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Prevention and repression of piracy and armed robbery at sea

Writings relevant to the definitions of piracy and of armed robbery at sea

Memorandum by the Secretariat

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I. Introduction

1. At its seventy-first session, in 2019, the Commission decided to recommend the inclusion of the topic “Prevention and repression of piracy and armed robbery at sea” in its long-term programme of work.¹ At its seventy-third session, in 2022, the Commission decided to include the topic in its current programme of work and to appoint Mr. Yacouba Cissé as Special Rapporteur.² At the same session, the Commission requested the Secretariat to prepare a memorandum concerning the topic, addressing in particular: (a) elements in the previous work of the Commission that could be particularly relevant for its future work on the topic and the views expressed by States; (b) writings relevant to the definitions of piracy and of armed robbery at sea; and (c) resolutions adopted by the Security Council and by the General Assembly relevant to the topic.³

2. With the agreement of the Special Rapporteur, the Secretariat prepared a memorandum ahead of the seventy-fourth session of the Commission, in 2023, addressing elements in the previous work of the Commission that could be particularly relevant for its future work on the topic and the views expressed by States, and resolutions adopted by the Security Council and by the General Assembly relevant to the topic.⁴ It was agreed that writings relevant to the definitions of piracy and of armed robbery at sea would be covered in a subsequent memorandum to be prepared ahead of the seventy-fifth session of the Commission. The present memorandum has been prepared pursuant to the request of the Commission at its seventy-third session and supplements the previous memorandum by the Secretariat on the topic.

3. As noted by the Commission at its seventy-fourth session, the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea⁵ is regarded as reflecting customary international law.⁶ The Commission notes that there is not necessarily any substantive difference between piracy and armed robbery at sea as far as the conduct itself is concerned, and that the main difference between piracy and armed robbery at sea is the location of the act.⁷

4. The origins of the definition on piracy contained in article 101 of the United Nations Convention on the Law of the Sea can be traced directly to article 15 of the 1958 Convention on the High Seas,⁸ and from there to the 1956 draft articles concerning the law of the sea, adopted by the Commission in 1956.⁹ The present memorandum therefore contains first a discussion of the legislative history of the definition of piracy in the aforementioned instruments, highlighting the views of negotiating States, then a review of the academic debate on its status, elements and subsequent utilization as a departure point for the definition of armed robbery at sea.

5. Chapter II of the memorandum supplements information previously provided on the work of the Commission on the topic “Regime of the high seas”. It contains a

¹ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, para. 290.

² *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. 239.

³ *Ibid.*, para. 243.

⁴ A/CN.4/757.

⁵ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, art. 101.

⁶ *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10 (A/78/10)*, para. 58, paragraph (1) of the commentary to draft article 2 (1).

⁷ *Ibid.*, para. 58, paragraph (2) of the commentary to draft article 3.

⁸ Convention on the High Seas (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11.

⁹ *Yearbook... 1956*, vol. II, document A/3159, at para. 33, pp. 256–301.

discussion of the treatment of the provision containing the definition of piracy in the 1956 draft articles concerning the law of the sea, and views expressed by States at the First United Nations Conference on the Law of the Sea, which resulted in the adoption of the Convention on the High Seas, and at the Third United Nations Conference on the Law of the Sea, which resulted in the adoption of the United Nations Convention on the Law of the Sea. A comparative table of the provisions of the 1956 draft articles and the two conventions is contained in annex II to the previous memorandum by the Secretariat on the topic.¹⁰

6. Chapter III then contains a survey of writings relevant to the definitions of piracy and of armed robbery at sea. Consistent with the approach of the Commission to the topic,¹¹ the memorandum takes as its point of departure the definition of piracy contained in the United Nations Convention on the Law of the Sea. Writings were found starting from bibliographies prepared by the Dag Hammarskjöld Library and the Library of the United Nations Office at Geneva and using the references contained therein to find additional relevant works. A broad approach has been taken in the present memorandum, erring on the side of including references to writings found to be relevant to either definition. A complete list of the writings cited in chapter III is contained in the annex.

II. Evolution of the definition of piracy in international law

7. The prior work of the Commission on the definition of piracy has already been discussed in the memorandum of the Secretariat prepared for the Commission at its seventy-fourth session.¹² In the present chapter, the evolution of the definition prepared by the Commission is traced through the formal negotiations held during the First and the Third United Nations Conferences on the Law of the Sea, covering both the views expressed by negotiating States in formal sessions, and formal proposals submitted to the negotiating bodies of the conferences.

A. United Nations Conference on the Law of the Sea

8. While the Commission began its work on the regime of the high seas and the regime of the territorial sea as two separate topics, the work was combined into a single topic, “Law of the sea”, at its eighth session, in 1956, in pursuance of General Assembly resolution 899 (IX) of 14 December 1954.¹³ The outcome of the work of the Commission was a single set of draft articles concerning the law of the sea, together with commentaries thereto.¹⁴

9. The General Assembly, at its eleventh session, adopted resolution 1105 (XI) of 21 February 1957, in connection with the agenda item “Report of the International Law Commission on the work of its eighth session: (a) Final report on the regime of the high seas, the regime of the territorial sea and related problems”. In that resolution, the Assembly decided that an international conference of plenipotentiaries should be convoked to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem,

¹⁰ A/CN.4/757, annex II.

¹¹ A/74/10, annex C.

¹² A/CN.4/757, paras. 18–19, 32, 35–63, 71 and 86–95.

¹³ *Yearbook ... 1956*, vol. II, document A/3159, para. 22. See also General Assembly resolution 798 (VIII) of 7 December 1953.

¹⁴ *Yearbook ... 1956*, vol. II, document A/3159, at para. 33, pp. 256–301.

and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.¹⁵

10. In the same resolution, the General Assembly referred to the conference the report of the Commission as the basis for its consideration of the various problems involved in the development and codification of the law of the sea, and also the verbatim records of the relevant debates in the Assembly, for consideration by the conference in conjunction with the Commission's report.¹⁶ In accordance with that provision, the definition of piracy contained in draft article 39 of the draft articles concerning the high seas, adopted by the Commission, became the working definition for the purposes of the conference.¹⁷

11. In the same resolution, the General Assembly requested the Secretary-General to obtain from the Governments invited to the conference any further provisional comments that the Governments may wish to make on the Commission's report and related matters, and to present to the conference in systematic form any comments made by the Governments, as well as the relevant statements made in the Sixth Committee at the eleventh and previous sessions of the General Assembly.¹⁸

12. Comments on the working definition of piracy, contained in draft article 39 of the draft articles concerning the high sea, were submitted by China, Italy, the Netherlands and Poland, for presentation to the United Nations Conference on the Law of the Sea.

13. China noted that the Commission had correctly concluded that acts committed on board a ship by the crew or passengers and directed against persons or property on board the ship could not be regarded as acts of piracy. However, if the acts so committed involved those of navigating or taking command of the ship, they should be deemed as acts of piracy. China therefore proposed that a new subparagraph be added to draft article 39, paragraph 1, with the effect of including in the definition of piracy acts directed, "[o]n the high seas, against persons or property on board the ship if, for these ends, the person or persons committing such act navigate or take command of the ship".¹⁹

14. In its comments, Italy noted that draft article 39 of the draft articles stated that illegal acts (of violence and so on) committed by the crew or the passengers of a private ship or a private aircraft against a ship on the high seas or in territory outside the jurisdiction of any State were acts of piracy. However, the draft article did not provide for the opposite situation: namely, that the illegal acts in question directed by a private ship against an aircraft were also to be considered piracy: "We think it advisable to draw the Commission's attention to this point because the commentary on the [draft] article shows that this particular case has not yet been studied."²⁰

15. Italy also noted the following with regard to ships or aircraft that should be considered pirate ships or aircraft:

To prevent the definition of pirate ships given in [draft] article 41 from covering only ships permanently engaged in acts of piracy, it would be advisable to

¹⁵ General Assembly resolution 1105 (XI) of 21 February 1957, para. 2.

¹⁶ *Ibid.*, para. 9.

¹⁷ *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. I, *Preparatory Documents*, document A/CONF.13/32; and *Yearbook ... 1956*, vol. II, document A/3159, at para. 33, pp. 256–301, at pp. 260–261.

¹⁸ General Assembly resolution 1105 (XI), para. 7 (a).

¹⁹ *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. I, *Preparatory Documents*, document A/CONF.13/5 and Add.1–4, p. 111.

²⁰ *Ibid.*, p. 91.

replace the principle of intended use by that of actual use, which has the advantage of making provision also for the case of occasional use for piracy.²¹

16. The Netherlands noted that by limiting acts of piracy to acts committed for private ends, acts performed in an official capacity were already excluded from the definition. However, it appeared from draft article 40 that such exclusion was not intended for acts committed for private ends by the crew of a government ship or a government aircraft. The Netherlands therefore proposed deleting the word “private”.²²

17. Poland expressed reservations with regard to the extent the definition of piracy put forward by the Commission, noting the following:

The classical form of piracy committed for gain is now largely a thing of the past. The period between the two World Wars witnessed the appearance of new forms of piracy, such as the acts of piracy committed during the Spanish Civil War in the years 1936–1938 and those perpetrated in the China seas in recent years, the victims of which have included two Polish merchantmen. The definition adopted in [draft] article 39 does not cover these modern forms of piracy, which are expressly declared to constitute piracy in a number of international agreements.²³

18. At its third plenary meeting, and in accordance with its rules of procedure,²⁴ the Conference established five main committees to deal with each of the main areas of its work.²⁵ The draft articles related to piracy were referred to the Second Committee of the Conference, which was tasked with tackling the “general regime” of the high seas.²⁶

19. In accordance with the method of work adopted by the Second Committee,²⁷ a general debate was held on the draft articles adopted by the Commission.²⁸ Only seven delegations referred to the definition of piracy prepared by the Commission in their statements. The delegation of Ireland noted that some of the provisions suffered from a lack of precise definition and that the word “ship” itself was not defined. It also expressed the hope that the Conference would draft precise provisions governing illegal acts of violence and depredation committed by the crew of a fishing boat of one nationality against a fishing boat of another nationality.²⁹

20. The delegation of Spain observed that draft article 39 contained provisions for the protection of ships on the high seas and of persons and property in such ships against piracy, but that there was no clause to protect aircraft either above or on the high seas. He observed that some provision should be added to that effect.³⁰

²¹ *Ibid.*, p. 91.

²² *Ibid.*, p. 109.

²³ *Ibid.*, p. 99.

²⁴ *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. I, *Preparatory Documents*, document A/CONF.13/35, rules 46–48.

²⁵ *Ibid.*, vol. II, *Plenary Meetings: Summary Records of Meetings and Annexes*, summary records of plenary meetings, 3rd plenary meeting, paras. 1–2.

²⁶ Fishing and the conservation of living resources in the high seas were the subject matter of the work of the Third Committee of the Conference.

²⁷ *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. IV, *Second Committee (High Seas: General Regime): Summary Records of Meetings and Annexes*, summary records of meetings, 4th meeting, paras. 3–5.

²⁸ The general debate started at the 4th meeting of the Second Committee and concluded at its 13th meeting.

²⁹ *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. IV, *Second Committee (High Seas: General Regime): Summary Records of Meetings and Annexes*, summary records of meetings, 8th meeting, para. 23.

³⁰ *Ibid.*, 9th meeting, para. 44.

21. The delegation of Czechoslovakia took the view that the provisions concerning piracy in the draft articles occupied a disproportionate amount of space. Moreover, it noted that the definition of piracy in draft article 39 did not seem to be quite in harmony with the development of international law. For example, the omission of acts of violence and depredation committed on the high seas for other than private ends meant that acts covered by the definition and committed at the order or the initiative of a State organ could not be regarded as piracy. It also noted that the definition did not cover acts of piracy committed on the high seas by one aircraft against another.³¹

22. The delegation of China reiterated its view that if the acts committed involved navigating or taking command of a ship, they should be regarded as acts of piracy.³²

23. The delegation of Pakistan joined those delegations requesting the inclusion of a stipulation that the acts in question directed against an aircraft by a privately owned ship also constituted piracy.³³

24. The delegation of Mexico noted that draft article 39 made “private ends” the essential factor in the commission of acts of piracy, but that other draft articles did not contain that qualification. It noted that the draft article, and draft articles 40 and 41, should state that acts committed for purely political ends would not be regarded as acts of piracy.³⁴

25. Lastly, the delegation of Ukraine took the view that the Commission’s draft provisions on piracy were anachronistic: piracy in the strict sense of the word was hardly known in modern times, but it had now taken the form of aggressive acts perpetrated or engineered by various States.³⁵

26. Following the conclusion of the general debate, the Second Committee agreed to proceed to discuss the draft articles adopted by the Commission, together with amendments thereto submitted by its members.³⁶ It considered the draft articles on piracy (draft articles 38 to 45) at its twenty-seventh,³⁷ twenty-ninth³⁸ and thirtieth³⁹ meetings. Draft article 39 was subject to six proposals, seeking to delete or amend the definition contained therein.

27. The first proposal to be considered was that made by the delegation of Uruguay, seeking to delete the entire set of draft articles on piracy.⁴⁰ When introducing the proposal, at the twenty-seventh meeting of the Second Committee, the delegation of Uruguay stated that piracy no longer constituted a general problem, and its suppression was already the subject of numerous international treaties with which the Commission’s draft articles might conflict.⁴¹ The proposal was rejected by 33 votes to 12, with 3 abstentions.⁴²

28. The delegations of Albania and Czechoslovakia had submitted a joint proposal to replace draft articles 38 to 43 adopted by the Commission by a single draft article, to read: “All States are bound to take proceedings against and to punish acts of piracy,

³¹ *Ibid.*, 11th meeting, para. 16.

³² *Ibid.*, 11th meeting, para. 24.

³³ *Ibid.*, 11th meeting, para. 31.

³⁴ *Ibid.*, 12th meeting, para. 19.

³⁵ *Ibid.*, 13th meeting, para. 24.

³⁶ *Ibid.*, 14th meeting, paras. 1–7.

³⁷ *Ibid.*, 27th meeting, paras. 31–49.

³⁸ *Ibid.*, 29th meeting, paras. 2–5.

³⁹ *Ibid.*, 30th meeting, para. 8.

⁴⁰ *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. IV, *Second Committee (High Seas: General Regime): Summary Records of Meetings and Annexes*, annexes, document A/CONF.13/C.2/L.78.

⁴¹ *Ibid.*, summary records of meetings, 27th meeting, para. 32.

⁴² *Ibid.*, summary records of meetings, 29th meeting, at para. 4.

as defined by present international law, and to co-operate to the fullest possible extent in the repression of piracy.”⁴³

29. When introducing the proposal, at the twenty-seventh meeting of the Second Committee, the delegation of Czechoslovakia expressed the view that the definition of piracy in draft article 39 adopted by the Commission did not accord with existing rules of international law and failed to enumerate all the categories of acts which in theory and practice were encompassed by that concept. The delegation added that the definition erroneously included acts committed on terra nullius, and was equally mistaken in excluding attacks made in the territorial sea or on the mainland by vessels coming from the high seas and afterwards escaping thither. In the delegation’s view, the most serious omission was the failure to mention piracy for political reasons. The delegation took the view that though it would have been desirable to elaborate a new definition, it would be impossible to do so in the time available.⁴⁴

30. Following the introduction of the amendment, the delegations of Romania and the Union of Soviet Socialist Republics expressed support for the proposal,⁴⁵ while the delegation of Yugoslavia opposed.⁴⁶ At the twenty-ninth meeting of the Second Committee, the joint proposal by Albania and Czechoslovakia was put to a vote, and rejected by 37 votes to 11, with 1 abstention.⁴⁷

31. The delegation of China had put forward a proposal to add a third subparagraph to draft article 39, paragraph 1, as announced in its comments on the draft articles (see para. 13 above). However, the proposal was withdrawn before the vote on the draft article and its amendments.⁴⁹

32. The delegation of Greece proposed to delete the word “illegal” in draft article 39, paragraph 1,⁵⁰ which qualified the acts that would constitute piracy. The delegation of Greece took the view that illegality must be qualified by some system of law; in the absence of international regulations on the subject, there would be no other interpretation of illegality than that covered by national law, and the legal confusion that would arise might make it impossible to punish a ship that had engaged in piracy.⁵¹ The proposal was rejected by 30 votes to 4, with 16 abstentions.⁵²

33. The delegation of Italy proposed an amendment,⁵³ which it explained was intended to fill a gap in the Commission’s text by extending the definition in subparagraphs (a) and (b) of draft article 39, paragraph 1, to acts committed against aircraft.⁵⁴ The question addressed by Italy had in fact been extensively discussed by the Commission, which had decided, by a series of votes, that an attack by one aircraft against another should not fall within the scope of the definition of piracy, but that an attack by an aircraft against a vessel in the high seas should fall within that scope.⁵⁵ The proposal by Italy was adopted by 18 votes to 16, with 19 abstentions.⁵⁶

⁴³ *Ibid.*, annexes, document A/CONF.13/C.2/L.46.

⁴⁴ *Ibid.*, summary records of meetings, 27th meeting, para. 33.

⁴⁵ *Ibid.*, summary records of meetings, 27th meeting, paras. 42 and 46.

⁴⁶ *Ibid.*, summary records of meetings, 27th meeting, para. 48.

⁴⁷ *Ibid.*, summary records of meetings, 29th meeting, at para. 4.

⁴⁸ *Ibid.*, annexes, document A/CONF.13/C.2/L.45.

⁴⁹ *Ibid.*, summary records of meetings, 29th meeting, para. 5.

⁵⁰ *Ibid.*, annexes, document A/CONF.13/C.2/L.62.

⁵¹ *Ibid.*, summary records of meetings, 29th meeting, para. 3.

⁵² *Ibid.*, summary records of meetings, 29th meeting, at para. 5.

⁵³ *Ibid.*, annexes, document A/CONF.13/C.2/L.80.

⁵⁴ *Ibid.*, summary records of meetings, 27th meeting, para. 43.

⁵⁵ *Yearbook ... 1955*, vol. I, 293rd meeting, paras. 2 and 12–13. See also A/CN.4/757, paras. 60–62.

⁵⁶ *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. IV, *Second Committee (High Seas: General Regime): Summary Records of Meetings and Annexes*, summary records of meetings, 29th meeting, at para. 5.

34. The delegation of the United Kingdom of Great Britain and Northern Ireland proposed to amend draft article 39 by modifying the chapeau and paragraph 1 and deleting paragraph 3.⁵⁷ The proposed amendment to the chapeau was to add the word “such” before the phrase “[p]iracy consists in any of the following acts”, linking the definition to the concept, used in the preceding draft article, of “piracy on the high seas or in any other place outside the jurisdiction of any State”.⁵⁸ The delegation of the United Kingdom had also proposed to add “*jure gentium*” after “piracy” in that phrase from the preceding draft article, in order to distinguish between the definition of piracy in municipal and international law and to make it plain that the draft articles covered the latter only.⁵⁹

35. The proposed amendment by the United Kingdom to draft article 39, paragraph 1, involved retaining the initial characterization of the crime drafted by the Commission, which read “any illegal acts of violence, detention or any act of depredation”, but then adding “or any attempt to commit such acts”. As a corollary, the delegation proposed to delete paragraph 3, under which “any act of incitement or of intentional facilitation” of such acts was included in the definition. In the view of the delegation, the provision contained in paragraph 3 was imprecise and would unacceptably widen the definition. Its proposed amendments to draft article 39 were designed to render the attempt to commit an act of piracy unlawful as well as the act itself.⁶⁰

36. The proposal by the United Kingdom was considered in two separate votes: the first on the amendment of the chapeau and paragraph 1, and the second on the deletion of paragraph 3. Both proposals were rejected, the first by 22 votes to 13, with 17 abstentions, and the second by 36 votes to 3, with 13 abstentions.⁶¹

37. At its twenty-ninth meeting, after the votes on the proposed amendments, the Second Committee voted on the text of draft article 39 submitted by the Commission, as amended by the Second Committee in accordance with the proposal by Italy. The amended draft article, containing the definition of piracy, was adopted by 45 votes to 7, with 3 abstentions.⁶²

38. Once the Second Committee had finished its work on all the draft articles referred to it, it appointed a Drafting Committee⁶³ to prepare its report to the plenary of the Conference. The Second Committee considered the report of the Drafting Committee at its thirty-sixth meeting,⁶⁴ and the draft report of the Second Committee at its thirty-seventh meeting.⁶⁵

39. At the thirty-sixth meeting, the delegation of the Union of South Africa noted that, in draft article 39 as adopted by the Second Committee, the words “private aircraft” referred not to privately owned aircraft, which was the actual meaning of the phrase, but to “civil aircraft”.⁶⁶

⁵⁷ *Ibid.*, annexes, document A/CONF.13/C.2/L.83.

⁵⁸ The full text of draft article 38, as adopted by the Commission, read: “All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” *Yearbook ... 1956*, vol. II, document A/3159, at para. 33, pp. 256–301, at p. 260.

⁵⁹ *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. IV, *Second Committee (High Seas: General Regime): Summary Records of Meetings and Annexes*, summary records of meetings, 27th meeting, para. 36.

⁶⁰ *Ibid.*, summary records of meetings, 27th meeting, para. 37.

⁶¹ *Ibid.*, summary records of meetings, 29th meeting, at para. 5.

⁶² *Ibid.*, summary records of meetings, 29th meeting, at para. 5.

⁶³ *Ibid.*, summary records of meetings, 34th meeting, para. 15.

⁶⁴ *Ibid.*, summary records of meetings, 36th meeting, and annexes, document A/CONF.13/C.2/L.152.

⁶⁵ *Ibid.*, summary records of meetings, 37th meeting, and annexes, document A/CONF.13/C.2/L.153.

⁶⁶ *Ibid.*, summary records of meetings, 36th meeting, para. 19.

40. The Vice-Chairman of the Second Committee explained that the matter raised by the delegation of the Union of South Africa had been discussed in the Drafting Committee. It had been pointed out that the terminology of the International Civil Aviation Organization, which used the term “civil aircraft”, was different from that of the Commission. Moreover, if the term “private aircraft” were changed to “civil aircraft”, the first paragraph of draft article 39 would contain the expression “a private ship or a civil aircraft”, which would suggest a difference, not merely of terminology, but also of substance. Such a distinction, he noted, was indeed one of substance, for a government non-military aircraft was not covered by the draft article as it stood, but would be if the words “private aircraft” were changed to “civil aircraft”. The Drafting Committee had thus considered that it could not change the wording of the draft article, and that the Second Committee would do so if it wished.⁶⁷

41. The delegation of the Union of South Africa suggested that the Second Committee’s report to the Conference should point out that the term “private aircraft” meant “non-State-owned aircraft”.⁶⁸ The proposal was accepted, and was thus included in the report of the Second Committee.⁶⁹

42. The Conference considered the report of the Second Committee at its tenth plenary meeting.⁷⁰ After the Rapporteur of the Second Committee had introduced the report, the Conference voted on each draft article individually. When the Conference reached draft article 39, the delegation of the Union of Soviet Socialist Republics stated that it found draft articles 39 to 45 unacceptable, because the concept of piracy adopted in them was wholly obsolete. In the view of that delegation, the Commission and the Second Committee had both ignored the fact that, in modern times, piracy could be committed otherwise than by individual private ships; even the principles approved in the Nyon arrangement of 14 September 1937⁷¹ had been omitted. The delegation suggested that the Conference should reject those draft articles, as they would oblige delegations to formulate unwelcomed reservations.⁷² Draft article 39 was then put to a vote, and the Conference adopted it by 54 votes to 9, with 4 abstentions.⁷³

43. Following the adoption of the draft articles, they were referred to the Drafting Committee of the Conference,⁷⁴ which prepared the text of a convention along with a preamble highlighting the customary character of its provisions.⁷⁵ At its 18th plenary meeting, the Conference decided that the work of the Second Committee should be embodied in a convention,⁷⁶ and proceeded to adopt the text of the convention as a whole, by 65 votes to none, with 1 abstention.⁷⁷ The definition of piracy was thus codified in article 15 of the Convention on the High Seas:

⁶⁷ *Ibid.*, para. 20.

⁶⁸ *Ibid.*, para. 21.

⁶⁹ *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. II, *Plenary Meetings: Summary Records of Meetings and Annexes*, annexes, document A/CONF.13/L.17, para. 38.

⁷⁰ *Ibid.*, summary records of plenary meetings, 10th plenary meeting.

⁷¹ Nyon Arrangement (Nyon, 14 September 1937), League of Nations, *Treaty Series*, vol. CLXXXI, No. 4184, p. 135.

⁷² *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. II, *Plenary Meetings: Summary Records of Meetings and Annexes*, summary records of plenary meetings, 10th plenary meeting, para. 20.

⁷³ *Ibid.*, summary records of plenary meetings, 10th plenary meeting, at para. 20.

⁷⁴ *Ibid.*, summary records of plenary meetings, 11th plenary meeting, para. 41.

⁷⁵ *Ibid.*, annexes, document A/CONF.13/L.37.

⁷⁶ *Ibid.*, summary records of plenary meetings, 18th plenary meeting, at para. 97.

⁷⁷ *Ibid.*, summary records of plenary meetings, 18th plenary meeting, at para. 103, and annexes, document A/CONF.13/L.53.

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

B. Third United Nations Conference on the Law of the Sea

44. On 17 December 1970, the General Assembly decided, in its resolution 2750 C (XXV), to convene in 1973 a conference on the law of the sea, and instructed the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (itself established in Assembly resolution 2340 (XXII) of 18 December 1967) to act as the preparatory body for the conference.⁷⁸ The Committee was also asked to prepare, *inter alia*, a comprehensive list of subjects and issues relating to the law of the sea, including the regime of the high seas, which should be dealt with by the conference, and draft articles on such subjects and issues.⁷⁹ The list formally approved by the Committee, and contained in its report to the Assembly on its work at its two sessions in 1972, included the issue “Slavery, piracy, drugs” under the heading “High seas”.⁸⁰

45. Having considered the report of the Committee, the General Assembly decided to convene the first two sessions of the Third United Nations Conference on the Law of the Sea.⁸¹ The Assembly also decided that the mandate of the Conference would be the adoption of a convention dealing with all matters relating to the law of the sea taking into account, *inter alia*, the list of subjects and issues relating to the law of the sea formally approved by the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.⁸²

46. Pursuant to the decision of the General Assembly,⁸³ the Conference did not start its substantive work until its second session, when its committees started tackling the subjects referred to each of them. The item on the high seas was allocated to the Second Committee of the Conference.⁸⁴ From the very start of the debate on that topic, at the thirty-first session of the Committee, delegations highlighted the virtues of the Convention on the High Seas.

47. The delegation of El Salvador noted that the regime of the high seas had been built up on the basis of customary standards, many of which had been codified in the Convention on the High Seas. It observed that the regulations on piracy, *inter alia*,

⁷⁸ General Assembly resolution 2750 C (XXV) of 17 December 1970, paras. 2 and 6.

⁷⁹ *Ibid.*, para. 6.

⁸⁰ *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 21 (A/8721)*, para. 23.

⁸¹ General Assembly resolution 3067 (XXVIII) of 16 November 1973, paras. 2 and 4.

⁸² *Ibid.*, para. 3.

⁸³ *Ibid.*, para. 4.

⁸⁴ *Official Records of the Third United Nations Conference on the Law of the Sea, 1973–1982*, vol. III, *First and Second Session: Documents*, document A/CONF.62/29.

were established practices which needed little modification except in respect of any new zones – such as the economic zone and the international seabed area – that might be included in the new convention.⁸⁵

48. The delegation of New Zealand also noted that it generally believed that the substance of the Convention on the High Seas was suitable for incorporation in the new law of the sea.⁸⁶ The delegation of the United States of America expressed the view that it would be appropriate to expedite the work of the Conference by incorporating in the new convention the provisions of the Convention on the High Seas (including those related to piracy) as modified by new provisions to be adopted.⁸⁷

49. The summary records of the Second Committee do not contain any substantive or stylistic discussion on the definition of piracy. However, at the end of the second session of the Conference, the Second Committee decided to consolidate the various informal working papers discussed at the session into a single document, which would form the basis of its future work.⁸⁸ Provision 167 of the consolidated text comprises a definition of piracy identical to article 15 of the Convention on the High Seas.⁸⁹

50. A month into the third session of the Conference, and in view of the slow progress made up to that point, the President of the Conference made a statement on the progress of work as reported to him by the chairs of the three committees.⁹⁰ The President noted that the Second Committee's informal working group on the high seas was preparing a text which seemed to command wide support among its members.⁹¹ At the same meeting, he also suggested that the chairs of the committees should each submit a single negotiating text that covered the issues falling within their respective mandates.⁹² That proposal was adopted by the Conference at its 55th meeting, on 18 April 1975.⁹³

51. Pursuant to the decision of the Conference, the Chair of the Second Committee submitted a text, which contained a definition of piracy in its draft article 87.⁹⁴ That draft article was nearly identical to article 15 of the Convention on the High Seas, with the exception of editorial changes to align the paragraphing style with that used at the Third Conference, and the consequent replacement of the reference in the third paragraph to “sub-paragraph 1 or sub-paragraph 2” with one to “subparagraphs (a) and (b)”.

52. The text of the definition of piracy remained unchanged in subsequent iterations of the negotiating text until the sixth session of the Conference, when, in the second revision to the Informal Composite Negotiating Text, the text of the third paragraph of draft article 101 was amended to “subparagraphs (a) or (b)”.⁹⁵

53. The final change to the definition of piracy appeared in the text of the draft convention, which had been revised pursuant to a decision of the Conference, adopted

⁸⁵ *Ibid.*, vol. II, *First and Second Session: Summary Records of the First, Second and Third Committees*, Second Committee, 31st meeting, paras. 49–50.

⁸⁶ *Ibid.*, 31st meeting, para. 63.

⁸⁷ *Ibid.*, 44th meeting, para. 20.

⁸⁸ *Ibid.*, 46th meeting, paras. 1–2.

⁸⁹ *Official Records of the Third United Nations Conference on the Law of the Sea, 1973–1982*, vol. III, *First and Second Session: Documents*, document A/CONF.62/L.8/Rev.1, annex II, appendix I.

⁹⁰ *Ibid.*, vol. IV, *Third Session*, summary records of plenary meetings, 54th meeting, paras. 1–45.

⁹¹ *Ibid.*, summary records of plenary meetings, 54th meeting, para. 20.

⁹² *Ibid.*, summary records of plenary meetings, 54th meeting, paras. 5–6.

⁹³ *Ibid.*, summary records of plenary meetings, 55th meeting, at para. 95.

⁹⁴ *Ibid.*, working papers of the Plenary, document A/CONF.62/WP.8/Part II, part V.

⁹⁵ *Official Records of the Third United Nations Conference on the Law of the Sea, 1973–1982*, vol. VIII, *Sixth Session: Informal Composite Negotiating Text*, working papers of the plenary, document A/CONF.62/WP.10/Rev.2 and Corr.2–5.

at its 153rd meeting,⁹⁶ to incorporate the recommendations of the Drafting Committee of the Conference, approved by “the informal plenary Conference”.⁹⁷ As recommended by the Drafting Committee, the opening text of the first paragraph was amended from “Any illegal acts of violence, detention or any act of depredation” to “any illegal acts of violence or detention, or any act of depredation”.⁹⁸

54. Article 101 of the United Nations Convention on the Law of the Sea, as adopted in Montego Bay, Jamaica, on 10 December 1982, contains the following definition of piracy:

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

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

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

III. Writings relevant to the definitions of piracy and of armed robbery at sea

55. The present chapter is presented further to the request by the Commission, at its seventy-third session, that the Secretariat prepare a memorandum concerning the topic, addressing in particular writings relevant to the definitions of piracy and armed robbery at sea.⁹⁹ The term “writings” was taken to refer to academic works of scholarship or individual or collective authors. Accordingly, works attributable to Governments or the secretariats of intergovernmental organizations were not included.¹⁰⁰

56. Writings were found starting from bibliographies prepared by the Dag Hammarskjöld Library, the Library of the United Nations Office at Geneva and the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs, and using the references contained therein to find additional relevant works. A broad approach has been taken in the present memorandum, erring on the side of including references to writings found to be relevant to either definition. A complete list of the writings cited in chapter III is contained in the annex.

57. In the present section, a survey is presented of the views expressed by authors in their various writings. Quotations from writings are used both when they are

⁹⁶ *Official Records of the Third United Nations Conference on the Law of the Sea, 1973–1982*, vol. XV, *Tenth and Resumed Tenth Session*, summary records of plenary meetings, 153rd meeting.

⁹⁷ *Ibid.*, limited documents of the Plenary, document A/CONF.62/L.78, introductory note.

⁹⁸ *Ibid.*, art. 101.

⁹⁹ A/77/10, para. 243 (b).

¹⁰⁰ For example, Division for Ocean Affairs and the Law of the Sea, “Piracy: elements of national legislation pursuant to the United Nations Convention on the Law of the Sea, 1982”, International Maritime Organization (IMO), document LEG 98/8/1, 18 February 2011 (annexed to IMO circular letter No. 3180 of 17 May 2011).

representative of a view shared by many authors and to illustrate individual views relevant to the definitions of piracy and armed robbery at sea. The inclusion of a view in the present memorandum does not necessarily imply the acceptance of the said view by the Secretariat.

A. Authority of the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea

58. The present memorandum proceeds from the premise that the definition of “piracy” contained in article 101 of the United Nations Convention on the Law of the Sea reflects customary international law. As the Commission noted in its commentary to draft article 2, paragraph 1, of the draft articles on the prevention and repression of piracy and armed robbery at sea as provisionally adopted at its seventy-fourth session, the definition “is regarded as reflecting customary international law and has been reproduced in several regional legal instruments”.¹⁰¹ Several delegations expressed the same view in the debate in the Sixth Committee on the report of the Commission on the work of its seventy-fourth session.¹⁰² This view is generally reflected in writings relevant to the definition of piracy, although some writings question the definition in article 101.

59. The emergence of a widely agreed definition of piracy as a matter of customary international law is a noteworthy development. Before the Commission undertook its early work on the law of the sea and the subsequent adoption of the Convention on the High Seas and the United Nations Convention on the Law of the Sea, there was no clear, agreed definition of the term. Writing in 1928, Brierly considered that there was “no authoritative definition of international piracy”.¹⁰³ Writing in 1932, Gidel agreed, considering that “la notion juridique de la piraterie est très difficile à préciser”.¹⁰⁴ Later writings also reflect this understanding.¹⁰⁵

1. Article 101 as a reflection of customary international law

60. Most authors writing in recent decades consider that article 101 of the United Nations Convention on the Law of the Sea reflects customary international law.¹⁰⁶ As

¹⁰¹ A/78/10, para. 58, paragraph (1) of the commentary to draft article 2. A list of regional legal instruments may be found in a footnote to that paragraph.

¹⁰² A/CN.4/763, para. 44.

¹⁰³ J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (London, Oxford University Press, 1928), p. 154.

¹⁰⁴ Gilbert Gidel, *Le Droit international public de la mer: le temps de paix*, vol. 1, *Introduction – la haute mer* (Chateauroux, Établissements Mellottée, 1932), p. 306.

¹⁰⁵ For example, Malvina Halberstam, “Terrorism on the high seas: the *Achille Lauro*, piracy and the IMO Convention on Maritime Safety”, *American Journal of International Law*, vol. 82, No. 2 (April 1988), pp. 269–310, at p. 272.

¹⁰⁶ For example, Institute of International Law, resolution on “Piracy, present problems”, Institute of International Law, *Annuaire*, vol. 83 (2023), Session of Angers (2023), third preambular para. and art. 1 (also available at www.idi-iil.org); Institute of International Law, report of the Eleventh Commission, “Piracy, present problems”, *ibid.*, pp. 156–238, at pp. 170 and 187 (also available at www.idi-iil.org); American Law Institute, *Restatement of the Law Third: the Foreign Relations Law of the United States*, vol. 2 (St. Paul, American Law Institute Publishers, 1987), p. 84; Ademuni-Odeke, “You are free to commit piracy and armed robbery against ships but please do not do it in this place: geographical scope of piracy and armed robbery against ships under UNCLOS and related international instruments”, *Journal of Maritime Law and Commerce*, vol. 50, No. 4 (October 2019), pp. 407–449, at pp. 413–414; Kamal-Deen Ali, “Anti-piracy responses in the Gulf of Guinea: addressing the legal deficit”, in *Ocean Law and Policy: 20 Years under UNCLOS*, Carlos Espósito *et al.*, eds. (Leiden, Brill Nijhoff, 2016), pp. 203–219, at p. 213; Lawrence Azubuiké, “International law regime against piracy”, *Annual Survey of International and Comparative Law*, vol. 15, No. 1 (Spring 2009), pp. 43–59, at p. 55; Ian

Brownlie, *Principles of Public International Law*, 7th ed. (Oxford, Oxford University Press, 2008), p. 229; Antonio Cassese, *International Law*, 2nd ed. (Oxford, Oxford University Press, 2005), p. 435; Robin Churchill, “The piracy provisions of the UN Convention on the Law of the Sea: fit for purpose?”, in *The Law and Practice of Piracy at Sea: European and International Perspectives*, Panos Koutrakos and Achilles Skordas, eds. (Oxford, Hart, 2014), pp. 9–32, at pp. 10 and 12; James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (Oxford, Oxford University Press, 2012), pp. 302–303; Yoram Dinstein, “Piracy *jure gentium*”, in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, vol. 2, Holger P. Hestermeyer *et al.*, eds. (Leiden, Martinus Nijhoff, 2012), pp. 1125–1145, at pp. 1125–1126 and 1128, paras. 1–2 and 6; Yoram Dinstein, “Piracy vs. international armed conflict”, in *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos*, Lilian del Castillo, ed. (Leiden, Brill Nijhoff, 2015), pp. 423–434, at pp. 423–424; Osatohanmwon Anastasia Eruaga and Maximo Q. Mejia, Jr., “Piracy and armed robbery against ships: revisiting international law definitions and requirements in the context of the Gulf of Guinea”, *Ocean Yearbook*, vol. 33 (2019), pp. 421–455, at pp. 435–436; Mathias Forteau and Jean-Marc Thouvenin, *Traité de droit international de la mer* (Paris, A. Pedone, 2017), p. 916; Ricardo Gosalbo-Bono and Sonja Boelaert, “The European Union’s comprehensive approach to combating piracy at sea: legal aspects”, in *The Law and Practice of Piracy at Sea*, Koutrakos and Skordas, eds. (*op. cit.*), pp. 81–166, at pp. 97–98; Douglas Guilfoyle, “Piracy and suppression of unlawful acts against the safety of maritime navigation”, in *Routledge Handbook of Transnational Criminal Law*, Neil Boister and Robert J. Currie, eds. (London and New York, Routledge, 2015), pp. 364–378, at p. 371; Sandra L. Hodgkinson, “The governing international law on maritime piracy”, in *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes*, Michael Scharf, Michael A. Newton and Milena Sterio, eds. (New York, Cambridge University Press, 2015), pp. 13–31, at p. 17; Marie Jacobsson and Natalie Klein, “Piracy off the coast of Somalia and the role of informal lawmaking”, in *Unconventional Lawmaking in the Law of the Sea*, Natalie Klein, ed. (Oxford, Oxford University Press, 2022), pp. 44–61, at p. 46; Robert Jennings and Arthur Watts, eds., *Oppenheim’s International Law*, 9th ed., vol. 1, *Peace* (Harlow, Longman, 1992), p. 747; José Luis Jesus, “Protection of foreign ships against piracy and terrorism at sea: legal aspects”, *International Journal of Marine and Coastal Law*, vol. 18, No. 3 (September 2003), pp. 363–400, at pp. 373 and 375; James L. Kateka, “Combating piracy and armed robbery off the Somali coast and the Gulf of Guinea”, in *Law of the Sea*, del Castillo, ed. (*op. cit.*), pp. 456–468, at p. 458; Eugene Kontorovich, “‘A Guantánamo on the sea’: the difficulty of prosecuting pirates and terrorists”, *California Law Review*, vol. 98, No. 1 (February 2010), pp. 243–276, p. 252; James Kraska, “Developing piracy policy for the National Strategy for Maritime Security”, in *Legal Challenges in Maritime Security*, Myron H. Nordquist *et al.*, eds. (Leiden, Martinus Nijhoff, 2008), pp. 331–440, at p. 336; James Kraska, “The laws of civil disobedience in the maritime domain”, in *Ocean Law and Policy*, Espósito *et al.*, eds. (*op. cit.*), pp. 163–202, at pp. 180–181; Rainer Lagoni, “Piraterie und widerrechtliche Handlungen gegen die Sicherheit der Seeschifffahrt”, in *Recht – Staat – Gemeinwohl: Festschrift für Dietrich Rauschning*, Jörn Ipsen and Edzard Schmidt-Jortzig, eds. (Cologne, Carl Heymanns, 2001), pp. 501–534, at p. 524; Hanspeter Neuhold, “The return of piracy: problems, parallels, paradoxes”, in *Coexistence, Cooperation and Solidarity*, Hestermeyer *et al.*, eds. (*op. cit.*), pp. 1239–1258, at p. 1246; Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Oxford, Hart, 2013), p. 163; J. Ashley Roach, “General problematic issues on exercise of jurisdiction over modern instances of piracy”, in *Selected Contemporary Issues in the Law of the Sea*, Clive R. Symmons, ed. (Leiden, Martinus Nijhoff, 2011), pp. 119–137, at p. 121; Clive Schofield and Kamal-Deen Ali, “Combating piracy and armed robbery at sea: from Somalia to the Gulf of Guinea”, in *Routledge Handbook of Maritime Regulation and Enforcement*, Robin Warner and Stuart Kaye, eds. (Abingdon, Routledge, 2016), pp. 277–292, at p. 278; Malcolm N. Shaw, *International Law*, 9th ed. (Cambridge, Cambridge University Press, 2021), p. 528; I.A. Shearer, “Piracy” (last updated October 2010), in *Max Planck Encyclopedia of Public International Law*, Anne Peters and Rüdiger Wolfrum, eds. (Oxford University Press, 2008, available at www.mpepil.com), para. 13; Yoshifumi Tanaka, *The International Law of the Sea*, 4th ed. (Cambridge, Cambridge University Press, 2023), p. 487; Tullio Treves, “Piracy, law of the sea, and use of force: developments off the coast of Somalia”, *European Journal of International Law*, vol. 20, No. 2 (April 2009), pp. 399–414, at p. 401; Tullio Treves, “Piracy and the international law of the sea”, in *Modern Piracy: Legal Challenges and Responses*, Douglas Guilfoyle, ed. (Cheltenham, Edward Elgar, 2013), pp. 117–146, at pp. 119–120; Rüdiger Wolfrum, “Fighting terrorism at sea: options and limitations under international law”, in *Legal Challenges in Maritime Security*, Nordquist *et al.*,

Guilfoyle writes, “[w]hatever commentators might wish, [that] rule is the only generally applicable one and the only clear candidate for having customary status”.¹⁰⁷ Some authors note that States also see the definition as reflecting customary international law and that there is a lack of State opposition to it.¹⁰⁸ Several recall the preamble of the Convention on the High Seas, in which the States parties to the Convention recognize that its provisions are “generally declaratory of established principles of international law”.¹⁰⁹ Dinstein, among others, argues that the retention of the provisions of the Convention on the High Seas in the United Nations Convention on the Law of the Sea “affirms that States accept them as an accurate reflection of international law”.¹¹⁰ Some writings additionally note that the definition has since also been included in regional instruments and referred to in Security Council resolutions.¹¹¹

61. For some authors, the codification of the definition of piracy in the Convention on the High Seas and the United Nations Convention on the Law of the Sea resulted in a treaty-based definition without changing the previous lack of authoritative definition in customary international law, discussed above.¹¹² Tuerk writes that “[u]nder customary international law there is no authoritative definition of piracy”, but adds that “[s]ome countries which are not yet parties to [the United Nations Convention on the Law of the Sea] are nevertheless bound by the 1958 Convention [on the High Seas] so that the respective provisions state the international law on piracy currently in force”.¹¹³

eds. (*op. cit.*), pp. 3–40, at p. 7; Zou Keyuan, “Enforcing the law of piracy in the South China Sea”, *Journal of Maritime Law and Commerce*, vol. 31, No. 1 (January 2000), pp. 107–118, at p. 110; and Zou Keyuan, “Issues of public international law relating to the crackdown of piracy in the South China Sea and prospects for regional cooperation”, *Singapore Journal of International and Comparative Law*, vol. 3, No. 2 (1999), pp. 524–544, at pp. 527–528. See also Myron H. Nordquist *et al.*, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 3 (The Hague, Martinus Nijhoff, 1995) (hereinafter “Virginia Commentary”), p. 197.

¹⁰⁷ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge, Cambridge University Press, 2009), p. 26.

¹⁰⁸ Institute of International Law, report (see footnote 106 above), p. 176; Churchill, “The piracy provisions” (see footnote 106 above), p. 9; Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 916; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 31; I.R. Hyslop, “Contemporary piracy”, in *Piracy at Sea*, Eric Ellen, ed. (Paris, International Chamber of Commerce, 1989), pp. 3–40, at pp. 6–7; Treves, “Piracy, law of the sea, and use of force” (see footnote 106 above), p. 401; and Treves, “Piracy and the international law of the sea” (see footnote 106 above), p. 120.

¹⁰⁹ For example, Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 423.

¹¹⁰ *Ibid.*, p. 424; and Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1126, para. 2. See also Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 31; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 371; Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), p. 17; Jacobsson and Klein, “Piracy off the coast of Somalia” (see footnote 106 above), p. 46; Lagoni, “Piraterie und widerrechtliche Handlungen” (see footnote 106 above), p. 524; and Neuhold, “The return of piracy” (see footnote 106 above), p. 1246.

¹¹¹ Churchill, “The piracy provisions” (see footnote 106 above), p. 12; and Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 31. See also Regional Cooperation Agreement on combating piracy and armed robbery against ships in Asia (Tokyo, 11 November 2004), United Nations, *Treaty Series*, vol. 2398, No. 43302, p. 199.

¹¹² Institute of International Law, report (see footnote 106 above), p. 170. See also Oscar Abalde Cantero, “La conceptualización de la piratería y el robo a mano armada en el derecho internacional: ¿un buque anclado en el pasado?”, in *Piratería marítima y gente de mar: más allá de la ficción*, Olga Fotinopoulou Basurko and Xosé Manuel Carril Vázquez, eds. (Barcelona, Atelier, 2020), pp. 57–86, at p. 62.

¹¹³ Helmut Tuerk, “Combating piracy: new approaches to an ancient issue”, in *Law of the Sea*, del Castillo, ed. (see footnote 106 above), pp. 469–492, at pp. 469–470.

2. Criticisms of article 101

62. A number of writings offer general criticisms of the definition, often taking the view that it lacks clarity.¹¹⁴ Rubin observes the following:

Judging by the confusions apparent in the attempts to codify what had been widely supposed to be clear international law regarding “piracy,” inconsistencies and unworkable formulae apparent in nearly all the secondary sources and many of the primary sources and judicial pronouncements, the “conventional wisdom” in this case has proved to be as wrong as conventional wisdom usually is.¹¹⁵

Geiß and Petrig consider that the definition is “intrinsically convoluted”, because, they suggest, piracy was perceived, at the time of the elaboration of the definition, to be an archaic phenomenon that was “not worthy of prolonged diplomatic deliberation”, and because the definition reflected “overly ambitious attempts to capture a criminal phenomenon in its entirety in one offense, while simultaneously making allowance for the preservation of States’ sovereign interests”.¹¹⁶ Aune considers that the piracy provisions “are limited in scope, and the words and terms used continue to be ill defined and imprecise”.¹¹⁷ In view of such shortcomings, O’Connell views the definition as, for example, “one of the least successful essays in codification of the Law of the Sea”.¹¹⁸ Guilfoyle addresses such criticism, arguing that “the successive re-enactment of this definition ... evidences States’ general acceptance of its customary status”.¹¹⁹

63. Other criticisms concern whether the scope of the definition is appropriate.¹²⁰ One such critique concerns the acts covered by the definition. For example, Klein writes that, since the adoption of the United Nations Convention on the Law of the Sea, “the definition of piracy has come under scrutiny, particularly in relation to whether [S]tates may exercise universal jurisdiction over terrorists on the basis that they may be analogized to pirates”.¹²¹ Another line of criticism concerns the geographical scope of the definition, which has led to the discussion of “armed robbery at sea” (see sect. D below).¹²² Dinstein notes that the definition “does not fully cover all acts of violence endangering the safety of international navigation”, but considers, along with other authors, that other treaties have been concluded to address such concerns.¹²³ Eruaga and Mejia note that “[t]he ambiguities and debates

¹¹⁴ See Abalde Cantero, “La conceptualización de la piratería” (see footnote 112 above), pp. 64–66; Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 437; Churchill, “The piracy provisions” (see footnote 106 above), pp. 11 and 22–23; Jesus, “Protection of foreign ships” (see footnote 106 above), p. 376; and Alfred P. Rubin, *The Law of Piracy*, 2nd ed. (Irvington-on-Hudson, New York, Transnational, 1998), p. 373.

¹¹⁵ Rubin, *The Law of Piracy* (see footnote 114 above), p. 373.

¹¹⁶ Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford, Oxford University Press, 2011), p. 59.

¹¹⁷ Bjorn Aune, “Piracy and its repression under the 1982 Law of the Sea Convention”, *Ocean Yearbook*, vol. 8 (1989), pp. 18–43, at p. 28.

¹¹⁸ D.P. O’Connell, *The International Law of the Sea*, vol. 2, I.A. Shearer, ed. (Oxford, Clarendon Press, 1988), p. 970.

¹¹⁹ Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 371.

¹²⁰ Churchill, “The piracy provisions” (see footnote 106 above), pp. 22–23; and Wolfrum, “Fighting terrorism at sea” (see footnote 106 above), p. 7.

¹²¹ Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford, Oxford University Press, 2011), p. 119.

¹²² For example, Jesus, “Protection of foreign ships” (see footnote 106 above), pp. 382–386.

¹²³ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1128, para. 7. See also Churchill, “The piracy provisions” (see footnote 106 above), pp. 22–23; and Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 364.

associated with some of the legal requirements of piracy, such as the motive, high seas requirement, and two-ship rule particularly, reveal the insufficiency of the international framework for piracy to handle contemporary maritime violence”.¹²⁴

64. Occasional harsher criticisms are also present in the writings. Rubin, in particular, considers that codification efforts have moved the definition of piracy away from that to be inferred from State practice, recognizing, however, that he is in the minority in this view.¹²⁵

3. Writings that contemplate amendment of article 101

65. Some writings contemplate amendment of article 101, considering perceived inadequacies in its definition of piracy. For example, the Institute of International Law discusses the question, determining that “[t]wo considerations lead to the conclusion that, in the case of piracy, it would be more appropriate not to recommend changes in the wording” of the provisions of the United Nations Convention on the Law of the Sea.¹²⁶ The first consideration is the authority of the definition in the Convention.¹²⁷ The second is the “delicate balance between different interests” reflected in the Convention, which any proposal for amendments might upset.¹²⁸ Writing before the entry into force of the Convention, Birnie similarly suggests that to amend the Convention may be politically difficult, if not impossible, without reopening the entire treaty package.¹²⁹

4. Writings that consider other definitions of piracy

66. Some writings consider other definitions of piracy. It is often noted that the term “piracy” can be used in non-legal contexts to refer more broadly to violence at sea.¹³⁰ Dinstein notes that “[s]ince the term ‘piracy’ resonates in a powerful manner with the public at large, it is occasionally used by the media and even by statesmen and lawyers in diverse settings which have nothing to do with piracy *jure gentium*”.¹³¹ One particular definition referenced in many writings is the one used by the International Maritime Bureau of the International Chamber of Commerce, which for statistical purposes has applied a definition of piracy that incorporates armed robbery at sea: “an act of boarding or attempting to board any ship with apparent intent to commit theft or any other crime with the apparent intent or capability to use force in the furtherance of that act”.¹³² Such writings generally emphasize that the purpose of that definition is different from the purpose of a definition under international law. It is also to be noted that the Bureau now follows the respective definitions of piracy and armed robbery at sea contained in article 101 of the United Nations Convention on the Law of the Sea and paragraph 2.2 of the International Maritime Organization

¹²⁴ Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 437. See also Churchill, “The piracy provisions” (see footnote 106 above), pp. 22–23.

¹²⁵ Rubin, *The Law of Piracy* (see footnote 114 above), p. 374.

¹²⁶ Institute of International Law, report (see footnote 106 above), p. 176.

¹²⁷ *Ibid.*, p. 176.

¹²⁸ *Ibid.*, p. 177.

¹²⁹ P.W. Birnie, “Piracy – past, present and future”, in *Piracy at Sea*, Ellen, ed. (see footnote 108 above), pp. 131–158, at p. 148.

¹³⁰ For example, Anna Petrig, “Piracy”, in *The Oxford Handbook of the Law of the Sea*, Donald Rothwell *et al.*, eds. (Oxford, Oxford University Press, 2015), pp. 843–865, at p. 850.

¹³¹ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1126, para. 4.

¹³² Kraska, “Developing piracy policy” (see footnote 106 above), p. 337; Jean-Paul Pancraccio, *Droit de la mer* (Paris, Dalloz, 2010), pp. 446 and 448; Alexander S. Skaridov, “*Hostis humani generis*”, in *Legal Challenges in Maritime Security*, Nordquist *et al.*, eds. (see footnote 106 above), pp. 479–500, at p. 483; and Tuerk, “Combating piracy” (see footnote 113 above), pp. 470–471.

(IMO) Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.¹³³

67. Some writings note that, before the Third United Nations Conference on the Law of the Sea, which would eventually adopt the United Nations Convention on the Law of the Sea, the International Law Association proposed the following new definition of piracy: “unlawful seizure or taking control of a vessel through violence, threats of violence, surprise, fraud or other means”.¹³⁴ The definition proposed was not taken into account by the Conference.¹³⁵

B. Writings on the offence of piracy as defined in article 101 (a)

68. The definition of piracy in article 101 of the United Nations Convention on the Law of the Sea reflects three offences that amount to piracy, one in each of its paragraphs.¹³⁶ However, writings relevant to the definition of piracy primarily focus on paragraph (a), which defines what might be considered the core offence as it concerns the acts of violence, detention or depredation that are the most prominent acts of piracy. Most such writings share the approach of dividing the definition contained in article 101 (a) into a series of elements for the sake of analysis.

69. The number of such elements varies. Guilfoyle, for example, uses four elements:

- (1) an act of violence, detention or depredation;
- (2) committed for private ends;
- (3) on the high seas or in a place outside the jurisdiction of any [S]tate; and
- (4) by the crew or passengers of a private ship or aircraft, against another vessel or persons or property aboard.¹³⁷

70. Several authors consider Guilfoyle’s fourth element in two parts, one relating to the actors and one relating to the target of the acts, specifically the “two-ship” requirement.¹³⁸

71. For example, Tanaka follows the text of article 101 (a) and identifies five elements:

- (i) There must be “any illegal acts of violence or detention, or any act of depredation”. ...
- (ii) Unlawful offences must be committed for “private ends” (the private ends requirement). ...
- (iii) Piracy is committed by the crew or the passengers of a private ship or a private aircraft against another ship or aircraft, or against persons or property on board such ships or aircraft (the private ship requirement). ...

¹³³ IMO, resolution A.1025(26), annex. See International Maritime Bureau of the International Chamber of Commerce, *Piracy and Armed Robbery against Ships: Report for the Period 1 January–31 December 2022* (London, 2023), p. 3.

¹³⁴ Zou, “Issues of public international law” (see footnote 106 above), pp. 528–529. See also Aune, “Piracy and its repression” (see footnote 117 above), p. 31.

¹³⁵ Aune, “Piracy and its repression” (see footnote 117 above), p. 31; Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 139; and Zou, “Issues of public international law” (see footnote 106 above), p. 529.

¹³⁶ See Petrig, “Piracy” (see footnote 130 above), p. 846.

¹³⁷ Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 27; and Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 371.

¹³⁸ For example, Churchill, “The piracy provisions” (see footnote 106 above), p. 13; and Tanaka, *The International Law of the Sea* (see footnote 106 above), pp. 487–489.

(iv) Piracy involves two ships or aircraft, that is to say, pirate and victim (the two vessels requirement). ...

(v) Piracy must be directed on the high seas or in a place outside the jurisdiction of any State.¹³⁹

72. Other writings identifying five elements share this division. Zou, citing Goldie, considers the five elements to be the following:

(1) the acts complained against must be crimes of violence such as robbery, murder, assault or rape;

(2) committed on the high seas beyond the land territory or territorial sea, or other territorial jurisdiction, of any State;

(3) by a private ship, or a public ship which through mutiny or otherwise is no longer under the discipline and effective control of the State which owns it;

(4) for private ends; and

(5) from one ship to another so that two ships at least are involved.¹⁴⁰

73. Dinstein, similarly, breaks his discussion of the definition into “The Acts”, “The Actors”, “The Purpose”, “The Venue” and “The Target”, corresponding roughly to Tanaka’s elements (i), (iii), (ii), (v) and (iv).¹⁴¹

74. Identifying the “essential elements” of piracy, the Institute of International Law report further distinguishes the points that only private ships, or government ships whose crews have mutinied, are capable of engaging in piracy and that piracy may be committed by ships or aircraft.¹⁴²

75. The present memorandum divides the definition into five elements, which correspond to the most prominent fields of discussion in the writings. The elements are considered in turn below, following the text of article 101 (a).

1. Any illegal acts of violence or detention, or any act of depredation

76. The first element of the definition of piracy contained in article 101 (a) is that piracy involves “any illegal acts of violence of detention, or any act of depredation”.

77. Several writings comment on the lack of further specification on the kinds of act to which the definition refers. As O’Connell notes, the definition “offers no guidance as to what types of violence constitute piracy”.¹⁴³ Geiß and Petrig comment on the use of the word “acts”: they note that while the plural “acts” is used in paragraph (a), the singular “act” is used in paragraphs (b) and (c), and they conclude that a single act may amount to piracy.¹⁴⁴ Some authors note that the text suggests that, as Tanaka puts it, “these two acts, i.e. an illegal act of violence or depredation[,]”

¹³⁹ Tanaka, *The International Law of the Sea* (see footnote 106 above), pp. 487–489.

¹⁴⁰ Zou, “Issues of public international law” (see footnote 106 above), p. 527. See also L.F.E. Goldie, “Terrorism, piracy and the Nyon Agreements”, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Yoram Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), pp. 225–248, at p. 227; and Zou, “Enforcing the law of piracy” (see footnote 106 above), p. 110.

¹⁴¹ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), pp. 1128–1136, paras. 8–26; and Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 425. See also Tanaka, *The International Law of the Sea* (see footnote 106 above), pp. 487–489.

¹⁴² Institute of International Law, report (see footnote 106 above), p. 188.

¹⁴³ O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 969.

¹⁴⁴ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 60; and Petrig, “Piracy” (see footnote 130 above), p. 846.

are in the form of alternatives”, without defining the terms.¹⁴⁵ He also notes that violence may be committed against persons or property on board.¹⁴⁶ The Institute of International Law, in its report, explains that “[i]t appears that the words ‘violence’ (killing, wounding, raping, etc.) and ‘detention’ (segregating, hijacking for ransom, etc.) are used to indicate illegal acts against persons, while the word ‘depredation’ to denote acts against properties”.¹⁴⁷ Dinstein observes that “[d]epredation is usually defined as an ‘act of plundering, robbing or pillaging’”.¹⁴⁸ Several authors note that neither theft nor the intent to steal are essential elements of piracy.¹⁴⁹ Dinstein also considers that acts of sexual violence can be “a very important element of the crime”.¹⁵⁰ Pellegrino adds that “damages or loss are not required” to establish the crime.¹⁵¹

78. The most prominent question discussed in the writings is the significance of the word “illegal” used to qualify “acts of violence or detention”.¹⁵² Some writings note that it is unclear under which legal system – international or domestic – the acts must be illegal.¹⁵³ Some authors recall the unsuccessful proposal by Greece to delete the word at the time of the negotiation of the Convention on the High Seas (see para. 32 above).¹⁵⁴ Geiß and Petrig describe the word as “imprecise”, and as “tautologous because grounds for justification of acts of violence committed between private actors, such as individual self-defense under domestic law, cannot be found in public international law”.¹⁵⁵ Several authors, including the Institute of International Law and Geiß and Petrig themselves, resolve the question by concluding that the word must refer to illegality under domestic law or general principles of law.¹⁵⁶ According to the

¹⁴⁵ Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 487. See also Churchill, “The piracy provisions” (see footnote 106 above), p. 13.

¹⁴⁶ Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 487.

¹⁴⁷ Institute of International Law, report (see footnote 106 above), p. 189.

¹⁴⁸ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), pp. 1128–1129, para. 8.

¹⁴⁹ For example, Institute of International Law, report (see footnote 106 above), p. 189; Thomas A. Clingan, Jr., “The law of piracy”, in *Piracy at Sea*, Ellen, ed. (see footnote 108 above), pp. 168–172, at p. 169; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1129, para. 8; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 32; Jennings and Watts, *Oppenheim’s International Law* (see footnote 106 above), p. 749; Kontorovich, “A Guantánamo on the sea” (see footnote 106 above), pp. 252–253; O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 969; and Turk, “Combating piracy” (see footnote 113 above), p. 470.

¹⁵⁰ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1129, para. 8.

¹⁵¹ Francesca Pellegrino, “Historical and legal aspects of piracy and armed robbery against shipping”, *Journal of Maritime Law and Commerce*, vol. 43, No. 3 (July 2012), pp. 429–446, at p. 436.

¹⁵² For example, Institute of International Law, report (see footnote 106 above), p. 189; Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 140; Churchill, “The piracy provisions” (see footnote 106 above), p. 13; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), pp. 42–43; Håkan Friman and Jens Linborg, “Initiating criminal proceedings with military force: some legal aspects of policing Somali pirates by navies”, in *Modern Piracy*, Guilfoyle, ed. (see footnote 106 above), pp. 172–201, at p. 175; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 371; Petrig, “Piracy” (see footnote 130 above), p. 846; Alfred P. Rubin, “Is piracy illegal?”, *American Journal of International Law*, vol. 70, No. 1 (January 1976), pp. 92–95, at p. 92; Rubin, *The Law of Piracy* (see footnote 114 above), pp. 366–367; and Wolfrum, “Fighting terrorism at sea” (see footnote 106 above), p. 8.

¹⁵³ Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 371; and Rubin, “Is piracy illegal?” (see footnote 152 above), p. 92.

¹⁵⁴ For example, Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 43; and Rubin, “Is piracy illegal?” (see footnote 152 above), p. 93.

¹⁵⁵ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 60. See also O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 969.

¹⁵⁶ See also, for example, Churchill, “The piracy provisions” (see footnote 106 above), p. 13; Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), p. 18; Lagoni, “Piraterie und widerrechtliche Handlungen” (see footnote 106 above), p. 513; and Nordquist *et al.*, eds., *Virginia Commentary* (see footnote 106 above), pp. 200–201.

Institute of International Law, it “seems evident that [article 101] ... refers to acts that are illegal according to the generality of domestic systems of penal law and according to general principles of penal law as well”.¹⁵⁷ For Geiß and Petrig, it “refers to the self-evident, namely, to the illegality of the acts under the law of the State which decides to exercise its adjudicative jurisdiction over acts of piracy and to prosecute alleged offenders under its domestic laws”.¹⁵⁸ Dinstein rather considers that the term must refer to international law, while acknowledging that domestic law will be relevant to a State choosing to prosecute persons suspected of piracy.¹⁵⁹

79. Authors taking both viewpoints raise acts undertaken in self-defence against a pirate attack as examples of acts that might not be “illegal” in the meaning of the definition of piracy.¹⁶⁰ Petrig also suggests that “private detention may be lawful (e.g. in holding a person caught red-handed in the commission of a crime until he is surrendered to law enforcement officials)”.¹⁶¹ Because they consider that the scope of the qualifier “illegal” is determined with reference to domestic laws, Geiß and Petrig take the view that the criterion of illegality is irrelevant in terms of the scope of the enforcement powers granted to States under international law.¹⁶² Similarly, Wolfrum considers that “[i]t is for the courts of the prosecuting State to decide whether the act of violence under consideration was illegal under international law or the national law of that State”.¹⁶³ Rubin takes a more critical view, considering that the term “seems to revive the law of privateering”, but also notes that such an outcome was unlikely to have been the intended effect of the provision.¹⁶⁴

80. Guilfoyle discusses the possibility that the word “illegal” may signify that the act in question is “dissociated from a lawful authority”, considering that such a view conflates the term with the “private ends” requirement, discussed below.¹⁶⁵ He also considers that “[t]he definition would be rendered unnecessarily complicated if before an act constituted piracy it also had to be demonstrably illegal under some [S]tate’s internal law”.¹⁶⁶ He prefers the view that the words “any illegal acts” should be understood “to expand the range of covered conduct”.¹⁶⁷

81. Some writings discuss whether specific acts fall within the meaning of violence, detention or depredation. In its resolution of 30 August 2023 on “Piracy, present problems”, the Institute of International Law considers that such acts “include acts such as killing, wounding, torturing, raping, enslaving, holding for ransom or imprisoning persons, as well as robbing, stealing, destroying, damaging or ransoming ships, aircraft or property on board”.¹⁶⁸ Forteau and Thouvenin consider that the definition is “suffisamment large pour couvrir les actes tels que le vol, le

¹⁵⁷ Institute of International Law, report (see footnote 106 above), p. 189.

¹⁵⁸ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 60.

¹⁵⁹ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1129, para 10.

¹⁶⁰ Institute of International Law, resolution (see footnote 106 above), art. 6 (1); Institute of International Law, report (see footnote 106 above), p. 223; Churchill, “The piracy provisions” (see footnote 106 above), p. 13; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1129, para. 10; Friman and Linborg, “Initiating criminal proceedings” (see footnote 152 above), p. 175; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 371; Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), p. 18; and Petrig, “Piracy” (see footnote 130 above), p. 846.

¹⁶¹ Petrig, “Piracy” (see footnote 130 above), p. 846.

¹⁶² Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 60.

¹⁶³ Wolfrum, “Fighting terrorism at sea” (see footnote 106 above), p. 8.

¹⁶⁴ Rubin, “Is piracy illegal?” (see footnote 152 above), p. 93–94; and Rubin, *The Law of Piracy* (see footnote 114 above), p. 366.

¹⁶⁵ Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 43.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ Institute of International Law, resolution (see footnote 106 above), art. 3 (1).

détournement, l'attaque et le meurtre".¹⁶⁹ Aune presents a list of 26 acts that may amount to piracy.¹⁷⁰ Hodgkinson considers that the description of the relevant acts "allows acts such as detaining, robbing, looting, hijacking, commandeering or violently attacking a ship to qualify as piracy", while noting that robbery is not a requirement.¹⁷¹ However, "direct threats, sabotage, or the placing of harmful substances on board a ship" are not necessarily within the scope of the definition.¹⁷² Considering the term "depredation", the Institute of International Law considers it "broad enough to include, besides acts of patent spoliation and ravage, acts of secret theft".¹⁷³ The Institute speculates, however, that "[t]he conclusion would probably be different if some people boarded another ship to play cards with people on board and returned to their own ship with the money of the cheated passengers or crew of the boarded ship".¹⁷⁴ Consulting dictionaries, Churchill concludes that depredation appears to mean "stealing goods from a ship by force, and possibly also merely attacking a ship".¹⁷⁵ Jennings and Watts consider that coercing another ship by threat of force falls within the scope of the definition.¹⁷⁶

82. Churchill questions whether violence must reach a certain threshold before amounting to piracy.¹⁷⁷ He raises the example of violence between fishing vessels competing for the same catch, which he considers to be better dealt with under the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.¹⁷⁸ He also considers violent acts of environmental protest (see para. 97 below), noting that Japan, whose ships are most affected, does not seem to consider such acts piracy.¹⁷⁹ In Churchill's view, "there must be a minimum threshold of violence, probably of a fairly serious nature", for the conduct to constitute piracy and justify the application of universal jurisdiction.¹⁸⁰

83. Some writings address the *mens rea* element of the crime. A baseline on which most authors agree is that the intention to rob, *animus furandi*, is not necessary for an act to amount to piracy.¹⁸¹ O'Connell raises the scenario of violence between competing fishing vessels as an example of conduct for clear private ends without the

¹⁶⁹ Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 917.

¹⁷⁰ Aune, "Piracy and its repression" (see footnote 117 above), p. 43. Aune's list of acts comprises the following: "larceny, plunder, pickpocketing, vandalism, blackmail, extortion, riotry, arson, kidnapping, assault, mayhem, rape, sodomy, torture, manslaughter, murder, pogrom, genocide, infanticide, fratricide, matricide, patricide, enslavement, endangering life, hijacking (of second vessel) [and] scuttling (of second vessel)".

¹⁷¹ Hodgkinson, "The governing international law on maritime piracy" (see footnote 106 above), p. 18.

¹⁷² *Ibid.*

¹⁷³ Institute of International Law, report (see footnote 106 above), p. 189.

¹⁷⁴ *Ibid.*, pp. 189–190.

¹⁷⁵ Churchill, "The piracy provisions" (see footnote 106 above), pp. 15–16.

¹⁷⁶ Jennings and Watts, *Oppenheim's International Law* (see footnote 106 above), p. 752.

¹⁷⁷ Churchill, "The piracy provisions" (see footnote 106 above), pp. 13–14.

¹⁷⁸ *Ibid.*, p. 14. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988), United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201.

¹⁷⁹ Churchill, "The piracy provisions" (see footnote 106 above), pp. 14–15.

¹⁸⁰ *Ibid.*, p. 15.

¹⁸¹ For example, Institute of International Law, report (see footnote 106 above), p. 189; Churchill, "The piracy provisions" (see footnote 106 above), p. 21; Dinstein, "Piracy *jure gentium*" (see footnote 106 above), p. 1132, para. 15; Gosalbo-Bono and Boelaert, "The European Union's comprehensive approach" (see footnote 106 above), p. 98; Guilfoyle, *Shipping Interdiction* (see footnote 107), p. 32; Jennings and Watts, *Oppenheim's International Law* (see footnote 106 above), p. 752; Jesus, "Protection of foreign ships" (see footnote 106 above), p. 377; Papastavridis, *The Interception of Vessels* (see footnote 106 above), pp. 163–164; Pellegrino, "Historical and legal aspects" (see footnote 151 above), p. 436; and Tuerk, "Combating piracy" (see footnote 113 above), p. 470.

intent to rob.¹⁸² Some writings take a different view. For example, Schofield and Ali conflate “private ends” with *lucri causa* (the intent to profit).¹⁸³ Considering the question of *mens rea* more generally, the Institute of International Law considers that “it is implied that all acts of piracy are wilful”.¹⁸⁴ Churchill notes that the definition does not explicitly state the *mens rea* of piracy, but he similarly concludes that it “appears ... to be intent”, noting the inclusion of comparable standards in article 101 (b) concerning “voluntary participation in the operation” of a pirate ship, which is itself defined in article 103 with reference to the intent of “the persons in dominant control”.¹⁸⁵

84. A number of writings discuss whether attempted acts of piracy come within the definition.¹⁸⁶ The Institute of International Law considers that attempts do.¹⁸⁷ To the Institute, “it seems implicit in the obligation to co-operate to the fullest possible extent in the repression of piracy” that attempts should be punished.¹⁸⁸ It also notes that “[i]t can be assumed that an attempt to commit piracy falls indirectly under [article 101 (b)], as acts of ‘voluntary participation in the operation of a ship or [of an] aircraft with knowledge of facts making it a pirate ship or aircraft’”.¹⁸⁹ Dinstein takes a similar view, contending that “there can scarcely be any doubt that it is not necessary for an act of piracy to be consummated”.¹⁹⁰ The Virginia Commentary similarly notes that, while attempts are not included in the definition, they “could be assimilated to piracy”.¹⁹¹ Some authors disagree. For example, Tanaka considers that attempt is not within the scope of the definition, citing a proposal by the United Kingdom that was rejected during the elaboration of the Convention on the High Seas (see paras. 35–36 above).¹⁹² Citing the same proposal and legality principle, Churchill considers that the definition does not extend to attempted piracy, as such an act is not “clearly spelt out in the law”.¹⁹³

85. On a similar note, Treves considers that “[a]cts preparatory to piracy are covered only to the extent that they fall within” article 101 (b) and (c).¹⁹⁴

2. Committed for private ends

86. The second element of the definition contained in article 101 (a) is the requirement that, to constitute piracy, acts be “committed for private ends”. Shaw

¹⁸² O’Connell, *The International Law of the Sea* (see footnote 118), p. 970.

¹⁸³ Schofield and Ali, “Combating piracy and armed robbery at sea” (see footnote 106 above), p. 278.

¹⁸⁴ Institute of International Law, report (see footnote 106 above), p. 190.

¹⁸⁵ Churchill, “The piracy provisions” (see footnote 106 above), p. 20.

¹⁸⁶ For example, Friman and Linborg, “Initiating criminal proceedings” (see footnote 152 above), p. 176; Roach, “General problematic issues” (see footnote 106 above), p. 121; and Rubin, “Is piracy illegal?” (see footnote 152 above), pp. 94–95.

¹⁸⁷ Institute of International Law, resolution (see footnote 106 above), art. 3 (1); and Institute of International Law, report (see footnote 106 above), pp. 191–192.

¹⁸⁸ Institute of International Law, report (see footnote 106 above), p. 191.

¹⁸⁹ *Ibid.*

¹⁹⁰ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1129, para. 9. See also Jennings and Watts, *Oppenheim’s International Law* (see footnote 106 above), p. 752.

¹⁹¹ Nordquist *et al.*, eds., *Virginia Commentary* (see footnote 106 above), p. 202.

¹⁹² Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 487. See also, for example, Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), pp. 22–23; and Rubin, *The Law of Piracy* (see footnote 114 above), p. 367.

¹⁹³ Churchill, “The piracy provisions” (see footnote 106 above), p. 21.

¹⁹⁴ Treves, “Piracy and the international law of the sea” (see footnote 106 above), pp. 120–121. See also sect. C below; Friman and Linborg, “Initiating criminal proceedings” (see footnote 152 above), p. 176; and Treves, “Piracy, law of the sea, and use of force” (see footnote 106 above), p. 402.

describes this criterion as the “essence of piracy under international law”.¹⁹⁵ As Wolfrum notes, the criterion “limits the scope of application of [the piracy] rules considerably”.¹⁹⁶

87. The “private ends” requirement gives rise to the most prominent difference of views in the writings relevant to the definition of piracy. As Geiß and Petrig put the point, this element “has sparked ample debate”.¹⁹⁷ Descriptive writings often observe that there are two main lines of interpretation, one according to which acts not authorized by a State are considered to be “for private ends”, and the other according to which private ends are to be understood as opposite to political ends.¹⁹⁸ For example, Eruaga and Mejia note that the “private ends” requirement “remains a cleft in the discussion on whether or not acts of violence by States or politically motivated groups are considered acts of piracy”.¹⁹⁹

88. Some writings note other possible interpretations. For example, Halberstam observes that the “private ends” requirement may also be interpreted as excluding “those whose acts have no personal motive, whether monetary or otherwise”.²⁰⁰ Aune considers a further, narrower, sense of the phrase that would require the intention to steal, which he rejects as inconsistent with the customary understanding of piracy at the time of the elaboration of the Convention on the High Seas.²⁰¹

89. Many authors support the view that “for private ends” is to be understood to mean without State or governmental authority.²⁰² Such an understanding is reflected in article 3 (2) of the Institute of International Law resolution on “Piracy, present problems”, according to which “[a]cts committed by a State do not constitute piracy” under article 101 of the United Nations Convention on the Law of the Sea.²⁰³ Kateka considers that acts for private ends are simply “non-public acts lacking [S]tate sanction”.²⁰⁴ Guilfoyle links this understanding to the rule reflected in article 102 of the Convention that government vessels are generally not capable of committing piracy.²⁰⁵ To him, it is “deliberately operating outside the law of a [S]tate-based system” that is essential to piracy.²⁰⁶ O’Connell similarly considers that “it is the

¹⁹⁵ Shaw, *International Law* (see footnote 106 above), p. 528.

¹⁹⁶ Wolfrum, “Fighting terrorism at sea” (see footnote 106 above), p. 8.

¹⁹⁷ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 61. See also Tanaka, *The International Law of the Sea* (see footnote 106 above), pp. 487–489.

¹⁹⁸ Institute of International Law, report (see footnote 106 above), pp. 193–194; Azubuike, “International law regime against piracy” (see footnote 106 above), p. 52; Churchill, “The piracy provisions” (see footnote 106 above), pp. 16–17; Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 917; Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 61; Claude Goyard, “L’affaire du « Santa-Maria »”, *Revue générale de droit international public*, vol. 66 (1962), pp. 123–142, at pp. 124–125; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), pp. 32–42; Douglas Guilfoyle, “Piracy and terrorism”, in *The Law and Practice of Piracy at Sea*, Koutrakos and Skordas, eds. (see footnote 106 above), pp. 33–52, at p. 33; and Petrig, “Piracy” (see footnote 130 above), pp. 846–847. See also Tanaka, *The International Law of the Sea* (see footnote 106 above), pp. 487–489.

¹⁹⁹ Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 437.

²⁰⁰ Halberstam, “Terrorism on the high seas” (see footnote 105 above), p. 282.

²⁰¹ Aune, “Piracy and its repression” (see footnote 117 above), p. 26.

²⁰² For example, Crawford, *Brownlie’s Principles of Public International Law* (see footnote 106 above), pp. 305–306; Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 61; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 36; Guilfoyle, “Piracy and terrorism” (see footnote 198 above), p. 52; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 372; and Papastavridis, *The Interception of Vessels* (see footnote 106 above), pp. 164–165.

²⁰³ Institute of International Law, resolution (see footnote 106 above), art. 3 (2).

²⁰⁴ Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 458.

²⁰⁵ Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 36.

²⁰⁶ *Ibid.*, p. 37. See also Papastavridis, *The Interception of Vessels* (see footnote 106 above), pp. 164–165.

repudiation of all authority that seems to be the essence of piracy”.²⁰⁷ A consequence Guilfoyle draws from his position is that the “lack of authority is a question that may be tested objectively and without reference to subjective motives”.²⁰⁸ Crawford links the question to those as to whether the act would benefit from State immunity or give rise to State responsibility.²⁰⁹ Goldie similarly considers that “[t]he touchstone for determining whether an end is non-private becomes one of deciding whether the group seeking its effectuation is a recognized political entity capable of bearing public international law obligations and responsibilities”.²¹⁰

90. Several of the authors taking this view refer to the previous work of the Commission on the definition. Such writings note that, as Geiß and Petrig observe, “[t]he words ‘for private ends’ were originally included in the definition of piracy to acknowledge the historic exception for civil-war insurgencies that attacked solely the vessels of the [G]overnment they sought to overthrow”.²¹¹ Halberstam describes the elaboration of the definition and notes that the preparatory works on the definition contrast private and political ends and that there was no suggestion at any stage that the words “for private ends” would exclude terrorist acts from the definition of piracy.²¹² Van der Mensbrugge recalls the importance accorded to avoiding the serious consequences involved if States were allowed to stop other States’ warships on suspicion of piracy.²¹³ Churchill, however, does not consider the drafting history to “give any real guidance as to the meaning of the phrase”.²¹⁴ Some writings highlight the commentaries of the Commission, noting the Commission’s position that acts of piracy “may be prompted by feelings of hatred or revenge”.²¹⁵

91. For a number of other authors, private ends are to be understood in contrast to political ends.²¹⁶ For instance, Tuerk writes that “[t]he ‘private-ends criterion’ removes attacks on shipping ‘for the sole purpose of achieving some political end’”

²⁰⁷ O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 970.

²⁰⁸ Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 42.

²⁰⁹ Crawford, *Brownlie’s Principles of Public International Law* (see footnote 106 above), pp. 305–306.

²¹⁰ Goldie, “Terrorism, piracy and the Nyon Agreements” (see footnote 140 above), p. 235.

²¹¹ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 61. See also Institute of International Law, report (see footnote 106 above), p. 194; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 33; Guilfoyle, “Piracy and terrorism” (see footnote 198 above), p. 34; and Halberstam, “Terrorism on the high seas” (see footnote 105 above), pp. 275 and 277.

²¹² Halberstam, “Terrorism on the high seas” (see footnote 105 above), pp. 281 and 290.

²¹³ Yves van der Mensbrugge, “Le pouvoir de police des États en haute mer”, *Revue belge de droit international*, vol. 11, no. 1 (1975), pp. 56–102, at p. 63.

²¹⁴ Churchill, “The piracy provisions” (see footnote 106 above), p. 16.

²¹⁵ *Yearbook ... 1956*, vol. II, document A/3159, at para. 33, p. 282, paragraph (1) (i) of the commentary to draft article 39 of the draft articles concerning the law of the sea. See Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 438; Gosalbo-Bono and Boelaert, “The European Union’s comprehensive approach” (see footnote 106 above), p. 98; and Jennings and Watts, *Oppenheim’s International Law* (see footnote 106 above), p. 752.

²¹⁶ For example, American Law Institute, *Restatement* (see footnote 106 above), p. 85; Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 140; Jesus, “Protection of foreign ships” (see footnote 106 above), p. 378; Kraska, “Developing piracy policy” (see footnote 106 above), p. 336; Neuhold, “The return of piracy” (see footnote 106 above), pp. 1247–1248; Nguyen Quoc Dinh *et al.*, *Droit international public*, 8th ed. (Paris, LGDJ, 2009), p. 1345; Virginia Commentary (see footnote 106 above), p. 200; Pancraccio, *Droit de la mer* (see footnote 132 above), p. 450; Pellegrino, “Historical and legal aspects” (see footnote 151 above), p. 436; Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford, Hart, 2010), p. 162; Schofield and Ali, “Combating piracy and armed robbery at sea” (see footnote 106 above), p. 278; and Zou, “Issues of public international law” (see footnote 106 above), p. 528. See also Klein, *Maritime Security* (see footnote 121 above), p. 119; Shearer, “Piracy” (see footnote 106 above), para. 16; Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 487; and Wolfrum, “Fighting terrorism at sea” (see footnote 106 above), p. 8.

from the scope of the definition.²¹⁷ For Shaw, “hijacking or takeover for political reasons is automatically excluded” from the definition of piracy.²¹⁸ For Dinstein, “acts committed with a view to harming the interests of a State or its Government are irrefutably public or political by nature”.²¹⁹ Some authors consider that the private ends requirement *per se* excludes acts of terrorism from the definition of piracy.²²⁰ For example, Tuerk contrasts the presumed aims of pirates and terrorists:

[W]hile pirates usually seek financial gain, terrorists wish to make a “political or ideological” point, most often coupled with the wanton destruction of human life. Furthermore, pirates act with stealth, while terrorists seek publicity with their actions. This basic difference between the two groups as to the aims of their actions and the manner of achieving them seems to make a collusion between them unlikely.²²¹

92. Some authors consider the potential relationships between political and commercial activities. Jesus generally considers politically motivated acts to be excluded, but raises the use of piratical activities to raise funds for political activities as an edge case that may be difficult to qualify.²²² Similarly, Azubuike considers the requirement to reflect “the reluctance of other States to assert jurisdiction over politically motivated acts that do not have a commercial aspect”.²²³

93. Several writings address the determination of the motives of someone accused of piracy. Tanaka notes that, when private ends are to be understood in contrast to political ends, “acts are tested on the basis of the motives of an offender”.²²⁴ Dinstein considers that “the question whether an act is carried out for private or political ends ought to be determined objectively” and not on the basis of the perpetrator’s view.²²⁵ Schofield and Ali see the private ends criterion as problematic, arguing that “it is practically difficult to prove the private motive for a crime”.²²⁶

94. The Institute of International Law criticizes the viewpoint that opposes private and political acts, taking the view that “illegal acts of violence or detention, or any act of depredation, even if inspired by a ‘good cause’, can constitute piracy”.²²⁷ It adds that “[a]n interpretation of the notion of ‘private ends’ to exclude any kind of action by private individuals motivated by political, ideological, religious or environmental reasons could easily open the way to undue justifications of acts of violence at sea”.²²⁸ Similarly, Guilfoyle, citing a draft treaty prepared by Harvard Law School in 1928 and 1929 and commonly referred to as “the Harvard draft”,²²⁹

²¹⁷ Tuerk, “Combating piracy” (see footnote 113 above), p. 470.

²¹⁸ Shaw, *International Law* (see footnote 106 above), p. 528.

²¹⁹ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1132, para. 16.

²²⁰ For example, Angela Del Vecchio, “The fight against piracy and the *Enrica Lexie* case”, in *Law of the Sea*, del Castillo, ed. (see footnote 106 above), pp. 397–422, at p. 407; Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), p. 18; and Zou, “Issues of public international law” (see footnote 106 above), p. 528.

²²¹ Tuerk, “Combating piracy” (see footnote 113 above), p. 473.

²²² Jesus, “Protection of foreign ships” (see footnote 106 above), p. 379.

²²³ Azubuike, “International law regime against piracy” (see footnote 106 above), pp. 52–53.

²²⁴ Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 487.

²²⁵ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1132, para. 16.

²²⁶ Schofield and Ali, “Combating piracy and armed robbery at sea” (see footnote 106 above), p. 278.

²²⁷ Institute of International Law, report (see footnote 106 above), p. 196.

²²⁸ *Ibid.*, p. 197.

²²⁹ Harvard Law School, *Research in International Law, American Journal of International Law*, vol. 26, Supplement (*Codification of International Law*) (1932), pp. 739–885.

considers that it is “undesirable to permit the collateral motives or purposes of an offender to control the matter of [S]tate jurisdiction”.²³⁰

95. Churchill stakes an intermediate position between the two views, emphasizing that “the rationale for labelling conduct as piracy is that it constitutes an indiscriminate and violent menace to international shipping and commerce”.²³¹ For him, indiscriminate terroristic conduct therefore satisfies the private ends requirement, but environmental protest does not.²³² Also relevant to his analysis is the question as to whether a warship of a State other than the flag State would be able to identify the conduct as piracy.²³³ Menefee similarly considers that a balancing test is necessary for the definition to have meaning.²³⁴

96. Some writings discuss such an understanding of “private ends” with respect to specific cases.²³⁵ For example, Tuerk considers that the “private ends” criterion excludes the *Achille Lauro* incident, which involved the hijacking of a ship by members of the Palestine Liberation Front in 1985, from the definition of piracy.²³⁶ Another case discussed is the 1961 *Santa María* incident, in which a group of political dissidents on board a ship seized control of the ship, intending to overthrow the Government of the flag State.²³⁷ While the flag State denounced the seizure as an act of piracy, another State disagreed and granted asylum to the actors. Tanaka raises the incident to make the point that “lack of State status may not automatically make the actors pirates”.²³⁸ Some writings raise the incident to support the proposition that politically motivated acts do not amount to piracy.²³⁹ Others seems to categorize it as falling within the scope of insurgency.²⁴⁰ Regardless of whether such acts are regarded as “for private ends”, both incidents are nevertheless outside the scope of the definition because they each involved only one ship.²⁴¹

97. Some writings examine cases where environmental activists were accused of piracy for violent action against other ships on the high seas.²⁴² Examples raised

²³⁰ Guilfoyle, *Shipping Interdiction* (see footnote 107 above), pp. 32 and 38. See also Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 372.

²³¹ Churchill, “The piracy provisions” (see footnote 106 above), p. 17.

²³² *Ibid.*, pp. 17–18.

²³³ *Ibid.*, p. 17.

²³⁴ Samuel P. Menefee, “The *Achille Lauro* and similar incidents as piracy: two arguments”, in *Piracy at Sea*, Ellen, ed. (see footnote 108 above), pp. 179–180, at p. 180.

²³⁵ For example, Birnie, “Piracy – past, present and future” (see footnote 129 above), pp. 143–147; Guilfoyle, “Piracy and terrorism” (see footnote 198 above), p. 35; and Shearer, “Piracy” (see footnote 106 above), paras 23–24.

²³⁶ Tuerk, “Combating piracy” (see footnote 113 above), p. 473.

²³⁷ Birnie, “Piracy – past, present and future” (see footnote 129 above), pp. 144–145; Halberstam, “Terrorism on the high seas” (see footnote 105 above), pp. 286–287; Nguyen *et al.*, *Droit international public* (see footnote 216 above), p. 1345; Rubin, *The Law of Piracy* (see footnote 114 above), p. 381; and Tanaka, *The International Law of the Sea* (see footnote 106 above), pp. 487–488.

²³⁸ Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 487.

²³⁹ For example, Nguyen *et al.*, *Droit international public* (see footnote 216 above), p. 1345. See also Barry Hart Dubner, “The law of international sea piracy”, *New York University Journal of International Law and Politics*, vol. 11, No. 3 (Winter 1979), pp. 471–518, at p. 484; and O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 972.

²⁴⁰ Halberstam, “Terrorism on the high seas” (see footnote 105 above), pp. 286–287; and Klein, *Maritime Security* (see footnote 121 above), p. 119.

²⁴¹ Institute of International Law, report (see footnote 106 above), p. 193; and Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 36.

²⁴² Institute of International Law, report (see footnote 106 above), pp. 194–195; Churchill, “The piracy provisions” (see footnote 106 above), pp. 17–18; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1132, para. 16; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 372; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 38; Atsuko Kanehara, “So-called ‘eco-piracy’ and interventions by NGOs to protect against scientific

includes the *Castle John v. NV Mabeco* case, heard in Belgian courts, and the *Cetacean Research (Japan) v. Sea Shepherd* case, heard in United States courts. Such writings generally observe that, in both cases, the courts regarded the violent acts of activists against other ships as piracy as, despite the political inspiration, the ends were nevertheless still private.²⁴³ Churchill doubts the conclusions of the above-mentioned courts, as “such protest is not an indiscriminate menace to international shipping but is instead directed at a very specific object”.²⁴⁴ Similarly, Jesus considers that the “private ends” requirement “seems to exclude acts of violence and depredation exerted by environmentally-friendly groups or persons, in connection with their quest for marine environment protection”.²⁴⁵ The Institute of International Law clarifies that “[a]cts, including acts of peaceful protest at sea, that do not involve illegal acts of violence or detention, or any act of depredation, do not constitute piracy”.²⁴⁶

98. A number of writings discuss the relationship between piracy and armed conflict. For Tanaka, it follows from the “private ends” requirement “that piracy cannot be committed by vessels or aircrafts on military or government service or by insurgents”.²⁴⁷ The Institute of International Law adopts the same view with greater precision, referring to “insurgents ... acting against an enemy [G]overnment”.²⁴⁸

99. Dinstein, in his analysis, refers to the character of armed conflict. In the case of international armed conflicts, he draws a clear distinction with piracy, noting that “pirates resort to violence as private persons, whereas combatants do so while belonging to one of the Belligerent States and acting as members of the armed forces”.²⁴⁹ He recalls that “[a]bsent mutiny, State-commissioned platforms – warships and military aircraft – cannot be deemed to be engaged in piratical acts”.²⁵⁰ He also observes that international humanitarian law “prohibits pillage of enemy property for private ends”, and that “perpetrators of pillage in wartime are deemed war criminals”.²⁵¹ With respect to non-international armed conflict, Dinstein’s position depends on the target and purpose of the attack:

Grosso modo, insurgent ships or aircraft operating in the course of a non-international armed conflict cannot be considered as indulging in piracy: their acts will be considered as carried out for public, rather than private, ends. However, ... [i]f the vessel/aircraft attacked belong to foreign countries, and the attack takes place on or above the high seas – for private ends that are not

research whaling on the high seas: an evaluation of the Japanese position”, in *Selected Contemporary Issues*, Symmons, ed. (see footnote 106 above), pp. 195–220, at pp. 207–212; Kraska, “The laws of civil disobedience” (see footnote 106 above), pp. 181–184; Papastavridis, *The Interception of Vessels* (see footnote 106 above), p. 165; Petrig, “Piracy” (see footnote 130 above), p. 847; and Tanaka, *The International Law of the Sea* (see footnote 106 above), pp. 488–489.

²⁴³ Kanehara, “So-called ‘eco-piracy’” (see footnote 242 above); Shearer, “Piracy” (see footnote 106 above), para. 16; and Tanaka, *The International Law of the Sea* (see footnote 106 above), pp. 488–489. See also Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 38.

²⁴⁴ Churchill, “The piracy provisions” (see footnote 106 above), p. 17. See also Kanehara, “So-called ‘eco-piracy’” (see footnote 242 above), p. 210.

²⁴⁵ Jesus, “Protection of foreign ships” (see footnote 106 above), p. 379.

²⁴⁶ Institute of International Law, resolution (see footnote 106 above), art. 3 (3); and Institute of International Law, report (see footnote 106 above), p. 197. See also Kanehara, “So-called ‘eco-piracy’” (see footnote 242 above), p. 211.

²⁴⁷ Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 487.

²⁴⁸ Institute of International Law, report (see footnote 106 above), pp. 192–193.

²⁴⁹ Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 427.

²⁵⁰ *Ibid.*, p. 427.

²⁵¹ *Ibid.*, p. 428.

connected to the non-international armed conflict – it would still constitute piracy.²⁵²

100. Guilfoyle understands the question similarly, considering that exemption of civil-war insurgents attacking vessels of the Government that they are attempting to overthrow could be understood on the basis that such vessels “are legitimate targets for insurgents in the course of a civil conflict”.²⁵³ However, because international humanitarian law allows neither insurgent groups to stop and search neutral shipping nor any attacks targeting civilians, he and some other authors consider attacks by such groups against civilian and foreign-flagged vessels to fall within the regime of piracy.²⁵⁴ O’Connell considers the position of “unrecognized insurgents” similarly:

The real line of demarcation between legitimate and illegitimate acts of belligerency is not the status of the acts in the eyes of neutral countries, but the quality of the acts done. So long as the acts are those which are normally incidental to belligerent activity they should not be characterized as piracy, even though the actors may have only the most slender claims to international authority.²⁵⁵

3. By the crew or the passengers of a private ship or a private aircraft

101. The third element of the definition of piracy contained in article 101 (a) concerns the actors: the requirement that an act be undertaken “by the crew or the passengers of a private ship or a private aircraft” in order to amount to piracy. A number of writings take note of this requirement.²⁵⁶

102. Several authors discuss this criterion in relation to article 102 of the Convention, which assimilates “a warship, government ship or government aircraft whose crew has mutinied and taken control” to a private ship or aircraft.²⁵⁷ In this context, some

²⁵² *Ibid.*

²⁵³ Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 33. See also Halberstam, “Terrorism on the high seas” (see footnote 105 above), pp. 278–280.

²⁵⁴ Guilfoyle, *Shipping Interdiction* (see footnote 107 above), pp. 34–35; and Crawford, *Brownlie’s Principles of Public International Law* (see footnote 106 above), p. 305. See also Halberstam, “Terrorism on the high seas” (see footnote 105 above), pp. 282–283.

²⁵⁵ O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 975.

²⁵⁶ For example, American Law Institute, *Restatement* (see footnote 106 above), p. 85; Aune, “Piracy and its repression” (see footnote 117 above), p. 27; Brownlie, *Principles of Public International Law* (see footnote 106 above), p. 230; Clingan, “The law of piracy” (see footnote 149 above), pp. 168–169; Churchill, “The piracy provisions” (see footnote 106 above), p. 18; Crawford, *Brownlie’s Principles of Public International Law* (see footnote 106 above), p. 303; Gosalbo-Bono and Boelaert, “The European Union’s comprehensive approach” (see footnote 106 above), p. 98; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 372; Jennings and Watts, *Oppenheim’s International Law* (see footnote 106 above), p. 747; O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 974; Pellegrino, “Historical and legal aspects” (see footnote 151 above), p. 436; Petrig, “Piracy” (see footnote 130 above), p. 848; and Rothwell and Stephens, *The International Law of the Sea* (see footnote 216 above), p. 162.

²⁵⁷ For example, Aune, “Piracy and its repression” (see footnote 117 above), p. 27; Azubuike, “International law regime against piracy” (see footnote 106 above), p. 52; Brownlie, *Principles of Public International Law* (see footnote 106 above), p. 230; Churchill, “The piracy provisions” (see footnote 106 above), p. 18; R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester, Manchester University Press, 1999), p. 210; Crawford, *Brownlie’s Principles of Public International Law* (see footnote 106 above), p. 303; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1130, para. 12; Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 917; Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), p. 19; Jennings and Watts, *Oppenheim’s International Law* (see footnote 106 above), p. 748; Neuhold, “The return of piracy” (see footnote 106 above), p. 1247; Pellegrino, “Historical and legal aspects” (see footnote 151 above), p. 436; Rothwell

support a broad understanding of “mutiny” to include taking out government vessels without authorization to engage in piratical acts.²⁵⁸ Some writings address the question of whether acts by State officials may fall within the definition of piracy, concluding that they do when undertaken in a private capacity.²⁵⁹

103. A number of writings address the meaning of the term “ship”, noting that the Convention does not define it.²⁶⁰ Geiß and Petrig, observing that the interest of States in protecting the freedom of navigation on the high seas is generally reflected in the law of the sea, argue that “even small vessels and crafts (skiffs) are included within the meaning of the word ‘ship’”, and recall that small boats have been used effectively to carry out attacks at sea.²⁶¹ For them, it is irrelevant whether the pirate ship “was dispatched from a ‘mother ship’”.²⁶² Eruaga and Mejia take a differing view, considering that the lack of a definition of “ship” leaves room for interpretation and that attacks by small vessels may not fall within the definition of piracy.²⁶³

104. Some writings consider the impact of technological developments on the scope of the definition. For example, the Institute of International Law considers that “[w]hether the acts are committed by or against an autonomous or remotely-operated craft does not, *mutatis mutandis*, affect the application” of article 101.²⁶⁴ The Institute notes that, for “evident chronological reasons”, the definition contained in article 101 does not address autonomous vehicles.²⁶⁵ However, it reasons that as the notion of ship or aircraft includes uncrewed vehicles, “the principle should be followed that the rules applicable to ships, including submarines, and aircraft generally apply also to remotely-operated vehicles”, and that “it could be broadly understood that the notion of ‘crew’ includes those who operate” an uncrewed vehicle.²⁶⁶ Ademuni-Odeke discusses the possibility of piratical acts under water or on or below the seabed, but notes that, at least at the time of the negotiation of the Convention, “technology had not yet developed to enable the three-dimensional commission of piracy”.²⁶⁷

105. A number of writings address the inclusion of aircraft in the definition of piracy. Some authors consider that the inclusion of aircraft in the definition, both as craft used for the commission of piracy and as targets of piracy, reflects progressive development of international law.²⁶⁸ Dinstein calls the reference to aircraft “innovative”.²⁶⁹ Crawford agrees that the inclusion of aircraft is innovative, but considers it sensible nonetheless.²⁷⁰ The Institute of International Law considers that,

and Stephens, *The International Law of the Sea* (see footnote 216 above), p. 163; Shearer, “Piracy” (see footnote 106 above), para. 17; and Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 489.

²⁵⁸ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1130, para. 12.

²⁵⁹ Churchill, “The piracy provisions” (see footnote 106 above), pp. 18–19; and Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1130, para. 12.

²⁶⁰ Churchill, “The piracy provisions” (see footnote 106 above), p. 18; and Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), pp. 62–63.

²⁶¹ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), pp. 62–63.

²⁶² *Ibid.* See also Schofield and Ali, “Combating piracy and armed robbery at sea” (see footnote 106 above), p. 278.

²⁶³ Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 440.

²⁶⁴ Institute of International Law, resolution (see footnote 106 above), art. 3 (4).

²⁶⁵ Institute of International Law, report (see footnote 106 above), p. 199.

²⁶⁶ *Ibid.*

²⁶⁷ Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), pp. 445–446.

²⁶⁸ Vladimir Golitsyn, “Maritime security (case of piracy)”, in *Coexistence, Cooperation and Solidarity*, Hestermeyer *et al.*, eds. (see footnote 106 above), pp. 1157–1176, at p. 1162; Rubin, *The Law of Piracy* (see footnote 114 above), p. 367; and Shearer, “Piracy” (see footnote 106 above), para. 15.

²⁶⁹ Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1130, para. 11.

²⁷⁰ Crawford, *Brownlie’s Principles of Public International Law* (see footnote 106 above), p. 303.

in practice, only attacks by ships against other ships are likely.²⁷¹ As both the Institute and Churchill note, piracy by aircraft has not proven to be a problem in practice.²⁷²

4. Directed against another ship or aircraft, or against persons or property on board such ship or aircraft

106. The fourth element of the definition in article 101 (a) concerns the targets of an act of piracy. Under subparagraph (i) of the provision, an act of piracy consists of an attack “against another ship or aircraft, or against persons or property on board such ship or aircraft”. Under subparagraph (ii), an attack must be “against a ship, aircraft, persons or property”.

107. A number of writings refer to the requirement under subparagraph (i) that an act be directed against another ship or aircraft, highlighting this so-called “two-ship” or “two-vessel” requirement, or “dual condition”.²⁷³ A major consequence emphasized is that crimes aboard a single ship carried out by its crew or passengers do not fall within the definition of piracy under subparagraph (i).²⁷⁴ Some writings note that, as a consequence, attacks from land, a dock or the water itself cannot amount to piracy under article 101 (a).²⁷⁵

108. Some writings, however, note that, under subparagraph (ii), the “two-ship” requirement does not apply in a place outside the jurisdiction of any State other than on the high seas.²⁷⁶ As the Institute of International Law notes, subparagraph (ii) “do[es] not require that the persons or property against which piracy is directed are

²⁷¹ Institute of International Law, report (see footnote 106 above), pp. 197–198.

²⁷² *Ibid.*, p. 199; and Churchill, “The piracy provisions” (see footnote 106 above), p. 18.

²⁷³ For example, Institute of International Law, report (see footnote 106 above), pp. 205–206; Aune, “Piracy and its repression” (see footnote 117 above), pp. 26–27 and 31; Azubuikwe, “International law regime against piracy” (see footnote 106 above), p. 53; Clingan, “The law of piracy” (see footnote 149 above), p. 169; Churchill, “The piracy provisions” (see footnote 106 above), p. 19; Churchill and Lowe, *The Law of the Sea* (see footnote 257 above), p. 210; Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 439; Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 918; Gosálbo-Bono and Boelaert, “The European Union’s comprehensive approach” (see footnote 106 above), p. 98; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 372; Jesus, “Protection of foreign ships” (see footnote 106 above), p. 376; Kanehara, “So-called ‘eco-piracy’” (see footnote 242 above), p. 208; Kraska, “Developing piracy policy” (see footnote 106 above), p. 338; Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th ed. (London, Routledge, 1997), p. 189; Neuhold, “The return of piracy” (see footnote 106 above), p. 1247; Nordquist *et al.*, eds., *Virginia Commentary* (see footnote 106 above), p. 201; O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 970; Papastavridis, *The Interception of Vessels* (see footnote 106 above), p. 163; Pellegrino, “Historical and legal aspects” (see footnote 151 above), p. 436; Petrig, “Piracy” (see footnote 130 above), p. 848; Shaw, *International Law* (see footnote 106 above), p. 528; Shearer, “Piracy” (see footnote 106 above), para. 15; Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 489; Treves, “Piracy, law of the sea, and use of force” (see footnote 106 above), p. 402; and Treves, “Piracy and the international law of the sea” (see footnote 106 above), p. 120.

²⁷⁴ For example, Crawford, *Brownlie’s Principles of Public International Law* (see footnote 106 above), p. 303; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), pp. 1134–1136, paras. 23–26; Jesus, “Protection of foreign ships” (see footnote 106 above), p. 376; Kraska, “Developing piracy policy” (see footnote 106 above), p. 338; Lagoni, “Piraterie und widerrechtliche Handlungen” (see footnote 106 above), p. 513; Petrig, “Piracy” (see footnote 130 above), p. 848; and Shearer, “Piracy” (see footnote 106 above), para. 15.

²⁷⁵ Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), p. 22. The hypothesis of an attack from land may be relevant in the case of *terra nullius*.

²⁷⁶ Institute of International Law, report (see footnote 106 above), p. 205; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), pp. 1135–1136, paras. 21–24; Nordquist *et al.*, eds., *Virginia Commentary* (see footnote 106 above), p. 201; and Zou, “Issues of public international law” (see footnote 106 above), p. 528.

on board a ship or aircraft, provided however that the act of piracy is committed by a ship or aircraft”.²⁷⁷ Some writings draw from this provision that, as the Virginia Commentary puts it, “challenges by a ship’s crew against its own master – acts that can be considered mutiny under municipal law – may fall within the Convention’s definition of ‘piracy’”.²⁷⁸ Jesus and Rubin both take the view that, in the light of the drafting history of the definition, such a conclusion would be limited to places outside the jurisdiction of any State other than on the high seas.²⁷⁹

109. As with the previous element, the definition of the term “ship” is discussed, this time with reference to the potential targets of piracy. Geiß and Petrig consider that “it would seem to suffice that the ship is seaworthy enough to be out on the high seas” for a victim ship to fall within the scope of article 101.²⁸⁰ They also note that it is irrelevant whether the attacked ship is a private or government ship and whether it flies the same flag as the attacking ship.²⁸¹ The Virginia Commentary takes a different view, considering that, “in limiting piracy to acts committed on or against ‘a private ship or private aircraft,’ [the definition] excludes acts against warships or other government ships operated for noncommercial purposes”.²⁸² Churchill criticizes this view, noting that “[t]here is no support for such a position in the text or drafting history of the conventions”.²⁸³

110. Several writings discuss this element with reference to specific cases that did not amount to piracy because only one ship was involved.²⁸⁴ A number of authors refer to the *Achille Lauro* incident, in which a ship was hijacked by passengers who had boarded in port.²⁸⁵ Because the incident involved only one ship, it did not amount to piracy under international law, a conclusion which inspired the negotiation of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.²⁸⁶ Some writings note that the same analysis applies to the *Santa María*

²⁷⁷ Institute of International Law, report (see footnote 106 above), p. 205. See also Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 140; and Menefee, “The *Achille Lauro*” (see footnote 234 above), p. 179.

²⁷⁸ Nordquist *et al.*, eds., Virginia Commentary (see footnote 106 above), p. 201. See also O’Connell, *The International Law of the Sea* (see footnote 118 above), pp. 970–971.

²⁷⁹ Jesus, “Protection of foreign ships” (see footnote 106 above), p. 377; and Rubin, “Is piracy illegal?” (see footnote 152 above), p. 95.

²⁸⁰ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 63. See also Petrig, “Piracy” (see footnote 130 above), p. 848.

²⁸¹ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 62. See also Dinstein, “Piracy *jure gentium*” (see footnote 106 above), pp. 1132 and 1135, paras. 15–17 and 24; Gosalbo-Bono and Boelaert, “The European Union’s comprehensive approach” (see footnote 106 above), p. 98; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 372; and Jennings and Watts, *Oppenheim’s International Law* (see footnote 106 above), p. 753.

²⁸² Nordquist *et al.*, eds., Virginia Commentary (see footnote 106 above), p. 200.

²⁸³ Churchill, “The piracy provisions” (see footnote 106 above), p. 19.

²⁸⁴ For example, Birnie, “Piracy – past, present and future” (see footnote 129 above), pp. 144–147; Churchill and Lowe, *The Law of the Sea* (see footnote 257 above), p. 210; Gosalbo-Bono and Boelaert, “The European Union’s comprehensive approach” (see footnote 106 above), p. 98; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 40; Klein, *Maritime Security* (see footnote 121 above), p. 119; Treves, “Piracy, law of the sea, and use of force” (see footnote 106 above), p. 402; and Treves, “Piracy and the international law of the sea” (see footnote 106 above), p. 120.

²⁸⁵ For example, Institute of International Law, report (see footnote 106 above), p. 206; Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 62; Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), p. 22; Kraska, “Developing piracy policy” (see footnote 106 above), p. 338; Pellegrino, “Historical and legal aspects” (see footnote 151 above), pp. 436–437; and Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 489.

²⁸⁶ For example, Institute of International Law, report (see footnote 106 above), p. 206; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 39; Guilfoyle, “Piracy and suppression of

incident.²⁸⁷ As Klein writes, “the requirement in the definition of piracy that two ships are involved precludes the characterization of hijacking (where passengers gain control of one ship) as piracy”.²⁸⁸ For Menefee, however, such incidents may still be considered piracy under subparagraph (ii), as they occurred in an area outside the jurisdiction of any State.²⁸⁹

111. A further question relating to this element concerns attacks against structures on the high seas or in the exclusive economic zone. Citing the 2015 *Arctic Sunrise* award,²⁹⁰ the Institute of International Law concludes that “[a]ttacks directed against artificial islands, installations and structures existing on the high seas or, more likely, in the exclusive economic zone are also excluded from the scope of piracy”.²⁹¹ Similarly, Clingan discusses whether acts targeting an uncrewed buoy on the high seas can amount to piracy.²⁹² While he notes that such targets may be considered property “in a place outside the jurisdiction of any State”, he rejects this interpretation as being inconsistent with the Commission’s intended meaning of the phrase (see also para. 120 below).²⁹³

112. Considering the question of aircraft as targets, Guilfoyle notes that, for an attack on an aircraft to amount to piracy, the victim craft must be “on the high seas (i.e. not in flight)”.²⁹⁴

5. On the high seas or in a place outside the jurisdiction of any State

113. The final element of the definition contained in article 101 (a) concerns the geographical scope of the definition of piracy. Two geographical areas to which the definition applies are specified: acts “on the high seas”, under subparagraph (i), and acts “in a place outside the jurisdiction of any State”, under subparagraph (ii).

114. Many writings focus on subparagraph (i), according to which, as the Institute of International Law notes, “[a]cts of piracy take place on high seas”.²⁹⁵ A number of writings consequently emphasize that the definition of piracy does not encompass

unlawful acts” (see footnote 106 above), p. 373; Pellegrino, “Historical and legal aspects” (see footnote 151 above), p. 437; Petrig, “Piracy” (see footnote 130 above), p. 848; Rothwell and Stephens, *The International Law of the Sea* (see footnote 216 above), p. 163; and Skaridov, “*Hostis humani generis*” (see footnote 132 above), p. 481.

²⁸⁷ Institute of International Law, report (see footnote 106 above), p. 206; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1135, para. 24; Dubner, “The law of international sea piracy” (see footnote 239 above), p. 484; O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 972; and Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 489.

²⁸⁸ Klein, *Maritime Security* (see footnote 121 above), p. 119.

²⁸⁹ Menefee, “The *Achille Lauro*” (see footnote 234 above), p. 179. He refers to article 15 (1) (b) of the 1958 Convention, which became article 101 (a) (ii) in the 1982 Convention.

²⁹⁰ Permanent Court of Arbitration, *Award in the Arbitration regarding the Arctic Sunrise between the Kingdom of the Netherlands and the Russian Federation*, Award on the Merits, 14 August 2015, *Reports of International Arbitral Awards*, vol. XXXII (2019), pp. 205–314, at p. 272, para. 238.

²⁹¹ Institute of International Law, report (see footnote 106 above), pp. 206–207. See also Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1135, para. 24; and Petrig, “Piracy” (see footnote 130 above), p. 848.

²⁹² Clingan, “The law of piracy” (see footnote 149 above), pp. 170–171.

²⁹³ *Ibid.*

²⁹⁴ Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 373.

²⁹⁵ Institute of International Law, report (see footnote 106 above), p. 200. See also, for example, Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), pp. 441–442; Dubner, “The law of international sea piracy” (see footnote 239 above), pp. 473–474; Neuhold, “The return of piracy” (see footnote 106 above), p. 1247; Papastavridis, *The Interception of Vessels* (see footnote 106 above), p. 163; and Wolfrum, “Fighting terrorism at sea” (see footnote 106 above), p. 8.

acts in the territorial sea or in archipelagic waters.²⁹⁶ Schofield and Ali put the point succinctly, noting that, in accordance with article 101, “piracy only refers to acts taking place outside the territorial sea”.²⁹⁷ As Dinstein notes, “[r]aids conducted – even from the high seas – into an area which is subject to the jurisdiction of a State (including its internal, archipelagic or territorial waters or even reaching inland) exceed the bounds of the definition of piracy”.²⁹⁸ The distinction is important because, as several authors note, most attacks against shipping occur while the target is at anchor or otherwise in territorial waters.²⁹⁹

115. On the question of piracy by aircraft, the Virginia Commentary considers that acts committed by one aircraft against another in the air, and not “on the high seas”, do not fall within the scope of subparagraph (i).³⁰⁰ Churchill doubts the correctness of this view, while suggesting that such attacks would nevertheless be better dealt with under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.³⁰¹

116. A number of authors address the question as to whether acts undertaken within the exclusive economic zone of a State fall within the scope of subparagraph (i) and could therefore amount to piracy. Most agree that the rules concerning piracy apply in the exclusive economic zone.³⁰² Several authors consider that the consequences of

²⁹⁶ Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 140; Churchill, “The piracy provisions” (see footnote 106 above), p. 20; Crawford, *Brownlie’s Principles of Public International Law* (see footnote 106 above), p. 303; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1133, para. 19; Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 917; Gosalbo-Bono and Boelaert, “The European Union’s comprehensive approach” (see footnote 106 above), p. 98; Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), pp. 19–20; Jesus, “Protection of foreign ships” (see footnote 106 above), p. 379; Kraska, “Developing piracy policy” (see footnote 106 above), p. 337; Nordquist *et al.*, eds., Virginia Commentary (see footnote 106 above), p. 201; O’Connell, *The International Law of the Sea* (see footnote 118 above), p. 978; Pancraccio, *Droit de la mer* (see footnote 132 above), p. 455; Roach, “General problematic issues” (see footnote 106 above), p. 123; Rothwell and Stephens, *The International Law of the Sea* (see footnote 216 above), p. 162; Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 490; Treves, “Piracy, law of the sea, and use of force” (see footnote 106 above), p. 402; and Treves, “Piracy and the international law of the sea” (see footnote 106 above), p. 120.

²⁹⁷ Schofield and Ali, “Combating piracy and armed robbery at sea” (see footnote 106 above), p. 278.

²⁹⁸ Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 429. See also Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 43.

²⁹⁹ For example, Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 142; Dubner, “The law of international sea piracy” (see footnote 239 above), p. 474; and Tuerk, “Combating piracy” (see footnote 113 above), pp. 470–471. See also Neuhold, “The return of piracy” (see footnote 106 above), p. 1247.

³⁰⁰ Nordquist *et al.*, eds., Virginia Commentary (see footnote 106 above), p. 201.

³⁰¹ Churchill, “The piracy provisions” (see footnote 106 above), p. 19. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971), United Nations, *Treaty Series*, vol. 974, No. 14118, p. 177.

³⁰² For example, Institute of International Law, report (see footnote 106 above), pp. 200–201; Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 141; Clingan, “The law of piracy” (see footnote 149 above), p. 170; Churchill, “The piracy provisions” (see footnote 106 above), p. 20; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1133, para. 18; Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), pp. 442–443; Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 917; Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 64; Gosalbo-Bono and Boelaert, “The European Union’s comprehensive approach” (see footnote 106 above), p. 98; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), pp. 43–44; Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), p. 19; Jacobsson and Klein, “Piracy off the coast of Somalia” (see footnote 106 above), p. 46; Jennings and Watts, *Oppenheim’s International Law* (see footnote 106 above), p. 753; Virginia Commentary (see

article 58 (2) of the Convention are clear in this respect.³⁰³ Article 58 (2) provides, *inter alia*, that the provisions relating to piracy “apply to exclusive economic zone in so far as they are not incompatible with [Part V]”. Petrig take the view that, “[g]enerally, nothing in [a]rticle 56 of the [Convention] defining the coastal State’s sovereign rights in the [exclusive economic zone] is incompatible with the [Convention’s] provisions on piracy”.³⁰⁴ Jennings and Watts bolster this conclusion, noting that “the exclusive economic zone, whether it be regarded simply as a special part of the high seas, or as being an area *sui generis*, is certainly not territorial”.³⁰⁵ The Institute of the International Law additionally takes note of article 58 (3) of the Convention, as a consequence of which “due regard must be given to the rights and duties of the coastal State” in the exclusive economic zone.³⁰⁶

117. Some writings question this conclusion. Zou writes that the provisions “are ambiguous and controversial”.³⁰⁷ He takes note of article 86 of the Convention, according to which the rules applicable to the high seas, including the regime of piracy, “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”, and of article 58 (3).³⁰⁸ From the two provisions he concludes that “[b]ecause piracy is closely related to the safety of navigation, perhaps [S]tates can suppress piracy in the [exclusive economic zone] of another nation when the latter’s anti-piracy measures are inadequate”.³⁰⁹ He considers that the question as to whether the coastal State has a right to request another State to hand over pirates captured in the exclusive economic zone of the former is “unresolved”.³¹⁰

118. Aune raises two further potential interpretations under which responsibility for repressing piratical acts falls to the coastal State.³¹¹ According to the first, because “piracy is not one of the lawful uses of the sea permitted under [a]rticles 58 and 87 ...

footnote 106 above), p. 202; Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (Cambridge, Cambridge University Press, 1989), p. 100; Pancraccio, *Droit de la mer* (see footnote 132 above), p. 455; Papastavridis, *The Interception of Vessels* (see footnote 106 above), p. 163; Petrig, “Piracy” (see footnote 130 above), pp. 847–848; Roach, “General problematic issues” (see footnote 106 above), p. 122; Shearer, “Piracy” (see footnote 106 above), para. 19; Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 489; and Wolfrum, “Fighting terrorism at sea” (see footnote 106 above), p. 8. See also Nguyen *et al.*, *Droit international public* (see footnote 216 above), p. 1335.

³⁰³ Institute of International Law, report (see footnote 106 above), p. 200; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1133, para. 18; Golitsyn, “Maritime security” (see footnote 268 above), p. 1162; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 372; Jesus, “Protection of foreign ships” (see footnote 106 above), p. 379; Kateka, “Combating piracy and armed robbery” (see footnote 106 above), pp. 458–459; Nordquist *et al.*, eds., *Virginia Commentary* (see footnote 106 above), p. 202; Roach, “General problematic issues” (see footnote 106 above), p. 122; Shearer, “Piracy” (see footnote 106 above), para. 19; Treves, “Piracy and the international law of the sea” (see footnote 106 above), p. 121; and Tuerk, “Combating piracy” (see footnote 113 above), p. 470. See also Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 44.

³⁰⁴ Petrig, “Piracy” (see footnote 130 above), pp. 847–848.

³⁰⁵ Jennings and Watts, *Oppenheim’s International Law* (see footnote 106 above), p. 753.

³⁰⁶ Institute of International Law, report (see footnote 106 above), p. 201.

³⁰⁷ Zou, “Issues of public international law” (see footnote 106 above), p. 530; and Zou, “Enforcing the law of piracy” (see footnote 106 above), p. 111.

³⁰⁸ Zou, “Issues of public international law” (see footnote 106 above), p. 530; and Zou, “Enforcing the law of piracy” (see footnote 106 above), p. 111.

³⁰⁹ Zou, “Enforcing the law of piracy” (see footnote 106 above), p. 111. See also Zou, Zou, “Issues of public international law” (see footnote 106 above), p. 530.

³¹⁰ Zou, “Enforcing the law of piracy” (see footnote 106 above), p. 111. See also Zou, “Issues of public international law” (see footnote 106 above), p. 531.

³¹¹ Aune, “Piracy and its repression” (see footnote 117 above), pp. 29 and 36–37.

the right to capture pirates [in the exclusive economic zone] falls to the coastal [S]tate”.³¹² The second is that “piracy is an economic venture, and, under the scope of [a]rticles 55 and 56”, only the coastal State has the authority to deal with such activities in its exclusive economic zone.³¹³

119. While fewer writings address whether the regime of piracy applies in the contiguous zone, those that do agree that the regime does apply.³¹⁴ In doing so, Shearer makes the point that the contiguous zone is often part of the exclusive economic zone.³¹⁵ Ademuni-Odeke supports this conclusion by noting that the contiguous zone is excluded from the IMO definition of armed robbery at sea, from which he infers that the definition of piracy must apply.³¹⁶ Aune also notes that the regime applies in the waters superjacent to the continental shelf beyond the exclusive economic zone, as such waters are part of the high seas.³¹⁷

120. Several writings address the scope of the phrase “in a place outside the jurisdiction of any State”, contained in subparagraph (ii) of article 101 (a). Tuerk considers that, today, it “is hardly a realistic possibility”.³¹⁸ Golitsyn notes that, according to the Harvard draft, “this provision relates to acts committed in a place or on an island ‘inappropriated by a civilized Power’”.³¹⁹ Ademuni-Odeke notes that this concept is distinct from that of “areas beyond national jurisdiction” used in other contexts relating to the law of the sea.³²⁰ Several writings note that the Commission had in mind mainly “an island constituting *terra nullius*”.³²¹ Explaining why the territorial waters of a State without an effective Government were not within the scope of the definition of piracy, Geiß and Petrig add that “as far as the identification of a ‘place outside the jurisdiction of any State’ is concerned, sovereignty is decisive whereas the existence or absence of actual governmental control is irrelevant”.³²² Additionally, a number of authors mention Antarctica as being included among possible places outside State jurisdiction, and the Institute of International Law mentions outer space, noting the unlikelihood of piracy in either location.³²³

³¹² *Ibid.* p. 37. See also Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 141.

³¹³ Aune, “Piracy and its repression” (see footnote 117 above), p. 37.

³¹⁴ For example, Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), p. 425; Aune, “Piracy and its repression” (see footnote 117 above), p. 35; and Birnie, “Piracy – past, present and future” (see footnote 129 above), pp. 140–141.

³¹⁵ Shearer, “Piracy” (see footnote 106 above), para. 19.

³¹⁶ Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), pp. 425 and 431. See also IMO, resolution A.1025(26), annex, para. 2.2.

³¹⁷ Aune, “Piracy and its repression” (see footnote 117 above), p. 35.

³¹⁸ Tuerk, “Combating piracy” (see footnote 113 above), p. 471.

³¹⁹ Golitsyn, “Maritime security” (see footnote 268 above), p. 1162. See also Institute of International Law, report (see footnote 106 above), p. 204.

³²⁰ Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), pp. 443–444.

³²¹ American Law Institute, *Restatement* (see footnote 106 above), p. 86; Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), p. 443; Aune, “Piracy and its repression” (see footnote 117 above), p. 31; Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 139; Brownlie, *Principles of Public International Law* (see footnote 106 above), p. 230; Churchill, “The piracy provisions” (see footnote 106 above), p. 20; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1133, para. 18; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 372; Jennings Watts, *Oppenheim’s International Law* (see footnote 106 above), p. 753; Jesus, “Protection of foreign ships” (see footnote 106 above), p. 377; O’Connell, *The International Law of the Sea* (see footnote 118 above), pp. 970–971; Roach, “General problematic issues” (see footnote 106 above), p. 122; and Shearer, “Piracy” (see footnote 106 above), para. 15. See also A/CN.4/757, para. 55.

³²² Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 63.

³²³ Institute of International Law, report (see footnote 106 above), p. 205. See also, for example, Aune, “Piracy and its repression” (see footnote 117 above), p. 31; Birnie, “Piracy – past, present and future” (see footnote 129 above), p. 139; Churchill, “The piracy provisions” (see footnote 106 above), p. 20; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1133, para. 18;

121. One author, González-Lapeyre, criticizes the phrasing of this provision, recalling that, under article 92 (1) of the Convention, “[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas”. He accordingly questions whether it is correct to say that piracy can only occur in places outside the jurisdiction of any State.³²⁴

122. Considering the impact of subparagraph (ii) generally, the Institute of International Law concludes that “[h]owever contradictory and practically useless it might be, the extension of the territorial scope of piracy to places outside the jurisdiction of any State does not seem to cause any harm or discussion within the present regime of piracy”.³²⁵

C. Writings on voluntary participation in the operation of a pirate ship or aircraft and on incitement or intentional facilitation of piracy

123. Fewer writings address the second and third offences specified in the definition of piracy.³²⁶ The two offences are specified in paragraphs (b) and (c) of article 101, which relate respectively to “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” and “any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)”. As the Institute of International Law notes, the purpose of the two subparagraphs is to include within the definition of piracy the activities of participants who are not directly involved in acts of violence, detention or depredation.³²⁷ Examples given by the Institute include sailors, motor engineers and cooks aboard pirate ships, and arms and equipment dealers, bankers lending money and negotiators of ransom on behalf of pirates.³²⁸

124. A number of authors comment on paragraph (b). Petrig notes that “a person who voluntarily participates in the operation of a ship, in the knowledge that it is intended to be used for a pirate attack, commits piracy under international law as soon as the ship enters the [exclusive economic zone] or high seas”, and considers this offence to come close to the concept of conspiracy.³²⁹ She considers that the paragraph serves as a legal basis for early intervention by patrolling naval forces to prevent piracy.³³⁰ Geiß and Petrig note that the definition of “pirate ship” contained in article 103 of the Convention, which refers to a ship “intended ... to be used for the purpose of committing one of the acts referred to in article 101”, can result in a circular interpretation when read in conjunction with article 101 (b).³³¹ To avoid such a result,

Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 372; Roach, “General problematic issues” (see footnote 106 above), p. 122; and Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 489.

³²⁴ Edison González-Lapeyre, “Un nouvel envisagement sur la piraterie maritime”, in *Law of the Sea*, del Castillo, ed. (see footnote 106 above), pp. 435–455, at p. 443.

³²⁵ Institute of International Law, report (see footnote 106 above), p. 205.

³²⁶ See, for example, Churchill, “The piracy provisions” (see footnote 106 above), pp. 20–21; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1129, para. 9; Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 918; Friman and Linborg, “Initiating criminal proceedings” (see footnote 152 above), p. 175; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 371; and Petrig, “Piracy” (see footnote 130 above), pp. 848–849.

³²⁷ Institute of International Law, report (see footnote 106 above), pp. 207–208.

³²⁸ *Ibid.*, p. 207.

³²⁹ Petrig, “Piracy” (see footnote 130 above), pp. 848–849.

³³⁰ *Ibid.*, p. 849.

³³¹ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 64.

they propose that, “by way of a teleological reduction”, article 103 be read as referring only to the first arm of the definition, contained in article 101 (a).³³² Jennings and Watts note that paragraph (b) may bring mutiny within the scope of the definition of piracy, notwithstanding the “two-vessel” requirement, if the mutiny is undertaken “with the present intention of using the craft for piratical acts”.³³³ Ademuni-Odeke notes that paragraph (b) does not include an explicit geographical limitation, unlike paragraph (a).³³⁴

125. Comments with respect to paragraph (c) focus on its geographical scope. Some highlight the lack of geographical limitation in the paragraph, which means that the provision can encompass acts on land or in waters within a State’s jurisdiction and need not take place on board a ship.³³⁵ Geiß and Petrig consider it an “illogical discrepancy” that a ship used to facilitate piratical acts on the high seas from within territorial waters amounts to a pirate ship within the meaning of article 103 of the Convention, but a ship that engages in the acts envisaged in article 101 (a) within territorial waters is not.³³⁶ For the Institute of International Law, the broader geographical scope of paragraphs (b) and (c) entails “no right to enter the territory of other States for the purpose of arresting suspected participants, incitators or facilitators”.³³⁷

D. Writings relevant to the definition of armed robbery at sea

126. Fewer writings relevant to the definition of armed robbery at sea – also referred to by commentators and in definitions as “armed robbery against ships” – were found. Such writings generally focus on the relevant practice of States and international organizations and often reflect a sense that international law concerning armed robbery at sea is under development. For example, Petrig writes that “[t]he definitional elements of armed robbery at sea are far from settled under international law”.³³⁸ Many writings note that the term is defined neither in the United Nations Convention on the Law of the Sea nor in relevant Security Council resolutions.³³⁹

127. The definitions most commonly cited in the writings are those adopted by IMO: those in paragraph 2.2 of the 2001 Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships,³⁴⁰ and paragraph 2.2 of the 2009 Code

³³² *Ibid.*, p. 65.

³³³ Jennings and Watts, *Oppenheim’s International Law* (see footnote 106 above), pp. 751–752.

³³⁴ Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), p. 435.

³³⁵ Institute of International Law, resolution (see footnote 106 above), art. 3 (5); Institute of International Law, report (see footnote 106 above), p. 208; Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), p. 435; Churchill, “The piracy provisions” (see footnote 106 above), p. 21; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1134, para. 21; Friman and Linborg, “Initiating criminal proceedings” (see footnote 152 above), p. 176; Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 65; Guilfoyle, “Piracy and suppression of unlawful acts” (see footnote 106 above), p. 373; and Petrig, “Piracy” (see footnote 130 above), p. 849. See also Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 917.

³³⁶ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 65.

³³⁷ Institute of International Law, report (see footnote 106 above), p. 208.

³³⁸ Petrig, “Piracy” (see footnote 130 above), p. 851.

³³⁹ For example, Institute of International Law, report (see footnote 106 above), p. 226; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1134, para. 20; Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 429; and Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), pp. 72–74. See also [A/CN.4/757](#), paras. 206–329.

³⁴⁰ IMO, resolution A.922(22), annex. See Dinstein, “Piracy *jure gentium*” (see footnote 106 above), p. 1134, para. 20; Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 429; Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 73;

of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, which superseded the former.³⁴¹ The 2001 definition provides the following:

2.2 “Armed robbery against ships” means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a State’s jurisdiction over such offences.³⁴²

128. The 2009 definition, which is reflected in draft article 3 of the draft articles on the prevention and repression of piracy and armed robbery at sea as provisionally adopted by the Commission at its seventy-fourth session,³⁴³ provides the following:

2.2 “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.³⁴⁴

129. Other definitions discussed include those included in the Regional Cooperation Agreement on combating piracy and armed robbery against ships in Asia (often referred to as “ReCAAP”), adopted on 11 November 2004 in Tokyo;³⁴⁵ the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct), adopted on 29 January 2009;³⁴⁶ and the Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa (Yaoundé Code of Conduct), adopted on 25 June 2013.³⁴⁷

Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 460; Kraska, “Developing piracy policy” (see footnote 106 above), p. 338; Pancraccio, *Droit de la mer* (see footnote 132 above), p. 449; Papastavridis, *The Interception of Vessels* (see footnote 106 above), p. 166; and Tuerk, “Combating piracy” (see footnote 113 above), p. 471.

³⁴¹ IMO, resolution A.1025(26), annex. See Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), pp. 424–425; Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 460; Abalde Cantero, “La conceptualización de la piratería” (see footnote 112 above), p. 75; and Juan Cristóbal Fernández Sanz, “Marco jurídico actual de la piratería: un antiguo delito del Derecho Internacional del Mar”, *Revista Tribuna Internacional*, vol. 2, No. 4 (2013), pp. 9–31, at p. 18.

³⁴² IMO, resolution A.922(22), annex, para. 2.2.

³⁴³ A/78/10, para. 57.

³⁴⁴ IMO, resolution A.1025(26), annex, para. 2.2.

³⁴⁵ For example, Institute of International Law, report (see footnote 106 above), p. 227; Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 74; Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 460; Klein, *Maritime Security* (see footnote 121 above), p. 120–121; and Papastavridis, *The Interception of Vessels* (see footnote 106 above), p. 166.

³⁴⁶ IMO, document C 102/14, annex, attachment 1. For example, Institute of International Law, report (see footnote 106 above), p. 227; Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), pp. 73–74; and Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 460.

³⁴⁷ For example, Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 460.

130. For some authors, the definitions contained in the IMO Codes of Practice are authoritative.³⁴⁸ Others refer to an IMO definition as a sole or primary example.³⁴⁹ Some writings compare the above-mentioned definitions.³⁵⁰

131. In article 8 (1) of its resolution of 30 August 2023, the Institute of International Law uses a different definition that more closely parallels that of piracy:

1. For the purposes of this Resolution, “armed robbery at sea” means any of the following acts:

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship or against persons or property on board such ship, in a place within a State’s territorial sea, internal waters or archipelagic waters;

(b) any act of voluntary participation in the operation of a ship with knowledge of its use to commit one or more acts referred to in subparagraph (a), irrespective of where the act is committed;

(c) any act of incitement or of intentional facilitation of an act described in subparagraphs (a) or (b), irrespective of where the act is committed.³⁵¹

132. The Institute notes that this resolution confines itself to “a call upon States and international organizations to establish appropriate forms of co-operation wherever there is a need to repress armed robbery at sea”.³⁵² It did not see a further need to elaborate a regime relevant to armed robbery at sea.

133. Geiß and Petrig analyse the practice of the Security Council, noting that the terminology used in its resolutions 1816 (2008) and 1846 (2008) is “highly inconsistent”. They recall that in a number of resolutions, the Security Council reaffirms that the United Nations Convention on the Law of the Sea sets out the legal framework applicable to combating both piracy and armed robbery at sea. However, the concept of armed robbery at sea does not appear in the Convention. They conclude that, for the Security Council resolutions granting enforcement powers within the territorial waters of Somalia, the notion of armed robbery at sea should be understood as being distinct from piracy.³⁵³

1. Territorial scope

134. The most prominent question addressed by writings relevant to the definition of armed robbery at sea is that of its territorial scope. Most writings concerning the definition of armed robbery at sea distinguish the concept from piracy with reference to the geographical location of the relevant act.³⁵⁴ Many authors explain that the

³⁴⁸ Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), pp. 443–444; and Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 459–460.

³⁴⁹ Kraska, “Developing piracy policy” (see footnote 106 above), p. 338; and Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 490.

³⁵⁰ For example, Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 429; and Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), pp. 73–74.

³⁵¹ Institute of International Law, resolution (see footnote 106 above), art. 8 (1).

³⁵² Institute of International Law, report (see footnote 106 above), p. 227.

³⁵³ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), pp. 72–73.

³⁵⁴ For example, Dinstein, “Piracy *jure gentium*” (see footnote 106 above), pp. 1133–1134, para. 20; Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 429; Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 917; Guilfoyle, *Shipping Interdiction* (see footnote 107 above), p. 46; Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 443; Klein, *Maritime Security* (see footnote 121 above), pp. 81 and 120–121; Kraska, “Developing piracy policy” (see footnote 106 above), p. 337; Pancracio, *Droit de la mer* (see footnote 132 above), pp. 449 and 455; Petrig, “Piracy”

concept was developed to address the geographical limitations of the definition of piracy reflected in article 101 (a) of the United Nations Convention on the Law of the Sea (see paras. 113–122 above).³⁵⁵ Such limitations are well captured by the Institute of International Law in its 2009 Naples Declaration on Piracy, in which the Institute acknowledges “that existing international law on piracy, as reflected in the 1982 [Convention], which is restricted to proscribing acts of violence committed for private ends on the high seas and undertaken by one ship against another, does not fully cover all acts of violence endangering the safety of international navigation”.³⁵⁶ Kateka notes that “[o]ther international legal regimes have been developed to fill the lacuna in the definition”.³⁵⁷ Geiß and Petrig explain the following: “Pirate-like attacks against vessels in territorial waters do not amount to piracy in the legal sense. In the parlance of [IMO] and of the Security Council, these attacks are commonly referred to as armed robbery against ships or as armed robbery at sea.”³⁵⁸

135. Most authors agree that the place of commission of an offence of armed robbery at sea can only be a place within the jurisdiction of a State, such as internal, territorial or archipelagic waters.³⁵⁹ For some authors, the place of commission is the only distinction between piracy and armed robbery at sea.³⁶⁰

2. Acts within the scope of armed robbery at sea

136. Several writings discuss the acts covered by the definitions of armed robbery at sea, which are generally similar to those covered by article 101 (a) of the United Nations Convention on the Law of the Sea and may also extend to acts similar to those covered by article 101 (b) and (c).³⁶¹ Geiß and Petrig note that the definitions “go well beyond pure property offenses in the sense of taking away moveable objects belonging to another person and may also include hijacking ships and holding persons on board hostage”, a commonality with piracy.³⁶² Accordingly, Dinstein calls the term

(see footnote 130 above), p. 850; and Tanaka, *The International Law of the Sea* (see footnote 106 above), p. 490.

³⁵⁵ For example, Debra Doby, “Piracy *jure gentium*: the jurisdictional conflict of the high seas and territorial waters”, *Journal of Maritime Law and Commerce*, vol. 41, No. 4 (October 2010), pp. 561–580, at p. 567; Klein, *Maritime Security* (see footnote 121 above), pp. 120–121; and Papastavridis, *The Interception of Vessels* (see footnote 106 above), pp. 165–166.

³⁵⁶ Institute of International Law, resolution on “Naples Declaration on Piracy”, Institute of International Law, *Annuaire*, vol. 73 (2009), Session of Naples (2009), pp. 584–586, at p. 584, second preambular para.

³⁵⁷ Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 459. See also Hodgkinson, “The governing international law on maritime piracy” (see footnote 106 above), p. 20.

³⁵⁸ Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 64.

³⁵⁹ For example, Institute of International Law, report (see footnote 106 above), p. 226; Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), pp. 420 and 424–425; Churchill, “The piracy provisions” (see footnote 106 above), p. 20; Dinstein, “Piracy *jure gentium*” (see footnote 106 above), pp. 1133–1134, para. 20; Forteau and Thouvenin, *Traité de droit international de la mer* (see footnote 106 above), p. 917; Jesus, “Protection of foreign ships” (see footnote 106 above), p. 379; Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 74; Jacobsson and Klein, “Piracy off the coast of Somalia” (see footnote 106 above), p. 46; Petrig, “Piracy” (see footnote 130 above), p. 851; Schofield and Ali, “Combating piracy and armed robbery at sea” (see footnote 106 above), p. 278; and Tuerk, “Combating piracy” (see footnote 113 above), p. 471.

³⁶⁰ For example, Ademuni-Odeke, “You are free to commit piracy” (see footnote 106 above), pp. 424–425; and Klein, *Maritime Security* (see footnote 121 above), pp. 302–303.

³⁶¹ Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 444; and Petrig, “Piracy” (see footnote 130 above), p. 851.

³⁶² Geiß and Petrig, *Piracy and Armed Robbery at Sea* (see footnote 116 above), p. 74.

“armed robbery” in this context “a misnomer, considering that the range of violence involved transcends robbery”.³⁶³

3. Question of a “private ends” requirement

137. Writings addressing the question generally note that definitions of armed robbery at sea tend to include a “private ends” requirement.³⁶⁴ Papastavridis, however, notes that the 2001 IMO definition did not include such a requirement.³⁶⁵ Further, Dinstein considers that “[u]nlike piracy, so-called ‘armed robbery’ may be an integral part of an insurgency and a non-international armed conflict (although this does not follow automatically)”.³⁶⁶

4. Question of a “two-ship” requirement

138. Some authors address the question as to whether the “two-ship” requirement applies to armed robbery at sea. Several note that the IMO definitions refer to acts “directed against a ship” rather than “against another ship”.³⁶⁷ Some draw the conclusion that armed robbery at sea includes acts on board a single ship.³⁶⁸

5. Aircraft

139. With respect to aircraft and armed robbery at sea, Kateka notes that “[a]rmed robbery also does not extend to aircraft which are governed by different international law rules such as the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft”.³⁶⁹

³⁶³ Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 429. See also Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 443.

³⁶⁴ For example, Eruaga and Mejia, “Piracy and armed robbery against ships” (see footnote 106 above), p. 444; and Petrig, “Piracy” (see footnote 130 above), p. 851.

³⁶⁵ Papastavridis, *The Interception of Vessels* (see footnote 106 above), p. 166.

³⁶⁶ Dinstein, “Piracy vs. international armed conflict” (see footnote 106 above), p. 429.

³⁶⁷ For example, Papastavridis, *The Interception of Vessels* (see footnote 106 above), p. 166; and Petrig, “Piracy” (see footnote 130 above), p. 851.

³⁶⁸ For example, Institute of International Law, report (see footnote 106 above), pp. 226–227; Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 461; and Petrig, “Piracy” (see footnote 130 above), p. 851.

³⁶⁹ Kateka, “Combating piracy and armed robbery” (see footnote 106 above), p. 461. Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105.

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