or flag states are unwilling or unable to do prevent piracy and arrest suspects.<sup>125</sup>

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<sup>122</sup> Article 101(a), UNCLOS [emphasis added].

<sup>123</sup> Vienna Convention on the Law of Treaties, Article 31(3), May 23, 1969, 1155 U.N.T.S. 331.

<sup>124</sup> Articles 110 and 105, UNCLOS.

<sup>125</sup> The inability of Somalia to combat piracy serves as an example for the difficulties found in **scenario C** and it led the UNSC to grant a special authorization to enter Somalian waters. Yet, the situation in Somalia is unique and that authorization is inapplicable elsewhere. Indeed, the UNSC explicitly affirmed that “the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing

Furthermore, a review of the measures that are sanctioned by UNCLOS to suppress criminal activities show their shortcomings in addressing other scenarios described above. For example, the right to conduct “hot pursuit” under Article 111 of UNCLOS appears to be inapplicable to “scenario D”, namely where the pirate vessel directs its attack while on the high seas, since a precondition to exercising the right is that the pursuit “must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State.”<sup>126</sup>

The difficulty found in the “hot pursuit” doctrine under Article 111, UNCLOS, might perhaps be addressed through the doctrine of “constructive presence”, which allows a coastal State to carry out hot pursuit and arrest foreign ships that remain on the high seas but commit an offence within the territorial sea or the EEZ by using their boats.<sup>127</sup> The rationale behind that doctrine is that while an act may have physically occurred outside a state's jurisdiction, the act is considered to have occurred within that state's jurisdiction if its effects are felt within that state.<sup>128</sup> A coastal State can therefore potentially argue for the application of the doctrine where an attack is directed from the high seas against a ship located within the state’s territorial waters (“scenario D”). It seems, however, that the doctrine is limited to situations where a mother ship is located on the high seas and carries out an illegal activity within the territorial waters of a state

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customary international law” – see UNSC Resolution 1816, 2 June 2008, S/RES/1816 (2008), para. 9. For a description of the few other cases where the UNSC authorized operations in a State’s territorial waters see R. McLaughlin, *United Nations Mandated Naval Interdiction Operations in the Territorial Sea?*, 51 Int'l & Comp. L.Q. 249 2002.

<sup>126</sup> Article 111(1), UNCLOS.

<sup>127</sup> Article 111(4), UNCLOS; D P O'Connell, *The International Law of the Sea*, (Oxford University Press, Oxford, 1982-1984) vol. 2 at 1092-1093; Tanaka, *supra* note 48, at 165.

<sup>128</sup> Randall Walker, “*International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century*”, 17 Auckland U. L. Rev. 194 2011, 206-207 (making a reference to O'Connell, *idem*).

using its own boats (“simple constructive presence”) or “other craft working as a team”<sup>129</sup> (“extensive constructive presence”). Applying it to the hypothetical “scenario D” described above may therefore be a stretch. Conversely, this doctrine can potentially be invoked for other situations, for example where a ship on the high seas uses a drone to attack a ship located in territorial waters.

Be that as it may, in light of the preconditions for conducting hot pursuit and the general limitation on exercising jurisdiction on the high seas by countries other than the flag ship country, if an attack carried out under “scenario D” is not considered as piracy under Article 101, the attacking ship may continue to carry out similar attacks uninterrupted since states may not exercise the rights of visit or seizure under UNCLOS.<sup>130</sup>

With regard to “scenario E”, the difficulty in determining in real time whether the illegal act has been completed on the high seas or alternatively in territorial waters further supports an expansive interpretation which considered an attack of piratical nature as piracy under Article 101 if the high seas element is at least partially fulfilled.

In the *U.S. v. Ali* case, the Court of Appeal noted that Ali, whose role was to serve as the negotiator on behalf of the pirates, was on the attacked ship for only a brief period of “minutes” while it was on the high seas, and that otherwise “the ship traversed exclusively territorial waters

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<sup>129</sup> Article 111(4), UNCLOS.

<sup>130</sup> One possible exception is to allow intervention in such a case for the purpose of rendering assistance under Article 98, UNLOS. Yet, this provision is primarily aimed to cover distress as the consequence of a nature disaster or of a collision at sea. In that regard, see Rüdiger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations under International Law*, at 4, available at [http://www.itlos.org/fileadmin/itlos/documents/statements\\_of\\_president/wolfrum/doherty\\_lecture\\_130406\\_eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/doherty_lecture_130406_eng.pdf) (noting that “[T]his possibility [i.e. applying Article 98 to piracy suppression] is a limited one, though. It does not embrace in general the mandate to suppress piracy in a particular area”).

while Ali was aboard.”<sup>131</sup> As appears from the Court’s discussion of the case, this brief presence on the high seas did not satisfy the high seas requirement, thereby necessitating a discussion of “dry-land” piracy under Article 101(c) of UNCLOS.

In the ensuing discussion of the case by the District Court, however, the Court held that piracy is “an offense that can continue once pirates have left the high seas, such that a defendant may aid and abet piracy even if no high-seas conduct occurred during or after his allegedly facilitative actions.”<sup>132</sup>

In reaching this conclusion, the Court found that “both the “explicit language” of UNCLOS 101(a) and the “nature” of the crime of piracy compel the conclusion that piracy under the law of nations is a continuing offense. UNCLOS does not limit piracy to discrete acts of violence and depredation, but extends the offense to acts of “detention” against a ship, or persons or property aboard that ship, as well. With the inclusion of acts of “detention” as piratical acts, the crime of piracy under the law of nations “necessarily becomes a continuing one”...For this reason...piracy as defined in UNCLOS and incorporated in 18 U.S.C. § 1651 is a continuing offense that is not necessarily completed the moment a perpetrator seizes another’s ship, or ceases attacking or plundering.”<sup>133</sup>

The Court rejected Ali’s argument that when high seas conduct has ceased, the crime of piracy necessarily ceases with it. The Court noted that “the law of continuing offense does not

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<sup>131</sup> United States v. Ali, *supra* note 108.

<sup>132</sup> United States v. Ali, Memorandum Opinion, District Court for the District of Columbia, Criminal No. 11-0106, 31 October 2013. As noted by the District Court, this question did not arise in the context of the discussion before the Court of Appeals.

<sup>133</sup> *Id.*

require that all elements of an offense be satisfied for that offense to continue. Instead, a continuing offense continues “until the ultimate illegal objective is finally attained.”<sup>134</sup>

The Court continued by stating that “while high-seas conduct is what makes piracy a universal crime, high-seas conduct is not the pirates’ “ultimate illegal objective.” Instead, much like kidnapers, pirates’ “ultimate illegal objective” is the use of “illegal acts of violence or detention, or . . . depredation . . . for private ends”... Therefore, so long as the illegal acts of violence, detention, or depredation for private ends continue, the offense of piracy continues even after the perpetrators leave the high seas. And so long as the offense of piracy continues, a defendant can be convicted of aiding and abetting piracy even if he facilitates only non-high-seas acts of the principals.”<sup>135</sup>

For the foregoing reasons, the Court concluded that “piracy under 18 U.S.C. § 1651 is an offense that continues beyond the high seas so long as the perpetrators continue to use “illegal acts of violence or detention, or . . . depredation . . . for private ends.” Accordingly, Ali may be convicted of aiding and abetting piracy if the government convinces the jury beyond a reasonable doubt that he intentionally facilitated the pirates aboard the CEC Future in their continued use of “illegal acts of violence or detention, or . . . depredation . . . for private ends,” regardless of whether the continued “illegal acts” he facilitated occurred on the high seas.”<sup>136</sup>

The Court holding presents a broad interpretational approach of what constitutes piracy under Article 101(a). It can therefore support the view that situations such as of “scenario E” may constitute piracy under UNCLOS.

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

For purpose of clarification: Viewing acts of piratical nature which include some territorial waters aspects (i.e. “scenarios C-E”) as potentially constituting piracy under Article 101 does not entail that states may exercise the rights conferred by UNCLOS (such as the right of visit under Article 110) in the territorial waters of another state. The proposed broad interpretive approach merely concerns the possible qualification of certain acts as piracy even if they do not possess the features of “classic” piracy (i.e. piratical acts occurring entirely on the high seas – “scenario B”). The corresponding rights must be exercised in respect of other principles enshrined by UNCLOS.

The suggestion to apply a broader approach in interpreting the high seas requirement can potentially address another interpretational difficulty that arose in the current fight against piracy: As counter-piracy operations focus on identifying, apprehending, and prosecuting the masterminds behind the attacks as well as those financing piracy, a question arose on how to address “dry-land” facilitators – namely those present only on land and not participating in the actual attack at sea. Specifically, the question is whether the “dry land” facilitators’ acts fall under the definition in Article 101(c) – therefore constituting piracy, or whether the individuals must be physically present on the high seas for the purpose of this provision. If, as proposed above, the high seas condition does not require the physical presence on the high seas of those that carry the actual attack (see in particular “scenario C”), it would be difficult to sustain an argument according to which the facilitators must be present on the high seas for the purpose of Article 101(c).<sup>137</sup>

To conclude on this point, it is suggested that the high seas requirement should not be limited to the traditional concept of piracy, namely where both vessels are present on the high

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<sup>137</sup> See further discussion on “dry land” piracy *infra* Part 2.3.2.

seas throughout the illegal act of violence or depredation (“scenario B”). This approach can close the legal gap between “classic” piracy and acts of piratical nature committed entirely within territorial waters (“scenario A”). It also corresponds to the nature of the crime as a continuing offence, which can begin on the high seas and continue in territorial waters, as well as to the overarching goal of ensuring the freedom of navigation and safety on ships upon the high seas.

Alternatively, if a narrower interpretational approach is adopted, the acts committed under “scenarios C-E” might be addressed by invoking other legal sources such as the SUA Convention,<sup>138</sup> or through viewing the acts as constituting “armed robbery at sea”.<sup>139</sup> Both solutions, however, have shortcomings: Notably, neither one provides for exercising universal jurisdiction in a manner akin to Article 105, UNCLOS. In addition, the offence of ‘armed robbery at sea’ is not defined in a binding international legal instrument.<sup>140</sup>

#### *2.2.4.C. The high seas requirement in the context of piracy off the coast of Somalia*

A different interpretational question concerns the situation in Somalia and the intervention of the UNSC: In this particular context, the UNSC, acting under Chapter VII of the UN Charter, authorized states that are “cooperating with Somalia’s Transitional Federal Government (TFG) in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General,” to:

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<sup>138</sup> See, in that respect, Nance and Struett, *Conflicting Constructions: Maritime Piracy and Cooperation under Regime Complexes*, MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE *supra* note 31, 134-5 (noting that the SUA Convention extends the territorial applicability of UNCLOS).

<sup>139</sup> See discussion regarding acts of piratical nature committed in territorial waters *infra* Part 2.6.

<sup>140</sup> Reference to ‘armed robbery at sea’ is made in non-binding instruments such as the Djibouti Code of Conduct.

“a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.”<sup>141</sup>

Thus, in application of this rather uncommon UNSC Resolution,<sup>142</sup> actions such as boarding a suspected vessel or seizing it (Articles 110 and 105) may be carried out by “cooperating states” in Somalia’s territorial waters in the same way they would have been conducted on the high seas. Resolution 1816 does not, however, affect Somalia’s right to continue and exercise in Somalia’s territorial waters the jurisdictional powers conferred upon coastal states, for example for the purpose of conducting a “hot pursuit” of a piracy ship that left Somalia’s territorial waters.

It has been argued that the authorization granted by Resolution 1816 “does not make the international law of piracy directly applicable in Somalian water.”<sup>143</sup> This can lead to ambiguities related to the distinction between the authorization given by the Resolution to exercise enforcement jurisdiction (e.g. the right to seize the pirates ship), on the one hand, and prescriptive and adjudicating jurisdictions, on the other.

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<sup>141</sup> See S.C. Res. 1816, *supra* note 125, para. 7.

<sup>142</sup> The UNSC explicitly affirmed that “the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law” – see S.C. Res. 1816, *idem*, para. 9.

<sup>143</sup> Guilfoyle, *UN Security Council Resolution 1816*, *supra* note 74, at 696.

This author believes that the Resolution did not include any limitations on the powers that may be exercised “with respect to piracy under relevant international law.” The Resolution used non-restrictive terminology by sanctioning the use of “all necessary means to repress acts of piracy and armed robbery.” An interpretation that does not equate the powers conferred upon cooperating States by Resolution 1816 with those permitted on the high seas may defeat the purpose of the Resolution. Particularly, if States may only seize pirate ships (enforcement jurisdiction), but may not bring the suspects to trial before their courts in accordance with Article 105 of UNCLOS (adjudicating jurisdiction), this might entail the release of piracy suspects since handing them over to face trial in Somalia has not been considered as a viable option.<sup>144</sup>

Another question arises regarding the implications of Resolution 1816 for acts of piratical nature committed entirely within Somali waters. If such acts are considered only “armed robbery at sea” – as they would typically be in any other territorial waters<sup>145</sup> – difficulties will arise in applying the piracy section of UNCLOS. For example, it would be difficult to argue for the application of the universal jurisdiction paradigm derived from Article 105, which is limited to piracy. It is also questionable whether many national laws criminalize armed robbery at sea carried out in territorial waters of other countries. Viewing piratical acts that take place in Somali waters as purely “armed robbery at sea” might therefore result in a situation where only Somalia would be in a position to prosecute those acts,<sup>146</sup> an outcome that appears to contradict the spirit of the piracy Resolutions.

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<sup>144</sup> *Id.* at 697 (“[A]s a practical matter, given the limited capacity of the Somalian State, the interdicting State having custody will likely have the job of finding a forum to try the suspects.”).

<sup>145</sup> See discussion on acts of piratical nature committed in territorial waters *infra* Part 2.6.

<sup>146</sup> Note however that in certain instances, prosecution of piratical act committed entirely in Somali waters might potentially be carried out under the terms of Article 4 of the SUA Convention or Article 16 of UNTOC.

A different approach, however, would suggest that, with regard to acts of piratical nature committed in Somali's waters – and notwithstanding the continuous jurisdictional powers of Somalia – Resolution 1816 blurred the distinction between the high seas and the territorial waters of Somalia.<sup>147</sup> It can therefore be argued that the Resolution created a legal fiction according to which Somali territorial waters are viewed as also legally forming part of the high seas for the purpose of applying the piracy section of UNCLOS.<sup>148</sup> This fiction would extend to counter-piracy operations, related jurisdictional aspects (i.e. the application of universal jurisdiction for piratical acts committed in Somali's waters), and the definition of piracy. Put differently, the authorization provided in Resolution 1816 may imply that an act of piratical nature committed entirely within Somali waters will be viewed as an act of piracy under Article 101 of UNCLOS and concomitantly as “armed robbery at sea” for Somalia.

Such an interpretation would enable all States to exercise universal jurisdiction and prosecute individuals for the crime of piracy for acts committed within Somali's territorial

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<sup>147</sup> See NATO General Rapporteur, *The Growing Threat of Piracy to Regional and Global Security*, ¶ 43, available at <http://www.nato-pa.int/default.asp?SHORTCUT=1770> (“This measure [introduced by Resolution 1816] effectively abolishes the distinction between the high seas and territorial waters, and allows foreign navies engaged in counter-piracy operations to operate throughout the entire zone.”); Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT’L L. 399, 404 (2009) [hereinafter Treves, *Developments*] (“The basic effect of these provisions . . . is to make the rules of international law concerning piracy on the high seas applicable also to territorial waters, inter alia permitting pursuit from the high seas into these waters, and clarifying that states acting under these rules within the territorial waters of Somalia may use ‘all necessary means.’”); Eric A. Heinze, “A Global War on Piracy? International Law and the Use of Force against Sea Pirates”, MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE, *supra* note 31, 55.

<sup>148</sup> It goes without saying, though, that the piracy Resolutions did not equate the high seas and Somali waters with regard to non-piracy-related aspects (e.g. natural resources).

waters.<sup>149</sup> This broad approach, however, might support those arguing against the UNSC’s “legislation” or “adaptation” of UNCLOS.<sup>150</sup>

#### 2.2.4.D. *Piratical act “in a place outside the jurisdiction of any State”*

A final point on the geographical element of the crime concerns part (ii) of the definition under Article 101(a): As indicated by the ILC in its commentary to the Draft Articles it adopted, the main purpose of this part was to prevent piratical acts committed on ownerless territories – such as on an island constituting terra nullius or on the shores of an unoccupied territory - from escaping all penal jurisdiction.<sup>151</sup> It was mentioned that such ownerless territories do not refer to any area of sea at all since apart from the high seas – covered by part (i), there are no other parts of the sea that are 'outside the jurisdiction of any State'.<sup>152</sup> It can therefore be argued that including part (ii) in a convention governing the law of the sea was conceptually wrong. A counter argument, however, will point to the fact that UNCLOS addresses other activities on land such as pollution from land-based sources.<sup>153</sup> Be that as it may, part (ii) appears to have very little relevance to today’s world order, where it is practically impossible to find a territory that is not claimed by any State, perhaps with the exception of Antarctica.<sup>154</sup>

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<sup>149</sup> See Sandra L. Hodgkinson et al, *Piracy: New Efforts in Addressing This Enduring Problem*, 36 Tul. Mar L.J. 65, 107 (2011-2012) (“There clearly exists sufficient authority under international law for nations to exercise criminal jurisdiction over pirates captured on the high seas and, pursuant to the relevant U.N. Security Council Resolutions, in the territorial waters of Somalia.”).

<sup>150</sup> See further discussion on the UNSC’s “legislative powers” *infra* Chapter 3.

<sup>151</sup> 1956 ILC Report, *supra* note 23, commentary to article 39, 282.

<sup>152</sup> Kashubsky, *supra* note 19, at 167.

<sup>153</sup> Article 207, UNCLOS.

<sup>154</sup> See Jesus J, “Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects” (2003) 18(3) *International Journal of Marine and Coastal Law*, 367, 377.

#### 2.2.5. “against another ship or aircraft”

The requirement that the action should be taken against another ship indicates that a trans-vessel operation must take place for piracy to occur,<sup>155</sup> thereby reflecting the traditional view of piracy as an act carried out by bandits from their pirate ship against another ship.<sup>156</sup> It therefore excludes acts committed on board of a ship and directed against the ship itself or its passengers.<sup>157</sup> This includes acts of petty theft,<sup>158</sup> mutiny, or internal seizures for a political goal by insurgents (e.g. the Santa Maria incident)<sup>159</sup> or terrorist groups (e.g. the Achille Lauro case).

While the ship or aircraft from which the piratical attack is launched must be a private one (or alternatively a governmental one whose crew has mutinied and taken control over it),<sup>160</sup> the victim ship/aircraft need not be.<sup>161</sup> In the case of *U.S. v. Dire*, the pirates mistakenly attacked a U.S. navy frigate, having confused it for a merchant ship. This mistake, however, did not prevent their conviction for piracy.

The reference to “ship” (or aircraft) as the only potential subjects of piracy suggests that similar attacks, where committed against other objects at sea, will fall outside the definition of piracy. Thus, for example, it appears that offshore installations such as an off-shore petroleum

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<sup>155</sup> Menefee, Jamaica Discipline, *supra* note 25, at 144.

<sup>156</sup> Collins and Hassan, *supra* note 44, at 100-101.

<sup>157</sup> 1956 ILC Report, *supra* note 23, commentary to draft article 39, 282. This corresponds also to the definition of piracy under the Harvard Research Draft, according to which “If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.”

<sup>158</sup> Collins and Hassan, *supra* note 44, at 100.

<sup>159</sup> This incident concerns the seizure of a Portuguese cruise ship by Portuguese insurgents.

<sup>160</sup> Article 102, UNCLOS.

<sup>161</sup> Shearer, *supra* note 26, ¶ 15.

platform may not be considered as “ships” for the purpose of article 101(a).<sup>162</sup> One potential exception may be a situation where the installation is in motion (e.g. is being relocated). This ‘dual status’ approach has been espoused by IMO and potentially also be some international conventions.<sup>163</sup> Yet, considering that off shore installations do not spend much time in motion, this exception – even if accepted – is unlikely to solve this shortcoming of the piracy definition in addressing the growing threat of attacks against oil platforms and similar installations.<sup>164</sup>

On a different point, while part (i) of the definition under Article 101(a), referring to attacks committed on the high seas, explicitly mentions that the piratical attack must be directed at *another* ship/aircraft, in part (ii) of the definition, referring to attacks “in the place outside the jurisdiction of any State”, the word “another” was omitted. Though possibly a mere oversight in the drafting process, this difference can potentially lead to a conclusion that the “two ship” requirement pertains only to part (i). Although this distinction between the two parts of the definition appears to have little practical consequences in today’s world, it nonetheless creates a possible scenario where the exact same act (e.g. an internal seizure) may qualify as piracy if directed against a vessel “in the place outside the jurisdiction of any State” but not when directed against a vessel on the high seas.

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<sup>162</sup> Attacks against off shore installations may nonetheless be covered under other international instruments such as the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 10 Mar., 1988, 1678 UNTS 304 / [1993] ATS 11 / 27 ILM 685 (1988) [hereinafter “1988 Protocol”].

<sup>163</sup> Kashubsky, *supra* note 19, at 168.

<sup>164</sup> Kashubsky *supra* note 19, 164–65 (mentioning that between 2007 and 2012 at least six attacks took place in three different regions: four in the Gulf of Guinea, one near Tanzania, and one near India).

## 2.3. VOLUNTARY PARTICIPATION, INCITEMENT AND FACILITATION

### 2.3.1. The inter-relation between sub-paragraphs (a)-(c)

Both international and national criminal law systems criminalize acts carried out in support of an illegal activity. Yet, in general, a distinction is drawn between the primary perpetrators and those carrying out the accessory acts such as aiding or abetting the crime.<sup>165</sup> At least at first reading, Article 101 of UNCLOS appears to present a different approach. To recall, it defines piracy as consisting of *any* of the following acts:

“(a) any illegal acts of violence or detention, ...;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”<sup>166</sup>

It therefore seems that the provision created three separate offences (though the third is linked to the first two), each of which is considered piracy. If this line of interpretation is adopted, under UNCLOS the supporting individuals are to be considered on an equal footing as the primary perpetrators.<sup>167</sup> Thus, for example, a cook on a piracy ship, who acted voluntarily

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<sup>165</sup> See, for example, the Rome Statute of the International Criminal Court, which distinguishes between a person who commits a crime subject to the Court’s jurisdiction and a person who facilitates such a crime – see Article 25.3(a) and Article 25.3(c) respectively of the Rome Statute of the International Criminal Court, Jul. 12, 1998, 2187 U.N.T.S. 900 [hereinafter “the Rome Statute of the ICC”].

<sup>166</sup> UNCLOS, Article 101.

<sup>167</sup> In that regard, see also UNSC Resolution 1976, which stated in Paragraph 15: “Individuals and entities who incite or intentionally facilitate an act of piracy are themselves engaging in piracy as defined under international law” – see UNSC Resolution 1976, S/RES/1976 (2011). See also the U.S. *Hasan I* case, where the court sustained the piracy charges against two defendants under subparagraphs (b) and (c). This was premised on the allegation “that they maintained the seagoing vessel [“mother ship”] from which the assault boat carrying [the other three defendants] was launched, while their conspirators set out to attack the [target ship]” – see *Hasan I*, at 641.

with knowledge of the piratical nature of the ship, or an individual who provided the attackers with a ladder that was used to climb the targeted ship would both be considered as much a pirate as the individuals that actually carried out the illegal violent attack against another ship.<sup>168</sup> The manner in which Article 101 is structured, namely defining each of the acts described in sub-paragraphs (a)-(c) as “piracy”, can possibly serve as another indication that the main objective of the piracy section was to create a jurisdictional regime, which, through the application of universal jurisdiction, facilitates the arrest and prosecution of all those involved in a piratical activity.

Though the way Article 101 is structured supports the above interpretation (i.e. that it created three separate offences of piracy), an alternative interpretation is that Article 101(a) defines the core offence of piracy with sub-paragraphs (b) and (c) defining "fringe connections" of complicity: aiding and abetting in the form of voluntary participation, being an accessory to the crime as a facilitator, and inciting to commit the crime.<sup>169</sup>

If this interpretation is espoused, a question may arise regarding the added value of sub-paragraph (b), since the acts described therein can also be considered as facilitating acts of piracy, covered by sub-paragraph (c). In that regard, it is noteworthy that Article 101(b) has been omitted from the IMO definition of ‘armed robbery at sea’, which is otherwise structured very similarly to the piracy UNCLOS definition,<sup>170</sup> as well as from certain national piracy laws,<sup>171</sup> or alternatively has been treated as a separate, lesser offence.<sup>172</sup>

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Conversely, in *U.S. v. Ali* case, the indictment contained no straightforward charge of piracy. Rather, he was accused of two inchoate offenses relating to piracy: conspiracy to commit piracy and aiding and abetting piracy.

<sup>168</sup> Naturally, this does not prevent the court adjudicating their cases from taking into account each individual’s role when sentencing the convicted pirates.

<sup>169</sup> See Samuel Shnider, *Maritime Piracy*, *supra* note 30, at 499.

<sup>170</sup> See discussion *infra* Part 2.6.

A third interpretational approach will view sub-paragraphs (a) and (b) as two independent core piracy crimes and only sub-paragraph (c) as a form of aiding and abetting either one of these offences. This interpretation is supported by the phrasing of sub-paragraph (c), which, different than the first two sub-paragraphs, describes supportive activities of the acts mentioned in sub-paragraphs (a) and (b).

Along this line, sub-paragraph (b) can be useful in certain scenarios: For example, it can overcome the difficulty in determining who among the crew of the attacking vessel physically engaged in the act of violence. In such a case, the ‘common intention’ doctrine might support conviction of all the members of the PAG for the act of piracy under sub-paragraph (a); before domestic courts that do not recognize this theory, however, they can be convicted under sub-paragraph (b).

In addition, sub-paragraph (b) can be used to prosecute the pirates operating at sea in cases where they are arrested before engaging in any act of violence and therefore cannot be prosecuted under sub-paragraph (a).<sup>173</sup> In one case before the Seychelles court, the defendants were turned away by gunfire from the ship they intended to attack. The court held that they cannot be convicted for count one of piracy (corresponding to sub-paragraph (a)). Nonetheless, it concluded that they were arrested while operating two ‘pirate ships’ and had full knowledge of

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<sup>171</sup> See Shnider, *Maritime Piracy*, *supra* note 30, at 520 (mentioning Liberia and Somaliland as two such examples).

<sup>172</sup> See Shnider, *Maritime Piracy*, *supra* note 30, at 522-3 (mentioning Australia and Japan as two examples).

<sup>173</sup> See Collins and Hassan, *supra* note 44, at 101 (suggesting that where an attempt to carry out a piratical act cannot be addressed via sub-paragraph (a) since no act of violence took place, this shortcoming could be remedied by prosecuting under the “voluntary pirate” clause of Art. 101(b) of UNCLOS, but only if it can be shown that the attacker voluntarily participated in the operation of the vessel while knowing that it was a pirate vessel).

the fact that they were ‘pirate ships.’ The court therefore convicted them for the count of operating of a pirate ship (corresponding to sub-paragraph (b)).<sup>174</sup>

Another example where sub-paragraph (b) becomes useful in lieu of sub-paragraphs (a) or (c) is where the available evidence does not suffice to determine that the defendants participated in a pirate attack (i.e. no piracy under sub-paragraph (a)) or that they incited or facilitated piracy activities committed by others (hence no basis for conviction under sub-paragraph (c)), but can nonetheless establish that they belonged to a PAG operating a pirate ship, thereby falling within the scope of sub-paragraph (b). In another case before the courts of Seychelles, the court found that it cannot be satisfied beyond a reasonable doubt that the ship interdicted following a piratical attack was the only one that could have committed the attack. The available circumstantial evidence, however, sufficed to establish that the defendants belonged to a PAG operating a pirate ship.<sup>175</sup>

A question arises with regard to the operators of a ‘mother ship’. The critical role of a ‘mother ship’, which has been described in the ‘Topaz’ case as the ‘umbilical cord’ of the attacking skiffs without which the latter would not have been able to operate,<sup>176</sup> would justify the view that operators of a ‘mother ship’ should be considered as full-fledged piracy offenders.

Indeed, the definition of a ‘pirate ship’ under Article 103, UNCLOS, is not restricted to the vessel that committed the attack; rather, it includes any ship “intended by the persons in dominant control to be *used* for the purpose of committing one of the acts referred to in article

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<sup>174</sup> Republic v. Osman & Ten Others (“Draco”), Judgment, Crim. Side No. 19 of 2011 (Oct. 12, 2011) (Seychelles). The defendants were also convicted for attempt to carry out piracy under Seychelles law. Interestingly, while in this case there were testimonies that the accused shot at a navy helicopter that has reached the place following the distress calls from the ship that was meant to be attacked, the court did not consider these shootings as an act of violence against an aircraft that can qualify as piracy under sub-paragraph (a).

<sup>175</sup> See "Happy Bird", *supra* note 110.

<sup>176</sup> See the Topaz case, case, *supra* note 49, ¶ 68.

101.”<sup>177</sup> Since a ‘mother ship’ is intended to be used for the purpose of committing piracy (even if not for the purpose of serving as the vessel from which the attack will be launched), its operators can be considered as “voluntary participants” for the purpose of sub-paragraph (b) or alternatively as “facilitators” for the purpose of sub-paragraph (c).<sup>178</sup> In the ‘Talenduic’ case, the court went a step further by considering the operators of the ‘mother ship’ as among the primary perpetrators and convicting them for both piracy (equivalent to sub-paragraph (a)) and operation of a pirate ship (equivalent to sub-paragraph (b)). Conversely, in the ‘Topaz’ case, the prosecution charged the eight individuals that attacked the Topaz with piracy, while the three individuals that were operating the ‘mother ship’ were charged (and convicted) only for aiding and abetting piracy.

Regardless of the interpretational paradigm adopted from among the above three possibilities, it is clear that for the purpose of convicting a person under sub-paragraphs (b) and (c), no actual act of violence needs to have taken place: Suffice it is to prove that the accused participated in the operation of a pirate ship in the meaning of Article 103 (i.e. intended to be used for piracy) or otherwise incited or facilitated the operation of a pirate ship or a potential act of piracy, even if no such act occurred at all.<sup>179</sup>

The combination of the three sub-paragraphs attests to the seriousness ascribed to the crime of piracy by the international community and the broad and inclusive approach adopted by UNCLOS, with a view to ensuring that all participants in the criminal activity - including “low

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<sup>177</sup> Article 103, UNCLOS [emphasis added].

<sup>178</sup> This was the holding of U.S. *Hasan I* case – see also further discussion below regarding sub-paragraphs (b) and (c).

<sup>179</sup> See also Shnider, *Maritime Piracy*, *supra* note 30, at 550, in reference to the Seychelles case-law and Article 101(b) (“The UNCLOS provision and its parallel in Seychellois law do not require that the ship actually be used for piracy; rather, these provisions only require that those in control intend for it to be used for such a purpose”).

level” facilitators - may be subject to the counter-piracy measures provided under the Convention, notably arrest on the high seas and prosecution based on the universal jurisdiction paradigm.

### 2.3.2. Sub-paragraphs (b) and (c) and the ‘high seas’ requirement

One of the interpretational questions that arose following the spike in piracy off the coast of Somalia concerns the geographical scope of the crime, specifically whether the high seas requirement of sub-paragraph (a) applies also to sub-paragraphs (b) and (c) or whether the physical location of the operators of a pirate ship, the inciters or the facilitators is irrelevant for the purpose of these sub-paragraphs, thereby viewing them as pirates under UNCLOS even when they operate far from the place of the piratical incident, including on dry land (“dry land” piracy).

In support of the position that views dry land activities as potentially falling within the scope of the piracy definition, one can point to the fact that the wording of sub-paragraphs (b) and (c) include no ‘high seas’ requirement, nor is a ‘high seas’ criterion mentioned in Article 103. Indeed, a legal note prepared by the United Nations Division for Ocean Affairs and the Law of the Sea (UN-DOALOS), circulated by IMO in 2011, indicated that “Subparagraphs (b) and (c) of article 101... do not explicitly set forth any particular geographic scope”.<sup>180</sup>

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<sup>180</sup> IMO Doc LEG 98/8/1, 18 February 2011, available at [http://www.un.org/Depts/los/piracy/circular\\_letter\\_3180.pdf](http://www.un.org/Depts/los/piracy/circular_letter_3180.pdf); Roger L. Phillips, “Pirate Accessory Liability: Developing A Modern Legal Regime Governing Incitement and Intentional Facilitation of Maritime Piracy”, 25 Fla. J. Int'l L. 271, 293, 2013 (arguing that “[A] plain language interpretation of UNCLOS Article 101 indicates that accessory liability of piracy does not require the *actus reus* of incitement or intentional facilitation to occur on the high seas”).

The main counter arguments point to the need to read sub-paragraphs (b) and (c) in their context, i.e. while taking into account the clear reference to the geographical scope under the primary crime (Article 101(a)), the obligation to cooperate (Article 100)<sup>181</sup> and the general applications of Part VII of UNCLOS (Article 86). That position may also be supported by the Harvard Research Draft, which noted that “instigation or facilitation is not subjected to ... [universal] jurisdiction unless it takes place outside territorial jurisdiction.”<sup>182</sup> Based on those and other supporting arguments it was asserted that “there is strong evidence suggesting that UNCLOS and customary international law place a high seas requirement on pirate facilitators.”<sup>183</sup>

In two U.S. cases this latter interpretation of Article 101(c) was rejected. First, in the *U.S. v. Ali* case, the appellate court concluded that international law does not require facilitative acts to take place on the high seas. The Court noted that the “high seas” requirement is absent from Article 101(c), thereby “strongly suggesting a facilitative act need not occur on the high seas so long as its predicate offence has.”<sup>184</sup>

The Court also rejected the defendant’s argument according to which Article 105 restricts universal jurisdiction to the high seas and concluded that article 105 is “no indication international law limits the liability of aiders and abettors to their conduct on the high seas.”<sup>185</sup>

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<sup>181</sup> On the interpretation of the UNCLOS piracy section in light of the duty to cooperate under Article 100 see also *infra* Part 3.2.3.

<sup>182</sup> Harvard Research Draft, *supra* note 20, at p. 822.

<sup>183</sup> Jonathan Bellish, “A High Seas Requirement for Inciters and Intentional Facilitators of Piracy *Jure Gentium* and Its (Lack of) Implications for Impunity”, 15 *San Diego Int'l L.J.* 115, 119, 2013. For further discussion of “dry land” piracy and Article 101(c) in general see also the on-line debate featured in EJIL webpage: <http://www.ejiltalk.org/committing-piracy-on-dry-land-liability-for-facilitating-piracy/>.

<sup>184</sup> *United States v. Ali*, *supra* note 108.

<sup>185</sup> *Idem*.

Finally, with regard to the reference to the Harvard Research Draft, the Court found that ignoring the plain meaning of UNCLOS in favor of an eighty-year-old scholarship would be “a bridge too far.”<sup>186</sup> Pointing to the basic principles of treaty interpretation – both domestic and international, the Court recalled that courts are directed to construe treaties based on their text before resorting to extraneous materials.<sup>187</sup>

Similarly, in the *U.S. v. Shibin* case, the U.S. Court of Appeals found that with regard to aiding and abetting piracy, “conduct violating Article 101(c) does not have to be carried out on the high seas, but it must incite or intentionally facilitate acts committed against ships, persons, and property on the high seas.”<sup>188</sup>

This sound and broad interpretational approach of the U.S. courts corresponds to the view of piracy as an organized criminal enterprise, where each member of the group (the “PAG”) contributes to the criminal activity by exercising a specific task (organizer, financier, operator of a ‘mother ship’, attacker, negotiator, etc.).

The position expressed by the U.S. Courts is also supported by policy arguments: Indeed, posing a high sea condition might often render Article 101(c) practically futile: as evidenced by the case of piracy off the coast of Somalia, the inciters and facilitators have typically ordered, organized, financed, and otherwise facilitated the attacks from land. As shown in many piracy trials held so far, the pirates that carried out the attacks off the coast of Somalia were mostly low-level executioners within the structure of the criminal group, while at least some of the piracy kingpins never left the shore.

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<sup>186</sup> *Idem.*

<sup>187</sup> *Idem.*

<sup>188</sup> *United States v. Shibin*, 722 F.3d 233, 241 (4th Cir. 2013).

The importance of combating “dry land” piracy was also manifested in UNSC Resolution 1851, which granted a unique authorization for States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia to act in Somalia itself (i.e. not only in its territorial waters as was authorized by previous Resolutions).<sup>189</sup>

It is also noteworthy that with regard to serious international crimes such as genocide or war crimes, the universal jurisdiction paradigm undoubtedly applies to aiders and abettors operating in territories subject to the jurisdiction of other States. That crimes such as genocide confer universal jurisdiction due to the particular heinous nature of the offence (which may not necessarily be the case for piracy) does not change the fact that the international community deemed it important to grant all states with universal jurisdiction to combat piracy. With regard to concerns that applying universal jurisdiction may infringe upon the sovereignty of States, it is recalled that the power granted by Articles 105 and 110 of UNCLOS apply only where the suspect is on the high seas or is later found on the territory of the prosecuting state or is brought there following extradition proceedings.<sup>190</sup>

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<sup>189</sup> See UNSC Resolution 1851, S/RES/1851 (2008). In paragraph 6 of the Resolution, the UNSC authorized cooperating States and regional organizations to “undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.” Similar to other Resolutions on Somalia, the UNSC stated in paragraph 10 of the Resolution, that the authorization is unique to the situation in Somalia.

<sup>190</sup> In the context of the U.S. see also Phillips, *supra* note 180, at 294 (explaining that: “restricting intentional facilitation of piracy to crimes perpetrated wholly on the high seas is not necessary to protect the sovereignty of states where pirate kingpins may reside. The [U.S.] piracy statute only provides personal jurisdiction over those who are “afterwards brought into or found in the United States.” If a pirate kingpin has negotiated a ransom from the territory of another state, the U.S. must request extradition through the usual means prescribed by international law”).

### 2.3.3. The scope of “facilitation” under sub-paragraph (c)

Another intriguing issue that arose concerns the acts that may be considered as “facilitation” for the purpose of Article 101(c). Different than other international conventions addressing international crimes or cooperation in criminal matters, the provision does not explicitly mention acts such as financing, organizing piracy or conspiring to commit the crime of piracy.<sup>191</sup> Nonetheless, similar to the wording used throughout Article 101, this subsection also uses broad language, indicating that piracy shall consist of “*any act*” of intentionally facilitating an act of piracy. It therefore appears that even absent a concrete reference to acts such as financing of the crime, it would be reasonable to include those acts within the scope of the provision. A different conclusion would render that in places like Somalia, the kingpins behind the attacks – those who order, organize, finance and otherwise lead the wave of piratical attacks may go unpunished.

A similar view was presented by the aforementioned legal note prepared by UN-DOALOS, which stated that: “In addition to criminalizing the direct conduct of the crime, it is also important that all modes of participation in the offence, such as organizing, instigating, aiding and abetting, facilitating and counselling, are also criminalized. The criminalization of such acts is vital in combating any kind of organized crime, as not all of the criminals will be directly involved in carrying out the act itself.”<sup>192</sup>

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<sup>191</sup> Compare to the Terrorism Financing Convention (declaring conspiracy to commit genocide as an act punishable under the Convention); UNTOC, art. 6 (requiring States party to the Convention to criminalize conspiracy to commit crimes related to laundering the proceeds of crimes).

<sup>192</sup> See IMO Circular Letter, *supra* note 107.

#### 2.3.4. Legal persons as facilitators of piracy

Article 101(a) requires that the piratical act shall be carried out by the *crew* or *passengers* of the attacking ship or aircraft; consequently, it would be safe to assert that the offenders may be only **natural persons**. Conversely, sub-paragraphs (b) and (c) refer only to the forbidden act (voluntary participation, inciting or intentional facilitation) and are silent with regard to the nature of the offenders. This may therefore enable invoking the responsibility and liability also of **legal persons**, for example a company that was used by the pirates to finance their activities or a company that sold to the pirates weapons with the knowledge that they would be used for piracy. The gravity of the crime of piracy may justify this broad interpretation, which also corresponds to developments under national laws with regard to liability of legal persons for other international crimes such as war crimes.<sup>193</sup> If this interpretation is espoused, universal jurisdiction may also be exercised with regard to legal persons involved in piracy.

#### 2.3.5. Conclusion

The examination of Article 101(b) and (c) in their context makes it clear that Article 101 as a whole was meant to cover all aspects related to the crime of piracy, namely both the acts of violence and other acts intended to facilitate them. It will be nonetheless for national courts to address the above questions in accordance with their understanding of UNCLOS and the relevant applicable municipal law and case law. As mentioned in the note of UN-DOALOS: “The general

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<sup>193</sup> See, in that reference, Andrew Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (Oxford Publishing, 2006), 307 (“individuals have rights and duties under... international humanitarian law, we have to admit that legal persons may also possess the international legal personality necessary to enjoy some of these rights, and conversely to be... held accountable for violations of ... international duties”).

interpretation of UNCLOS article 101(b) and (c) is that it does allow for the prosecution of acts preparatory to a full attack. However, many national jurisdictions will require that point to be made explicitly in domestic criminal law if it is to provide a proper base for a prosecution.”<sup>194</sup> For example, in the case of *U.S. v. Ali*, despite the Court of Appeals’ broad approach with regard to “dry land” piracy, the Court adopted a more conservative approach with regard to the charge of conspiracy, concluding that unlike aiding and abetting, conspiracy is not part of the UNCLOS definition of piracy. Similarly, other interpretational questions such as whether legal persons can be held liable (through criminal or civil proceedings) for their involvement in piracy will depend on the applicable national legislation and their interpretation by domestic courts.

#### **2.4. THE MENTAL ELEMENT**

The drafting of Article 101 raises a number of ambiguities also with regard to the mental element (*mens rea*) of the piracy offences under that provision. While subparagraphs (b) and (c) make explicit references to the mental element – sub-paragraph (b) to *voluntary* participation with *knowledge* of the piratical nature of the boat and sub-paragraph (c) to the *intentional* facilitation of piratical acts - no such reference is found in the primary offence defined in Article 101(a).<sup>195</sup>

Yet, it would be reasonable to assume that the material elements of the crime should be committed with intent and knowledge. This conclusion is based on the very nature of the act, i.e. acts of violence, detention or depredation, which typically require intent to engage in the forbidden conduct and knowledge of the circumstances. It is further supported by the requirement of Article 103 of UNCLOS, which provides that “A ship or aircraft is considered a

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<sup>194</sup> See IMO Circular Letter, *supra* note 107.

<sup>195</sup> See Shnider, *Maritime Piracy*, *supra* note 30, at 507 (“The core definition of piracy in Article 101(a) does not address the subjective element of the acts using classic words of intent such as willfully, or knowingly”).

pirate ship or aircraft if it is *intended* by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101.”<sup>196</sup> Finally, it corresponds to the requirement for intent and knowledge found in the definition of other international crimes.<sup>197</sup> Accordingly, negligence or recklessness by a ship master that leads to collision on the high seas may not be considered as piracy.

Subparagraph (b) requires that the individual voluntarily participates in the operation of the pirate vessel with knowledge of facts making it a pirate ship. The knowledge requirement involves awareness of the circumstances forming part of the definition of “pirate ship” under Article 103, UNCLOS.<sup>198</sup> Thus, the awareness must include knowledge of the intent of the chief perpetrators.<sup>199</sup> Yet, it is not required to prove that the individual possessed any specific knowledge of the piracy act such as the plan of the attack or the acts carried out by the primary perpetrators following their boarding of the attacked ship. Showing that the individual knew that the vessel is intended to carry out piratical acts would be enough.<sup>200</sup> This is another manifestation

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<sup>196</sup> Article 103, UNCLOS (emphasis added).

<sup>197</sup> See the requirement for intent in the definition of genocide in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 278 U.N.T.S. 1951 [“the Genocide Convention”]; Article 30(1) of the Rome Statute of the ICC, *supra* note 165, according to which “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”

<sup>198</sup> Shnider, *Maritime Piracy*, *supra* note 30, at 508. Article 103, UNCLOS, reads as follows: “A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.”

<sup>199</sup> Shnider, *idem*.

<sup>200</sup> This requirement is similar to the one defined by the Rome Statute of the ICC with regard to individuals who contribute to the commission or attempted commission of a crime within the Court’s jurisdiction by a group of persons acting with a common purpose. As provided by Article 25(d) of the Statute, “[S]uch contribution shall be intentional and shall... (ii) Be made in the knowledge of the intention of the group to commit the crime.”

of the broad approach of the piracy definition, which views “low-level” contributors - e.g. a cook or a mechanic operating the pirate vessel– as active participants in the act of piracy.

Subparagraph (c) concerns incitement and intentional facilitation. The intent to induce another to take part in the piratical act is inherent to the crime of incitement.<sup>201</sup> With regard to the “intentional facilitators”, the individual must act with the knowledge that such act would assist the commission of a crime, or that he was aware of the substantial likelihood that his acts would assist the commission of underlying offence and he is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.<sup>202</sup>

The Somali piracy model led to a question on the application of this subparagraph: As mentioned, the Somali model is based on the hijacking of ships for the purposes of demanding ransom. Key participants under this modus operandi are the individuals negotiating the ransom payment. Considering that the negotiators typically become involved only after the hijacking successfully took place, their intervention may be perceived as ex-post-facto engagement,

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<sup>201</sup> See Phillips, *supra* note 180, at 301 (“The mens rea for instigation is the intent to instigate another person to commit a crime or at a minimum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated”).

<sup>202</sup> See Phillips, *supra* note 180, at 306; see also Selina MacLaren, *Entrepreneurship, Hardship, and Gamesmanship: Modern Piracy as a Dry Endeavor*, 14 Chi. J. Int'l L. 347, 369-370, 2013-2014 (noting that the mens rea of aiding and abetting liability under international law appears to be "reasonable knowledge" that the action will assist the perpetrator of the crime. She argues, however, that "intentionally facilitating" in international treaties should be read as a form of aiding and abetting, but with a stronger mens rea requirement, pointing, inter alia, to the language of "intentionally facilitating", which implies a higher mens rea requirement than mere aiding and abetting).

thereby potentially suggesting that they may not be considered as “intentionally facilitating” the act of piracy in the meaning of subparagraph (c).<sup>203</sup>

It appears, however, that two different scenarios can lead to concluding on the existence of the required *mens rea* of negotiators (or other facilitators of piracy): First, where evidence points to the participation of the individual in the planning of the piratical act. In such a case, his acts would be akin to a member of an organized criminal group, whose designated role in the criminal plan is to give shelter or facilitate the escape of the main perpetrators after their criminal activity (e.g. following a robbery). Thus, the fact that based on the “division of labor”<sup>204</sup> the negotiator’s role in the criminal enterprise arrives at a later stage does not entail that he did not possess the requisite intent to facilitate piracy at the time that the act was committed and should not be held accountable for his acts.

If such evidence does not exist – for example, if it is clear that the negotiator joined the PAG only after the hijacking of a vessel, it would not be possible to consider him as a facilitator of an act of violence used to hijack the vessel under Article 101(a) because he may not have been aware of, let alone had the requisite intent to facilitate, the hijacking.<sup>205</sup> If, however, the underlying conduct is the illegal detention of the vessel under Article 101(a), boarding the craft to negotiate a ransom arguably facilitates the continuing illegal detention of the craft and its crew. The illegal detention is an act of piracy separate and distinct from the hijacking and

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<sup>203</sup> See in that regard Eugene Kontorovich, Comment on U.S. v. Ali, July 13, 2012, Available at <http://www.volokh.com/2012/07/13/from-prof-eugene-kontorovich-about-todays-piracy-decision/> (stating that “I would not have thought the language [of subparagraph (c)] extends to ex post facilitation”).

<sup>204</sup> See the abovementioned discussion of the court of Seychelles in the "Talenduic" case with regard to the “division of labor” among the various defendants.

<sup>205</sup> See Phillips, *supra* note 180, at 307.

continues so long as the pirates retain control of the vessel without title.<sup>206</sup> In conclusion, a negotiator may be convicted of intentional facilitation. But there must be either (1) a prior agreement to assist the pirates or (2) assistance rendered whilst the underlying criminal conduct is on-going.<sup>207</sup>

## 2.5. THE PIRACY DEFINITION UNDER UNCLOS: AN ASSESSMENT

There is little doubt that the piracy definition under UNCLOS remains the primary source and point of reference when assessing piratical acts occurring on the high seas.<sup>208</sup> This status is reflected in the UNSC piracy resolutions<sup>209</sup> as well as in national legislations of countries. For example, in response to Somali piracy, countries in the Indian Ocean adopted piracy laws that borrowed the UNCLOS definition almost verbatim.<sup>210</sup> The fact that national courts in the U.S. examined the UNCLOS piracy definition to determine the applicability of the “law of nations” further supports the conclusion on the definition’s status.

UNCLOS piracy definition, however, raises difficulties and poses interpretation challenges. It was adopted at a time when piracy was not considered a major threat,<sup>211</sup> incorporated in international conventions whose focus is not on addressing a criminal

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.* In that regard, see the above discussion regarding the U.S. v. Ali case mentioning the court’s view of piracy as a continuing offence.

<sup>208</sup> See Guilfoyle, WG2 Compendium, *supra* note 29, at 3 (stating that “Whatever commentators might wish, the UNCLOS rule is the only generally applicable one and the only clear candidate for having customary status”).

<sup>209</sup> See discussion *infra* Chapter 3.

<sup>210</sup> *Cf.* the legislation passed in Mauritius, Seychelles, and Somalia, *supra* note 32.

<sup>211</sup> Scott Davidson, *Dangerous waters: combating maritime piracy in Asia*, 9 Asian Y.B. Int’l L. 3, 5 (2000) (“There was a lack of attention devoted to the drafting of the provisions on piracy at UNCLOS 101; it is attributable to the fact that, by that time, it was thought that maritime piracy was of such little practical concern . . . as to require scant consideration”).

phenomenon; and copied almost verbatim from one instrument to another, thereby becoming, at least to some extent, anachronistic.<sup>212</sup>

As a result, it is unsurprising that the definition was criticized even before UNCLOS entered into force.<sup>213</sup> Some have claimed that the definition is too narrow, creating one of the major deficiencies of the international legal regime concerning the suppression of piracy.<sup>214</sup> A number of commentators have proposed various amendments to the definition designed to correct its perceived flaws,<sup>215</sup> while others suggested addressing the definition's shortcomings by adopting a protocol to UNCLOS.<sup>216</sup>

Notwithstanding the lengthy and cumbersome procedures for amending UNCLOS,<sup>217</sup> it is submitted that launching such a process or alternatively engaging in negotiations over a new protocol for UNCLOS will be valuable to address future piracy threats. Another option can be to develop an interpretive guide to the piracy section and seek support to the guide via a Resolution that will be adopted by States under the auspices of IMO (similar to the IMO Resolutions adopting the Best Management Practices – BMP).<sup>218</sup> While an interpretive guide – even if

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<sup>212</sup> Cf. Kashubsky, *supra* note 19, at 167 (arguing that it is doubtful that, when the provisions of piracy were drafted in the 1950s and incorporated in the HSC and later in UNCLOS, the drafters contemplated piratical acts committed against offshore installations).

<sup>213</sup> See Menefee, *Jamaica Discipline*, *supra* note 25, at 128 (“[I]ronically, these piracy articles [in UNCLOS] perpetuate defects in response to maritime violence which . . . could enable that ‘business’ to thrive.”).

<sup>214</sup> Papastavridis, *supra* note 40, at 166.

<sup>215</sup> Cf. Kashubsky, *supra* note 19, at 167–68 (proposing a change that will enable viewing an attack against offshore installations as piracy under UNCLOS).

<sup>216</sup> Cf. Debra Doby, *Piracy Jure Gentium: The Jurisdictional Conflict Of the High Seas and Territorial Waters*, 41 J. Mar. L. & Com. 561, 576-7, 2010 (proposing an optional protocol that can address, in particular, the difficulties arising from the “high seas” requirement).

<sup>217</sup> See Article 312 of UNCLOS. Even the simplified procedure for amendments (Article 313, UNCLOS) can pose difficulties.

<sup>218</sup> See further discussion on BMP4 *infra* Chapters 2, 3, and 5.

supported by an IMO Resolution – does not have a binding effect on States, it can nonetheless assist national courts in better understanding and applying the piracy definition. The guide can be particularly useful for countries where the domestic piracy legislation is based on UNCLOS or alternatively makes a reference to the “law of nations”.

Pending the outcome of such possible initiatives, many challenges posed by the phrasing of the definition can be - and indeed often have been - addressed by adopting a broad and flexible interpretive approach, taking into consideration the seriousness of the crime and the overall object and purpose of the provision, namely the common interest of all States in ensuring the freedom of navigation and the safety of persons and property upon the high seas.<sup>219</sup> Adopting a broad interpretive approach also corresponds to the view that UNCLOS ought to be perceived and construed as a living and dynamic instrument.<sup>220</sup> It can enable the international community to better combat new types of modus operandi of piracy<sup>221</sup> or of perpetrators such as “dry land”

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<sup>219</sup> See also Guilfoyle, *Shipping Interdiction*, *supra* note 55, at 28 (“[T]he ordinary meaning, object and purpose of these words [of Article 101(a), UNCLOS] would suggest a broad approach should be taken”).

<sup>220</sup> In the *U.S. v. Dire* case, the United States Fourth Circuit Court of Appeals rejected the defendants’ arguments that the definition of piracy was fixed in the early nineteenth century when Congress passed the Act of 1819, which first authorized the exercise of universal jurisdiction by United States courts to adjudicate charges of “piracy as defined by the law of nations.” The Court held that the statute “incorporates a definition of piracy that changes with advancements in the law of nations,” and that there is “no reason to believe that the ‘law of nations’ evolves in the civil context but stands immobile in the criminal context” – *U.S. v. Dire*, at 467–68. This decision therefore rejected the approach taken by the U.S. Federal Court in the *Said* case, where the Court accepted the defendants’ arguments of a static definition of piracy under U.S. law.

<sup>221</sup> For example, it has been contended that “Somalian pirates introduced a different method of operation. The traditional model took the vessel and the cargo, but the Somali game changer has been the recognition that the crew is a valuable asset for ransom. This is a marine version of kidnap and ransom activity, rather than what we would traditionally regard as pirate activity” - See “LMA’s Smith gives evidence on piracy to US senators”, CIR o-line, 19 April 2013, available at <http://www.cirmagazine.com/cir/LMA%E2%80%99sSmith%20gives%20evidence%20on%20piracy%20to%20>

pirates.<sup>222</sup> It can also correspond to changes in the legal landscape (e.g. the growing recognition of the responsibility of legal persons for criminal activity) and address challenges posed by technological advancements (e.g. carrying out piratical attacks using a drone). Courts enforcing the piracy definition – in particular in criminal cases - should nonetheless bear in mind the principles of legality<sup>223</sup> and *in dubio pro reo*, and balance the broad interpretational approach against the defendant’s rights.<sup>224</sup>

## **2.6. ACTS OF PIRICAL NATURE COMMITTED ENTIRELY IN AREAS UNDER STATE JURISDICTION – THE DEFINITION OF “ARMED ROBBERY AT SEA”**

In light of the geographical scope of the crime of piracy as defined under UNCLOS, acts of piratical nature occurring entirely in areas under state jurisdiction<sup>225</sup> are not considered as piracy under international law and are not defined under UNCLOS.

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[US%20senators.php](#). Despite the novelty in the Somali piracy model and its departure from the “classic” piracy *modus operandi*, Somali piratical acts undoubtedly meet the first requirement of Article 101.

<sup>222</sup> *Cf.* the U.S. v. Ali case, where the Court of Appeal held that “extending aider and abettor liability to those who facilitate [piratical] conduct furthers the goal of deterring piracy on the high seas – even when the facilitator stays close to shore” - United States v. Ali, *supra* note 108.

<sup>223</sup> See Shnider, Maritime Piracy, *supra* note 30, 479, 502 (“Because the pirate is not on notice of any country’s specific laws, a wide-ranging interpretation of UNCLOS, which in effect creates a new crime, would be contrary to the principle of legality”; the principle of legality “is not only a problem of non-existent law, it is also a right of defendants to a clear law, accessible and foreseeable as a source of prosecutions”).

<sup>224</sup> See, in that regard, the U.S. v. Ali, *supra* note 108 (the Court of Appeal’s concluded that different than aiding and abetting, the crime of conspiracy is not part of the UNCLOS definition of piracy). Note, however, that in the *Hasan I* case (sustained on appeal in the U.S. v. Dire case), the Court convicted two individuals for piracy under Article 101(b) and (c), UNCLOS, referring to them as “coconspirators”.

<sup>225</sup> As previously noted, UNCLOS lists areas that are deemed to be part of a state’s sovereign territory, namely a state’s internal waters and ports, the territorial sea of a state, archipelagic waters of a state, and parts of straits used for international navigation that are within the territorial sea of a state – see references to the corresponding UNCLOS provisions in *supra* note 101.

This, however, does not entail that they may go unpunished. Indeed, a state has the right to exercise its criminal jurisdictional powers to address violent acts occurring within its territorial waters, including where the act was committed by a foreign ship passing through the territorial sea.<sup>226</sup> Where relevant, a state may also conduct hot pursuit of the foreign ship.<sup>227</sup> In addition, the flag state can exercise jurisdiction over the piratical acts if it obtains custody over the perpetrators.<sup>228</sup>

Considering the fact that a significant number of acts of piratical nature occur in areas subject to state jurisdiction and render the UNCLOS piracy section inapplicable,<sup>229</sup> the IMO adopted a definition of “armed robbery at sea” that reads as follows:

“Armed robbery against ships” means any of the following acts:

.1 any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;

.2 any act of inciting or of intentionally facilitating an act described above.”<sup>230</sup>

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<sup>226</sup> Article 27(1), UNCLOS.

<sup>227</sup> Article 111, UNCLOS.

<sup>228</sup> Article 94, UNCLOS. The flag state may not arrest the perpetrators while the ship is in the territorial waters of another state.

<sup>229</sup> cf. Carrie R. Woolley, *Piracy and Sovereign Rights: Addressing Piracy in the Straits of Malacca without Degrading the Sovereign Rights of Indonesia and Malaysia*, 8 SANTA CLARA J. INT’L L. 447, 450 (2010) (arguing that the geography of the Malacca Straits makes the ‘high seas’ requirement in the piracy definition “largely inapplicable since large portions of the Straits exist within the territorial waters of the coastal states bordering the Straits”).

<sup>230</sup> Int’l Maritime Org. [IMO], Assemb. Res. A.1025(26), Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships (Dec. 2, 2009). Since the first element of the crime concerns any illegal act of violence, detention or depredation, and in light of the earlier conclusion that this element is broader in scope than cases of armed robbery, it appears that a more accurate title of the crime would have been “acts of piratical nature

The IMO definition therefore resembles the structure of the piracy definition under Article 101. It nonetheless contains a number of important differences:

First, the location of the incident must take place within internal/archipelagic/territorial waters – i.e. not on the “high seas.” In that regard, the phrase “other than an act of piracy” supports the following propositions: That the term “high seas” in the piracy definition of Article 101(a), UNCLOS, indeed includes the EEZ and contiguous zone;<sup>231</sup> and that piratical acts carried out partially on the high seas<sup>232</sup> may be considered as piracy under UNCLOS; if this were not the case, the inclusion of this phrase in the IMO definition would have been redundant since undoubtedly the piracy definition is not met where the incident takes place entirely within internal/archipelagic/territorial waters.

Second, the IMO definition introduces an explicit reference to *threats* of violence, detention or depredation to avoid the ambiguity of the piracy definition.<sup>233</sup>

Third, the definition does not contain the “two ship requirement” of the piracy definition, thereby covering also acts committed on board of a ship and directed against the ship itself or its passengers or property.

Lastly, the definition does not include a provision corresponding to Article 101(b), namely the act of voluntary participation in the operation of a piracy (or “armed robbery at sea”) ship with knowledge of facts making it such a ship.

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committed in areas subject to state’s jurisdiction”, or – to avoid debates over the geographical scope - “acts of piratical nature committed within a State’s internal waters, archipelagic waters and territorial sea”.

<sup>231</sup> See the discussion of the high seas requirement *supra* Part 2.2.4.

<sup>232</sup> *idem*.

<sup>233</sup> See the discussion regarding the first element of the crime of piracy under Article 101 UNCLOS *supra* Part 2.2.1.

The explicit reference to piratical acts that took place in an area within state jurisdiction has been introduced in various regional legal instruments adopted under IMO's auspices. The first was the ReCAAP, followed by the Djibouti Code of Conduct and the Gulf of Guinea Code of Conduct.<sup>234</sup> These instruments address both piracy (as defined under UNCLOS) and armed robbery at sea with a view to cover all acts of piratical nature.<sup>235</sup> While ReCAAP's definition of armed robbery at sea is taken verbatim from UNCLOS's piracy definition (the only difference being the place where the piratical act took place – within a state jurisdiction as opposed to the high seas), the definition of the term in the two Code of Conducts follows the IMO definition of 2009.<sup>236</sup>

The reference in the IMO's Resolution and the aforementioned regional instruments to acts of piratical nature carried-out in areas subject to state jurisdiction does not confer additional jurisdictional powers on states in a manner similar to the universal jurisdiction provided for in Article 105, UNCLOS. Rather, it is meant to facilitate and harmonize international cooperation (e.g. through information sharing) in combating such acts, bearing in mind that it would be for the coastal or flag states to prosecute the perpetrators.

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<sup>234</sup> IMO, C102/14, Protection of Vital Shipping Lanes: Sub-regional meeting to conclude agreements on maritime security, piracy and armed robbery against ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea areas (Apr. 3, 2009), <http://www.imo.org/en/OurWork/Security/PIU/Documents/DCoC%20English.pdf> [hereinafter “the Djibouti Code of Conduct”]; IMO Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa (June 25, 2013), [http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/code\\_of\\_conduct%20signed%20from%20ECOWAS%20site.pdf](http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf) [hereinafter “the Gulf of Guinea Code of Conduct”].

<sup>235</sup> On the three instruments see further discussion *infra* Chapter 4.

<sup>236</sup> In both instruments there is one slight difference which appears to be inconsequential: Instead of using the UNCLOS/IMO reference to “any illegal act of violence or detention”, the definition of “armed robbery at sea” in the Codes of Conduct refers to “unlawful act of violence or detention.”

Finally, the fact that the IMO's definition of "armed robbery at sea" closely follows the piracy definition under UNCLOS can serve as another manifestation of the latter's status as representing customary international law. Whether the definition of "armed robbery at sea" carries the same weight might be premature to ascertain due to the relative short time that has passed since its introduction, yet its inclusion in legal instruments adopted by regional states in the three contemporary piracy "hotspots" can suggest that this is indeed the preferable definition of countries over other definitions.<sup>237</sup>

## **2.7. ADDRESSING PIRATICAL ACTS THROUGH OTHER INTERNATIONAL OR REGIONAL INSTRUMENTS**

Though UNCLOS sets out the applicable legal framework to combating piracy, it does not exclude the application of other relevant legal instruments. This conclusion derives from UNCLOS' own provisions,<sup>238</sup> as well as from the UNSC piracy Resolutions that have repeatedly encouraged countries to make use of treaties such as the SUA Convention in combating piracy.<sup>239</sup>

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<sup>237</sup> Compare, for example, to the International Maritime Bureau (IMB) broad definition of piracy (which also does not distinguish between acts committed on the high seas and those committed in areas subject to a state jurisdiction): "An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act" – see <http://www.riskintelligence.eu/about/approach/piracy/>. The purpose of this definition, however, is to facilitate the IMB's reports and statistics of acts of piratical nature. It is not meant to replace UNCLOS or other definitions relevant for criminal prosecution and establishing jurisdiction.

<sup>238</sup> See Article 311(2), UNCLOS: "This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention." In addition, Article 311(3), UNCLOS, sanctions the conclusions of agreements between State Parties, which, subject to certain restrictions modify or suspend the operation of UNCLOS' provisions in the relations between those State Parties.

<sup>239</sup> See further discussion *infra* Chapter 3.

Accordingly, piratical acts can be addressed not only through UNCLOS piracy section but also through the application of other relevant international instruments. As correctly indicated, “[D]epending on the facts of the individual case, a maritime crime may also be classified as an act of terrorism, a threat to maritime security or a transnational organized crime.”<sup>240</sup>

UNCLOS’ piracy section is therefore complemented by other conventions, which do not address piracy per se yet may be applicable to piratical incidents and international cooperation in suppressing them. These notably include the abovementioned SUA Convention,<sup>241</sup> UNTOC, the Terrorism Financing Convention, and the International Convention against the Taking of Hostages (the “Hostages Convention”).<sup>242</sup> Those international conventions are supplemented by

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<sup>240</sup> Cheah Wui Ling, *Maritime Crimes and the Problem of Cross-border Enforcement: Making the Most of Existing Multilateral Instruments*, in *ASEAN: PROSPECTS FOR COOPERATION* (Robert C. Beckman & J. Ashley Roach, eds., Edward Elgar Publishing Ltd, 2012), at 209. See also at her conclusions at page 231: “Due to the piecemeal development of these instruments and their overlapping nature, it is highly likely that more than one instrument is applicable to the maritime crime at hand.”

<sup>241</sup> As noted by commentators, while the SUA Convention does not use the language of “piracy” and is widely considered to be an anti-terrorist convention, its list of offences would in many situations overlap with piratical acts as understood in UNCLOS – see Heinze, *supra* note 147, at 55, and the references he makes there. As he further notes in P. 53-5, the SUA Convention is broader than UNCLOS regarding its definition of illegal acts at sea, in that the SUA Convention applies to offences committed even in territorial waters (as long as the ship in question is scheduled for international navigation), it does not have the “private ends” or “two ships” requirement, and it places a clear duty on capturing States to either prosecute or extradite. At the same time and unlike UNCLOS, only signatory States with a nexus to the offence are entitled to prosecute.

<sup>242</sup> International Convention against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 UNTS 205. In the *U.S. v. Ali* case, the Court of Appeal noted that the U.S. law criminalizing hostage taking reflects international law “as it fulfils U.S. treaty obligations under the widely supported International Convention against the Taking of Hostages.” The Court also rejected Ali’s argument against the application of this Convention since Somalia is not a State Party, explaining that the Convention provides foreign offenders with notice that they can be prosecuted by any party to the Convention – see *U.S. v. Ali*, *supra* note 108.

the UNSC piracy resolutions and regional instruments such as ReCAAP and the Djibouti and Gulf of Guinea Codes of Conduct.

Without delving into full discussion of these instruments,<sup>243</sup> the following points are noteworthy: First, the abovementioned conventions addressing certain criminal activities (e.g. organized crime addressed by UNTOC), do not limit themselves to land-based activities and consequently they cover also crimes committed at sea.<sup>244</sup>

With regard to the SUA and Hostage Conventions (and potentially other conventions that were primarily targeted at combating terrorism): The application of these conventions does not require an intent to carry-out a terrorist act; rather, they are based on addressing acts that can cause potential harm. Put differently, the conventions' focus is based on the acts rather than the purpose; hence piratical acts can be addressed using these frameworks.

With regard to UNTOC: Piracy can occur as isolated incidents carried out by opportunistic criminals. Yet, often times, piratical attacks are carried out by a well-organized criminal group. For example, in the context of Somalia, it has been indicated that “[T]he extraordinarily lucrative nature of piracy has transformed rag-tag, ocean-going militias into well-

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<sup>243</sup> Following the spike in piracy incidents in the past decade, much has been written on the applications of conventions such as SUA and UNTOC to suppress piracy. Cf. Cheah Wui Ling, *Extradition and Mutual Legal Assistance in the Prosecution of Serious Maritime Crimes: A Comparative and Critical Analysis of Applicable Frameworks* 9–13 (Hague Research Series), available at <http://ssrn.com/abstract=2259753> [hereinafter “Cheah Wui Ling, *Extradition and Mutual Legal Assistance*”]; J. Ashley Roach, *Countering Piracy off Somalia: International Law and International Institutions*, 104 AM. J. INT’L L. 397; United Nations Conference on Trade and Development, *Maritime Piracy – Part II: An Overview of the International Legal framework and of Multilateral Cooperation to Combat piracy*, available at [http://unctad.org/en/PublicationsLibrary/dtltlb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dtltlb2013d3_en.pdf); WG2 Compendium, *supra* note 29.

<sup>244</sup> With regard to UNTOC, Article 15(1)(b) of the Convention requires a State Party to establish jurisdiction when the offence has been committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

resourced, efficient and heavily armed syndicates employing hundreds of people in north-eastern and central Somalia.”<sup>245</sup>

In conclusion, UNCLOS continues to serve as the main legal framework to combating piracy and has the clear advantages of being accepted as representing customary international law and providing for universal jurisdiction over pirates. Other conventions such as SUA and UNTOC, which provides for robust obligations as well as for elaborated regime of international cooperation, can complement UNCLOS, in particular where UNCLOS’ shortcomings prevent its application.

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<sup>245</sup> U.N. Sec. Council, Monitoring Group on Somalia, *Report of the Monitoring Group on Somalia Pursuant to Sec. Council Resolution 1811* (2008), ¶ 140, U.N. Doc. S/2008/769 (Dec. 10, 2008) [hereinafter “Report of the Monitoring Group on Somalia”]. Scholars have reached a similar conclusion, cf. see Nicholas Onuf, *supra* note 102, Forward, at xxi (stating that “Piracy resembles a transnational criminal activity, such as drug trafficking and money laundering”); Beckman, *supra* note 6, at 514 (characterizing certain acts of piracy as “major transnational organized crime at sea”); Barry Hart Dubner and Sara Fredrickson, *On the Legal Issues Regarding the Prosecution of Sea Pirates (Including Human Rights): A Case of History Repeating Itself?*, 26 *Temp. Int’l & Comp. L. J.* 233, 243 (2012) (“It has been argued that piracy occurring in the world today is backed by organized crime, especially off the coast of Somalia and further into the Indian Ocean”); Cf. Cheah Wui Ling, *Extradition and Mutual Legal Assistance*, *supra* note 243 (“Modern-day piracy attacks usually involve several persons and a degree of coordination between them.”).