


2012

Implications of the UNCLOS definition of piracy on Seychelles prosecutions specifically addressing the incorporation of the definition of piracy in article 101 of UNCLOS and the implications for Seychelles piracy prosecutions

Randall Christopher Bray

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos

 Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Bray, Randall Christopher, "Implications of the UNCLOS definition of piracy on Seychelles prosecutions specifically addressing the incorporation of the definition of piracy in article 101 of UNCLOS and the implications for Seychelles piracy prosecutions" (2012). *War Crimes Memoranda*. 34.
https://scholarlycommons.law.case.edu/war_crimes_memos/34

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.



CASE WESTERN RESERVE
UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE ATTORNEY GENERAL OF SEYCHELLES

ISSUE: IMPLICATIONS OF THE UNCLOS DEFINITION OF PIRACY ON SEYCHELLES PROSECUTIONS

SPECIFICALLY ADDRESSING THE INCORPORATION OF THE DEFINITION OF PIRACY IN ARTICLE 101 OF
UNCLOS AND THE IMPLICATIONS FOR SEYCHELLES PIRACY PROSECUTIONS

Prepared by Randall Christopher Bray
J.D. Candidate, May 2013
Spring Semester, 2012

MEMORANDUM FOR THE ATTORNEY GENERAL OF SEYCHELLES

ISSUE:
THE IMPLICATIONS OF INCORPORATING THE UNCLOS DEFINITION OF PIRACY ON SEYCHELLES
PIRACY PROSECUTIONS.

TABLE OF CONTENTS

I. INTRODUCTION	1
A. SCOPE	1
B. SUMMARY OF CONCLUSIONS	2
i. The UNCLOS definition of piracy has been widely criticized for being narrow, confusing and ambiguous and defense attorneys may seize on this weakness to raise potentially successful defense strategies.	2
II. BACKGROUND	3
A. THE ELUSIVE DEFINITION OF PIRACY	3
B. PIRACY UNDER NATIONAL LAW	8
C. PIRACY UNDER INTERNATIONAL LAW	10
i. UNCLOS	10
ii. SUA	11
III. THE PROBLEM WITH UNCLOS	12
A. HISTORICAL ISSUES WITH UNCLOS	12
B. ARTICLE 101: DEFINITION OF PIRACY	17
i. An illegal act involving violence, detention or depredation	18
ii. Occurring on the high seas	22
iii. Committed for private ends	25
iv. Involving two ships or aircraft	27
C. ARTICLE 103: DEFINITION OF A PIRATE SHIP OR AIRCRAFT	28

IV. CONCLUSION	30
-----------------------------	----

TABLE OF AUTHORITIES

CASES

1. *In re Piracy Jure Gentium*, [1934] A.C. 586 (1934). 6
2. Republic v. Abdi Ali & Ten Others, Seychelles Supreme Court, Criminal Side No. 14 (2010) 19
3. Republic v. Houssein Mohammed Osman & Ten Others, Seychelles Supreme Court, Criminal Side No. 19 (2011) 19
4. Republic v. Mohamed Ahmed Ise & Four Others, Seychelles Supreme Court (2011) 19
5. U.S. v. Hasan, 747 F. Supp. 2d 599, 632- 633 (E.D. Va. 2010)..... 6
6. U.S. v. Said, 757 F. Supp. 2d 554, 567 (E.D. Va. 2010)..... 4
7. *U.S. v. Smith*, 18 U.S. 153 (1820) 5

TREATISES AND AGREEMENTS

8. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), opened for signature Mar. 10, 1988, 1678 U.N.T.S. 22 (entered into force mar. 1, 1992)..... 2
9. Convention on the High Seas, adopted April 29, 1958, 450 U.N.T.S. 11 13
10. United Nations Convention on the Law of the Sea (UNCLOS), opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) 1

LAW REVIEWS AND ARTICLES

11. Alexander Rahmonov, *Piracy Off the Coast of Somalia: In Search of the Solution*, (2011). 3
12. Barry Hart Dubner, Karen Greene, *On the Creation of A New Legal Regime to Try Sea Pirates*, 41 J. Mar. L. & Com. 439 (2010)..... 14
13. Barry Hart Dubner, *On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof*, 42 J. Mar. L. & Com. 71 (2011). 8

14. Edwin D. Dickinson, <i>Is the Crime of Piracy Obsolete?</i> , 38 Harv. L. Rev. 334 (1925)	4
15. Harvard Research in International law, <i>Draft Convention of Piracy with Comments</i> , 26 Am. Of Int'l L. (1932).....	18
16. Joseph P. Isanga, <i>Troubled Waters: Combating maritime Piracy with the Rule of law Articles</i> , 59 Am. U. L. Rev. 1267 (2010).....	4
17. Lucas Bento, <i>Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish</i> , 29 Berkeley J. Intl. L. 399 (2011)	11
18. Malvina Halbertstam, <i>Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety</i> , 82 Am. J. Int'l. L. 269 (1988).	12
19. Rosemary Collins & Daud Hassan, <i>Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective</i> , 40 J. Mar. L. & Com. 89 (2009).	4
20. Tullio Treves, <i>Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia</i> , 30 Eur. J. Int'l L. 399 (2009).	3
21. William Crum McKinney, <i>United States v. Said & United States v. Hasan</i> , 62 S.C. L. Rev. 577 (2011).	7

BOOKS

22. Alfred P. Rubin, <i>The Law of Piracy</i> , 373 and 393(2006).	30
23. Barry H. Dubner, <i>The Law of International Sea Piracy: Developments in International Law, Volume 2</i> , 3-4 (1980).	1
24. Robin Geiss & Anna Petrig, <i>Piracy and Armed Robbery at Sea: The legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden</i> (2011).	1

UNITED NATIONS DOCUMENTS

25. S.C. Res 1918 ¶ 13, U.N. Doc S/RES/1918 (April 27, 2010).	8
26. S.C. Res. 1846, ¶ 5, U.N. Doc. S/RES/1846 (December 2, 2008).	24
27. S.C. Res. 1897, ¶ 5, U.N. Doc. S/RES/1897 (November 30, 2009).	11

INTERNATIONAL MARITIME ORGANIZATION DOCUMENTS

28. Int'l Maritime Organization, *Piracy: Review of national Legislation*, IMO Doc. LEG979..... 8
29. Int'l Maritime Organization, *Request for Information on National Legislation on Piracy*, IMO Doc. C_L2933 (December 23, 2008)..... 8

INTERNET URL

30. A History of the Third United Nations Conference on the Law of the Sea, [http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Third Conference](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Third%20Conference)..... 10
31. Arvid Pardo's speech to the United Nations General Assembly, November 1, 1967, http://www.un.org/depts/los/convention_agreements/texts/pardo_ga1967.pdf..... 10
32. Jeffrey Gettleman, Q. & A. *With a Pirate: We Just Want the Money*, <http://thelede.blogs.nytimes.com/2008/09/30/q-a-with-a-pirate-we-just-want-the-money/> (September 30, 2008)..... 27
33. Piracy Under International Law, <http://www.un.org/Depts/los/piracy/piracy.htm>. 11
34. The § Mayaguez, <http://www.usmm.org/mayaguez.html> 15
35. Timeline: Pirates, <http://www.infoplease.com/world/statistics/pirates-timeline.html>; (see also, Piracy Timeline – Pirates History, <http://www.famous-pirates.com/pirates-history/piracy-timeline/> 3

I. INTRODUCTION

A. Scope

This memorandum discusses the definition of piracy in international law as incorporated into Seychelles law, and the implications for Seychelles piracy prosecutions due to that approach.* Throughout the 20th Century world leaders have treated piracy as if it were solely a crime of the past. As piratical techniques have changed, this has repeatedly left important questions regarding piracy unanswered because the conventions and writings which have arisen, specifically the United Nations Convention on the Law of the Sea ("UNCLOS"),¹ have ignored piracy almost altogether.² In fact the approach taken by UNCLOS has not seriously been vetted since the early 20th century and many of those same questions still remain unanswered.³ This memorandum will explore and analyze the UNCLOS definition of piracy in comparison with parallel Articles of the Convention for the Suppression of Unlawful Acts Against the

* The Seychelles new piracy law incorporates the UNCLOS definition of piracy, rather than the broader provisions of SUA. The Attorney General would like to know the implications for the Seychelles piracy prosecutions of this approach.

¹ United Nations Convention on the Law of the Sea (UNCLOS), opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

² Barry H. Dubner, *The Law of International Sea Piracy: Developments in International Law, Volume 2*, 3-4 (1980).

³ Robin Geiss & Anna Petrig, *Piracy and Armed Robbery at Sea: The legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*. 38-41 (2011). (explaining that the Harvard Draft Convention on Piracy of 1932 produced an exhaustive list of piracy laws of the time and a report summarizing the doctrinal debate, and that this research was the basis for the piracy articles included in the United Nations Convention on the Law of the Sea of 1958, and that the text is largely unaltered in the United Nations Convention on the Law of the Sea of 1982).

Safety of Maritime Navigation (SUA), and the implications for the prosecution of international piracy in the courts of Seychelles.⁴

B. Summary of Conclusions

- i. The UNCLOS definition of piracy has been widely criticized for being narrow, confusing and ambiguous and defense attorneys may seize on this weakness to raise potentially successful defense strategies.**

Significant problems have been noted regarding the language used in the definition of piracy found in Article 101 of UNCLOS.⁵ Some of this is a result of the failure of the drafters of conventions and writings to update the statutory language in any material way since the early part of the 20th century. The perception of piracy by those tasked with codifying international law in the 20th Century seemed to be that piracy was a “historical phenomenon hardly in need of elaborate codification.”⁶ Simply put, the laws do not contemplate acts of piracy which include high speed vessels, night vision goggles and GPS systems.⁷ Some commentators have asserted that the law now in effect was “dated and moot” when it was adopted.⁸ Article 101 of UNCLOS defines piracy as; illegal acts of violence, detention “or any act of depredation,” directed on the high seas, committed for private ends, and involving only those actions undertaken

⁴ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), opened for signature Mar. 10, 1988, 1678 U.N.T.S. 22 (entered into force mar. 1, 1992).

⁵ Geiss, *supra* note 4, at 60.

⁶ Geiss, *supra* note 4, at 51.

⁷ Saeed Ahmed, High-Tech Pirates Are No Romantic Figures, CNN.com, April 29, 2008, <http://www.cnn.com/2008/CRIME/04/29/pirates/index.html>.

⁸ Dubner, *supra* note 2, at 4.

by one ship against another ship. This language is very narrow⁹ and the significant questions which have arisen have been largely ignored.¹⁰

II. BACKGROUND

A. The Elusive Definition of Piracy

Where there is a sea, there are pirates. –Greek proverb¹¹

The underlying problem regarding the definition of piracy is the failure of State leaders to update international law to evolve along with the act of piracy itself. It is possible that the concept of piracy first came into existence the moment the second watercraft hit the ocean, but methods have evolved. History tells us for certain that acts of piracy have been recorded as far back as 1400 B.C., and piracy has been a constant on the international scene ever since.¹² Unfortunately, until recently, very little effort had been engaged in updating the legal framework regarding piracy.¹³ This failure to update the law on piracy was due both to the belief that piracy was a phenomenon of the

⁹ Tullio Treves, Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia, 30 Eur. J. Int'l L. 399, 402 (2009).

¹⁰ A discussion of some of the questions which have arisen occurs infra in Section III(A).

¹¹ Alexander Rahmonov, *Piracy Off the Coast of Somalia: In Search of the Solution*, (2011). http://scholarship.law.cornell.edu/lps_clacp/54.

¹² Timeline: Pirates, <http://www.infoplease.com/world/statistics/pirates-timeline.html>; (see also, Piracy Timeline – Pirates History, <http://www.famous-pirates.com/pirates-history/piracy-timeline/>).

¹³ Dubner, supra note 2, at 4.

past,¹⁴ and the fact that definitions of piracy such as that found in Article 101 of UNCLOS were based on a traditional understanding of piracy, “one that assumes that the state system works effectively and that a State can enforce its own laws in its territorial sea.¹⁵ Notwithstanding the recent efforts to update the piracy laws, there is and always has been a great deal of confusion as to what the definitive definition of piracy actually is. The result is that the current legal regimes cause confusion regarding the arrest and prosecution of suspected pirates.¹⁶ The confusion was illustrated in in 2010 in the United States District Court for the Eastern District of Virginia over a period of 63 days. In that court, two different judges, ruling in two different yet strikingly similar cases and ruling on two strikingly similar motions to dismiss, reached opposite decisions while interpreting the same law.¹⁷

On August 17, 2010, in the *United States v. Said*, District Court judge Raymond A Jackson held that the “definition of piracy in the international community is unclear,” and also that there existed a “flexible manner in which international sources treat the definition of piracy.”¹⁸ Jackson also noted that in

¹⁴ Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 Harv. L. Rev. 334 (1925).

¹⁵ Joseph P. Isanga, *Troubled Waters: Combating maritime Piracy with the Rule of law Articles*, 59 Am. U. L. Rev. 1267, 1273 (2010).

¹⁶ Rosemary Collins & Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40 J. Mar. L. & Com. 89 (2009).

¹⁷ See *U.S. v. Said*, 757 F. Supp. 2d 554, 567 (E.D. Va. 2010) (in which the defendant’s motion to dismiss was granted, the court holding that the definition of piracy was unclear, and that according to U.S. case history, piracy was legally defined as armed robbery at sea); *United States v. Hasan*, 747 F. Supp. 2d 599, 632- 633 (E.D. Va. 2010) (in which the defendant’s motion to dismiss was denied, the court holding that UNCLOS provided an adequate definitions and that acts of violence on the high seas were an element of the crime of piracy).

¹⁸ *U.S. v. Said*, 757 F. Supp. 2d 554, 567 (E.D. Va. 2010).

the only case to ever directly examine the definition of piracy in the United States Supreme Court, *U.S. v Smith*,¹⁹ the Court said piracy was “robbery on the sea, and that it was sufficiently and constitutionally defined.”²⁰ In *Smith*, Justice Joseph Story wrote that, despite the fact that there existed a “diversity of definitions...in other respects, all writers concur, in holding, that robbery, or forcible depredations’ upon the sea, animo furandi, is piracy.”²¹ Jackson interpreted this statement, along with his analysis of writers on common or maritime law and the law of nations, as holding that piracy’s “true definition” was robbery upon the sea.²² Jackson went on to conclude that the defendants’ alleged act of shooting a gun at a United States naval vessel did not constitute piracy according to United States law, and thereby granted the defendants’ motion to dismiss.²³

Subsequently, on October 29th, 2010, in *United States v. Hassan*, Justice Mark S. Davis held that:

[T] he definition of general piracy under modern customary international law is, at the very least, reflected in Article 15 of the 1958 High Seas Convention and Article 101 of the 1982 UNCLOS. Because UNCLOS (1) contains a definition of general piracy that is, for all practical purposes, identical to that of the High Seas Convention, (2) has many more states parties than the High Seas Convention, and (3) has been much more widely accepted by the international

¹⁹ *U.S. v. Smith*, 18 U.S. 153 (1820).

²⁰ *Id.* at 162.

²¹ *Id.* at 161.

²² *Said*, 757 F. Supp. 2d at 559.

²³ *Id.* at 567.

community than the High Seas Convention, the Court finds that the definition of piracy in UNCLOS reflects the current state of customary international law for purposes of interpreting 18 U.S.C. § 1651.²⁴

In holding that the definition of piracy did include acts of violence committed on the high seas for private ends without an actual taking, Davis referenced the famous case *In re Piracy Jure Gentium*,²⁵ which examined the question of how international law defined the act of piracy.²⁶ In that case the Privy Council of England determined that, while several cases referred to piracy as “robbery on the high seas,” it was probable that they did so because the cases concerned actual taking of vessels, not because actual taking were the threshold requirement which defined piracy.²⁷ Most notably, Viscount Sankey stated:

When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel, without any commission from any state, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth six-pence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.²⁸

²⁴ *United States v. Hasan*, 747 F. Supp. 2d 599, 632- 633 (E.D. Va. 2010).

²⁵ *In re Piracy Jure Gentium*, [1934] A.C. 586 (1934).

²⁶ *Hasan* at 616-617.

²⁷ *Id.* at 617.

²⁸ *In re Piracy Jure Gentium*, *supra* note 34, at 840.

Davis subsequently held that the general piracy statute was not unconstitutionally vague so as to defeat due process,²⁹ and that the indictment was sufficient to constitute the charges against the defendants.³⁰

The confusion in the two recent Virginia district court cases revolved around both the element of armed robbery and the interpretation of the phrase “piracy as defined by the law of nations.”³¹ The issue was further compounded in that it had not been addressed by the United States Supreme Court in the almost two centuries that elapsed since the decision in *Smith*.³² *Said* has subsequently been appealed to the United States Court of Appeals for the Fourth Circuit, and now that court must “determine whether federal courts can give credence to modern international law norms regarding piracy or whether they must limit the definition of piracy to the international law norms of the era when Congress enacted the original version of the piracy statute.”³³ The lack of a clear definition of piracy written into the United States Criminal Code has prevented these cases from being swiftly dealt with. Unfortunately, the United States is not the exception when it comes to vague or ineffective anti-piracy legislation.

²⁹ *Id.* at 640.

³⁰ *Id.* at 642.

³¹ William Crum McKinney, *United States v. Said & United States v. Hasan*, 62 S.C. L. Rev. 577 (2011).

³² *Id.* at 578.

³³ *Id.*

B. Piracy Under National Law

The United Nations Security Council noted as recently as 2010 concern over the fact that the “domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution.”³⁴ This is the basis for the contention that very few states have laws in place that are sufficient for the prosecution of piracy.³⁵ A request by the IMO³⁶ was issued in 2008 for member states to submit samples of national legislation enacted in order to “combat and punish acts of piracy and armed robbery at sea, as well as any pertinent information on such national legislation.”³⁷ In 2010, the Legal Committee released its findings regarding the 40 countries plus Hong Kong, China that had submitted samples of their legislation.³⁸ The results were examined and then categorized according to international provisions relating to the repression of piracy as follows:

- (i) whether the country concerned is Party to UNCLOS;
- (ii) whether piracy is defined in the legislation of the country concerned as it is defined in UNCLOS Article 101;
- (iii) whether the UNCLOS definition of piracy is effectively incorporated into national law even though the UNCLOS definition itself is not directly

³⁴ S.C. Res 1918 ¶ 13, U.N. Doc S/RES/1918 (April 27, 2010).

³⁵ Barry Hart Dubner, *On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof*, 42 J. Mar. L. & Com. 71, 98 (2011).

³⁶ Int’l Maritime Organization, *Request for Information on National Legislation on Piracy*, IMO Doc. \C_L\2933 (December 23, 2008).

³⁷ *Id.* at ¶ 2.

³⁸ Int’l Maritime Organization, *Piracy: Review of national Legislation*, IMO Doc. \LEG\97\9.

- quoted;
- (iv) whether universal jurisdiction under UNCLOS Article 105 is effectively implemented in national legislation;
 - (v) whether piracy is addressed by reference to the Law of Nations, *Jure Gentium*;
 - (vi) whether piracy is addressed by reference to other laws on crimes of violence;
 - (vii) whether the country concerned is Party to SUA 1988;
 - (viii) whether SUA offences which are complementary to UNCLOS provisions on piracy (Article 3.1(a) and (b) of SUA 1988) are effectively applicable to acts of piracy, as defined in UNCLOS, under national legislation;
 - (ix) whether the mandatory jurisdictional conditions under SUA 1988, Article 6.1, are effectively implemented in national legislation;
 - (x) whether the discretionary jurisdictional conditions under SUA 1988, Article 6.2, are effectively implemented in national legislation; and
 - (xi) whether the jurisdictional condition under SUA 1988, Article 6.4, is effectively implemented in national legislation.

The general assessment regarding the implementation of the relevant UNCLOS or SUA Article into State law was discouraging. The data showed that, although 31 of the 40 responding countries were party to UNCLOS, only 10 defined piracy in their own criminal codes as it is defined in Article 101 of UNCLOS.³⁹ The results were similar regarding those States that were a party to SUA and the implementation of the offenses found in Article 3 of SUA which are applicable to piracy.⁴⁰

³⁹ *Id.* at ¶ 5.

⁴⁰ *Id.*

C. Piracy Under International Law

i. UNCLOS

In a 1967 speech to the United Nations General Assembly, Malta's Ambassador to the United Nations Arvid Pardo called for an "effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction."⁴¹ Pardo and others were concerned with a "super-power" rivalry spreading across the sea that was the cause of pollution and instability regarding the rich potential of the sea bed.⁴² Pardo's speech occurred at a time when others also recognized that technological advances had occurred which needed to be considered regarding the law of the sea.⁴³ The focus of that the Conference that ensued and the resulting Convention was centered on the uses of the sea and its resources.⁴⁴ Pardo never once mentioned piracy,⁴⁵ and no material changes had been made compared to the Article drafted at the 1958 Convention when UNCLOS was entered into force.⁴⁶

The United Nations contends that UNCLOS "provides the framework for

⁴¹ A History of the Third United Nations Conference on the Law of the Sea, [http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Third Conference](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Third%20Conference).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Arvid Pardo's speech to the United Nations General Assembly, November 1, 1967, http://www.un.org/depts/los/convention_agreements/texts/pardo_ga1967.pdf.

⁴⁶ Geiss, *supra* note 4, 38-41.

the repression of piracy under international law, in particular in Articles 100 to 107 and 110.⁴⁷ The Security Council has also stated that “international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (“The Convention”), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities.”⁴⁸ Unfortunately, that framework provided by UNCLOS is viewed by many commentators as being less than sufficient for the task.⁴⁹ Some of the limitations which commentators have discussed include”

(i) restricting the definition of piracy to “private” ends; (ii) the geographical restriction of piracy to the high seas; (iii) issues of reverse hot pursuit; (iv) the “two ship” requirement that excludes internal seizure; and (v) the lack of a mandate for states to adopt domestic counter-piracy laws that implement their international commitments.⁵⁰

ii. SUA

The SUA Convention does not explicitly apply to piracy, but deals with violent actions against ships and those on board.⁵¹ The impetus behind the

⁴⁷ Piracy Under International Law, <http://www.un.org/Depts/los/piracy/piracy.htm>.

⁴⁸ S.C. Res. 1897, ¶ 5, U.N. Doc. S/RES/1897 (November 30, 2009).

⁴⁹ See e.g.; J. Ashley Roach, Countering Piracy Off Somalia: International Law and International Institutions, 104 *Am. J. Intl. L.* 397, 404 (2010) (discussing jurisdictional questions related to Article 100 of UNCLOS and the permissibility of States other than the capturing State prosecuting alleged pirates); Donald R. Rothwell, Maritime Piracy and International Law, Crimes of War Project, Feb. 24, 2009, <http://www.crimesofwar.org/commentary/maritime-piracy-and-international-law/> (explaining that modern international law on piracy does not cover attacks occurring within the territorial sea of a coastal state, thereby typically rendering the international community powerless to prosecute).

⁵⁰ Lucas Bento, Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish, 29 *Berkeley J. Intl. L.* 399, 416 (2011).

⁵¹ Geiss, *supra* note 4, at 42.

drafting of SUA revolved around the hijacking of the *Achille Lauro* in 1985.⁵² The *Achille Lauro* was seized by members of a faction of the Palestinian Liberation Organization, who subsequently shot a Jewish man that was confined to a wheelchair and then threw his body overboard.⁵³ In the aftermath, some commentators supported the contention by the United States that the hijacking was an act of piracy, but others did not agree with that assessment.⁵⁴ This confusion regarding the acts constituting piracy led to the consideration and subsequent drafting of the SUA Convention.⁵⁵ Although SUA was an important step in the prosecution of terrorism, it is not thought to completely supersede either customary law or the UNCLOS piracy provisions.⁵⁶ First, SUA only applies to ratifying States, and second, there are matters covered by customary law and the UNCLOS piracy provisions beyond the ambit of SUA.⁵⁷

III. THE PROBLEM WITH UNCLOS

A. Historical Issues with UNCLOS

As discussed *supra*, the language of the piracy articles of UNLCOS has been criticized for being narrow, confusing and ambiguous.⁵⁸ Part of

⁵² *Id.*

⁵³ Malvina Halbertstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 *Am. J. Int'l. L.* 269, 272 (1988).

⁵⁴ *Id.*

⁵⁵ SUA, *supra* note

⁵⁶ 82 *Am. J. Int'l. L.* 269 at 271.

⁵⁷ 82 *Am. J. Int'l. L.* 269 at 273-274.

⁵⁸ Geiss, *supra* note 4, at 59.

the issue concerns the fact that the piracy articles of UNCLOS date back to the early 20th century.⁵⁹ The bulk of the language which comprises the piracy articles of UNCLOS were first formed during the codification efforts undertaken by the Harvard Draft Convention on Piracy in 1932 (“Harvard Convention”).⁶⁰ The work of the Harvard Draft Convention formed the basis of the International Law Commission’s (“ILC”) piracy in the 1950’s.⁶¹ The work of the ILC led to the Convention on the High Seas of 1958 (“Convention of the High Seas”)⁶², which ultimately provided the language for Articles 100 to 107 of UNCLOS.⁶³ To be precise, the piracy provisions drafted in 1954 by the ILC were simply a translation into French of the Harvard Convention.⁶⁴ These provisions were then incorporated as Articles 14 to 21 in the Convention of the High Seas, which were in turn imported into UNCLOS as Articles 100 through 107.

The main topic of the Harvard Convention regarded the “initial significance” that piracy had in the law of nations, and pertained only to acts of piracy on the high seas.⁶⁵ At the time there was a view that the

⁵⁹ Geiss, *supra* note 4, at 37.

⁶⁰ Geiss, *supra* note 4, at 38.

⁶¹ Geiss, *supra* note 4, at 39.

⁶² Convention on the High Seas, adopted April 29, 1958, 450 U.N.T.S. 11

⁶³ Geiss, *supra* note 4, at 39-41.

⁶⁴ Geiss, *supra* note 4, at 39.

⁶⁵ Barry Hart Dubner, Karen Greene, *On the Creation of A New Legal Regime to Try Sea Pirates*, 41 J. Mar. L. &

law of nations was a law of States only.⁶⁶ The lack of any international tribunal or other organization to administer international criminal or civil justice against individuals coupled with the lack of any provision in the laws of many States to punish foreigners for acts outside the State's jurisdiction meant that it could not "truly be said that piracy are crimes or are offenses by the law of nations in a sense which a strict technical interpretation look at those terms."⁶⁷ These factors were the basis of a the fact that the only "norm" all could agree upon was that a "diversity of opinion" was in existence that was especially remarkable" concerning; (1) The definition of piracy in the sense of the law of the nations, (2) The meaning and justification of the traditional assertions that piracy is an offence or crime against law of nations, and (3) The common jurisdiction of all states to prosecute and punish pirates.

These issues were raised throughout the 20th century and persist today and were the basis of questions raised regarding the shortcomings of international law in the area of piracy throughout the better portion of the 20th century.⁶⁸ These questions were raised in an attempt to engage the international legal community in incidents occurring during those time

Com. 439, 440 (2010).

⁶⁶ *Id.* at 441.

⁶⁷ *Id.* at 441.

⁶⁸ Dubner, *supra* note 2, at 3.

periods.⁶⁹ Those incidents included; (a) the bootlegging of whiskey, (b) the work involved in the Harvard Convention, (c) the preparatory work of the ILC, (d) the Conference on the Law of the Sea, (e) the *Mayaguez* incident⁷⁰ at the end of the Vietnam War, and (f) the hijacking of the *Santa Maria* in 1961.⁷¹ An enumeration of the questions regarding piracy and the year they were asked shows that they closely mirror issues still being dealt with today:

1. Is piratical robbery at sea essentially different from ordinary robbery on land? (1925)
2. Is the jurisdiction universal because they are *hostes humani generis*, or are they said to be *hostes humani generis* because the jurisdiction is universal? (1925)
3. Does the proposition state a prerequisite or a consequence? (1925)
4. Does it describe a constituent element of the offense of piracy or only a reprehensible quality or characteristic which the law attributes to pirates? (1925)
5. Must piracy be committed on the high seas, or can it also be committed in the territorial sea or in ports? (1957)
6. Must piracy be committed for private ends, or can it also be committed by persons acting either on behalf of a state or at least on behalf of a politically organized group for a purpose which can reasonable by described as a public purpose as opposed to a private purpose? (1957)
7. Should all acts of state be exempt from universal jurisdiction? (1976)
8. Should all acts of politically organized, or similar groups,

⁶⁹ *Id.*

⁷⁰ The *SS Mayaguez* was an American container ship captured by the Khmer Rouge on May 12, 1975. At the time of the incident, U.S. President Ford denounced the seizure as an act of piracy. Questions arose regarding whether or not the act could be prosecuted since it was an act of state. See <http://www.usmm.org/mayaguez.html>.

⁷¹ The *SS Santa Maria* was a Portuguese passenger ship hijacked by Iberian rebels on January 23, 1961. The act has been referred to as a piratical act, which raises the question of whether or not an act done for a political reason rather than a financial one can be prosecuted as piracy. See Omer Direk, *Somalia and the Problem of Piracy in International Law*, at 124-125. (2010).

and of all individuals who are not acting for personal gain, revenge, and so on, be excluded from the common jurisdiction? (1976)⁷²

The questions are very similar in content because none of the conventions and writings that have occurred since the Harvard Convention sufficiently responded to these issues.⁷³ The drafters of these conventions and writings simply dismissed piracy as an antiquated notion. In fact, during the drafting process of the Convention on the High Seas, the only activity reported regarding the piracy articles were “requests for a complete deletion or a merger of the different articles on piracy.”⁷⁴ This lack of foresight, coupled with internal inconsistencies and shortcomings in the articles themselves, place a limitation on UNCLOS’ effectiveness in combating piracy.⁷⁵

It has been noted that every increase in piracy has been accompanied by a realization that a deficiency existed regarding the “legal framework pertaining to piracy during earlier drafting exercises.”⁷⁶ Part of the problem, specifically with UNCLOS, is that UNCLOS is “traditionally perceived to reflect a subtle balance of extensively

⁷² Drubner, *supra* note 2, at 3.

⁷³ *Id.*

⁷⁴ S.C. Res. 1897, *supra* note 42.

⁷⁵ 40 J. Mar. L. & Com. 89 at 94. *See also*; 45 Harv. Int’l L.J., *supra* note X, at 250.

⁷⁶ Geiss, *supra* note 4, at 52.

negotiated compromises that is only acceptable to State parties as a package deal."⁷⁷ This perception leads to a belief that any attempt to modify limited elements of UNCLOS would infringe upon the balance of the negotiated compromise and would lead to a movement to modify elements of UNCLOS in its entirety.⁷⁸ This concern allows for difficulties in piracy prosecutions to persist because the weaknesses of the UNCLOS piracy articles are "not where the greatest contemporary concern lies."⁷⁹

B. Article 101: Definition of Piracy

Article 101 of UNCLOS, which contains the Convention's definition of piracy, states:

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).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Geiss, *supra* note 4, 53 (alluding to the fact that Russia has claimed the North Pole as their own). See Nele Matz Lueck, *Planting the Flag in Arctic Waters: Russia's Claim to the North Pole*, *Göttingen Journal of International Law* (1), 235-256 (2009).

There are four main elements of Article 101 that have been subject to criticism. They can be summarized as follows:

1. An illegal act involving violence, detention or depredation
2. Occurring on the high seas
3. Committed for private ends
4. Involving two ships or aircraft⁸⁰

Each one of these elements has enjoyed criticism from scholars that complain they are too narrow and limiting because they place “severe limitations on the types of attacks on ships that are governed by these provisions.”⁸¹ The inability of the articles to evolve almost at all since 1932⁸² has also led to criticisms that the UNCLOS definition of piracy is “too narrow to include the majority of modern day piratical acts.”⁸³

i. An illegal act involving violence, detention or depredation

Article 101 of UNCLOS requires “illegal acts” that involves violence, detention or depredation. The first point of vagueness which arises then is whether or not more than one act must take place in order for Article 101 to

⁸⁰ 40 J. Mar. L. & Com. 89, supra note 18, at 94.

⁸¹ *Id.*

⁸² Harvard Research in International law, *Draft Convention of Piracy with Comments*, 26 Am. Of Int’l L. (1932).

⁸³ 40 J. Mar. L. & Com. 89, supra note 18, at 95.

apply?⁸⁴ A quick review of Article 101(b) and (c) show that each refers to a singular act, which infers that just one act will suffice.⁸⁵

The second point of vagueness regards the question of whether or not piratical acts that occur without violence are covered under Article 101. This is problematic in situations where the pirates utilize non-violent methods such as stealth, or merely make threats.⁸⁶ Although it is possible to characterize a threat as an act of violence, it requires a broadening of the language, something which could be a factor in a successful defense strategy.⁸⁷

This was precisely the reasoning of the Seychelles Supreme Court for dismissing the first count against the defendants in *Republic v. Houssein Mohammed Osman & Ten Others*.⁸⁸ In the *Draco* case, the court referred to two earlier Seychelles Supreme Court cases⁸⁹ in analyzing whether the defendants had engaged in acts of violence, detention or depredation against the *Draco*.⁹⁰ The court distinguished the conduct of the defendants in *Draco* from the conduct of the defendants in the earlier cases based on the fact that

⁸⁴ Geiss, *supra* note 4, at 60.

⁸⁵ *Id.*

⁸⁶ 40 J. Mar. L. & Com. 89, *supra* note 18, at 96.

⁸⁷ 40 J. Mar. L. & Com. 89, *supra* note 18, at 96.

⁸⁸ *Republic v. Houssein Mohammed Osman & Ten Others*, Seychelles Supreme Court, Criminal Side No. 19 (2011) (hereinafter “The *Draco* case” or “*Draco*”).

⁸⁹ *See; Republic v. Mohamed Ahmed Ise & Four Others*, Seychelles Supreme Court, Criminal Side No. 75 (2011) (hereinafter “The *Talenduic* case” or “*Talenduic*”); *Republic v. Abdi Ali & Ten Others*, Seychelles Supreme Court, Criminal Side No. 14 (2010) (hereinafter “The *Intertuna II* case” or “*Intertuna II*”).

⁹⁰ The *Draco* case, *supra* note 72, 11-12.

defendants in the earlier cases had engaged in overt violent acts directed at the vessels, including firing “at the vessels in an attempt to intercept board and take control of” them.⁹¹ The court held that the *Draco* defendants “had only come in a speeding skiff and got turned away by the gunfire from the *Draco* before or without committing any of the above overt acts.”⁹²

Article 3 of SUA enumerates a long list of offenses which are subject to prosecution:⁹³

1. Any person commits an offence if that person unlawfully and intentionally:
 - a. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - b. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
 - c. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
 - d. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 - e. destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
 - f. communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
 - g. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

⁹¹ *Id.* at 12.

⁹² *Id.*

⁹³ Geiss, *supra* note 4, at 153.

2. Any person also commits an offence if that person:
 - a. attempts to commit any of the offences set forth in paragraph 1; or
 - b. abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
 - c. threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Although SUA was specifically tailored to apply to terrorism after the *Achille Lauro* incident, there are offenses listed in Article 3 that may be applied to acts of piracy.⁹⁴

Particularly relevant in regard to piracy are the prohibitions against; seizing or exercising control over a ship by force or intimidation in 3(1)(a), performing an act of violence against any person on board a ship if the act is likely to endanger the safe navigation of that ship in 3(1)(b), and threatening to perform one of these acts, if that threat is likely to endanger the safe navigation of the ship in 3(2)(c).⁹⁵ The threshold for meeting the requirement that the acts must be likely to endanger the safe navigation of the ship does not entail that the ship be in danger of running aground or sinking to satisfy the.⁹⁶ Therefore, most acts

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 154.

of piracy would be covered.⁹⁷ It's also likely that the Article 3(1)(g) prohibition against injuring or killing any person in connection with the commission or attempted commission of any of the offenses found in 3(1)(a) to (f) would apply to acts of piracy.⁹⁸

It's also likely that the prohibition in Article 3(2)(a) against attempting to commit any of the offenses set forth in Article 3(1), and the Article 3(2)(b) prohibition against aiding and abetting the commission of any of those offenses would apply to acts of piracy.⁹⁹ However, it is important to note that aiding and abetting an attempt to commit one of the Article 3(1) offenses is not one of the Article 3 list of offenses.¹⁰⁰

If the Article 3 offenses had previously been amended into Seychelles law, it is likely that the court would have decided differently in *Draco*. Under such circumstance, the attempt by the pirates in the blue skiff to seize control of the *Draco* brandishing a bazooka would have satisfied Article 3(1)(a) read with Article 3(2)(a). Similarly, Article 3(2)(b) would have applied to the individuals on the support boat who aided and abetted that attempt.

ii. Occurring on the high seas

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 153-154.

¹⁰⁰ *Id.* at 155 n. 638.

According to Article 101 (a)(i), In order for an event to amount to piracy, an act must be committed on the high seas or someplace outside the jurisdiction of any State.¹⁰¹ Addressing the second geographical limitation first, the ILC has states that “a place outside the jurisdiction of any State” refers to “an island constituting *terra nullius* or the shores of an unoccupied territory.”¹⁰² Article 86 defines the high seas as “all parts of the sea that are not included in the exclusive economic zone (“EEZ”), in the territorial sea, or in the internal waters of a State.”¹⁰³ This limitation causes problems with acts of piracy which occur in territorial waters of a State, or when acts of piracy occur on the high seas, but the pirates escape to the territorial waters of a State before they can be apprehended. Exacerbating the issue is the fact that the central provisions of UNCLOS extended the territorial seas of a State to 12 miles.¹⁰⁴ Although this significantly limits the geographical location of acts defined as piracy under UNCLOS, Article 58(2) “deems the piracy provisions, and other important provisions to be applicable within the Exclusive Economic Zone ‘in so far as they are not incompatible with’ Part V of UNCLOS. Part V of UNCLOS deals with the rights and duties of coastal states and other users of the EEZ” with a focus on

¹⁰¹ *Id.* at 63.

¹⁰² *Id.*

¹⁰³ UNCLOS, *supra* note 6, art 86.

¹⁰⁴ 40 J. Mar. L. & Com. 89, *supra* note 18, at 97.

fishing and harvesting of seabed minerals.¹⁰⁵ Thus, it is generally accepted that the UNCLOS piracy provisions do operate within the EEZ.

The territorial waters limitation was in the specific context of the situation off of the coast of Somalia was dealt with by the request of the Somalian Transitional Federal Government ("STFG") for international assistance, and the granting by the U.N. Security Council of an express right for a period of 12 months for States to:

[E]nter into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and [u]se...all necessary means to repress acts of piracy and armed robbery at sea.¹⁰⁶

This right was further extended for an additional period of 12 months.¹⁰⁷

Unlike Article 101 of UNCLOS's restriction of jurisdiction to the high seas, the scope of jurisdiction found in SUA is much broader.¹⁰⁸ Article 4 of SUA ("Article 4"), which contains the jurisdictional limitation of the Convention, states:

1. This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.
2. In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or

¹⁰⁵ *Id.*

¹⁰⁶ S.C. Res. 1846, ¶ 5, U.N. Doc. S/RES/1846 (December 2, 2008).

¹⁰⁷ S.C. Res. 1897, ¶ 5, U.N. Doc. S/RES/1897 (December 2, 2008).

¹⁰⁸ Geiss, *supra* note 4, at 155.

the alleged offender is found in the territory of a State Party other than the State referred to in paragraph 1.

Although the language of this Article has also come under fire for “not being carefully drafted and not fully expressing the intent of the drafters,”¹⁰⁹ Article 4 has been interpreted as meaning that a State may exert jurisdiction over any of the acts enumerated in Article 3 whether they occur “on the high seas or the territorial sea of any State, so long as the scheduled or actual navigation is not limited to the territorial sea of that State.”¹¹⁰ Moreover, Article 4(2) grants jurisdiction if the suspected pirate is discovered “in the territory of a State other than the State in whose waters the cabotage was first taking place.”¹¹¹

iii. Committed for private ends

The language of Article 101 of UNCLOS restricts jurisdiction to acts which are committed for private ends, and thereby excludes acts which are committed for a non-pecuniary purpose, including acts of terrorism, or acts committed to highlight a cause. The origins of the private ends requirement are rooted in the Harvard Convention.¹¹² Commentary on the Harvard Convention indicates that the private ends requirement was drafted to “exclude acts by insurgents seeking independence for their state – a political aim.”¹¹³ In

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Collins, *supra* note 16, at 99.

¹¹³ *Id.*

customary international law, an attack on a vessel committed to highlight a situation such as a struggle of a State to gain independence is a defense to charges of piracy.¹¹⁴ This was especially relevant at the time of the Harvard Convention there were many former colonial nations struggling to achieve independence, and insurgents would utilize “maritime terrorism tactics” in that struggle.¹¹⁵

This defense of piracy based in the attempt to highlight a cause becomes especially pertinent regarding Somalians engaged in piracy. If those arrested on suspicion of piracy argued that they acted with a political motivation, that could provide them with “an easy excuse against any allegations of having committed piracy.”¹¹⁶ Defendants could argue that they are insurgents that are in conflict with the STFG since the STFG is involved in a non-international armed conflict in Somalia.¹¹⁷ It is also reasonable to suppose that defendants might argue that they attacked other vessels in an attempt to fight off illegal fishing and dumping which is occurring off the coast of Somalia, or that they acted in an attempt to make public the plight of Somalians due to the degradation of their climate.¹¹⁸ In fact, some Somalian pirates have already stated this.¹¹⁹

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Geiss, *supra* note 4, at 61.

¹¹⁷ Geiss, *supra* note 4, at 61-62.

¹¹⁸ Geiss, *supra* note 4, at 62.

It is likely that such a defense would fail on a technicality. It is accepted that acts are undertaken for private ends unless they are taken with State sanction or “without the possibility to attribute private acts to a State.”¹²⁰ Therefore, without any authorization from the STFG to commit acts of piracy, the activities of Somalian nationals could not be said constitute public acts which fall outside the ambit of the piracy definition found in UNCLOS.¹²¹ The SUA Convention does not contain a parallel mens rea element.

iv. Involving two ships or aircraft

Because the UNCLOS piracy provisions require that two ships be involved in an act of piracy, they do not convey jurisdiction over a person that hijacks a ship after stowing away or gaining access to a ship and subsequently overpowering the crew.¹²² Passenger takeovers, mutinies and crew-seizures of one and the same vessel fall outside the two-ship requirement.¹²³ Although the two ship rule does have a positive effect in that it prevents acts of theft committed while in port from being contemplated as piracy, historically it has been viewed as a weakness, most notably in the case of the *Achille Lauro*. The requirement itself reflects the traditional view of pirates as marauding bandits

¹¹⁹ Jeffrey Gettleman, *Q. & A. With a Pirate: We Just Want the Money*, <http://thelede.blogs.nytimes.com/2008/09/30/q-a-with-a-pirate-we-just-want-the-money/> (September 30, 2008) (stating that the pirates see people dumping and illegally fishing in Somalian waters, and that they just wanted the money to “protect themselves from hunger.”).

¹²⁰ Geiss, *supra* note 4, at 62.

¹²¹ *Id.*

¹²² 40 J. Mar. L. & Com. 89, *supra* note 18, at 100.

¹²³ Geiss, *supra* note 4, at 62.

sailing the seas in order to indiscriminately plundering other vessels.¹²⁴ That being said, if this condition were to be removed, theft which occurred while a ship was docked in port could technically be considered acts of piracy.¹²⁵

v. Additional Inconsistencies With Article 101

The acts described in Article 101(b) of UNCLOS concerning voluntary participation and those of Article 101(c) of UNCLOS which pertain to incitement of piratical acts have been interpreted as contrary to Article 101(a) in that they are not limited geographically to the high seas.¹²⁶ Since Article 101(c) proscribes “*any act of inciting*” the acts don’t need to take place aboard a pirate vessel, and it has been argued that these acts may even take place on shore or within a State’s territorial waters. Therefore, since States may take those into custody that incite piracy while aboard pirate ships located in territorial waters, but may not do the same for pirate ships which commit their acts within those same territorial waters, persons found on the high seas that are alleged to have facilitated piracy while located in territorial waters may be taken into custody, while those *known* to have engaged in actual piracy within territorial waters cannot be seized.¹²⁷

C. Article 103: Definition Of A Pirate Ship Or Aircraft

Article 103 contains the definition of a pirate craft and states:

¹²⁴ 40 J. Mar. L. & Com. 89, *supra* note 18, at 100.

¹²⁵ *Id.*

¹²⁶ Geiss, *supra* at note 2, at 64.

¹²⁷ Geiss, *supra* note 4, at 64-65.

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 101(a) contains no specific requirements regarding the size of the offending and victim vessels.¹²⁸ Given that the object of Part VII of UNCLOS in which the piracy Articles are found concerns the protection of free navigation on the high seas, it is arguable that even a small vessels and crafts such as skiffs would be included with the definition of the word “ship.”¹²⁹ The decisive criterion for the offending ship would seem to be whether its size made it capable of interfering with the free navigation of the victim ship on the high seas.¹³⁰ The decisive criterion for the victim ship according to UNCLOS would seem to be that the vessel was seaworthy.¹³¹ These interpretations regarding the offending victim vessels would then include attacks on smaller crafts such as yachts, as well as the usage of maneuverable outboard engine driven long boats which are effective for carrying out attacks at sea, and therefore capable of interfering with free navigation.¹³²

The Article 1 of SUA definition of a ship as “a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically

¹²⁸ Geiss, *supra* note 4, at 62.

¹²⁹ Geiss, *supra* note 4, at 62.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

supported craft, submersibles, or any other floating craft” is very broad.¹³³ Such a ship is also not required to fly a flag of any State that is a party to the SUA Convention.¹³⁴ Nor does it have to be “in service.”¹³⁵ This latter element was included specifically to cover ships lying in port, such as those ships that have been hijacked and detained in Somalian ports. Conversely, Article 2(1) excludes both any warship and any ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes.¹³⁶

IV. CONCLUSION

Alfred Rubin may have best captured it best when he wrote that the treaty rules on piracy are “incomprehensible and therefore codify nothing.”¹³⁷ Obviously, he was not suggesting that there were no relevant treaty rules on piracy, but rather, that the meaning and interpretation of these treaties was so confusing and convoluted as to strip them of all efficacy. Although the situation in the Indian Ocean and other areas around the world has stimulated extreme interest and action in developing international and State laws sufficient to combat piracy. Of preeminent import is the development of a definition of piracy that can be effectively implemented and applied in order to combat piracy.

¹³³ Geiss, *supra* note 4, at 154 n. 631.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Alfred P. Rubin, *The Law of Piracy*, 373 (2006).

The definition of piracy found in UNCLOS is rife with ambiguous language and inconsistencies. It has been widely criticized for this reason. The UNCLOS piracy provisions suffer primarily because they have seen almost no revision whatsoever in the 8 decades since the language was first drafted. The definition of piracy found in Article 101 is confusing and limiting. It is not clear whether or not piratical acts occurring as the result of threats of violence or stealth satisfy the element requiring violence, detention or depredation. It is also unclear whether or not the raising of a defense based on the theory that the piratical act was committed only to raise awareness of a situation such as the plight of Somalians averts the satisfaction of the "private ends" element. The article also places broad limitations on the geographic jurisdictional boundaries, and piratical acts which are undertaken by a person who gains access to the ship by stowing away or posing as a passenger. The implications of incorporating these articles into Seychelles law are that these widely recognized and analyzed deficiencies are readily available to defense attorneys in cases involving the prosecution of pirates.

Although there is no explicit definition of piracy to be found in the SUA Convention, the application of the SUA Articles to the crimes of piracy would act as a worthy supplement to the UNCLOS regime. Where UNCLOS is vague in that it includes no definition of which acts may be constituted as acts of piracy. Article 3 of SUA provides an explicit enumeration of offenses, many of which could be applied to acts of piracy. Furthermore, where SUA constricts jurisdiction

over piratical acts to the high seas and the EEZ, SUA encompasses no such limitations. Similarly, SUA is also not burdened by the “private ends” or “two ships” limitations found in UNCLOS, but each of these limitations does have constructive elements.