

The Crime of Piracy

DOUGLAS GUILFOYLE AND ROB MCLAUGHLIN

1. INTRODUCTION

Article 28A(5) of the Protocol includes the crime of piracy within the jurisdiction of the Court. Piracy is defined in Article 28F in the following terms:

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 boat, ship or a private aircraft, and directed:
 - i. on the high seas, against another boat, ship or aircraft, or against persons or property on board such boat, ship or aircraft;
 - ii. against a boat, 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 boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

This definition is drawn from the Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS);¹ indeed, the provisions are identical save for the addition of the word ‘boat’ to Article 28F. As discussed below,

This chapter draws on previously published work, in particular Douglas Guilfoyle, ‘Article 101’ and ‘Article 103’ in Alexander ProelB (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2017). The chapter also draws on research completed during drafting of the United Nations Office on Drugs and Crime’s *Maritime Law Enforcement Handbook* (2017), including detailed written reviews and comments from, inter alia, Justice Anthony Fernando, Wayne Raabe, Brian Wilson, and Patricia Jimenez Kwast.

¹ United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3 (UNCLOS).

Article 101 UNCLOS is often thought of less as a crime creating provision and more as a jurisdictional one providing broad authority to criminalise certain conduct, the detail of which must necessarily be filled in by national law. This chapter will address first the legal history underlying this drafting, then the elements of the offence set out and, finally, we consider some of the difficulties in interpreting and applying the present provision as drafted, and how they might be resolved.

2. LEGAL HISTORY

Contrary to popular belief, the current international law applicable to piracy is not of ancient origin. Certainly, references to piracy in classical Graeco-Roman writings date to at least 400 BC. It was thus said of King Minos of Crete: 'It is likely he cleared the sea of piracy as far as he was able, to improve his revenues.'² Famous historical episodes of piracy include the Barbary Corsairs and piracy in the Caribbean in the 16th to early 19th centuries. However, the term 'piracy' only acquired some settled legal meaning relatively recently. Historically, the word was often used simply to denounce the maritime violence of one's political enemies, whether lawful or not.³

The law of piracy as stated in UNCLOS is the result of various twentieth century attempts to codify aspects of existing international law. Accurately defining piracy for the purposes of public international law through such an exercise proved an exceptionally difficult task due to diverse and contradictory historical source material. One set of codifiers were thus moved to state that, 'An investigator finds that instead of a single relatively simple problem [defining piracy], there are a series of difficult problems which have occasioned [at different times] a great diversity of professional opinion.'⁴ The complete suite of articles dealing with piracy in UNCLOS (Articles 100–107; and Article 110) follow very closely the drafting of the equivalent provisions of the 1958 Geneva Convention on the High Seas (Articles 14–22).⁵ Indeed, the High Seas

² P. de Souza, *Piracy in the Graeco-Roman World* (Cambridge: Cambridge University Press, 2002), 15 (quoting Thucydides 1.4); see further T. Paige, 'Piracy and Universal Jurisdiction' 12 *Macquarie Law Journal* (2013) 131.

³ Harvard Research in International Law, 'Draft Convention on Piracy', 26 *American Journal of International Law (AJIL) Supplement* (1932) 739–885, at 796, 806–7 (Harvard Draft Piracy Convention).

⁴ Harvard Draft Piracy Convention, 764.

⁵ Convention on the High Seas 1958, 450 UNTS 11.

Convention provisions were adopted during the UNCLOS negotiations with little dissent or debate.⁶ The drafting history is well-summarised by Shearer:

[P]iracy received its first comprehensive definition ... in Art. 15 Geneva Convention on the High Seas of 1958 ... That definition, and the ancillary provisions relating to piracy in Arts 14 and 16–21, were based on the preparatory work of the United Nations International Law Commission [in 1950–1956] ... which, in turn, drew on the Draft Convention on Piracy prepared by the Harvard Research in International Law published in 1932.⁷

Indeed, the Harvard Research further drew on work done by Ambassador Matsuda in 1926 for the League of Nations Committee of Experts project on codification of international law.⁸ What is generally not appreciated is that the drafting proposals of 1926, 1932 and 1950–6, which culminated in the High Seas Convention provisions, were not, realistically, codification efforts. This is for the simple reason that the source materials on which they had to rely (national legislation and court decisions, State practice, the writings of jurists) were so contradictory as to make codification impossible.⁹ Matsuda provided only very limited explanation of his drafting choices in 1926 and appears to have approached the question without detailed historical research. The subsequent work of the Harvard Researchers has been accurately described as ‘frankly non-codifying but *de lege ferenda*’ and the later (and decisively influential) work of the International Law Commission as ‘legislative’.¹⁰ The point is further made by reference to the numerous historical controversies over the definition of the offence of piracy itself.

These controversies included: the geographical scope of the offence; whether politically motivated acts could be piracy; and whether States could commit piracy. These questions are discussed below in relation to the relevant elements of the offence. In general terms, early definitions of piracy stressed that it was simply robbery on the high seas without letters of marque or other

⁶ References to piracy in the *travaux préparatoires* are sparse. See, uniquely, Cambodia’s suggestion that the piracy provisions of the Geneva Convention 1958 were a ‘dead letter’ and did not need inclusion: UNCLOS III, 38th Plenary Meeting, UN Doc. A/CONF.62/SR.38 (1974), at 53. The word is most commonly used to describe illegal or unregulated resource exploitation, see e.g. UNCLOS III, 35th Plenary Meeting, UN Doc. A/CONF.62/SR.35, 1974, at 42; UNCLOS III, 31st Plenary Meeting, UN Doc. A/CONF.62/C.2/SR.31, 1974, at 61; UNCLOS III, 45th Plenary Meeting, UN Doc. A/CONF.62/C.2/SR.45 1974, at 11.

⁷ I. Shearer, ‘Piracy’, Max Planck Encyclopedia of Public International Law, available online at: <http://opil.ouplaw.com/home/EPIL>, at 12.

⁸ League of Nations Committee of Experts for the Progressive Codification of International Law, ‘Questionnaire No. 6: Piracy’ 20 AJIL Special Supplement (1926) 222–9, at 228–9.

⁹ A. Rubin, *The Law of Piracy* (2nd ed: Transnational Publishers, 1998), at 331–372.

¹⁰ *Ibid.*, at 353.

State sanction.¹¹ As Lauterpacht put it, '[P]iracy in its original and strict meaning is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (*animo furandi*).'¹² Lauterpacht went on to observe that this approach was less than entirely accurate as 'cases ... not covered by this narrow definition' were considered piratical, including 'unauthorised acts of violence, such as murder ... committed on the open sea without intent to plunder'.¹³

Nonetheless, following this 'codification' work and its widespread acceptance, including the piracy provisions' re-enactment in successive treaties, the piracy provisions of UNCLOS are now taken to reflect customary international law.¹⁴ That said, the UNCLOS provisions are not necessarily exhaustive of custom in that Article 105 refers only to the adjudicative jurisdiction of the courts of the flag State of a warship that captures pirates. However, it is generally accepted that customary international law grants universal jurisdiction to all States to prosecute piracy suspects, irrespective of whether a warship of their nationality captured them, and that UNCLOS has not abrogated this power.¹⁵ This is of limited relevance in the present context insofar as Article 46E bis of the Protocol restricts the jurisdiction of the Court to a series of bases (such as flag State or active or passive nationality jurisdiction) not including universal jurisdiction. This, however, poses no problem in itself for the Court. The jurisdiction it exercises is one delegated to it by member States. Those member States themselves may, without violating the general principle, choose to exercise universal jurisdiction over piracy on a limited basis or subject its exercise to preconditions. Thus, for example, many national laws limit the actual exercise of jurisdiction over piracy to cases affecting the national interest in some manner. Equally, there is no legal obstacle to conferring on an international court jurisdiction over piracy which falls short of full universal jurisdiction even if theoretically such a jurisdiction could be delegated to it by its member States.

¹¹ League of Nations Committee of Experts, 'Piracy', at 222 et seq.

¹² H. Lauterpacht, *Oppenheim's International Law* (5th ed, Longmans, 1937), vol. I, 486.

¹³ *Ibid.*

¹⁴ D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), at 31–2; Shearer, 'Piracy', at 3, 13; contra Rubin, *The Law of Piracy*, at 331–72. Note also the preamble to the High Seas Convention (stating that the parties drafted the Convention '[d]esiring to codify the rules of international law relating to the high seas').

¹⁵ R. Geiß and A. 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), 149–51.

In the period 2008–2013 piracy off the coast of Somalia was a particular cause of concern, and was (and continues to be) treated in numerous United Nations Security Council resolutions.¹⁶ These invariably affirmed that the relevant law is that which is set out in UNCLOS,¹⁷ typically stating that the Security Council affirms ‘that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 . . ., sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities.’¹⁸ This appears an unequivocal assertion that the UNCLOS definition now reflects customary law.

3. ELEMENTS OF THE PRIMARY OFFENCE

The difficulty posed by incorporating the UNCLOS definition of piracy into the statute of a criminal court is that UNCLOS defines a *jurisdiction* over piracy. It does not, necessarily, define an *offence*, or at least not with the specificity many modern legal systems would require. To take but two examples: the concept of ‘illegal act of violence’ is, at best, question begging (illegal under what system of law?); and the idea of ‘intentionally facilitating’ is left undefined and is not necessarily known to all legal systems. To some extent, this is to be expected. UNCLOS as a widely ratified instrument intended for universal adoption could not possibly spell out in detail a crime capable of direct translation into every conceivable national legal system. At best it could set the parameters within which States could validly define and punish acts of piracy. The ways in which States incorporate the offence of piracy into their national law will vary widely. There is no single right way to conduct the exercise, and it must always be done within the broader context of

¹⁶ SC Res. 1814, 15 May 2008; SC Res. 1816, 2 June 2008; SC Res. 1838, 7 October 2008; SC Res. 1846, 2 December 2008; SC Res. 1851, 16 December 2008; SC Res. 1897, 30 November 2009; SC Res. 1918, 27 April 2010; SC Res. 1950, 23 November 2010; SC Res. 1976, 11 April 2011; SC Res. 2020, 22 November 2011; SC Res. 2077, 21 November 2012; SC Res. 2125, 18 November 2013; SC Res. 2184, 12 November 2014; SC Res. 2446, 10 November 2015; SC Res. 2316, 9 November 2016; SC Res. 2383, 7 November 2017; SC Res. 2442, 6 November 2018; and *Statement by the President of the Security Council*, UN Doc. S/PRST/2010/16, 2010. On the decline of Somali piracy see: *Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia*, UN Doc. S/2015/776, 2015, at 3.

¹⁷ However, the Security Council has noted that acts constituting piracy could also be covered by offences under Art. 3 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, 1678 UNTS 201. See e.g.: SC Res. 2020, 22 November 2011, § 13 of preamble; Geiß and Petrig, *Piracy and Armed Robbery at Sea*, supra note 14, at 153–65. Somali piracy, based on ransoming hostages, may also violate Art. 1 International Convention against the Taking of Hostages 1979, 1316 UNTS 205.

¹⁸ SC Res. 2316, 9 November 2016, § 5 of preamble.

national criminal law in order to be coherent with other aspects of that law. In most cases, the UNCLOS provisions on piracy will be incorporated into national criminal law by passing laws implementing Articles 100 to 107 of UNCLOS with necessary modifications to suit the relevant national system. Nonetheless, a number of national legal systems have adopted national laws that use the UNCLOS definition with only minimal amendments.¹⁹ This suggests the theoretical problems in applying the UNCLOS text directly in concrete criminal cases may be somewhat overstated. The ‘primary’ offence described in Article 28F is contained in sub-paragraph (a). This offence has a series of elements which must be met in order for an offence of piracy to be made out. The offence of piracy thus requires:

- (1) any illegal act of violence, detention, or depredation;
- (2) for private ends;
- (3) from a private ship against another ship (which could be a non-private ship such as a warship); and
- (4) occurring on the high seas or in a place outside the jurisdiction of any State.

These are addressed in turn below.

A. An Illegal Act of Violence, Detention or Depredation

First, piracy requires an ‘illegal’ act or acts ‘of violence or detention, or any act of depredation’ (the latter usually being defined as plunder, pillage, robbery or damage).²⁰ Despite the reference to ‘acts’, a single prohibited act can constitute piracy.²¹ Thus piracy may be made out by proving an act of: violence, detention, or robbery. Each of these potentially piratical acts should be construed separately and not cumulatively. One should note that the word ‘violence’ is wide enough to cover any illegal act of force and thus it does not have to be of a particular severity or result in a particular level of physical injury or damage. Further, ‘detention’ operates as an autonomous concept and requires no violence per se. Thus, in a situation where the crew do not resist and there is no physical violence by the pirates, but the crew is nevertheless ‘detained’ by being locked in a compartment, this first element would be made out. An act of either violence or detention alone is sufficient: no robbery need be intended. Conversely, piracy may be committed through robbery

¹⁹ E.g. s 369(1), Merchant Shipping Act 2009 (Kenya); s 51 Crimes Act 1914 (Australia).

²⁰ E.g. *Oxford English Dictionary* (2nd ed, Oxford: Oxford University Press, 1989).

²¹ Geiß and Petrig, *Piracy and Armed Robbery at Sea*, supra note 14, at 60.

without violence or detention where, for example, pirates come aboard a vessel undetected in order to steal loose valuables.

Some ambiguity was introduced when the qualification ‘illegal’ was inserted into the earlier wording of the Harvard Draft Convention by the International Law Commission.²² The best view is either that this serves to emphasise that the act must ‘be dissociated from a lawful authority’ or is ordinarily left to the national law of the prosecuting State.²³ For a prosecution before an international court, the former consideration is obviously the more important. It opens the important possibility that where an act of violence, detention, or depredation is for some reason lawful in accordance with the flag State law applicable on either the alleged pirate vessel, or the alleged victim vessel, then it cannot be defined as piratical. Consider the following example. Imagine two yachts meet at sea and a person from one (yacht A) is invited aboard the other (yacht B) by its master. Assume then that the master of yacht B, threatens the person invited aboard from yacht A with a knife. If the person from yacht A reacts in self-defence and breaks the arm of the master of yacht B, this is not an illegal act of violence because it was an act carried out in lawful self-defence. The example described would thus not constitute piracy.

B. *Private Ends*

Second, the relevant illegal acts must be ‘committed for private ends by the crew or the passengers of a private ship or a private aircraft’. The key concepts here are threefold. The first two relate to the ‘two ship’ element of the offence discussed below. These are: (a) that piracy must be committed from a *private* vessel (UNCLOS by definition excludes the possibility of warships or government vessels committing piracy *unless their crew have mutinied*);²⁴ and (b) that piracy involves the crew or passengers of that private vessel committing the piratical acts against a second victim vessel or persons or property aboard (as discussed further below). Thirdly, and contentiously, piratical acts must be ‘committed for private ends’. There are two views as to the meaning of this phrase. Some authors have maintained that this requirement excludes all acts committed with political motives from being piratical; others have argued that

²² M. McDougal and W. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962), at 811; Rubin, *The Law of Piracy*, at 366–7.

²³ M. Nordquist, S. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. III (Martinus Nijhoff, 1995), at 201.

²⁴ Art. 102, UNCLOS. See further D. Guilfoyle, ‘Article 102’ in Proelß (ed), *The United Nations Convention on the Law of the Sea*, (Oxford: Hart Publishing, 2017) at 744–746.

all acts of violence that lack state sanction are acts undertaken for private ends.²⁵ The question then is whether the determining factor in judging ‘private ends’ should be the subjective motivation of the pirate (contrasting the idea of ‘private ends’ with ‘political purposes’) or whether their acts are objectively sanctioned by a State (contrasting ‘private ends’ with ‘public authority’). The question is returned to below (in section 6) in relation to challenges in the interpretation and application of the crime, but it is worth noting that in the few cases where national courts have been required to rule on the issue in criminal cases they have consistently upheld the proposition that unlawful violence on the high seas cannot be justified or excused from being piracy on the basis that it was committed with a political motive.²⁶ This approach would seem sensible. It is not apparent why the law of piracy should include, in effect, a defence that would excuse unlawful and dangerous acts on the high seas because they advance a political agenda. However, we should nonetheless note that some incidents of violence at sea which were dealt with only at the diplomatic level - such as the *Santa Maria* in 1961- were assessed and analysed at the time by reference to a possible exception for actions in the course of civil war ‘insurgency’ (discussed further in Section 6).²⁷

C. The Two Ship Rule

Third, the act of piracy must be directed either ‘against another ship or aircraft, or against persons or property on board such ship or aircraft’ (in relation to events on the high seas) or ‘against a ship, aircraft, persons or property’ (in relation to events occurring in ‘a place outside the jurisdiction of any State’). This is frequently described as the ‘two ship rule’: generally piracy requires that

²⁵ Geiß and Petrig, *Piracy and Armed Robbery at Sea*, supra note 14, at 61; see further Y. Tanaka, *The International Law of the Sea* (2nd ed, Cambridge: Cambridge University Press, 2016), at 380-1.

²⁶ Hof van Cassatie van België/Cour de cassation de Belgique (Court of Cassation of Belgium), *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, 19 December 1986 (1988) 77 ILR 537, 540; and *Institute of Cetacean Research v. Sea Shepherd Conservation Society* (725 F 3d 940 (9th Cir. 2013)), 944. Civil proceedings in some older insurance law cases have occasionally held that motives are the distinguishing factor in assessing ‘private ends’. See: *Republic of Bolivia v. Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 and *Banque Monetaica and Caystuki v. Motor Union Insurance Co Limited* (1923) 14 Lloyd’s Law Reports 48 as discussed in Peter MacDonald Eggers, ‘What is a Pirate?: A Common Law Answer to an Age-Old Question’ in Douglas Guilfoyle (ed), *Modern Piracy: Legal Challenges and Responses* (Cheltenham 2013), at 263-5. These cases did not however involve determining the criminal liability of individuals and should be treated with caution.

²⁷ On the *Santa Maria* (which was not piracy as it did not meet the two ship rule), see inter alia, the debate in the UK House of Commons in HC Deb 24 January 1961 vol. 633 cc32-5.

there be two vessels involved – the pirate vessel and a victim vessel. The alternative, regarding acts committed *from a private vessel* against persons or property outside the jurisdiction of any State, is considered below (at 3.D).

Situations involving illegal or violent conduct on the high seas in which there is only one ship involved – for example, where passengers or crew within a vessel mutiny and illegally seize control of that vessel – are not considered piracy under UNCLOS or, indeed, Article 28F of the Protocol. Such conduct is nevertheless likely to be an offence under some other law, for example, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).²⁸ Under the SUA Convention, for example, state parties agree that '[a]ny person commits an offence if that person unlawfully and intentionally . . . seizes or exercises control over a ship by force or threat thereof or any other form of intimidation'; it is a further offence to injure or kill anyone in the course of so doing.²⁹ The SUA Convention was drafted in the wake of the *Achille Lauro* incident in which passengers hijacked a vessel and in the course of attempting to intimidate the government of Israel, killed a hostage aboard.³⁰ Of course, the SUA Convention binds only those States party to it and has no direct application under the Court's statute. One should note that while piracy is subject to universal jurisdiction as a matter of customary international law most 'terrorist' offences under treaties are subject only to some form of 'prosecute or extradite' obligation, which applies only as between those States which have ratified the relevant treaties.³¹

D. 'On the High Seas' or 'Outside the Jurisdiction of Any State'

Finally, piratical acts must take place 'on the high seas' or in 'a place outside the jurisdiction of any State'. For the purposes of the offence of piracy in Article 28F paragraph (a)(i), the relevant acts must take place on the 'high

²⁸ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, 1678 UNTS 201 (SUA Convention) as amended by the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21.

²⁹ Art. 3(1)(a) and (g), SUA Convention.

³⁰ See generally: LA McCullough, 'International and Domestic Criminal Law Issues in the *Achille Lauro* Incident: A Functional Analysis' 36 *Naval Law Review* (1986), 53–108; M. Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety' 82 *American Journal of International Law* (1988), 269–310.

³¹ See e.g. Arts 6(4), 7 and 10, SUA Convention and further discussion in: Douglas Guilfoyle, 'Piracy and Terrorism' in Panos Koutrakos and Achilles Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Oxford, 2013), at 50–1.

seas'. It is regrettable the term is not defined in the Protocol as it might give rise to the impression that piracy can only be committed outside waters under national jurisdiction. This is not so. Under UNCLOS, the provisions of the law sea relating to piracy apply not only to the high seas but to all maritime areas outside national waters (that is, internal waters, territorial seas and archipelagic waters)³² including the contiguous zone and Exclusive Economic Zone (EEZ).³³ This follows from the fact that the EEZ is not a zone in which a coastal State enjoys sovereignty, merely certain sovereign rights; conversely, a variety of high seas freedoms and powers (though not all of them) enjoyed by the international community generally continue to operate in the EEZ.³⁴ Again, it is worth noting that the UNCLOS rules on piracy are accepted as stating customary international law;³⁵ therefore they could be taken into account in interpreting the Protocol under Charter Article 31(1) (c) on the law applicable before the Court.

A consequence of the high seas requirement is that acts otherwise capable of constituting 'piracy' but which take place within a States' internal waters, territorial sea or archipelagic waters are not acts of piracy under international law. Such acts of violence, detention or depredation between vessels are matters for the national law of the relevant coastal State, and the flag State, to judge according to their own legislation and are not matters of international concern or universal jurisdiction. The term 'armed robbery at sea' is usually used by the International Maritime Organisation (and more recently by the UN Security Council) to refer to such acts of violence against shipping within the territorial sea or in ports, even if no 'robbery' occurs.³⁶

The reference to 'other place[s] outside the jurisdiction of any State' was included in order to cover acts 'committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory.'³⁷ In

³² On the legal status of such waters see further: Arts. 2, 8 and 49, UNCLOS; and Tanaka, *The International Law of the Sea*, Chapters 2, 3 and 5; D. Rothwell and T. Stephens, *The International Law of the Sea* (2nd ed, Hart, 2016), Chapters 2, 3 and 8.

³³ Art. 58(2), UNCLOS.

³⁴ Tanaka, *supra* note 32, Chapter 4; Rothwell and Stephens, *supra* note 32, Chapter 4.

³⁵ Guilfoyle, Rubin, *supra* note 14.

³⁶ See International Maritime Organization, 'Piracy and Armed Robbery Against Ships', available at: www.imo.org/en/OurWork/Security/Piracy/ArmedRobbery/Pages/Default.aspx; and e.g., preamble SC Res 2316, 22 November 2011, preamble and §§ 1, 4, 6, 7, 12, 13, 14, 18, 27, 28, 30, 33. Compare Art. 1 (2)(a), Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (the definition of 'armed robbery against ships' includes acts against a single ship, and need not involve robbery).

³⁷ *Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea*, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 282 (Art. 39).

1980 and 1982 during the UNCLOS negotiations Peru proposed the deletion of these words as unnecessary given that, as discussed above, the law of piracy clearly applied to the EEZ and thus areas within State jurisdiction.³⁸ As the Peruvian proposal was rejected it might be inferred that the Conference considered the *terra nullius* argument still had some merit (or considered the issue insufficiently serious to merit the amendment).³⁹ This provision could apply in, for example, the unlikely event that a new island was created through a volcanic eruption, which was not claimed by, and thus not under the jurisdiction of, any State. If a vessel attacked persons or property ashore (for example, shipwrecked passengers) this would constitute piracy. It is also conceivable that that this provision could bring within the definition of piracy a mutiny of the crew against the master of a vessel which occurred in such a place.⁴⁰ Otherwise it could only encompass acts on the shores of the unclaimed sector of Antarctica (sovereign claims over the rest of the landmass are 'frozen' but not extinguished by the Antarctic Treaty).⁴¹

4. THE OFFENCE OF VOLUNTARY PARTICIPATION IN A PIRATE CRAFT

Article 28F(b) of the Protocol (and Article 101(b) of UNCLOS) define a secondary type of piracy offence – one that does not require the actual commission of an offence in the sense of Article 28F, paragraph (a). This offence focuses upon presence in, and participation in the running of, a 'pirate boat, ship or aircraft'. An oddity of Article 28F(b) is that this critical phrase is not defined. Presumably the intention was implicitly to rely upon the definition found in Article 103 UNCLOS, and recognised as custom on the basis outlined above. Article 103 of UNCLOS provides:

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101 [the principal definition of piracy]. The same

³⁸ Nordquist, Nandan and Rosenne (eds), *United Nations Convention on the Law of the Sea 1982*, at 183–4. See the documents reproduced in: Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents*, vol. V (Oceana Publications, 1984), at 66, 69 and 73.

³⁹ R. Churchill, 'Piracy Provisions of the UN Convention on the Law of the Sea' in Koutrakos and Skordas (eds.) *The Law and Practice of Piracy at Sea*, at 20.

⁴⁰ Nordquist, Nandan and Rosenne (eds), *United Nations Convention on the Law of the Sea 1982*, at 201.

⁴¹ *Ibid.*; see further: Bernard H. Oxman, 'The Antarctic Regime: An Introduction' 33 *University of Miami Law Review* (1978) 285–97 at 294; Art. 4 Antarctic Treaty 1959, 402 UNTS 71.

applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

For the reasons discussed above, this must be taken to be the applicable definition at customary international law and is therefore capable of application under Article 31(1)(c) of the Statute to interpret Article 28A5(b) of the Protocol. The reason for the addition of the word 'boat' is unclear, but it may be intended to cover small boats working either on their own or as part of a team with a pirate 'mothership' as was common during the Somali piracy crisis of 2008–13.

On this basis the following may be considered a pirate vessel:

- the vessel in which the pirates travel to a place to commit an act of piracy, or travel from the place where they have committed an act of piracy;
- a vessel in which people are travelling, where it is believed, on reasonable grounds, that the people in that vessel are intending to commit an act of piracy; and
- any vessel which the pirates have already taken through an act of piracy and which they are still in control of – most generally by still being aboard that vessel. However, once a pirated vessel is no longer in the control of pirates, it ceases to be a pirate vessel.

Some important issues for maritime law enforcement agents, prosecutors, and judges to consider in applying this definition include:

- who can be treated as a 'person in dominant control' and what are the indicators of this state of affairs;
- how does the relevant jurisdiction deal with the issue of 'intent' / 'intended'; and
- which factors may prove or disprove whether a pirated vessel was still under the dominant control of those guilty of its initial pirating at the time of its seizure by maritime law enforcement agents.

These questions are returned to below. On any approach, however, under this provision it is plain that persons not directly involved in the commission of illegal acts of violence, detention or depredation may also be held liable for piracy. It may criminalise some of those who support the capacity of others to commit piracy – for example, deckhands or cooks on board a pirate ship, who have joined the ship knowing it is a pirate ship.

The offence created involves 'any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft'. Several of the key elements of this offence can

only be properly understood in light of general criminal law concepts (such as complicity or common purpose) normally supplied by the 'general part' of criminal law. While a range of 'modes of responsibility' are acknowledged in Article 28N of the Protocol they are not further defined and will require elucidation by the Court.⁴²

To be convicted of an offence created on the basis of Article 28F(b), the elements contained in the Article 103 UNCLOS definition of a pirate vessel need to be established. Thus the prosecution would generally be required to establish (to the requisite standard of proof) that each of the accused were:

- (a) involved in an act, severally or jointly, of;
- (b) voluntary;
- (c) participation;
- (d) in the operation of that ship; and
- (e) that ship
 - (i) has been used to commit any illegal act of violence or detention, or any act of depredation, committed for private ends by its crew or its passengers and has remained under the control of the persons who committed those acts; or
 - (ii) is intended by the person in dominant control to be used for the purpose of committing, for private ends, any illegal act of violence, detention or depredation.

In the present context, neither the Protocol nor UNCLOS provides a specific definition of 'voluntary participation' in relation to piracy (although we might presume it to have a volitional or intentional element), or any precise detail as to what acts constitute 'operation' of a vessel. Similarly, any analysis of whether a person had 'knowledge of facts making [the vessel] a pirate ship' will to a large extent depend upon the way in which the Court defines the level of criminal responsibility it considers most closely analogous to 'knowledge'. The words 'act of voluntary participation' should require at the least the participatory presence of each of the pirates arrested on board a pirate ship. In some circumstances it will not be justified to convict all persons found on board a pirate ship on the basis that they are all pirates. Some act of participation by each of the pirates, whether by way of firing or holding a

⁴² See generally: G. Fletcher, 'The Theory of Criminal Liability and International Criminal Law' 10 *Journal of International Criminal Justice* (2012), 1029–44; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012); D. Guilfoyle, *International Criminal Law* (Oxford: Oxford University Press, 2016), Chapter 12; and A. Fernando, 'An insight into piracy prosecutions in the Republic of Seychelles' 41 *Commonwealth Law Bulletin* (2015), 173.

weapon, jettisoning goods, manoeuvring the ship, taking care of supplies or being on the lookout with binoculars, for example would suffice.⁴³

An appropriate source of law on both questions might be Article 30 of the International Criminal Court Statute. Article 30 provides that a person has intent if: '(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.' In relation to knowledge, Article 30 provides: "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.' On such an approach it would be enough to intentionally engage in the operation of a vessel, with awareness of the fact either that:

- (a) it has been used to commit an act of piracy and remains under the control of the persons who committed those acts; or
- (b) it is intended by the person in dominant control of it to be used for the purpose of committing an act of piracy.⁴⁴

Thus if the prosecution were to proceed based on Article 28F(b), they will have to prove either that at the time of the act of voluntary participation that the ship had already been used for a pirate attack in the past (and remained under the control of the same group of pirates) or that it was intended to be used for such an act in the future. On the first possibility, a ship that had been used by one set of pirates for purposes of piracy and sold off to another set of pirates (but which has not yet been used in a pirate attack) would not be a pirate vessel for the purposes of a prosecution under Article 28F(b). The prosecution must prove not only that a vessel had been used to commit one or more of the acts referred to in Article 28F(a)(i) or (ii) but also that it remained under the control of the persons who committed those acts at the time of the accused's act of voluntarily participation in the operation of that vessel.

On the alternative possibility, the vessel was intended by the person in dominant control to use it for the purpose of committing an act of piracy in the future, it would suffice to prove that the accused had knowledge of that intent at the time he or she voluntarily participated in the operation of the ship.

Similarly, if the suspect had voluntarily participated in the operation of the ship, but without knowledge that the ship had been or was to be used for the

⁴³ Such acts may serve as evidence in national jurisdictions of participation in a joint enterprise or in a plan with a common criminal intention. See e.g.: *R v. Houssein Mohammed Osman & Ten Others* (CR 19/2011), Supreme Court of Seychelles, 12 October 2011, § 29, available online at: www.unicri.it/topics/piracy/database/.

⁴⁴ Art. 103, UNCLOS.

purpose of committing acts of piracy, that person may not necessarily be made liable. Thus, if that person had voluntarily participated in the operation of a ship with the intention of carrying out some other illegal purpose, such as smuggling of arms, narcotics or contraband, then his or her conduct would not fall within Article 28F(b).

5. THE OFFENCE OF INCITING OR INTENTIONALLY FACILITATING AN ACT OF PIRACY

The final type of piracy offence in Article 28F(c) (also found in Article 101(c) of UNCLOS) is the offence of ‘any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)’.

This could criminalise the acts of those who organise or finance pirate raids,⁴⁵ including their activities ashore, as the geographical limitations of Article 28F(a) of the Protocol - or indeed of Article 101 (a) of UNCLOS - are not reproduced here.⁴⁶ It was noted by the Netherlands in 1956 that the International Law Commission’s drafting – in omitting reference to the high seas – would allow this provision to apply elsewhere.⁴⁷ The International Law Commission did not respond to the suggestion that the drafting be made consistent to prevent such a result.

A number of commentators have therefore taken the view, based on its plain language, that Article 101(c) of UNCLOS could apply to acts committed ashore.⁴⁸ The same logic would apply to Article 28F(a). This contention has leant some strength by the idea that Article 101 sets out a general definition of piracy in international law applicable beyond the Convention (as described in

⁴⁵ See e.g.: SC Res. 2316, 9 November 2016, § 19 and also §§ 4, 5, 11, 18, 21–3 and §§ 6 and 21 of preamble.

⁴⁶ See: International Maritime Organization, ‘Piracy: Elements of National Legislation Pursuant to the United Nations Convention on the Law of the Sea, 1982, Submitted by the Division for Ocean Affairs and Law of the Sea (UN-DOALOS)’, IMO Doc. LEG 98/8/3 (2001), noting these provisions ‘do not explicitly set forth any particular geographic scope’.

⁴⁷ *Comments by Governments on the Provisional Articles Concerning the Régime of the High Seas and the Draft Articles on the Régime of the Territorial Sea Adopted by the International Law Commission at Its Seventh Session*, UN Doc. A/CN.4/99 and Add. 1–9, 1956, reproduced in: ILC Yearbook (1956), vol. II, at 62, 64. The role of the International Law Commission in drafting the relevant treaty law provisions was discussed above at notes 7 and 10.

⁴⁸ A. Murdoch, ‘Recent Legal Issues and Problems Relating to Acts of Piracy of Somalia’ in Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (Leiden 2011), at 157–8; Geiß and Petrig, *Piracy and Armed Robbery at Sea*, at 64. Arguing the contrary: J. Bellish, ‘A High Seas Requirement for Inciters and Intentional Facilitators of Piracy Jure Gentium and Its (Lack of) Implications for Impunity’, 15 *San Diego International Law Journal* (2013), 115–62.

para. 1 above). At least one appellate court in the United States has thus held that acts of aiding and abetting piracy need not occur on the high seas and are subject to universal jurisdiction even when committed on land.⁴⁹

As is the case for the Article 101(b) offence, proof of the elements of this offence will be subject to the definitional approach taken to concepts such as ‘incite’ or ‘facilitate’. For example, the term ‘facilitate’ may in the relevant jurisdiction not be a term of legal art at all use will need to be made of other modes of criminal liability such as ‘aid and abet’, ‘conspire’, ‘incite’, or ‘procure’.

6. CHALLENGES IN THE INTERPRETATION AND APPLICATION OF THE CRIME

A number of possible challenges in interpreting and applying the crime of piracy within the framework of the Statute, as amended by the Protocol, have been discussed above. Principally these arise from the absence of definitions of key concepts such as that of a pirate boat, ship or aircraft which – in a law of the sea context – are normally supplied by other treaty provisions. The most likely technique for resolving such ambiguities would be to treat the relevant provisions of UNCLOS as stating customary law and as thus being capable of application under Article 31(1)(c) of the Statute. (See the discussion in sections 3.3 and 4, above.)

The remaining possible challenges are several. The first is the definition, as a matter of criminal law, of concepts such as ‘voluntary participation’, knowledge, intent, inciting and facilitating. Normally such concepts would be filled in by the detail of the relevant national legal system. The Court will only be able to fall back on the compendium of undefined concepts contained in Article 28N of the Protocol. It may be that in giving meaning to Article 28N the Court will have to rely on the concept of general principles of law derived from national legal systems (‘general principles’), as acknowledged under Article 31(1)(d) of the Statute. General principles have in the past been relied upon as a secondary source of law in deriving or deducing the elements of international crimes where no other source of international law stipulates their content.⁵⁰ The second is the role of universal jurisdiction and powers of arrest over pirate vessels on the high seas. These should not be of direct concern to

⁴⁹ *United States v. Ali*, Case No. 12–3056, US Court of Appeals, District of Columbia Circuit, Decided 11 June 2013; overruling *United States v. Ali*, Criminal Case No. 11–0106, Memorandum Opinion of 13 July 2012, 885 F.Supp. 2d 17 (2012).

⁵⁰ Guilfoyle, *International Criminal Law*, at 6–7; see for example, Article 21(1)(c), Rome Statute of the International Criminal Court 1998, 2187 UNTS 3.

the court insofar as the Court is one of limited jurisdiction and for the reasons discussed above (in section 2) the concept of universal adjudicative jurisdiction will not be relevant in proceedings before the Court. There is the possibility a defendant might claim they were arrested on the high seas in some manner in violation of international law (such as Articles 105 and 110, UNCLOS on powers of arrest and prosecution over pirates) and therefore they should not be prosecuted. These are complex issues of marginal relevance to the interpretation of the current Statute and will not be discussed in detail here. Briefly, though, one should note there is a possible textual argument arising under Article 105 UNCLOS that only the flag State of the government vessel which captures a pirate should be able to prosecute that pirate.⁵¹ On its face this would preclude transfer of a suspect to a regional court. However, the argument is unsupported by State practice. During the Somali piracy crisis numerous States prosecuted pirates transferred into their custody by foreign governments' warships.⁵² This practice conclusively suggests that the drafting of UNCLOS was not understood by the parties to exclude or replace the universal jurisdiction of every State to prosecute a pirate subsequently found within its territory.⁵³

Finally, as noted briefly above (at 3.B), a key controversy in interpreting UNCLOS has been whether the words 'for private ends' exclude politically motivated violence from being piracy. The relevance of the point is that if this is the case, political protestors - even those who commit life-endangering acts of violence at sea - may have a meretricious defence to a charge of piracy. Conversely, a person *prima facie* guilty of extreme acts of violence constituting piracy may claim as a bar to their prosecution that they had underlying political motives (such as striking back at an international community which has pillaged their fishing grounds).⁵⁴ Debate over the correct interpretation of

⁵¹ See discussion at note 14.

⁵² See: *Report of the Secretary-General on the Situation with respect to Piracy and Armed Robbery at Sea off the Coast of Somalia*, UN Doc. S/2016/843, 7 October 2016, paras. 38–43; D. Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options' 10 *Journal of International Criminal Justice* (2012), 767–96 at 791–2; S. de Bont, 'Murky Waters: Prosecuting Pirates and Upholding Human Rights Law' 7 *Journal of International Law and International Relations* (2011) 104–45 at 113 and 133–40; and Eddy Somers, 'Prosecution of Alleged Pirates in the 1982 Law of the Sea Convention: Is Outsourcing the Solution?' 47 *Revue Belge de Droit International / Belgian Review of International Law* (2014), 111–28.

⁵³ Art. 31(3)(b), Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

⁵⁴ An argument occasionally made by Somali pirates but not, to our knowledge, in court proceedings. See e.g.: D. Guilfoyle, 'Somali Pirates as Agents of Change in International Law-making and (2012) 1 *Cambridge Journal of International and Comparative Law* (2012), 81–106 at 82–4.

the words 'for private ends' tends to become bogged down in unproductive debate over the meaning of the historical sources; it is thus necessary to provide a reasonably detailed account of their origins as part of the definition of piracy.

The words 'for private ends' have a complex and contested history in the definition of piracy, but do not enjoy a particularly long pedigree.⁵⁵ Their earliest use in any textbook definition in English appears to date to 1892, when they were used in Joel Prentiss Bishop's influential work on criminal law in the phrase 'for gain or other private ends of the doers' seemingly as a synonym for piratical intent to plunder or rob.⁵⁶ No earlier sources or case law use the term nor any meaningful equivalent.⁵⁷ The phrase appears, without any explanation of its origin, in the League of Nations Committee of Experts Draft Provisions for the Suppression of Piracy of 1926.⁵⁸ It was either independently invented or (more likely) lifted from Bishop's textbook. Article 1 of the League's Draft Provisions provided:

Piracy occurs only on the high sea and consists in the commission for private ends of depredations upon property or acts of violence against persons. It is not required [...] that [such] acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.

The meaning of this provision, however, is not obvious on its face. The words 'purely political object' were intended to be construed narrowly. As the Chairman of the League Committee put it (in an uncontested summation of the position of the drafter):

⁵⁵ See generally: Guilfoyle, 'Piracy and Terrorism'.

⁵⁶ See J. Bishop, *New Commentaries on the Criminal Law*, vol. I (8th ed, TH Flood and Co, 1892), 339, § 553 and vol. II, 617, § 1058. The phrase does not appear in previous editions (under different titles). The author cites two authorities for his definition: *United States v. Palmer*, 16 U.S. 610 (1818); and *United States v. Terrell*, Hemp 411. The former, at least, does not use the phrase 'for private ends'. We have been unable to locate the latter. On Bishop's influence as a scholar see CS Bishop, 'Joel Prentiss Bishop. LL.D.' (1902) 36 *American Law Review* 1–8; he was quoted internationally on piracy, e.g. in G. Schlikker, *Die Völkerrechtliche Lehre von der Piraterie und den ihr Gleichgestellten Verbrechen* (Buchdruckerei R. Noske, 1907), at 43.

⁵⁷ The copious review of classical authorities in the eighteen-page footnote in *United States v. Smith*, 18 U.S. 153 (1820), 163–80 does not contain the English phrase or any equivalent in French or Latin. The quotes tend to focus on either the lack of state sanction or intention to plunder (*depredendi causa, pour piller*, etc.).

⁵⁸ League of Nations Committee of Experts, 'Piracy', at 228–9.

In the general case, whether the crime of piracy has been committed follows from the character of the acts. If acts of violence or depredation are committed, there is piracy, regardless of the motives for those acts. Nevertheless, the rapporteur has admitted an exception for acts committed for a purpose which is political and *solely political*.⁵⁹

The concrete case that this exception was designed to cover was a particular historical difficulty: the status of insurgents in civil wars who attacked foreign shipping on the high seas. Article 4 of the League's Draft Provisions thus stated: 'Insurgents committing acts of the kind mentioned in Article 1 must be considered as pirates *unless* such acts are inspired by *purely political* motives.'⁶⁰ In case law at the time insurgent forces in a civil war could take to the seas to attack vessels of their own nationality (or of the government they sought to overthrow) and reasonably expect to be treated by third States into whose power they might fall either as belligerents or as political asylum seekers, but not as pirates.⁶¹ Such acts might be considered 'purely political'. Where insurgents attacked foreign shipping, it was well known that they risked prosecution as pirates. This is important because attacking foreign shipping to fund an insurgency could be thought political; in the minds of the League Committee, however, it would seem such acts were not necessarily *purely political*.

The 1932 Harvard Research definition of piracy also adopted the words 'for private ends' to exclude certain cases from being piracy. Despite the drafters acknowledging that '[s]ome writers assert that such illegal attacks on foreign commerce [on the high seas] by unrecognized revolutionaries are piracies in the international law sense; and [that] there is even judicial authority to this effect', they preferred the view that such cases were governed by a special rule of the laws of war, not the law of piracy.⁶² Nonetheless, it is clear that their use

⁵⁹ 'Minutes of the League of Nations Committee of Experts for the Progressive Codification of International Law, Second Session, 14th Meeting, 20 January 1926' in: S. Rosenne, *League of Nations Committee of Experts for the Progressive Codification of International Law (1925–8)*, vol. 1 (Oceana Publications, 1972), at 124. Authors' translation and emphasis ('D'une manière générale, c'est d'après le caractère des actes que l'on peut déterminer le crime de piraterie. Si des actes de déprédation ou de violence sont commis, il y a piraterie, quel que soit le motif de ces actes. Toutefois, le rapporteur a admis une exception pour les actes commis dans un dessein politique et uniquement politique').

⁶⁰ League of Nations Committee of Experts, 'Piracy', at 228 (emphasis added).

⁶¹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 33–7. See for a practical example the acquittal of Mohamed Saad before British Courts in *Regina v. Tunkoo Mohamed Saad and ors* (1840) 2 Kyshe (Cr.) 18, discussed in Rubin, *The Law of Piracy*, 226–30.

⁶² Harvard Draft Piracy Convention, 857, see also 786; see further Guilfoyle, 'Piracy and Terrorism', 40–3.

of the words ‘for private ends’ was principally intended to exclude such cases from being covered by the definition of piracy and was not necessarily intended to have a wider effect.

The International Law Commission took the words ‘for private ends’ straight from the Harvard Research into its own Articles concerning the law of the sea, but its commentaries to the articles contain no explanation of the reasons for including the term or its intended meaning.⁶³ The International Law Commission rapporteur François, in speaking to his initial draft, made the point that requiring intention to rob (*animo furandi*) would overly narrow the definition, and he appeared to endorse the Harvard Research position that ‘it seems best to confine the common jurisdiction [over piracy] to offenders acting for private ends only’, thus excluding cases involving government warships or civil war insurgencies.⁶⁴ In International Law Commission debate on the draft article, some members of the Commission took the view that the words ‘for private ends only’ would be unduly narrowing and should be removed, but appeared to have in mind that the definition should include attacks by State vessels.⁶⁵ This view did not prevail.

Despite this rather ambiguous history, it is held by some commentators that the requirement that piracy be committed for ‘private ends’ means that any politically motivated acts cannot be piracy.⁶⁶ This was plainly not the view of the League of Nations Committee, and it is far from certain the authors of the Harvard Draft Convention necessarily intended to support such a broad proposition. An alternative view ‘is that any act of violence not sanctioned by State authority is one for “private ends”, the correct dichotomy being not “private/political” but “private/public”’.⁶⁷ It is submitted that this view is more

⁶³ International Law Commission, ‘Commentaries to the Articles Concerning the Law of the Sea’, 28 (Art. 39).

⁶⁴ International Law Commission, ‘Summary Records of the Meetings of the 7th Session’, ILC Yearbook (1955), vol. I, 40–1.

⁶⁵ *Ibid.*, 42–3 (comments of Mr. Amado and Mr. Krylov).

⁶⁶ McDougal and Burke, *The Public Order of the Oceans*, 822. See further B. Dubner and C. Pastorius, ‘On the Ninth Circuit’s New Definition of Piracy: Japanese Whalers v. the Sea Shepherd: Who are the Real Pirates (i.e. Plunderers)?’ 45 *Journal of Maritime Law and Commerce* (2015), 415–43, arguing against the conclusion that violent environmental protest can be piracy in *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, US Court of Appeals (9th Circuit), 725 F 3 d 940 (2013), 944.

⁶⁷ D. Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’ 59 *International and Comparative Law Quarterly* (2010), at 141–69, 143. See further M. Bahar, ‘Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations’ 40 *Vanderbilt Journal of Transnational Law* (2007), at 1–86, 30; Geiß and Petrig, *Piracy and Armed Robbery at Sea*, at 61. Note in particular the change in the French text from ‘buts personnels’ in Art. 15 High Seas Convention to ‘fins privées’ in Art. 101 UNCLOS.

consonant with the history of the codification efforts, which appear to have intended only a narrow exception consistent with the central idea that '[a]ccording to international law, piracy consists in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons.'⁶⁸

The latter approach is supported by both the *Castle John* case and *Institute of Cetacean Research v. Sea Shepherd* in which different national courts both held it was no defence to a charge of piracy that maritime violence was motivated by political (environmental) protest.⁶⁹ International practice now supports the view that politically motivated violence against civilians is in all circumstances unacceptable, and in the event of ambiguity in a treaty provision such as Article 28F this should clearly be the preferred interpretation.⁷⁰ As noted, historically, the private ends requirement existed only to exclude certain acts of insurgency or civil war from being considered piracy (strictly a question of the laws of war).⁷¹ The exception should thus be interpreted narrowly.

⁶⁸ League of Nations Committee of Experts, 'Piracy', at 223; quoted in Harvard Draft Piracy Convention, at 775.

⁶⁹ Hof van Cassatie van België/Cour de cassation de Belgique (Court of Cassation of Belgium), *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, 19 December 1986 77 ILR 537, (1988), 540; and *Institute of Cetacean Research v. Sea Shepherd Conservation Society* (725 F 3d 940, 944 (9th Cir. 2013)). See further Tanaka, *The International Law of the Sea*, at 380–1.

⁷⁰ Guilfoyle, *Shipping Interdiction*, at 38–40; compare G. Gidel, *Le Droit International Public de la Mer: Le Temps de Paix*, vol. I (1932), at 326.

⁷¹ Guilfoyle, *Shipping Interdiction*, at 33 and 36–8; D. O'Connell, *The International Law of the Sea*, vol. II (Oxford: Clarendon Press, 1984), at 975–6; Gidel, *Le Droit International Public de la Mer*, at 320 and 324.