Anti-whaling activism in the Southern Ocean and the international law on piracy: An evaluation of the requirement to act for ‘private ends’ and its applicability to Sea Shepherd Conservation Society

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Abbreviations

**COLREGs** … *1972 Convention on the International Regulation for Preventing Collision at Sea*, 1050 UNTS 16 & 1143 UNTS 346.


**ICR** … The Institute of Cetacean Research.

**ILC** … International Law Commission.


**Nm** … Nautical miles.


Introduction

“You don’t need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.”

So said Judge Kozinski, as the US Appeals Court overturned the decision of a District Court of Washington, which had refused to grant a preliminary injunction against the Sea Shepherd Conservation Society. For the past decade the private environmentalist organisation had been harassing the vessels of the Institute of Cetacean Research (ICR) during its seasonal hunt for whales in the Antarctic Sea using a variety of direct action methods. The relatively short judgement of the court has reopened a number of debates on the definition of piracy under international law, but perhaps the most surprising conclusion of the court was that the requirement of acts ‘committed for private ends’ under international law should be interpreted as acts “not taken on behalf of a state.”

The conclusion is contrary to the common, though not uniformly, held view of academics that ‘private ends’ excludes those pursuing ‘political ends’, such as environmental activists. In order to assess if the US Appeals Court correctly interpreted the international law definition of piracy, we must ask:

Under the international law definition of piracy, are Sea Shepherd acting ‘for private ends’ in their campaign against the ICR whaling research programme?

This study will approach the definition of piracy from an international law perspective, and thus will only look to municipal piracy law when it demonstrates some use in defining international law piracy. Within the international definition of piracy, the study will only focus on the requirement of acting ‘for private ends’. Thus although the other requirements will be touched upon, the study will not attempt to clarify these requirements or provide a conclusive definition of piracy under international law. Finally the question focuses on politically motivated private actors. Therefore we will only look to the relationship between politically motivated actors and the requirement of acting for private ends. The study will not determine the limits of other actors and the requirement of.

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3 The Appeal Court decision has been subsequently upheld, Sea Shepherd Conservation Society v. Institute of Cetacean Research, Application No. 12A790, US Supreme Court, 13 February 2013.
‘private ends’, such as whether insurgents need to be recognised, and whether attacks on their own governmental vessels are excluded by ‘private ends’.

To enable us to answer the proposed research question, a number of sub-questions must be answered. Firstly, to gain an understanding of the subject area, the thesis will explore the definition of piracy under international law (Chapter 1). It will be established that the requirement of acts committed for ‘private ends’ is part of the customary and treaty law definition of piracy (Section 1.1), before introducing the conflicting academic interpretations that have resurfaced following the US Court decision (Section 1.2).

In order to settle the debate on the interpretation of ‘private ends’, the study will then embark on assessing the different sources available to determine if political ends are excluded from the definition of piracy under international law (Chapter 2). These sources will necessarily include the historical documents that developed the term (Section 2.1), previous state practice in relation to politically motivated actors on the high seas (Section 2.2), and finally the policy and rationale behind the definition of piracy (Section 2.3). It is hoped by looking at these various sources collectively the definition of ‘private ends’, as interpreted by states, will become apparent. Chapter 2 will therefore be able to conclude on whether politically motivated violence is excluded from piracy under international law (Section 2.4).

Finally the study will take a closer look at the case between Sea Shepherd and ICR (Chapter 3). The position of the parties and what the current status of the confrontations is will be reviewed in order to provide the factual basis of the discussion (Section 3.1). The position of states towards environmental activists, as evidenced through state practice, will then be explored in order to determine if it supports or counters the interpretation reached at the end of Chapter 2 (Section 3.2). It will thus be possible to evaluate the US Court’s decision on whether Sea Shepherd are pursuing ‘private ends’ and thus are pirates, both by applying the interpretation previously reached (Section 3.3), and in attempting to apply the alternative (Section 3.4). The study will end with an overall conclusion and a look to possible areas of further research.
The international law definition of piracy

In order to answer the research question posed an introduction to the current definition of piracy under international law will be required, along with the differing interpretations on ‘private ends’.

1.1 The existence of a requirement to act for ‘private ends’

Before discussing what the ‘private ends’ requirement entails, it is necessary to first establish such a requirement exists in international law; in piracy jure gentium. It is self evident that the definition found within the United Nations Convention on the Law of the Sea (UNCLOS) will be binding upon the 165 Contracting Parties as a matter of treaty law. The same applies to those states, such as the United States of America, which ratified the Convention on the High Seas (HSC) but not UNCLOS. The HSC contains a near word for word definition to that of UNCLOS and both require an act “for private ends”. Neither provides a subsequent explanation of what that entails.

The Convention on the High Seas defines piracy as:

“Article 15
Piracy consists of any of the following acts:
(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.” [Emphasis added].

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5 Municipal piracy is a separate matter defined under national law. Piracy under international law sets the limits of the universal jurisdiction that may be exercised by states, whilst municipal piracy stipulates what that state will prosecute under criminal law as piracy. A state is free to provide for more extensive piracy under national law (e.g. activities in the territorial water being classified as piracy) or a more restrictive piracy crime (e.g. only activities with an intent to rob). As a separate issue these municipal definitions do not affect the international definition.


7 165 parties as of 20th June 2013: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#1 [last accessed 21.06.2013].


9 63 parties as of 20th June 2013: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21&lang=en [last accessed 21.06.2013]. Afghanistan (signatory UNCLOS), Cambodia (signatory UNCLOS), The Holy See, Iran (signatory UNCLOS), Israel, the United States of America and Venezuela are all party to the HSC, but not to UNCLOS.

10 There are five elements to piracy: (1) any illegal acts of violence or detention, or any act of depredation committed for private ends by the crew or the passengers (3) of a private ship or a private aircraft (4) against another ship or aircraft, or against persons or property (5) on the high seas or in a place outside the jurisdiction of any State.
The United Nations Convention on the Law of the Sea defines piracy in Article 101:

"Article 101 Definition of piracy
Piracy consists of any of the following acts:
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
I any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

[Emphasis added].

The HSC confirms in its preamble that the Contracting Parties desired “to codify the rules of international law relating to the high seas”\(^{11}\). It has long been widely accepted that the UNCLOS definition now reflects customary international law\(^{12}\) binding on all states\(^{13}\). Rubin argues that the rules presented in UNCLOS “are incomprehensible and codify nothing”\(^{14}\). Essentially the drafters failed to successfully codify the correct definition of piracy in the HSC\(^{15}\), and under customary law the definition is wider\(^{16}\). Indeed the efforts began with the Harvard Drafters claiming a “chaos of expert opinion as to what the law of nations includes”\(^{17}\). Upon joining the HSC, Mongolia, Albania,
Bulgaria, Poland, Romania, The Russian Federation, Belarus, Ukraine, Czechoslovakia and Hungary all made declarations stating the articles on piracy do not conform to customary law, the definition being too narrow.\(^{18}\)

However this article will proceed on the basis that the elements of piracy found within UNCLOS are reflective of customary law, which crystallised with the codification efforts at Geneva\(^{19}\). Customary law is defined by widespread state practice and the necessary \textit{opinio juris}\(^{20}\). The extensive ratification and adherence to this definition, including by the major maritime powers, provides great weight to the drafters’ attempts to codify customary law. Not only do the consistent adoptions of the same definition demonstrate a commitment to that definition, but even if it was to be wider prior to codification, the effect of successive re-enactment of the same definition and declarations on the customary rule would surely have an effect and restrict it to that as found in UNCLOS\(^{21}\). The ratification declarations mentioned above have not been repeated in relation to UNCLOS and states found in the Horn of Africa and South-East Asia (the principal areas affected by modern piracy) have incorporated the UNCLOS definition into their co-operative anti-piracy agreements\(^{22}\).

We see further evidence of international piracy under customary law including a requirement for ‘private ends’ by the affirmation of states through their action in international organisations. The UN Security Council has reaffirmed the definition found in Article 101 in the fight against piracy\(^{23}\). Article 101 is described as “reflective” of international law\(^{24}\). The International Maritime Organisation has invoked the same definitive definition, as have other relevant United Nations

\begin{itemize}
\item \textit{International Law}, 1932, p. 769.
\item It may even be that the customary law only became sufficiently defined once the law was codified. The chaos of opinion points to the fact that it is difficult to judge what the customary law would have been prior to codification. “[V]irtually every aspect of piracy was controversial” - (Direk et al. 2011, supra note 13, p. 238).
\item 1945 Statute of the International Court of Justice, 15 UNCIO 355, Art. 38(1)(b).
\item (Guilfoyle 2009, supra note 13, p. 31).
\end{itemize}
The international law definition of piracy

It used to be the case that the International Maritime Bureau had a very wide definition of piracy encompassing acts well beyond the UNCLOS definition. Authors distinguished this as a definition for commercial and statistical purposes that was not legally binding. However it is now the case that even the International Maritime Bureau has adopted the UNCLOS definition.

Finally, although the other elements of piracy jure gentium will be briefly explored in relation to Sea Shepherd’s activities and whether they have been satisfied, the main focus of this thesis is the definition of ‘private ends’. It is largely in relation to (a) the geographical scope of piracy and (b) the two-ship requirement that suggestions on a wider customary international law of piracy still exist. Disagreements on ‘private ends’ revolve around the precise meaning and not the existence of the requirement under customary law. Therefore we can conclude piracy under international law requires the party to act for ‘private ends’, the meaning of which we now turn to.

1.2 Differences of opinion on the requirement of ‘for private ends’ under the international law of piracy

The District Court and the Appeals Court reached opposite conclusions based on the same facts of Sea Shepherd’s conduct. This difference is attributable to the interpretation of whether Sea Shepherd’s conduct is for private ends.

On the one hand the District Court decided financial enrichment was the “prototypical private
end”\textsuperscript{31}. Financial gain may have been a by-product of Sea Shepherd’s conduct, but it was not the purpose\textsuperscript{32}. The purpose of Sea Shepherd’s conduct was to prevent the slaughter of marine life, a purpose for which according to the District Court no universal international norm against the use of violence exists\textsuperscript{33}. Although the District Court suggested financial gain was the prototypical example or “ordinary case” it gave no other examples of private ends for which violence conduct fulfilling the other requirements would be prohibited. Sea Shepherd’s conduct was only assessed against whether it was for financial gain\textsuperscript{34}.

The Court of Appeals for the Ninth Circuit interpreted private ends as falling at the other side of the scale, reversing the District Court decision. Private was given a very wide definition that according to its “ordinary meaning” is the antonym to public\textsuperscript{35}. Public ends are those pursued on behalf of a state. Anything not pursued on behalf of a state, including “those pursued on personal, moral or philosophical grounds, such as Sea Shepherd’s professed environmental goals”\textsuperscript{36} is classified as private ends. The public/private theory finds its greatest supporter in Douglas Guilfoyle\textsuperscript{37}. States are the only actors who can legitimately use violence, and who can claim, seize and redistribute property\textsuperscript{38}. A private end is an objective test that looks at the “relationship among the act, actors and states”\textsuperscript{39}. If the violence on the high seas between two ships or aircraft lacks state sanctioning\textsuperscript{40}, then it is committed for private ends and thus it is piracy.

However many authors disagree with this interpretation of private ends and do not equate private ends and a lack of state sanctioning. Private ends are seen to exclude purely politically motivated

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{31}]The Institute of Cetacean Research v Sea Shepherd Conservation Society, Case No. c11-2043RAJ, US District Court for the Western District of Washington, 2012 U.S. Dist. Lexis 36867, p. 15.
\item[\textsuperscript{32}]Ibid.
\item[\textsuperscript{33}]Ibid.
\item[\textsuperscript{34}]Sea Shepherd rested its case on piracy being “no more or less than robbery at sea”. The Institute of Cetacean Research argued a broader view of ‘private ends’, but provided no authorities of definition and no authorities on political activity falling within private ends; The Institute of Cetacean Research v Sea Shepherd Conservation Society, Case No. c11-2043RAJ, US District Court for the Western District of Washington, 2012 U.S. Dist. Lexis 36867, pp. 14-15.
\item[\textsuperscript{35}]The Institute of Cetacean Research v Sea Shepherd Conservation Society, Case No. 12-35266, US Court of Appeals for the Ninth Circuit, 25 February 2013, p. 4.
\item[\textsuperscript{36}]The Institute of Cetacean Research v Sea Shepherd Conservation Society, Case No. 12-35266, US Court of Appeals for the Ninth Circuit, 25 February 2013, p. 5.
\item[\textsuperscript{38}] (Guilfoyle 2009, supra note 13, p. 37).
\item[\textsuperscript{39}] (Bahar 2007, supra note 38, p. 17).
\item[\textsuperscript{40}] Or in theory in an area beyond any state jurisdiction – terra nullius.
\end{itemize}
\end{footnotesize}
violence\(^{41}\). This will be referred to as the private/political theory. Proponents suggest either politically motivated violence has traditionally not been seen as a private end, or that political action is another form of a public end, or both. Thus the actions of terrorists or political activists, pursuing the political agenda of their organisation, would not fall within the definition of piracy at international law and therefore not be subject to the universal jurisdiction it entails.

The District Court clearly erred in restricting the definition to financial gain, and Sea Shepherd’s arguments based on an analogy to robbery at sea are out-dated\(^{42}\). It is near universally accepted that private ends do not refer to personal gain. It is equally true that it is not restricted to state action\(^{43}\). A limited exception for recognised belligerent’s action against the state to which they are fighting is recognised by all as falling outside the private ends requirement\(^{44}\). Yet where the private ends distinction lies between these two extremes is debatable in international law. It is not as clear-cut as the Appeal Court suggests in its relatively short and under referenced opinion.

Are political ends private ends? One of the few articles referenced by the US Appeals Court to the affirmative states:

“the history of piracy, the motives behind the establishment of universal jurisdiction, as well as judicial precedent, powerfully demonstrate that a thwarted pirate cannot escape the world’s jails merely by pronouncing a political cause”\(^{45}\).

Given the debate over political ends being public or private ends, the US Appeals Court failed to inquire into whether this proposition is adequately supported. We will therefore proceed to assess this ourselves, before looking to assess whether Sea Shepherd are indeed pirates.


\(^{42}\) In *re piracy jure gentium*, Judicial Committee of the Privy Council, 26\(^{th}\) July 1934, (1934) A.C. 586, p. 594. The 1956 International Law Commission Report & Commentary equally concluded the intent to rob was not necessary.

\(^{43}\) The restriction to private ships excludes action by states.

\(^{44}\) Douglas Guilfoyle sees this exception as the basis for the private ends requirement; (Guilfoyle 2009, supra note 13, p. 33. The most restrictive version is that the actor must be a recognised belligerent acting against a state but also that the acts in question are in “furtherance of their rebellion” - Madden, T., *An Analysis of the United States’ Response to the Achille Lauro Hijacking*, 8 Boston College Third World Law Journal 137, 1988, p. 142.

\(^{45}\) (Bahar 2007, supra note 38, p. 30).
2 Defining ‘private ends’ in international law

Once we accept the UNCLOS definition has become the customary definition of piracy under international law, the difficulty comes in that the term ‘private ends’ is not elaborated in either document. The starting point is the Vienna Convention on the Law of Treaties (VCLT), Article 31, which is generally understood as reflective of the customary laws on treaty interpretation, and states:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.”

The court in the Sea Shepherd case began by looking into the ordinary meaning of ‘private’.

Firstly the term of UNCLOS is ‘private ends’, not ‘private’ and by removing the word from its context and surrounding text one risks a different interpretation that the term itself. But more importantly, the ordinary meaning of private does not provide a decisive interpretation that excludes/includes politically motivated ends. If private “is normally used as an antonym to public” and “matters of a personal nature” as the court suggested, then we would only have a working definition if those terms (public and personal) were clear. But these terms are equally ambiguous, action “taken on behalf of a state” is one definition of public, other interpretations of public could

46 Kasikili/Sedudu Island (Botswana/Namibia), International Court of Justice (ICJ), 13 December 1999, ICJ Reports 1999, p. 1045 Para. 18.
49 The term 'public’ is acting as an adjective to the noun 'ends', modifying the definition. Therefore the words should be looked at collectively, rather than in isolation.
51 Ibid.
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be used. These ambiguities are highlighted when looking at politically motivated activity. As discussed below, a Belgian Court has taken political perspectives as personal points of view, and so any action in support of political views will be in support of personal ends (i.e. private ends). But equally the Harvard Drafters interpreted politically motivated action as another form of public action. Political ends could be private, they could be personal, or they could be public ends. Supplementary means of interpretation need to be turned to in order to confirm which meaning is applicable.

Eugene Kontorovich has suggested Article 101 should be read in conjunction with Article 102, which clarifies that governmental ships operated by mutineers are assimilated to private ships. The argument goes, warships and other governmental ships are under governmental control and therefore public ships. Once the state loses control, the ship is a non-governmental ship, a ‘private’ ship, and “thus ‘private’ clearly means ‘non-governmental’. The term ‘private’ in the context of the treaty means ‘non-governmental’.

However this argument is unconvincing, given that Article 102 deals specifically with the issue of piracy by warships and governmental ships whose crews have mutinied. This is in relation to the term ‘private ship’ found in Article 101, which is of course much broader than the Article 102 example and includes all non-governmental ships. Whilst Article 102 may confirm ‘private ship’ is any ship that is non-governmental, it does not help define the term ‘private’ in UNCLOS. It does not attribute the term ‘private’ the special meaning of non-governmental within the treaty, which could then be transferred from the term ‘private ship’ to ‘private ends’. If private were used to refer to non-governmental then one would expect its use throughout the treaty in relation to non-governmental situations. The term ‘private’ is not used outside the context of Article 101 and 102, yet other non-governmental situations arise which are covered by UNCLOS. Article 169 refers to

52 “1. Of, concerning, or affecting the community or the people: the public good […] 5. Connected with or acting on behalf of the people, community, or government: public office.”, http://www.thefreedictionary.com/public, referencing The American Heritage Dictionary of the English Language, Houghton Mifflin Company, Forth Edition, 2009 [last accessed 02.07.2013]. Political action is generally seen as acting in the public interest for the public good, political disagreements being on what is for the public good. On the other hand definition No. 5 would point to sanctioned activity and the idea of state responsibility, the ‘acting’ being on behalf of the Government. If you define private as the antonym to public then the definition of private will depend on which definition of public you adopt. Adopting the first definition, political activity would be public activity and thereby excluded from the definition of private. Adopting definition No. 5 would exclude political activity from public, thereby defining private to encompass political activity.

53 “[I]t seems best to confine the common jurisdiction to offenders acting for private ends only […] acts committed for political or other public ends are covered by Article 16.” (Bingham 1932, supra note 18, p. 798) [Emphasis added].


56 (Geiss & Petrig 2011, supra note 13, p. 62, note 285).
consultation and cooperation with “non-governmental” organisations and Article 139(1) when discussing the liabilities for ‘private’ persons uses the term “natural of judicial persons”. If ‘private’ were used consistently to refer to non-governmental purposes or situations the argument would be convincing. But the fact private is used once, within the term ‘private ship’, to refer to non-governmental ships, is insufficient to conclude that ‘private’ ends must therefore be non-governmental ends.

Thus the meaning of ‘private ends’ must be found in the development of piracy law, the underlying object and purpose and the relevant state practice. The UNCLOS piracy provisions are the result of a long process beginning with the League of Nations work. It is this history we must now turn to in order to determine what the drafters intended when they used the term ‘private ends’. More specifically did they intend to exclude purely politically motivated ends?

2.1 The history of piracy codification & the definition of private ends

“the history of piracy, the motives behind the establishment of universal jurisdiction, as well as judicial precedent, powerfully demonstrate that a thwarted pirate cannot escape the world’s jails merely by pronouncing a political cause”. [Emphasis added].

The use of historical sources in determining the drafters’ intentions has recently been called into question in relation to the Sea Shepherd case. Guilfoyle argues the historical sources discussed below have been “overestimated” in usefulness, given they are representative of the intention of the different codifiers and not the UNCLOS drafters. Treaty interpretation aims to ascertain the intention of the drafters and so, given the documents are not part of the preparatory work of

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57 “The Secretary-General shall, on matters within the competence of the Authority, make suitable arrangements, with the approval of the Council, for consultation and cooperation with international and non-governmental organizations recognized by the Economic and Social Council of the United Nations” 1982 United Nations Convention on the Law of the Sea, 1983 UNTS 3, p. 93, Art. 169(1).

58 “States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations” 1982 United Nations Convention on the Law of the Sea, 1983 UNTS 3, p. 71, Art. 139(1).

59 Treves, T., 1958 Geneva Conventions on the Law of the Sea, United Nations Audiovisual Library of International law, 2008, p. 1. Treves makes this point in relation to the Geneva Conventions, however it is equally applicable in respect to the piracy provisions in UNCLOS. UNCLOS introduced many novel concepts and rules, but the piracy provisions were re-enacted from the HSC with the minimal of difference and without debate - (Guilfoyle 2009, supra note 13, p. 31). Thus we can see UNCLOS as another step in this history – albeit one that did nothing to alter the definition on piracy.

60 (Bahar 2007, supra note 38, p. 30).

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UNCLOS, or within any of the other usual sources for interpretation under VCLT Section 3, they are only of limited relevance. This argument is said to gain support from the recent US decision of United States of America v Ali Mohamed, in which Mr. Ali, indicted with aiding and abetting piracy, attempted to rely on the Harvard Law School Draft Convention on Piracy (Harvard Draft) in order to avoid prosecution for activities on land and within the territorial waters:

“Ali’s next effort to exclude his conduct from the international definition of piracy eschews UNCLOS’s text in favor of its drafting history - or, rather, its drafting history’s drafting history […] Ali would have us ignore UNCLOS’s plain meaning in favor of eighty-year-old scholarship that may have influenced a treaty that includes language similar to UNCLOS article 101. This is a bridge too far.” [sic]

However to ignore the historical context of the definition of piracy in Article 101 is to remove piracy from its legal context. The supplementary means of interpretation “include” but are not limited to the preparatory work of the treaty. The International Tribunal for the Law of the Sea has made reference to both the HSC and the International Law Commission Draft Articles Concerning the Law of the Sea (ILC Draft Articles) when interpreting UNCLOS. National courts applying international law prior to UNCLOS made approving references to the Harvard Draft. UNCLOS re-enacted the HSC provisions on piracy with the minimal of difference and without debate. The intentions of the drafters confirm those of the HSC drafters, which are to a large part, through quotes verbatim and approving references, reflective of the Harvard Draft and the Matsuda Draft Provisions for the Suppression of Piracy (Matsuda Draft). Indeed the preamble to UNCLOS

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66 “The Tribunal notes that the provision in article 91, paragraph 1, of the Convention, requiring a genuine link between the State and the ship, does not provide the answer. Nor do articles 92 and 94 of the Convention, which together with article 91 constitute the context of the provision, provide the answer. The Tribunal, however, recalls that the International Law Commission, in article 29 of the Draft Articles on the Law of the Sea adopted by it in 1956, […] The Convention follows the approach of the 1958 Convention.” International Tribunal for the Law of the Sea, The M/V “Saiga” (No.2) Case (Saint Vincent and The Grenadines v Guinea, Judgment 1 July 1999, p. 26, Paras. 80-81. “[I]n view of lingering ambiguity, recourse is now made to supplementary means of interpretation. The direct predecessor of article 33 is article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone”. International Tribunal for the Law of the Sea, The M/V “Saiga” (No.2) Case (Saint Vincent and The Grenadines v Guinea, Separate Opinion of Judge Laing, p. 5, Para. 11. International Tribunal for the Law of the Sea, The ”Ara Libertad” Case (Argentina v Ghana), Joint Separate Opinion of Judge Wolfrum and Judge Cot, 15 December 2012 - critiqued the order of the tribunal for not taking account of the legislative history of UNCLOS, which includes the ILC Draft Articles and HSC.
67 “Before leaving the authorities, it is useful to refer to a most valuable treatise on the subject of piracy contained in ‘The Research into International Law by the Harvard Law School,’ In re piracy jure gentium, Judicial Committee of the Privy Council, 26 July 1934, (1934) A.C. 586, p. 10.
68 Matsuda, M., & Wang Chung-Hui, M., Report by the Sub-Committee: Committee of Experts for the Progressive Codification of International Law, Questionnaire No. 6, Supplement to the American Journal of International Law,
Defining ‘private ends’ under international law makes clear the drafters intended to codify the Law of the Sea, a desire that hardly points to putting aside the historical origins of the piracy definition in Article 101. Rather than being of limited relevance as put forward by Guilfoyle, they become of critical importance in determining ambiguities that remain unresolved by the text and travaux préparatoires.

Secondly I would disagree with Guilfoyle’s interpretation of the US v Ali case, which does not dismiss “the relevance of arguments based on the idea that the Harvard codification project reflects the controlling intention of treaty drafters 50 years later”. The Ali case rests on the basis that a clear meaning of UNCLOS points to no high seas requirement for aiding and abetting. Obviously the Harvard Draft (the “drafting history’s drafting history”) could not be used to alter the law to the opposite effect because, as the court went on, “treaty interpretation—both domestic and international—direct courts to construe treaties based on their text before resorting to extraneous materials”. Had UNCLOS been unclear on the issue the court then could have looked to these further material if they were of use in confirming a particular meaning or resolving ambiguity (as other courts have). As seen above the term ‘private ends’ remains unclear after looking to its legal context and therefore resort to historical sources is a necessity. The date of the thinking should not matter if it is consistently confirmed. Indeed “the definition of piracy has been frozen in what Dubner refers to as ‘the thinking of 1932’”. Whilst states and the treaty drafters have felt it necessary to update thinking on maritime zones, piracy has remained much the same. By tracing the term private ends through the documentation we can discover what the term had come to mean when it was included within the UNCLOS definition of piracy.


The Draft Provisions for the Suppression of Piracy was submitted by Matsuda in 1926 as part of
the League of Nations’ attempts to progressively codify international law, and is certainly far removed from the adoption of the HSC and eventually UNCLOS. Indeed not many states responded to the draft, and the few comments received “did not evidence either interest or enthusiasm for the topic and were disparate”\(^\text{74}\). The project was eventually dropped due to difficulties in reaching agreement and a perceived unimportance in piracy codification\(^\text{75}\).

However the Report does represent the first stage within the codification process, and importantly the origin of the term ‘private ends’ within the process, which has persisted to this day through each codification undertaking\(^\text{76}\). As will be seen in the discussion on the Harvard Draft and the ILC Draft Articles a continuity of meaning can be attributed to ‘private ends’. Thus if ‘private ends’ is used in the same context, for the same purposes, then the origins of that term should help evaluate whether the requirement of an undertaking for private ends excludes political activity from the international piracy framework. If however it is clear that during the development of the customary definition of piracy (culminating in UNCLOS Article 101) that the development departed from the original meaning applied in the Matsuda Draft, then clearly it will be of limited use.

Such a departure is not evident in the continued use of ‘private ends’. Although the ILC Draft Articles commentary only refers to the Harvard Draft\(^\text{77}\), the Matsuda Draft was used as an authority on the subject of politically motivated violence during the ILC discussions on ‘private ends’\(^\text{78}\).

The Matsuda Draft adopts a clearly private-political distinction and not one that turns on public

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\(^{75}\) (Geiss & Petrig 2011, supra note 13, p. 38).

\(^{76}\) Douglas Guilfoyle’s research revealed, “as far as I have been able to ascertain the words were first used in Joel Prentiss Bishop’s *New Commentaries on the Criminal Law* (8th ed.) of 1892, effectively as a synonym for *animus furandi* (intention to rob, now generally dismissed as being a necessary element of piracy).” [Sic], Guilfoyle, D., *Political Motivation and Piracy: What History Doesn’t Teach Us About Law*, Blog of the European Journal of International Law (EJIL: Talk!), 17 June 2013. Available at: [http://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/](http://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/).

Bishop’s term ‘private ends’ is clearly a different use to that of Matsuda, as *animus furandi* was specifically rejected as a requirement by Matsuda; it being “contained in the larger qualification for private ends”. It seems reasonable to conclude then that the term private ends as used to distinguish between “piracy and practices similar to piracy” has its origins in the Matsuda Draft. See (Matsuda & Wang Chung-Hui 1926, supra note 74, pp. 223-224).


\(^{78}\) “In the matter of political motive, the Matsuda report stated: ‘Nevertheless, when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy’ […] The principle of common jurisdiction, according to which a pirate was treated with universal public enmity, could only exist where the political element was lacking and where the ship concerned was not the public property of a State. All that was made clear by the words “for private ends”, as used in article 23”. International Law Commission, *Summary record of the 290th meeting*, The Yearbook of the International Law Commission, 1955, Vol. I, A/CN.4/SR.290, p. 41, Paras. 40-45. [Emphasis added]. The political motives thinking of the Matsuda Draft was carried through to the ILC Draft Articles under the ‘private ends’ qualification. The ILC Draft Articles formed the basis of the HSC.
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power or state sanctioning. This distinction is the test underlying Matsuda’s use of ‘private ends’. Article 1 of the Draft Provisions for the Suppression of Piracy provides:

“1. Piracy occurs only on the high seas and consists in the commission for private ends of depredation upon property or acts of violence against persons. It is not involved in the notion of piracy that the above-mentioned 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 reason politically motivated violence did not qualify as piracy in Matsuda’s Draft was the realisation of the “important consequences which follow upon the commission of that crime”. In short, it was felt such criminals should be subject to the ordinary rules of jurisdiction because they would not be classified as “enemies of the community of civilised States”. Purely politically motivated violence would not indiscriminately target vessels or be a threat to all states and the “security of commerce”, to which piracy is a crime against. Therefore it was not a crime against mankind, which could be subject to the jurisdiction and punishment of mankind.

What constituted purely political objectives was not elaborated, nor were any examples provided. We can however conclude that the exception did not rest on whether the violence was state sanctioned, and secondly that the exception was very narrow. “It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often delicate question of motives” [emphasis added]. This was the reasoning applied for rejecting a personal gain criterion, but would assumingly be equally applicable to establishing political motives. Thus it would need to be clear that the action was purely political, the absence of which would point to violence for private ends.

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80 (Matsuda & Wang Chung-Hui 1926, supra note 74, p. 228).
81 (Matsuda & Wang Chung-Hui 1926, supra note 74, p. 224). The consequences and reasoning behind universal piracy jurisdiction are discussed in Subsection 2.3.1. Whether political ends meet such reasoning is discussed in Subsection 2.3.2.
82 When discussing *unrecognized* belligerents attacking third party vessels; “Third Powers, on the other hand, may consider such ships as pirates […] unless the acts are inspired by purely political motives, in which case it would be exaggeratedly rigorous to treat the ships as declared enemies of the community of civilized States”, (Matsuda & Wang Chung-Hui 1926, supra note 74, p. 225). Guilfoyle’s proposed intention of the Harvard Drafters including ‘private ends’ to exclude insurgents attacking vessels of the Government they sought to overthrow is clearly inapplicable to the Matsuda Draft (Guilfoyle 2009, supra note 13, pp. 33-35). Matsuda also sought to exclude attacks on third party vessels.
83 (Matsuda & Wang Chung-Hui 1926, supra note 74, p. 224).
84 Matsuda began, “According to international law, piracy consists in sailing the seas for private ends without authorization from the government of any state”; (Matsuda & Wang Chung-Hui 1926, supra note 74, p. 223). Authorization is treated as a separate issue from private ends, although this most likely distinguishes public ships and private ships. Nonetheless at no point is ‘political acts’ equated with state sanctioning.
2.1.2 The Harvard Law School Draft Convention on Piracy

The Harvard Draft Convention on Piracy\(^\text{86}\) was prompted by the League of Nations’ work\(^\text{87}\) and has had a major impact on piracy development throughout the 20\(^{\text{th}}\) Century\(^\text{88}\), despite its status as an academic endeavour. This is because the Harvard Draft was the basis of the ILC’s work\(^\text{89}\); the draft text produced by Dutch Rapporteur François was a French translation of the Harvard Draft Convention on Piracy\(^\text{90}\). This draft was adopted by the ILC, including the ‘private ends’ requirement\(^\text{91}\). The ILC Draft Articles in turn formed the basis of the HSC and the follow-up UNCLOS definition. The ILC Draft Articles commentary noted:

“In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.”\(^\text{92}\).

Despite the definition of piracy being the most difficult article to draft and the “chaos of expert opinion”\(^\text{93}\) at the time, the draft is the result of thorough analysis and extensive research. The draft reflects “the most common views on piracy, seen from the angle of state practice over the centuries”\(^\text{94}\). The collection of piracy laws and doctrinal debate at the time enabled the Harvard drafters to carry out the most extensive discussion and evaluation of the term ‘private ends’ seen to date, the findings of which were generally endorsed by the ILC and carried through into the HSC. The ILC and UNCLOS drafters were free to disagree or demonstrate a differing view on ‘private ends’ (having only agreed with the research ‘in general’), but this does not appear to be the case.

Those who argue for an expansive view of piracy based on the lack of state sanctioning look to the particular purpose and historical context of the Harvard drafting. For private ends was included for the sole purpose of excluding civil-war insurgents\(^\text{95}\). That is those “acts by unrecognized insurgents


\(87\) (Geiss & Petrig 2011, supra note 13, p. 38).

\(88\) (Geiss & Petrig 2011, supra note 13, p. 39).

\(89\) (Beckman 2012, supra note 24, p. 17).

\(90\) (Geiss & Petrig 2011, supra note 13, p. 39).


\(93\) (Bingham 1932, supra note 18, p.769).

\(94\) (Jesus 2003, supra note 42, p. 20).

\(95\) (Guilfoyle 2009, supra note 13, p. 33).
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who limited their attacks to the state from which they were seeking independence.\(^96\) The HSC similarly included ‘for private ends’ for such a purpose. This is because an insurgent attacking the ships of their state was one tool in gaining independence.\(^97\) This would be a public end, which clearly only threatens the state to which independence is sought, and not the community of nations at large.\(^99\) This historical exception the Harvard drafters tried to include is based on the objective test of the ships targeted by the insurgents\(^100\), not the subjective intentions of the actor.\(^101\)

The Harvard Draft commentary focuses on the issues of insurgency, and the exception to Article 3 does appear to apply to “all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognised belligerent organizations, or of unrecognised revolutionary bands”. This is said by Guilfoyle to be a closed list of contentious cases, which would seemingly exclude actors such as Sea Shepherd.\(^102\) Thus the private ends qualification was formulated to deal with only insurgency attacks on state vessels. This is the only form of ‘political end’ that falls outside the definition of piracy, to be dealt with under traditional international law.\(^104\)

But as Kevin Heller points out in his comment, Article 16 of the Harvard Draft, which deals with cases falling outside piracy, does not adopt a limited list approach. Although designed primarily for such cases, it “covers all non-piratical but unjustifiable attacks for public or private ends on persons or property under the protection of a state on the high seas”.\(^106\) Article 16 “covers inter alia the troublesome matter of illegal forcible acts for political ends against foreign commerce, committed

\(^{96}\) (Halberstam 1988, supra note 92, p. 277).
\(^{97}\) (Halberstam 1988, supra note 92, p. 275). (Guilfoyle 2009, supra note 13, p. 33).
\(^{98}\) Guilfoyle explains such attacks as the exercise of a “limited form of public power”. Insurgents have the capability to become lawful Governments, and thus a limited public status unlike terrorists or pirates. (Guilfoyle 2009, supra note 13, p. 35).
\(^{99}\) (Halberstam 1988, supra note 92, p. 275).
\(^{100}\) Governmental ships of the state to which the insurgents are seeking independence from.
\(^{101}\) (Guilfoyle 2009, supra note 13, p. 37).
\(^{104}\) Article 16 provided: “the provisions of this convention do not diminish a state’s right under international law to take measures for the protection of its nationals and ships and its commerce against interference on or over the high seas, when such measures are not based upon jurisdiction over piracy” [Emphasis added]. (Bingham 1932, supra note 18, p. 746).
\(^{106}\) (Bingham 1932, supra note 18, p. 857).
on the high seas by unrecognised organizations. Article 16 covers the examples given in Article 3 quoted above, but there is no indication the article is limited to just these cases. This would suggest political violence by unrecognised organisations and not just insurgents could fall within Article 16, which covers the cases that do not qualify as piracy under Article 3.

The conclusion that such exclusion is more about the class of vessel as a legitimate target for insurgents than their motives seems unsupported. The academic writings referenced by the Harvard drafters do restrict the exception to insurgents attacking the vessels of the state they wish to seek independence from, and this is presumably the “better view” they reference in supporting. However the Harvard Draft does not distinguish between acts against innocent third national shipping and acts against a particular flagged vessel as a legitimate target. Nor does it distinguish between groups targeting a single Government and those affecting multiple states. The rationale for exclusion is rather (a) there is no reasonable justification for extending universal jurisdiction, (b) such acts would not fall indisputably under the common jurisdiction by traditional piracy law, and (c) that such cases often involve serious political considerations that could direct the action of the offended state. Theoretically therefore if the list of contentious cases is not exhaustive, and comparable cases of purely politically motivated violence fulfilled the rationale above, it would not

107 (Bingham 1932, supra note 18, p. 857). Inter alia suggests room for other acts. Illegal forcible acts for political ends against foreign commerce, committed on the high seas by groups other than unrecognized organizations, although not anticipated by the Harvard drafters could fall as another example of excluded conduct. Such a conclusion would be very much dependent on subsequent state practice in shaping the law.

108 The Harvard drafters give the example of a revolutionary organization attacking or blockading foreign commerce. But this is preceded by “for instance”. Terrorism does not seem to have been considered by the drafters. Presumably if the list is not closed it could then be assessed if such action should be considered as “not cases falling under the common jurisdiction of all states as piracy by traditional law, but are special cases of offences for which the perpetrators may be punished by the offended state” as it sees fit” [i.e. within Article 16]. (Bingham 1932, supra note 18, p. 857).

109 Kevin Jon Heller has summarised the Harvard Draft references that support the view politically motivated violence could be committed by parties other than insurgents and states, but still be a public end and not private end – Heller, K., Why Political Ends are Public Ends, Not Private Ends, Opinio Juris, 1 March 2013. Available at: http://opiniojuris.org/2013/03/01/a-final-word-about-politically-motivated-piracy/.

110 (Guilfoyle 2009, supra note 13, pp. 33-35). Also see (Halberstam 1988, supra note 92, p. 277) - “on the basis of the travaux préparatoires that "for private ends" was used in the Harvard Draft to exclude acts by unrecognized insurgents who limited their attacks to the state from which they were seeking independence, and was used in the Geneva Convention for that purpose and also to exclude attacks by state ships”.

111 (Halberstam 1988, supra note 92, p. 279).

112 (Bingham 1932, supra note 18, p. 857).

113 (Crockett 1977, supra note 104, p. 94). Also see the Harvard Draft Commentary to Art. 16, which when discussing acts not covered by the definition of piracy refers to attacks on “foreign commerce”, “persons of property under the protection of a state” and the “offended state”, none of which seem to take any consideration of the ships status or flag. (Bingham 1932, supra note 18, p. 857).

114 (Crockett 1977, supra note 104, p. 87).

115 Offended states are free to take action under traditional jurisdictional rules. Although universal jurisdiction requires no nexus between the state and act, the basis of the principle is that the crime affects a common interest of all states (piracy affecting the freedom of navigation and commerce). If the action does not threaten the common interest, then piracy should not concede jurisdiction to states not offended or threatened.

116 (Bingham 1932, supra note 18, p. 857).

117 (Bingham 1932, supra note 18, p. 857). The Japanese refrainment of taking action against Sea Shepherd could only be explained on grounds of a political decision.
be for ‘private ends’. Insurgency is the principal issue the test sets out to address, but other violence for non-private ends that is not state sanctioned could exist.

In summary the Harvard Draft restricts piracy to those acts carried out for private ends. Similar to the Matsuda Draft, political ends are not private ends. They are the opposite; they are public ends, which fall to the offended state to prosecute under the ordinary jurisdictional rules of international law (Article 16). “The cases of acts committed for political or other public ends are covered by Article 16” [Emphasis added]118. Looking at that Article, whilst state sanctioned violence would not be piracy, there is no indication that this is the only conduct that would not qualify. Insurgents were the focus of discussion and the origin of the private ends test, but the commentary contemplates other unrecognised organisations using force for political ends that would not be piratical. Although environmental activists were certainly never considered, the reasoning of excluding insurgents could equally apply. Piracy is a special common basis of jurisdiction, and it will be seen in the discussion below whether reasonable justification exists for the application of universal jurisdiction119. The state practice discussed would suggest such cases do not fall undisputedly under the common jurisdiction120. And finally the discussion on Sea Shepherd highlights the serious political considerations that have directed the offended state, notably Japan.

### 2.1.3 The International Law Commission Draft and The UN Conferences on the Law of the Sea

The International Law Commission *Articles Concerning the Law of the Sea with Commentaries* 121 is an indispensable tool in interpreting the HSC, and in turn the UNCLOS piracy provisions which borrow from that convention. As the Commission noted:

“[I]ts Report, the reports of its Special Rapporteurs and the related research projects, studies, working documents and questions directed to States are indispensable also for the following reasons:
(i) they are a critical component of the process of consulting States and obtaining their views;
(ii) they assist individual States in the understanding and interpretation of the rules embodied in codification conventions;
(iii) they are part of the travaux préparatoires of such conventions, and are frequently referred to, or quoted in the diplomatic correspondence of States, in argument before the International Court of Justice and by the Court itself in its judgments;”122.

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118 (Bingham 1932, supra note 18, p. 798).
119 Section 2.3.
120 Sections 2.2 & 3.2.
As already mentioned, the ILC Draft Articles generally agreed with the research conducted by the Harvard Law School, and the resulting Harvard Draft. This is specifically mentioned in the piracy Section\textsuperscript{123}. However whether agreeing in general includes the Harvard Draft interpretation on private ends, and whether ‘private ends’ does not include purely political motivation is unclear\textsuperscript{124}. The Matsuda Draft was discussed during the sessions approvingly, and language used in the commentary is taken from that draft\textsuperscript{125}. But noticeably the political exception Matsuda went onto describe is not featured in the commentary, which some authors take to suggest such an exception was not accepted\textsuperscript{126}. This does not appear to be a very convincing argument however when put in context. Point (i) on the possibility of piracy driven by hatred or revenge is immediately followed by (ii) “The acts must be committed for private ends”\textsuperscript{127}. Thus it appears the commentary is making two distinct points; firstly that an intention to rob (\textit{animus furandi}) is not required, and secondly, that the act must be committed for private ends. If private ends were non-political then the fact the commentary does not mention a political exception cannot be taken as a rejection of the previous codification attempts\textsuperscript{128}.

In the absence of convincing evidence to the contrary, it must be taken that the ILC approval and references to previous codification efforts extend to the discussions on political violence. Indeed


\textsuperscript{124} However see the interesting example of Beckman from the ILC reports; “Following the Harvard precedent, he had defined as piracy acts of violence or of depredation committed for private ends, thus leaving outside the scope of the definition all wrongful acts perpetrated for a political purpose.” (Referencing: ‘International Law Commission: Summary Records of the Seventh Session’ (UN Doc. A/1955) in \textit{Yearbook of the International Law Commission 1955}, vol. 1, (New York: UN, 1960) 37 (UN Doc. A/CN.4/SER.A/1955) at p. 40, Paras. 38–45 (loc. cit. at 786)). Beckman goes on to argue it would be troubling therefore if terrorist or political activists were “unrecognized revolutionary bands” – the words from the Harvard Draft quoted by the ILC. It would be ‘better’ to distinguish private-public ends based on state sanctioning, but no legal argument is made in support of the ‘better’ interpretation. (Beckman 2012, supra note 24, p. 23).

\textsuperscript{125} “Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain”, \textit{Articles Concerning the Law of the Sea with Commentaries: 1956}, Yearbook of the International Law Commission, 1956, Vol. II, p. 282, Art. 39, Commentary. This is very similar to the language and examples used in the Matsuda Draft, (Matsuda & Wang Chung-Hui 1926, supra note 74, p. 224).


\textsuperscript{128} Different viewpoints were raised during the discussions, but such an interpretation of private ends could be seen in the Special Rapporteur’s phrasing of the question to the commission “Mr. FRANCOIS (Special Rapporteur) said that finally the Commission had to decide whether to restrict piracy to \textit{acts committed for private ends, thus excluding acts committed for political motives or by warships} […] The CHAIRMAN then put to the vote the retention of the words "for private ends" in the Special Rapporteur's revised text. \textit{It was decided, by 11 votes to 2, that those words should be retained.}” [Emphasis added]. \textit{Summary Records of the Seventh Session 2 May – 8 July 1955}, Yearbook of the International Law Commission 1955, Vol. I, A/CN.4/SER.A/1955, p. 55 Para. 16, & p. 57 Para. 35.

Fitzmaurice on the other hand seems to have adopted the state sanction / lack of state sanctioning approach during the ILC discussions – See (Halberstam 1988, supra note 92, p. 281).
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this is the position taken by Czechoslovakia, which criticized the International Law Commission for failing to include piracy committed for political ends when the draft came to be discussed at the negotiations\(^\text{129}\). The Czech proposal was part of a number of criticisms that pointed to a very wide interpretation of piracy that has never been seen in international law\(^\text{130}\). The Czech interpretation of international law was rejected by other states\(^\text{131}\).

The only major change brought about by the ILC Draft Articles is the addition of “any illegal acts” to the original Harvard Draft definition. The addition is best understood to broaden the conduct that would fall under the definition of piracy, yet the term ‘illegal’ is unclear and open to interpretation. It has been suggested the term “emphasize[s] that the act must be dissociated from a lawful authority”\(^\text{132}\) in support of the public-private theory of private ends. But the link between the two phrases is not explained or argued. It seems difficult to see, if the term illegal does restrict piracy to not include privateers sanctioned by Governments\(^\text{133}\), how that conclusion would affect the interpretation of private ends. The political exception theory does not suggest the action would be legal. It is perfectly reasonable for the action to be illegal (non-state sanctioned) but still fall outside the private ends requirement due to its political nature\(^\text{134}\).

Finally, the difference between the UNCLOS definition and that of the HSC is minimal, merely confirming the customary definition contained. A change is seen in the French version of the text, but this does not tell us much, and does not appear very conclusive as evidence of a change in approach, given no change was made to the English text\(^\text{135}\). It might be thought that re-enactment without debate tells us little about the position of the private ends debate. But the private ends requirement was maintained despite academic references to broaden the definition by deleting


\(^{130}\) Mr Cervenka for Czechoslovakia suggested that piracy should also cover attacks within the territorial sea or indeed the mainland if the vessel came or left to the high seas. He also suggested attacks within the *terra nullius* should not be piracy. United Nations Conference on the Law of the Sea, *Official Records, Vol. IV: Second Committee (High Seas: General Regime)*, U.N. Doc. A/CONF. 13/40, p. 78, Para. 33.

\(^{131}\) (Guilfoyle 2009, supra note 13, p. 43).

\(^{132}\) (Beckman 2012, supra note 24, p. 22).

\(^{133}\) An alternative view of the addition of ‘illegal’ acts is to highlight an intention to rob is not required. (Gardner 2012, supra note 13, p. 809).

\(^{134}\) The French text HSC referred to “buts personnel” (personnel goals), whilst UNCLOS uses the term “Fins privees” (private purposes). Neither term would appear to be conclusively clear as to whether political motives would be included or excluded under the definition of piracy, and the change is simply to bring the French text wording more in line with that of the English text. Joe Verhoeven concludes both terms are to be treated as substantially equivalent (“*Les termes doivent sans doute etre tenus pour substantiellement equivalents, la version anglaise etant identique dans l'un et l'autre instruments*”) – Verhoeven, J., *Droit International Public*, De Boeck & Larcier, 2000, p. 568.
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‘private ends’\textsuperscript{136}. Clearly states were not willing to enlarge the scope of the piracy definition.

But perhaps the inaction is due to similar reasons as the failure of states to define terrorism within international law. At the time of the Harvard Draft there was a chaos of expert opinion on what constituted piracy, yet the drafters as a minimum agreed with the Matsuda Draft that purely political ends fell outside piracy, to be dealt with under general jurisdictional rules\textsuperscript{137}. The limits of this were never expanded or established beyond insurgent attacks for political ends, the example of the day. By the time of the UNCLOS drafting the problems of political activity at sea and the doctrinal debate would have become apparent, yet the drafters still did not address the issue. With terrorism no definition exists because no will exists at the UN level to define the term\textsuperscript{138}. Perhaps the grey area of politically motivated violence at sea faces similar insecurity with states unwilling to delineate the point at which subjects should be under the jurisdiction of all.

What is clear from the history of piracy is that the exact position of politically motivated violence by private individuals/organizations is unclear. The rich history alluded to in the Sea Shepherd case does not define private ends as all acts “not taken on behalf of a state”\textsuperscript{139}. Crockett argues the private ends requirement of the HSC was added to settle the debate on whether acts of political groups and states were piracy\textsuperscript{140}. If so, the “sledgehammer”\textsuperscript{141} private ends test has failed to do so. I would hesitantly conclude however that purely political acts perpetrated against a particular state(s) are not included within the definition of piracy, although the exact boundaries of this are still unclear. Very much will depend on state practice and the policy underlying the piracy provisions. It is to this we now turn, to evaluate whether it confirms the interpretation reached, and what the limits of political ends is.

2.2 State practice on the definition of ‘private ends’

“the history of piracy, the motives behind the establishment of universal jurisdiction, as well as judicial precedent, powerfully demonstrate that a thwarted pirate cannot escape the world’s jails merely by pronouncing a political cause”\textsuperscript{142}. [Emphasis added].

\textsuperscript{136} (Ronzitti 1990, supra note 130, p. 2).
\textsuperscript{137} (Bingham 1932, supra note 18, Article 16).
\textsuperscript{138} “The world still seems to be split between those who believe that defining terrorism is a totally political issue best addressed by individual states and those who believe that world deserves to have the phenomenon of terrorism defined in an international convention” (Mejia 2003, supra note 73, p. 172).
\textsuperscript{140} (Crockett 1977, supra note 104, p. 79).
\textsuperscript{141} (Crockett 1977, supra note 104, p. 87).
\textsuperscript{142} (Bahar 2007, supra note 38, p. 30).
The history of piracy codification was clear that public ends are not private ends. It was equally clear that political acts could be a form of public act, thereby excluded from being classified as piracy. Although the discussions of ‘private ends’ in the history was limited, and at times mixed, it would appear that ‘political’ acts might extend beyond those sanctioned by a state authority, or those carried out by insurgents against their Government. Despite such a distinction the Matsuda Draft, and subsequent codification in the HSC and UNCLOS, have not explained the exact meaning of purely political acts beyond those of insurgents, since its introduction to primarily deal with that issue.

However to conclude public ends, as opposed to private ends, could extend beyond state sanctioned violence is one thing. To conclude that politically motivated violence by individual groups is a public end is another. This history of piracy codification tells us that such acts could be for public ends, but the position remains unclear. We must therefore turn to state practice to confirm or deny whether the political acts of private organisations on the high seas are ‘for private ends’ under customary law and treaty law. The recent decision of the International Court of Justice on immunity provides the context of the evaluation and is worth quoting in full:

“In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. Opinio juris in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international

143 Thus the conclusion that private ends are all acts lacking state sanction doesn’t appear in the history of the piracy definition. State sanctioned violence is not a private end. The question now is whether politically motivated violence without state sanctioning is also not a private end.

144 (Halberstam 1988, supra note 92, p. 278).

145 A customary rule will be “in accordance with a constant and uniform usage practiced by the states in question” (Asylum Case (Colombia v. Peru), 20 November 1950, ICJ Reports 1950, p. 276), “the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of a recognition of a new rule” (Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), 27 June 1986, I.C.J. Reports 1986; General List No. 70, p. 432). State practice should be accompanied by opinio juris – the recognition that a legal obligation obligates a particular behaviour; “not only must the acts concerned ‘amount to a settled practice’, but they much be accompanied by the opinio juris sive necessitatis, Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), 27 June 1986, I.C.J. Reports 1986; General List No. 70, pp. 108-9; 76 ILR, pp. 442-3. See Shaw, M., International Law, Sixth Edition, Cambridge University Press, 2008, pp. 72-93.

146 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(3)(b) – subsequent practice in the application of the treaty can be taken into account in confirming the interpretation reached on ‘private ends’.
law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite opinio juris and therefore sheds no light upon the issue currently under consideration by the Court.147 [Emphasis added].

Such reasoning should also be applied to the evaluation of universal jurisdiction exercised by states over pirates. If the exercise of jurisdiction, or state assertions, based on a wider/narrower interpretation of ‘private ends’ is not accompanied by the requisite opinio juris (or evidence of), it will be of little use. Equally the “judgments of national courts” must be those faced with the question of piracy under international law. States are free to define piracy under their national law as they see fit, Article 101 of UNCLOS merely provides a definition for the purposes of the exercise of universal jurisdiction148. Municipal piracy is a separate crime, the judgments of which will be of no use for defining ‘private ends’ under international law149. This applies equally to the legislation of those states, unless it is apparent that such legislation is a “domestic implementation of the legal regime for combating piracy under international law”150. The position of states and the International Law Commission have already been discussed. But other treaty law, which is a form of state practice151, may help in identifying the limits of ‘private ends’ as understood by the states involved.

2.2.1 The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)152 was adopted on the 10th March 1988 and entered into force on the 1st March 1992. There are 156 Contracting Parties representing 94.62% of the world’s tonnage153. Various protocols have

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148 A definition of piracy under international law has one purpose, “that purpose is to define the common special jurisdiction of the several states based on certain sorts of facts which it calls piracy”. (Bingham 1932, supra note 18, p. 785).

149 “[T]he decisions of courts of a certain state or the dictates of its legislation as to what the crime of piracy includes for the purposes of the law of that state, are not throughout pertinent to the scope of this common international jurisdiction”. (Bingham 1932, supra note 18, p. 785). [Emphasis added].

150 (Kanehara 2010, supra note 12, p. 469). For an overview of the different municipal definitions see: United Nations Security Council, Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates, Annex S/2012/177, 26 March 2012.


153 International Maritime Organization, Convention for the Suppression of Unlawful Acts Against the Safety of
been adopted, with those of 2005 entering into force in 2010. The significant state adoption, particularly by those ‘whose interests are specifically affected’ suggests a convention to prevent, punish and prosecute all forms of violence against shipping was needed.

Although the crimes under SUA and piracy are not exclusive crimes, some authors have taken the adoption of the SUA Convention as evidence the rules on piracy did not cover terrorists and other politically motivated actors. This is supported by the fact the convention was adopted in direct response to the Achille Lauro incident. The sponsoring states that introduced the draft convention, Austria, Egypt and Italy, cited the two-ship restriction and the private ends requirement as to why a new convention on terrorism was needed. Both the Special Representative of the UN Secretary General for the Law of the Sea (Nandhan), and the Italian Minister of Justice (Vassalli) stated at the conference that the private end criterion would not be met by maritime terrorism; thereby making piracy inapplicable. The SUA Convention does appear to adopt the wider

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155 “BEING CONVINCED of the urgent need to develop international co-operation between States in devising and adopting effective and practical measures for the prevention of all unlawful acts against the safety of maritime navigation, and the prosecution and punishment of their perpetrators” Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 27 ILM 668 (1988), 1678 UNTS 221, Preamble, Para. 6.

156 See Art. 3.


158 “The mere fact of the adoption of the SUA Convention stands testimony that the international sea piracy rules cannot handle terrorist activities at sea” - (Jesus 2003, supra note 42, p. 27).

159 Briefly, members of the Palestinian Liberation Front, a splinter group from the Palestinian Liberation Organization, hijacked an Italian cruise liner on the 7th October 1985 and demanded the release of 50 Palestinian prisoners incarcerated in Israel.

160 (Guilfoyle 2012, supra note 30, p. 93, Para. 24), citing IMO Doc. PCUA 1/3 (3 February 1987), Annex, Para. 2. The crimes covered by SUA were only touched upon by the piracy provisions of the HSC and UNCLOS: “these provisions apply to illegal acts of violence or detention or any other act of depredation committed for private ends by the crew or the passengers on board a private ship on the high seas against another ship or against persons on board of such ship. Thus, these acts cover only a small part of the unlawful acts that deserve punishment as such acts are mostly not committed for private ends or from aboard a ship against persons on board of another ship” – quoted by: Treves, T., The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, pp. 69-90 in, Ronzitti, N., (ed.), Maritime Terrorism and International Law, Martinus Nijhoff Publishers, 1990, p. 87, note 13.

161 (Ronzitti 1990, supra note 130, p. 2; citing, IMO Doc. SUA/CONF/RD 13).
Defining ‘private ends’ under international law interpretation, covering the activity in Article 3 that lack state sanctioning. If piracy covered all violence on the high seas that lacked state sanctioning, the SUA Convention would be obsolete in that respect – all states would already by able to exercise universal jurisdiction against such actors (putting aside the two-ship requirement). Yet the convention was introduced for the very purpose of covering politically motivated violence, which lacked state sanctioning, and which was thought by those states to not be covered by piracy as defined in the HSC.

Guilfoyle however views the SUA Convention within its historical context, and concludes the treaty represents state practice condoning the idea that political motives could ever exclude criminal responsibility. Later terrorism suppression treaties exclude a ‘political offences exception’ from applying to extradition requests. Although the exception is not expressly excluded in the SUA Convention, this is due to the debate at the time, within the UN General Assembly, whether acts in furtherance of self-determination were legitimate acts of politically motivated violence, or whether they were terrorist attacks. Since the 1994 Declaration on Measures to Eliminate International Terrorism the position has been settled that no such considerations can be taken into account - all such violent attacks being unjustifiable. The 2005 SUA protocol adopts this position, expressly excluding any ‘political offence’ ground to refuse extradition. Thus subsequent state practice confirms political motivation cannot excuse otherwise criminal acts. The private ends requirement of piracy should thus be interpreted as not excluding action just because it was politically

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162 Art. 2 provides the convention does not apply to;
1. A warship; or
2. A ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or
3. A ship which has been withdrawn from navigation or laid up.
Nothing in this Convention affects the immunities of warships and other governmental ships operated for non-commercial purposes.


163 (Guilfoyle 2009, supra note 13, pp. 38-40).


165 (Guilfoyle 2009, supra note 13, p. 39).

166 “Are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethic, religious or any other nature that may be invoked to justify them” UN General Assembly, Measures to Eliminate International Terrorism, A/RES/49/60, 9 December 1994, Annex, Para. 3. Reiterated; Measures to Eliminate International Terrorism, A/RES/50/53, 11 December 1995, Para. 2.

167 “None of the offences set forth in article 3, 3bis, 3ter or 3quater shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.” Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 2005 (2005 SUA Convention), Consolidated Text, p. 14, Art. 11bis. Available at: https://www.unodc.org/tdb/pdf/Convention&Protocol%20Maritime%20Navigation%20EN.pdf, [last accessed 08.07.2013].
motivated.

Furthermore it should be remembered that although the states introducing the SUA Convention were of the opinion politically motivated attacks were excluded from the definition of piracy, that is just an opinion. Yes it should be borne in mind as state practice and _opinio juris_ to the effect political ends are excluded, but this is hardly uniform practice shared by all states. At least one major maritime power, The United States, clearly did not take the position politically motivated attacks were excluded. The United States charged those involved in the _Achille Lauro_ incident with piracy, citing the domestic law that pointed to the ‘law of nations’, and basing its jurisdiction on the universal jurisdiction principle applicable to piracy _jure gentium_. It is perfectly reasonable to look to the other reasons for introducing the SUA Convention, which could explain the vast state practice beyond the three states that introduced the draft text. The Convention aims to suppress a broader number of acts equally disruptive to navigation, it provides a working regime applicable to a larger geographical area than piracy, and most importantly, it provides a duty to prosecute or extradite.

Such interpretations demonstrate the fundamentally different starting point each theory adopts. Academics setting out to demonstrate purely politically motivated violence is another form of public end are thus demonstrating the ‘private ends’ requirement has not been fulfilled, and so universal criminal jurisdiction should not be extended to their actions. The piracy regime is in the interest of the freedom of the seas “one of the exceptional cases where individuals are directly the objects of International Law”. The freedom of navigation is upheld by the exclusive flag state jurisdiction, which prevents unnecessary restrictions or impediments to navigation on the high seas. “It cannot be taken for granted that remedies which states are allowed to take against the more traditional instances of maritime violence are also available in the case of maritime terrorism.” Therefore states turned to the adoption of the SUA Convention to regulate violence that was not for private ends or involving two ships, but necessarily required a further exception to flag state jurisdiction.

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168 (Madden 1988, supra note 45, p. 140).
169 E.g. “communicates information which that person knows to be false, thereby endangering the safe navigation of a ship” - _Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation_, 27 ILM 668 (1988), 1678 UNTS 221, Art. 3(1)(f). The SUA Convention also does not have a two-ship requirement.
173 (Ronzitti 1990, supra note 130, p. 1).
The expansive interpretation of piracy however is premised on the general rule being that the freedom of navigation means that ships should not be subject to violence on the seas. Only states and belligerents/insurgents targeting state vessels are those who can legitimately use violence.\(^\text{174}\) The lack of state responsibility for the actions of private political organizations means we must turn to the criminal law in order to hold those responsible accountable.\(^\text{175}\) Thus we turn to piracy law, the general rule excluding all violence lacking state sanctioning (and responsibility). The private ends term is a limited exception applying to the particular facts of insurgency, and the argument proceeds that purely political violence does not fall within this limited exception.\(^\text{176}\)

Thus those who see purely political violence as a public end are asking whether purely political violence falls within the exception of piracy universal jurisdiction, whilst the wider view asks if purely political violence falls within the exception of non-private ends to the exercise of universal jurisdiction over violence at sea. Such viewpoints clearly affect how the SUA Convention is interpreted.\(^\text{177}\) Put simply is acting for ‘private ends’ a requirement for the exercise of universal jurisdiction or is it an exception to the exercise of universal jurisdiction if the other elements of piracy exist? The answer necessarily turns on how the definition of piracy operates in terms of policy, and the justification for the exercise of universal jurisdiction. This question is dealt with in the policy Section below, the answer to which determines how the SUA Convention should be interpreted.\(^\text{179}\)

2.2.2 Judicial precedent on ‘private ends’ & international incidents

\(^{174}\) (Guilfoyle 2009, supra note 13, p. 37).

\(^{175}\) (Bahar 2007, supra note 38, p. 17). (Guilfoyle 2009, supra note 13, p. 37). (Direk et al. 2011, supra note 13, p. 233).

\(^{176}\) Although it is true that such acts do not raise the issue of state immunity or state responsibility, the link between the lack of state responsibility and the necessity of dealing with this via piracy is not demonstrated. The need to resort to criminal law does not mean the actions must be dealt with via international piracy rules, only that they must be dealt with via criminal law in general.

\(^{177}\) An exception to the exclusive flag state jurisdiction on the high seas.

\(^{178}\) As a confirmation that political acts do not fall within the definition of piracy, or as confirmation that political acts are not excluded from criminal liability.

\(^{179}\) However if one adopts the view that purely political violence does not constitute piracy because it is not for private ends, then both interpretations of the SUA Convention can be reconciled. The fact political violence does not constitute grounds for the exercise of the special jurisdictional grounds of international piracy does not mean such violence is condoned. Such action is always unjustifiable; it is just not dealt with via the piracy provisions.
Despite the fact piracy has existed “since the early days of mankind’s adventures into the sea”\(^{180}\), the discussion of case law will be limited for a number of reasons. As mentioned above, municipal and international piracy cases need to be distinguished\(^{181}\). National courts are tasked with the prosecution of all pirates, but only those based on the international definition of piracy will be examined\(^{182}\). Secondly, we are concerned with the modern definition of piracy and the requirement of private ends as applied in the Sea Shepherd case. Therefore only cases that have followed the codification and definition of piracy, or those that played a crucial role in relation to defining private ends will be examined. The Harvard drafters already conducted thorough research into the case law and academic literature at the time, the results of which have been discussed\(^{183}\). There is also some suggestion the exact boundaries of the customary law prior to codification was unclear, allowing states to exercise a wide discretion in deciding what qualified as piracy\(^{184}\). Prior to the Harvard Draft, states agreed “an international crime granting them universal jurisdiction” existed, but not on the definition of piracy\(^{185}\). The complex task of defining piracy prior to the beginning of the codification process is beyond the limits of this thesis and therefore such jurisprudence cannot be relied on\(^{186}\).

The seminal case of *Re Piracy Jure Gentium*\(^{187}\) is consistently referenced both in academic literature and case law. It was heavily relied on in *United States of America v Dire*\(^{188}\), which in turn was one of the few cases the court in the Sea Shepherd decision referenced\(^{189}\). The case involved a failed attempt at robbery of another ship at sea. A special reference to the English Privy Council reasoned that actual robbery was not an essential element of piracy under the law of nations\(^{190}\).

\(^{180}\) (Jesus 2003, supra note 42, p. 364).
\(^{181}\) Section 1.1.
\(^{182}\) This occurs where the Court’s jurisdiction rests on the universal jurisdiction found in international law, or the national definition is defined by international law/the law of nations (as the US law in the Sea Shepherd case is).
\(^{183}\) Subsection 2.1.2.
\(^{184}\) “It was through their codification for the first time in the 1958 HSC that a clear and uniform definition was retained of piracy, putting an end to the quite wide discretion of states in their qualification of acts of piracy, for until the precise wording is written down in the codification instrument there are really no exact boundaries in existing customary law.” (Jesus 2003, supra note 42, p. 375). (Direk et al. 2011, supra note 13, p. 238).
\(^{186}\) “To use the notion of "piracy" to achieve results which had nothing to do with classical piracy at all became an established international practice.” Sundberg, J., *Piracy: Air and Sea*, 20 DePaul Law Review 337, 1997, p. 340.
\(^{187}\) In re piracy jure gentium, Judicial Committee of the Privy Council, 26th July 1934, (1934) A.C. 586.
\(^{188}\) *United States of America v Dire*, 680 F3d 446, US Court of Appeals for the Fourth Circuit, 23 May 2012.
\(^{189}\) The Institute of Cetacean Research v Sea Shepherd Conservation Society, Case No. 12-35266, US Court of Appeals for the Ninth Circuit, 25th February 2013, p. 3.
\(^{190}\) The reference asked: “Whether actual robbery was an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally *jure gentium*” – *In re piracy jure gentium*, Judicial Committee of the Privy Council, 26th July 1934, (1934) A.C. 586, pp. 1-2. Special references do not affect the court ruling; the decision of the Hong Kong Court was final.
“Vengeance, anarchistic or other ends”\(^{191}\) could equate to piracy, should violence be committed on the high seas between two ships. The court emphasized the lack of state sanctioning\(^{192}\), and endorsed “piracy is any armed violence at sea which is not a lawful act of war” as the definition “nearest to accuracy”\(^{193}\). This landmark case, having referred to both the League of Nations Matsuda Draft and the Harvard Draft approvingly\(^{194}\), concluded the lack of state sanctioning and liability was the key to piracy\(^{195}\).

However that court explicitly refused to endorse a general definition of piracy after discussing the Matsuda Draft and the question of armed takeovers by the crew of a ship\(^{196}\). The decision does appear to be silent on the issue of politically motivated violence\(^{197}\). The only question asked was whether actual robbery was a necessity of piracy, and “all that their Lordships propose to do is to answer the question put to them”\(^{198}\). Thus whilst the history may demonstrate a “gradual widening of the earlier definition of piracy”\(^{199}\) in response to new or unconsidered situations, the case only reflects that attempted robbery is also piracy, not that the lack of state sanctioning is the necessary test for all cases.

The Santa Maria incident in the 1960s involved the seizure of a Portuguese merchant ship by Captain Henrique Galvao and his men posing as innocent passengers\(^{200}\). This was claimed to be in the interest of the Independent Junta of Liberation\(^{201}\). The action was branded as piracy by the Portuguese, which requested the assistance of the USA, the Netherlands and the UK\(^{202}\). The refusal

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191 In re piracy jure gentium, Judicial Committee of the Privy Council, 26th July 1934, (1934) A.C. 586, p. 10.
192 Referencing the definition of Wheaton, the court said; “this enshrines a concept which had prevailed from earliest times that one of the main ingredients of piracy is an act performed by a person sailing he high seas without the authority of commission of any state” In re piracy jure gentium, Judicial Committee of the Privy Council, 26th July 1934, (1934) A.C. 586, p. 7.
193 In re piracy jure gentium, Judicial Committee of the Privy Council, 26th July 1934, (1934) A.C. 586, p. 9 – Although noting it was far too expansive to include violence on-board a single ship.
194 In re piracy jure gentium, Judicial Committee of the Privy Council, 26th July 1934, (1934) A.C. 586, p. 10.
196 In re piracy jure gentium, Judicial Committee of the Privy Council, 26th July 1934, (1934) A.C. 586, p. 10.
198 In re piracy jure gentium, Judicial Committee of the Privy Council, 26th July 1934, (1934) A.C. 586, p. 11.
199 Ibid.
201 General Humberto Delgado who had lost the Portuguese Presidential election led the group from Brazil. The group had no politically organized presence within Portugal, only those in exile in Brazil. (Zwanenberg 1961, supra note 173, p. 816).
202 (Menefee 1990, supra note 201, p. 57).
to allow the use of force, and the House of Commons discussion suggested the British doubted the case for piracy, whilst the US had no hesitation in branding the act as piracy. This soon changed however and the USA declared it was unclear whether an act of piracy had occurred. The incident was a publicity stunt to achieve political change in Portugal, much like the Sea Shepherd harassment is largely a media event aimed at causing political change in Japan. The many legal commentaries the case received “almost without exception, declined to label Galvao a pirate.” Although some commentaries were based on the two-ship requirement, others felt the political aims were not considered to be private ends.

Bahar saw the case as one in which the international community classified the attackers as Portuguese insurgents attacking Portuguese shipping, and therefore within the limited exception. The political motives alone were not sufficient, it was the political decision of states as to their international status that absolved them from piracy. But given the attack was on an innocent third party merchant vessel with the interests of many states at issue, one could also adopt the reasoning of Jesus who works from the traditional definition and case of piracy to conclude the political objectives of Galvao and his men would be excluded. The piracy rules were developed for particular situations and acts. The Portuguese definition as piracy was a stretch in definition and application beyond the traditional rule. In the words of the Privy Council, the history demonstrated a ‘gradual widening’ of the definition. Stretching the definition to cover political activists and terrorist would be beyond a ‘gradual widening’. The incident may therefore be evidence of practice such political ends are excluded, but notably only by a few states, and with other possible explanations as to why the attack did not constitute piracy.

Modern day piracy in the Gulf of Aden has demonstrated the limits of the definition of piracy under international law and the need to adopt novel approaches. Although the case law has helped

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203 (Menefee 1990, supra note 201, p. 57).
204 The comments by the Civil Lord of the Admiralty rest on the request for assistance and did not suggest the incident was piratical. (Zwanenberg 1961, supra note 173, p. 800).
205 (Menefee 1990, supra note 201, p. 58).
206 (Menefee 1990, supra note 201, p. 58).
207 Halberstam discusses Whiteman’s interpretation that such action was for private ends, but not involving two ships. (Halberstam 1988, supra note 92, p. 287).
208 (Klein 2011, supra note 196, p. 119). Green and Franck are quoted by Halberstam to argue such political acts are not for private ends, (Halberstam 1988, supra note 92, p. 287).
209 (Bahar 2007, supra note 38, p. 35).
210 (Jesus 2003, supra note 42, p. 378).
211 (Jesus 2003, supra note 42, p. 378).
212 See the various UN Security Council resolutions, the adoption of prosecution agreements with local countries (notably Kenya) and the formation of international warship patrols. Other less favoured approaches include the allowance of private security firms, and the proposal by the Netherlands for the establishment of an international tribunal. Discussed in: (Middelburg 2011, supra note 186, pp. 29-74). The use of private security firms has raises a host of other legal issues, e.g. see Rickett, O., Piracy fears over ships laden with weapons in international waters:
develop our understanding of other requirements, few have evaluated the private ends requirement. This is because such pirates are driven by the classic example of financial gain.

The courts of the Seychelles have discussed the issue of ‘private ends’ in relation to Somali pirates under customary law, but with mixed results. The Dahir decision reasoned: “piracy deals with illegal acts of violence committed for private ends by the crew of a private ship on the high seas against another ship or persons or property on board and does not include acts with governmental objectives.” The requirement of ‘private ends’ conflicted with the political motivation of terrorism and therefore each crime was to be dealt with in the alternative. The more recent decision of Abdukar Ahmed however rested on an interpretation of ‘private ends’ being all violence, depredation or detention on the high seas “without authorization by public authority.” The discussions in that case continued, making it unclear whether ‘authorization’ and ‘ends’ were different issues, or equivalent. Modern case law has done little to clarify the position of politically motivated violence on the high seas.

Finally perhaps the most important decision on the law of piracy and environmental activists is the famous Castle John decision. Both the US Appeal Court in the Sea Shepherd case, and


214 (Direk et al. 2011, supra note 13, p. 241).

215 The Republic vs. Mohamed Ahmed Dahir & Ten (10) Others, Supreme Court of Seychelles, Criminal Side No. 51, 2009, p. 18, Para. 37. ‘Governmental objectives’ does not appear to be in reference to any state sanctioning as this was clearly missing in the case. Rather it refers to political ends of private individuals. This can be seen with the contrast to terrorism that followed, which is the influence of Governments for ‘political ends’.

216 (Gardner 2012, supra note 13, p. 811).

217 “On the second query of the element of ‘private ends’, we should bear in mind that according to the definition provided in law, one will notice that piracy is a war-like act committed by non-state actors (private parties not affiliated with any government) against other parties at sea. So, in common parlance [sic parlance], piracy is generally understood as violence or depredation or detention on the seas for private ends without authorization by public authority.” The Republic vs. Abdukar Ahmed & Five (5) Others, Supreme Court of Seychelles, Criminal Side No. 21, 2011, p. 15, Para. 21.

218 “Private ends without authorization by public authority” was followed by a discussion of privateers, who also acted for their ‘own ends’ but not under their own will – they had state sanctioning (p. 15). Yet the lack of any state sanctioning for Abdukar was taken as evidence the “accused were acting on their own and for their own private ends” (p. 16). The Republic vs Abdukar Ahmed & Five (5) Others, Supreme Court of Seychelles, Criminal Side No. 21, 2011.

219 Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin, Belgium Court of Cassation, 19 December 1986, 77 ILR 537.

Defining ‘private ends’ under international law

Academic writers\(^{221}\) take the ruling as evidence purely political acts by private actors are private acts. Environmentalists from the Greenpeace group boarded, occupied, and damaged two vessels (The *Wadsy Tanker* and The *Falco*) on the high seas, which were attempting to discharge waste\(^{222}\). Just like Sea Shepherd’s campaign, and the Santa Maria incident, the goal of Greenpeace was to “alert public opinion”. In this case, to inform the public on the dangers of discharging waste into the sea, a goal set out in Greenpeace’s articles of association\(^{223}\). Such acts were therefore committed for personal ends:

“The applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or a State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective […] the Court of Appeal was entitled to decide that the acts at issue were committed for personal ends within the meaning of Article 15(1) of the Convention.”\(^{224}\) [Emphasis added].

The court clearly equated private ends to personal ends. Undertaking action in support of a non-state goal would be a personal end, and “more personal motivation such as hatred, the desire for vengeance and the wish to take justice into their own hands are not excluded in this case”\(^{225}\). Thus environmental violence like Sea Shepherds campaigns, or those of Greenpeace may qualify as piracy if the Belgian Court is followed. Although the case was an application for a restraining order and not the exercise of criminal jurisdiction, it is interesting that The Netherlands (the Greenpeace flag-state) did not protest the decision.

However some reservations must be made about the decision. Firstly the decision still does not stand for a definition of a ‘private end’. The ruling stands for the potential that acts of violence by private parties, against other private parties, will not be public ends, even if manifesting a political view\(^{226}\). What would be “committed in the interest or to the detriment of a State or a State system” is not very clear. Thus, if a private party targeted a governmental vessel in order to change their public policy, would that be to the detriment of a state?

\(^{221}\) (Guilfoyle 2009, supra note 13, p. 38). (Brown 1994, supra note 38, pp. 301-2).


\(^{223}\) *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, Belgium Court of Cassation, 19 December 1986, 77 ILR 537, p. 539.

\(^{224}\) *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, Belgium Court of Cassation, 19 December 1986, 77 ILR 537, p. 540.

\(^{225}\) Quoted from the upheld Court of Appeal decision – (Menefee 1994, supra note 223, p. 13).

\(^{226}\) “In retrospect, the court might have given more useful guidance in defining what was a private end rather than doing this indirectly by saying what was not a “public” end. Muddled definitions do not, in the long term, make for clear and consistent court decisions” (Menefee 1994, supra note 223, p. 15).
Secondly Menefee called the decision “evolutionary”, given it is not based on any judicial precedent. Belgium has been described as the “world capital for universal jurisdiction”, with the Arrest Warrant case demonstrating an over application of universal jurisdiction and the necessity to subsequently change the law. If the decision’s acceptance in international law is based on (1) similar decisions being possible with similar situations arising, and (2) it being generally held such action is piratical, then clearly we cannot say such acceptance has been reached. Apart from the Sea Shepherd decision, no other case law has followed the Castle John decision.

2.3 The justification for the universal jurisdiction of international law piracy, & its relationship to the freedoms of the high seas

“the history of piracy, the motives behind the establishment of universal jurisdiction, as well as judicial precedent, powerfully demonstrate that a thwarted pirate cannot escape the world’s jails merely by pronouncing a political cause.” [Emphasis added].

The final tool in assessing the definition of ‘private ends’ under the international law of piracy is the policy underlying the crime. As Bahar rightly points out, the rationale of universal jurisdiction over acts of piracy may be useful in shedding light on whether political acts should be, and are, covered by the piracy provisions.

The piracy provisions are part of the high seas regime and should not be viewed in isolation. “The legal regime of piracy should be viewed in the context of the general principles of international law governing jurisdiction”. The high seas regime is founded on the freedom of the high seas, as evidenced by its prominence in Article 87 of UNCLOS. This freedom, coupled with the denial of any sovereign claims, means the general principle of jurisdiction on the high seas is that of flag state exclusivity. Any claim to jurisdiction over other vessels, unless provided for under international law, would be tantamount to a claim of a sovereign right within the high seas to the detriment of the
other state involved. The exclusive flag state jurisdiction is found in Article 92 of UNCLOS, which restates the international customary law:

"1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas."

The universal jurisdiction over pirates is one such exception to the general principle of flag state exclusivity, and is repeated in Article 105 of UNCLOS. As an exception is should thus be interpreted restrictively, and we should be cautious to extend the reach of such a principle. A restrictive approach is seen in the subsequent acts of states, which have not followed the age-old crime of piracy and granted universal jurisdiction over other threats to their interests in the high seas, such as illegal fishing or passenger hijacking. Indeed encroachments onto flag state exclusivity are permitted to the “minimum extent possible.” Thus we must ask, do the justifications for providing universal jurisdiction under the international law of piracy extend to politically motivated violence? To do so we must know what the correct rationale is.

### 2.3.1 The policy and rationale behind the piracy exception to exclusive flag state jurisdiction

A number of different theories have been advanced as to why piracy is a crime subject to universal jurisdiction. The oldest, and once popular theory argued that once someone became involved (or a ship was used) in an act of piracy they became denationalised and hence open to the

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236 The famous SS Lotus Case put the principle in similar words; “It is certainly true that – apart from certain special cases which are defined by international law - vessels on the high seas are subject to no authority except that of the State whose flag they fly”. SS Lotus Case (France v Turkey), 7 September 1927, P.C.I.J. Reports (ser. A), No. 10, Para. 64.


239 “On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith”. 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3, Art. 105. The same text is found in the 1958 Convention on the High Seas, 450 UNTS 11, Art. 19.

240 (Guilfoyle 2009, supra note 13, p. 25). States have rather followed an approached based on ‘consensual interdiction’ to deal with other threats which need to be tackled on the high seas.

241 (Guilfoyle 2009, supra note 13, p. 24, (citing Klein, N., Legal limitations on ensuring Australia’s maritime security, (2006) 7 MJIL 306 at 334)).

242 Or, following In re piracy jure gentium, Judicial Committee of the Privy Council, 26th July 1934, (1934) A.C. 586 -
jurisdiction of all states. This is based on the idea that pirates are the enemies of all mankind. By such actions the pirate has rejected “the authority of that to which he is properly subject” and therefore no state could be held to account for those actions. If the flag state cannot be held to account, but such action threatens the interest of all states, then it should be open to all states to exercise jurisdiction. Their self-imposed denationalisation would, as quoted by the Harvard Drafters, take them “out of the protection of all laws and privileges”. Without the nationality and flag state protection of their registry, pirates can be subject to the ancient and well-established universal jurisdiction existent since at least the 17th century.

However this theory has been widely rejected and looking at UNCLOS denationalisation is not an automatic or necessary step, but rather left to the national law of the flag state under Article 104. International law is indifferent to the nationality of the ship under the piracy provisions and whether nationality is kept or lost. I would argue the same position exists under customary law, with universal jurisdiction existing whatever the position on the nationality of the ship.

involved in an attempted piracy attack, or, 1958 Convention on the High Seas, 450 UNTS 11, Art. 103 - if it is intended to be used so.

243 “Some writers stress the important fact that a pirate ship on the high sea is not under the excluding jurisdiction of any state, by asserting that the ship is ‘denationalized’ as a legal consequence of piracy. Some assert that the pirates are ‘denationalized’ as a legal consequence of piracy”. (Bingham 1932, supra note 18, p. 825).

244 (Guilfoyle 2009, supra note 13, p. 28). They could be equated with those ships falling within UNCLOS, Art. 110(d), whereby ships without nationality are open to visit by any state. However for piracy ships it goes much further – they are open to arrest, detention, national courts and seizure. Ironically in traditional piracy cases denationalisation wouldn’t add much given that the ships do not enjoy the protection of any flag state and are already open to boarding under Art. 110(d). “[T]he boats used by pirates are often not registered in any State” - (Wendel 2007, supra note 27, p. 22).

245 Hostis humani generis.

246 (Bingham 1932, supra note 18, p. 818).


248 Universal jurisdiction becomes a necessity if we want pirates to be prosecuted. The active personality principle would not provide jurisdiction, given the pirate would no longer be a national of any state. Nor would there be territorial jurisdiction, as the act must be committed on the high seas. (Geiss & Petrig 2011, supra note 13, p. 146). Prosecution would be left to only the victim state under the contested passive personality principle. However its development occurred after that of the need to prosecute pirates and therefore universality was the only established option. Even today the use of the principle beyond prosecuting terrorists is contested – See Lowe, V., & Staker, C., Jurisdiction, in, Evans, M., (ed.), International Law, Oxford University Press, 2010, p. 330.

249 (Bingham 1932, supra note 18, p. 819).


251 (Guilfoyle 2009, supra note 13, p. 28).

252 Of course, if I am incorrect on the customary law status of the crime of international piracy then nationality could come into play to the extent that only a treaty source exists which would therefore not apply to states (and ships flagged to that state) not party to either the HSC or UNCLOS.

253 It could be that customary law differed on this point, and denationalization was a necessary result of piratical acts – but I have found no arguments to this effect. The Convention on the High Seas sought to codify customary international law and if one looks to Art. 18, then Art. 104 of the 1982 United Nations Convention on the Law of the Sea, can be seen to be a verbatim copy of that Article. Therefore the indifference to nationality is well established under customary law.
Denationalisation clearly cannot be the rationale.\textsuperscript{254}

Another possibility is to compare piracy to other crimes subject to universal jurisdiction such as genocide or crimes against humanity. These are the most heinous crimes under international law and therefore subject to universal jurisdiction\textsuperscript{255}. This is what judges Higgins, Kooijmans and Buergenthal believe, stating it “is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community. Piracy is the classical example”\textsuperscript{256}. Thus universal jurisdiction was extended beyond piracy to these other crimes, given the interest of all states in repressing such heinous activity.

However this seems equally unconvincing and piracy is certainly not comparable to other universal crimes in terms of severity\textsuperscript{257}. Indeed piracy as defined in Article 101 of UNCLOS is broad enough to capture minor violence or depredation that could not be described as heinous. One would expect if it were based on the heinousness of the crime it would be restricted to those uses of force that could be classified as heinous, or that other far more heinous crimes such as murder would have found their way into universal jurisdiction\textsuperscript{258}. What’s more, if a seafarer were to rape and pillage other ships less than Three nautical miles (nm) off the coast of Britain\textsuperscript{259}, these would be just as heinous crimes, and just as much make her an enemy of mankind as if she were to do so 15 nm off the coast. But only in the second instance would universal piracy jurisdiction become applicable – an arbitrary restriction which cannot be explained under the heinousness rationality.

Rather the correct rationale for universal jurisdiction over piracy seems to be the ‘common interest of all states’ idea. This involves two elements. Firstly piratical attacks, particularly when looked at as a whole\textsuperscript{260}, threaten the common interest of all states in the freedom of the high seas, most

\textsuperscript{254} Another interesting and persuasive point advanced by the Harvard drafters is simply that the pirates are still subject to the legislative, executive and judicial jurisdiction of the flag state. (Bingham 1932, supra note 18, p. 825). If as a pirate I were denationalized, I would have, as must persuasion to follow the safety regulations of my old flag state, as any other state in the world. Yet pirates clearly do not loose all their other obligations just because they have committed piratical acts.

\textsuperscript{255} (Lowe & Staker 2010, supra note 249, p. 326).

\textsuperscript{256} International Court of Justice, 

\textsuperscript{257} Geiss and Petrig argue piracy is more “comparable to property offenses or hostage taking committed at land” than say genocide. (Geiss & Petrig 2011, supra note 13, p. 145).

\textsuperscript{258} (Lowe & Staker 2010, supra note 249, p. 327).

\textsuperscript{259} Thereby falling with the territorial waters of the United Kingdom, whether based on the old ‘cannon-shot rule’, or 12nm as now established in 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3, Art. 3. International piracy law does not extend to action within the territorial waters.

\textsuperscript{260} (Randall 1988, supra note 239, p. 794). Piracy can even threaten the economic development of an entire region as seen with the Horn of Africa. (Wendel 2007, supra note 27, p. 20).
notable the freedom of navigation\textsuperscript{261}. Secondly, despite the threat of piracy to the common interests of all states, the \textit{locus delicti} of piracy (the high seas) leads to a lack of state jurisdiction and the possibility of the crime going unpunished\textsuperscript{262}. Because piracy can target any state, and every state benefits from maritime commerce, “every state has an interest in its own safety, but none has jurisdiction”\textsuperscript{263}. The complexities of modern day shipping only broaden the possible states threatened\textsuperscript{264}. Such a theory fits much better with the territorial waters distinction whereby activity within twelve nautical miles is not under international law classified as piracy\textsuperscript{265}.

Such rationality, as pointed out by Petrig & Geiss\textsuperscript{266}, can also be seen and confirmed in states’ attempts to build a working international regime in response to the situation in the Gulf of Aden and the difficulties to enforcement of international law presented by the coastal state Somalia, which lacks the capacity of maritime law enforcement\textsuperscript{267}. Both elements of the ‘common interest’ rationality are found in the Security Council resolutions building the unique regime. \textit{Resolution 1846} provided temporary authorisation to ‘cooperating’ states to use all necessary means within the Somali territorial waters to repress piracy\textsuperscript{268}. Such authorisation was based on the first element of the ‘common interest’ rationality, the threat posed to the common interest in international navigation and commerce\textsuperscript{269}. The \textit{locus delicti} is different in that it is the Somalia territorial waters, yet the same issue of a lack of effective state jurisdiction and threat of serious crimes going unpunished prevails\textsuperscript{270}. Modern efforts are guided by the rationality of ‘common interest’ as much

\textsuperscript{261} 1982 \textit{United Nations Convention on the Law of the Sea}, 1833 UNTS 3, Art. 87(a). See (Gulfoyle 2009, supra note 13, p. 28). Of course there are other shared interests threatened by piracy – such as the economic value of shipping, the freedom of fishing, the freedom of scientific research and, as seen by attacks on military vessels around the Gulf of Aden, even military vessel passage. Whether the threat is real, or only potential (as currently the attacks on warships are), the threat exists which needs to be repressed. (Crockett 1977, supra note 104, p. 81).

\textsuperscript{262} (Lowe & Staker 2010, supra note 249, pp. 326-327).

\textsuperscript{263} (Geiss & Petrig 2011, supra note 13, p. 147).

\textsuperscript{264} “[C]argo ships are often owned by a corporation in a State, fly the flag of a second State, carry cargo destined for multiple other States and ships are often crewed by people from still other States” - (Middelburg 2011, supra note 186, p. 30, quoting; N.J. Arajärvi, \textit{Universal Jurisdiction: End of Impunity or Tyranny of Judges?}, Master Thesis, University of Helsinki, 2006, pp. 7-8).

\textsuperscript{265} Seen as an extension of the State’s territory and control, primacy is given to the territorial jurisdiction of the coastal state (\textit{1982 United Nations Convention on the Law of the Sea}, 1833 UNTS 3, Art. 2). Therefore such crimes can be equated with land-based crimes and the traditional heads of jurisdiction that theoretically prevents crimes going unpunished - nationality (the flag state) and a territorial link (the coastal state).

\textsuperscript{266} (Geiss & Petrig 2011, supra note 13, p. 147).

\textsuperscript{267} Often referred to as a ‘failed state’. The term however seems to be falling out of fashion. Easterly, W., & Freschi, L., \textit{Top 5 reasons why 'failed state' is a failed concept}, 13 January 2010. Available at: \url{http://aidwatchers.com/2010/01/top-5-reasons-why-%E2%80%9Cfailed-state%E2%80%9D-is-a-failed-concept/} [last accessed 03.08.2013].


\textsuperscript{269} UN Security Council, \textit{Resolution 1846}, 2 December 2008, S/RES/1846, p. 1, Preamble, Para. 2; “gravely concerned by the threat that piracy and armed robbery at sea against vessels pose […] to international navigation and the safety of commercial maritime routes”.

\textsuperscript{270} UN Security Council, \textit{Resolution 1851}, 16 December 2008, S/RES/1851, p. 1, Preamble, Para. 5; “taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia,
as the original justification for universal jurisdiction was.

However I would disagree with Guilfoyle’s interpretation that rather than being seen as an exception to the exclusive jurisdiction of the flag-state, piracy is best seen “as a case where states, through customary or conventional rule, have given comprehensive permission in advance to foreign states’ assertion of law enforcement jurisdiction over their vessels resulting in the absence of any flag state immunity from boarding”\textsuperscript{271}. Guilfoyle argues this by looking to the extent of powers granted over pirate ships, which go beyond the other limited exceptions such as the right to visit\textsuperscript{272}. The exclusivity of flag-state jurisdiction still applies, but once a piratical attack has been committed, attempted, or intended, the exclusivity in terms of piracy law enforcement only is relinquished. I would argue there is not an absence of ‘any flag state immunity from boarding’ when you look at the effects piracy jurisdiction does not have. Piracy does not affect the exclusive flag state jurisdiction over navigation rules, or safety regulation, or rules of nationality. Piracy does not affect the exclusive flag-state prescriptive, executive, or judicial jurisdiction in relation to any other issues; it only represents a limited waiver in relation to piracy law enforcement.

We can conclude that the universal jurisdiction over piracy results from a balance of competing navigational interests. In upholding the freedom of the seas, the principal starting point is the exclusive flag-state jurisdiction. However once an activity actually presents a threat to the common interest of states in the freedom of the seas, the rationality points to an exception to the exclusive flag-state jurisdiction\textsuperscript{273} - in order to ensure the activity goes punished and the freedom is restored for all other users of the high seas. Bearing this rationality in mind, does the policy justification for universal jurisdiction point to an interpretation of ‘private ends’ that excludes political ends? In other words\textsuperscript{274}, does classifying Sea Shepherd as pirates and subjecting them to universal jurisdiction fit within the “motives behind the establishment of universal jurisdiction”\textsuperscript{275}?

\section*{2.3.2 The balance between flag state sovereignty and the collective interests of all states in relation to politically motivated violence between two private vessels on the high seas}

Should purely political ends not extend to the acts of non-state sanctioned\textsuperscript{276} private parties
pursuing political objectives, then Sea Shepherd will be subject to the universal jurisdiction to seize and prosecute pirates\(^{277}\). As an exception however, the starting point is Article 92 of UNCLOS, and the exclusive flag-state jurisdiction of the state in which the Sea Shepherd vessels are registered\(^{278}\). Holding political activists who use violence at sea as subject to universal piracy jurisdiction has a significant effect\(^{279}\). In terms of prescriptive jurisdiction in areas outside the jurisdiction of any state an exception is provided allowing the warships of any state to arrest those aboard and seize the ship and its contents\(^{280}\). In terms of adjudicative jurisdiction an exception is provided allowing universal jurisdiction to potentially prosecute the pirate for those acts in any court of the World, provided the pirate is under the lawful custody of that state\(^{281}\). If we are to now say conclusively, those political ends of private parties are private ends, and subject to such universal jurisdiction, the threat of universal jurisdiction alone will significantly deter such activity. The serious legal results explain why, in such contentious cases where states have not established beyond doubt the applicability of the universal jurisdiction exception, the “presumption is against the legitimacy of any exception and the burden of proof in contentious cases rests with the state asserting the exception”\(^{282}\).

Firstly, it is plainly evident that politically motivated violence is as much a threat to the internationally held common interests of the freedom of navigation and the freedom of the seas as any other violence, depredation or detention on the high seas. It matters little to victims\(^{283}\), potential victims, and the shipping sector as a whole whether the violence is pursued in the interest of a

\(^{277}\) Excluding the other requirements of the piracy definition.

\(^{278}\) As the general principle upholding the freedom of the seas this should be the starting point in every situation of violent political activism, no matter the level of violence used or the distaste of the ‘political’ goal pursued.

\(^{279}\) (Beckman 2012, supra note 24, p. 20). University of Canterbury Communications, UC law expert disagrees with US court decision, 4 March 2013. Available at: http://www.comsdev.canterbury.ac.nz/rss/news/?feed=news&articleId=735 [last accessed 04.08.2013]. Professor Karen Scott argues the effects of holding Sea Shepherd as a pirate goes beyond what is supported by international law, but sadly doesn’t expand. This Section attempts to answer her argument and look to whether the significant effects can be supported. Matsuda pointed to the ‘important consequences’, when first justifying the ‘purely political motives’ exception – (Matsuda & Wang Chung-Hui 1926, supra note 74, p. 224).

\(^{280}\) This also includes the right to create the law applicable, within the boundaries of the International definition of piracy in UNCLOS, Art. 101. See Art. 105, “[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed”.

\(^{281}\) It is debated whether Art. 105 restricts prosecution to the country of seizure, or whether Art. 100 and the SUA Convention allow jurisdiction to be established in other States. This is beyond the scope of this thesis, see further; (Middelburg 2011, supra note 186, p. 69). It may however be that under customary international law in relation to universal jurisdiction, mere subsequent presence of the pirate within the territory is sufficient to allow the exercise of jurisdiction – Guilfoyle, D., Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes, 3rd Meeting of Working Group 2 on Legal Issues: The Contact Group on Piracy off the Coast of Somalia, 26-27 August 2009, p. 5. Available at: http://ssrn.com/abstract=1537272 [last accessed 04.08.2013].


\(^{283}\) Both those targeted by the piratical style action and those who are indirectly affected, such as other users or the insurers.
political objective or a personal end. Even if it were conceded that an “indifference of target”\textsuperscript{284} was required in order for such action to threaten the common interest, the justification would still exist. The action of Sea Shepherd is not “directed against a particular state”\textsuperscript{285}, but rather “all [illegal] whaling by any people, anywhere for any reason”\textsuperscript{286}. Any flagged ship conducting what Sea Shepherd deems ‘illegal’ could be targeted\textsuperscript{287}. Such action threatens the universal open access of the oceans, the principle of \textit{ius communiationis}\textsuperscript{288}.

The specific case between Sea Shepherd and the Japanese whalers threatens the freedom of the high seas beyond unhindered navigation. Exclusive flag-state jurisdiction embodies the freedom of the high seas by ensuring ships are not subject to any restrictions other than those imposed by their flag state and international law\textsuperscript{289}. However this goes beyond preventing other states from exercising jurisdiction and placing limitations upon the vessel. As seen in the case of \textit{Le Louis}, “In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, \textit{or any of its subjects}, has a right to assume or exercise authority over the subjects of another” \textsuperscript{290}. To allow subjects to exercise control over ships on the high seas which in their personal opinion have violated international maritime conservation law would be a significant watering down of the principle of exclusive flag-state jurisdiction, perhaps to non-existence\textsuperscript{291}. Such a possibility poses as much a threat to the freedom of navigation, as the tradition idea of restricting unhindered access\textsuperscript{292}.

Finally the freedom of the high seas also includes the freedom to carry out scientific research. Once

\begin{footnotesize}
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\item[(285)] Halberstam 1988, supra note 92, p. 279.
\item[(286)] Sea Shepherd Conservation Society, \textit{Whaling Around the World}. Available at: \url{http://www.seashepherd.org/whales/whaling-around-the-world.html} [last accessed 04.08.2013].
\item[(287)] This becomes more evident when you consider other theoretical environmental activists. Klein defines these as not pursuing private ends, but “marine environmental protection” (Klein 2011, supra note 196, p. 141). Theoretically the prevention of oil vessel passage would be in the interest of the marine environment, given the significant threat it poses, not just from spillage but also use. There would be no question that a group preventing the transport of oil would target all state and threaten the common interests of commerce.
\item[(288)] The freedom of entry and unhindered navigation extends beyond the interference by States to interference by all entities, including Sea Shepherd. (Wendel 2007, supra note 27, pp. 5-6).
\item[(289)] “It is the very fact that the high seas are open to all states that no one state is then able to exert control or authority over the vessels traversing the oceans unless that vessel has a tie to that particular state” – (Klein 2007, supra note 248, p. 292).
\item[(290)] \textit{Le Louis}, High Court of Admiralty, (1817) 165 Eng. Rep. 1464, p. 1479 (as quoted, (Klein 2007, supra note 248, p. 292)).
\item[(291)] Sea Shepherd appears to justify their action based on the upholding of international law. Sea Shepherd Conservation Society, \textit{International Laws and Charters}. Available at: \url{http://www.seashepherd.org/who-we-are/laws-and-charters.html} [last accessed 04.08.2013].
\item[(292)] Freedom of navigation on the high seas is upheld by (1) \textit{ius communiationis} (2) exclusive flag state jurisdiction. (Wendel 2007, supra note 27, p. 6). Indiscriminate citizen justice on the high seas against an entire industry threatens both aspects.
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an implicit freedom under the HSC\textsuperscript{293}, the freedom of scientific research is now reflected in UNCLOS, Article 87(f). Targeting research vessels threatens the common interest of scientific research, a high seas freedom\textsuperscript{294}.

However it is important to note that the freedoms of the high seas are not absolute. They are to be exercised consistently with international law\textsuperscript{295}, and with due regard to “the interests of other States in the exercise of their freedom of the high seas”\textsuperscript{296}. This suggests in certain situations the exercise of the Japanese authorised researchers’ freedom of navigation could be balanced against the general right of others to the exercise of their freedom\textsuperscript{297}. Yet if political ends are pursued by an organisation it is difficult to see what interest the flag-state could have which would legitimize the action as a necessary restriction on the freedom of the high seas. The definition of piracy requires an act of violence, detention or depredation\textsuperscript{298}, which would take any such ship outside the realm of exercising the freedom of navigation. This is because the high seas are “reserved for peaceful purposes”\textsuperscript{299}, restricting any interest of the flag-state to only unobstructed peaceful navigation of its subjects. Similar reasoning can be applied to any suggestion that such political parties are upholding the common interest of states in marine environmental protection\textsuperscript{300}. Sea Shepherd has been quoted as claiming they are an environmental law enforcement organisation\textsuperscript{301}. Not only is there no suggestion of any ability to use force in upholding marine protection within UNCLOS, but also any enforcement ability (and therefore foreseeable restriction on other users) falls onto States Parties only\textsuperscript{302}.

\textsuperscript{293} (Klein 2007, supra note 248, p. 294, note 37) – pointing to the International Law Commission conclusion such a freedom existed.

\textsuperscript{294} (Kanehara 2011, supra note 283, p. 210). However if it was decided the activity was not good faith research under the International Convention for the Regulation of Whaling: see UNCLOS, Art. 240(d). If the Australian Antarctic Exclusive Economic Zone was internationally recognised: see UNCLOS, Art. 246. Both provisions are found within Part XIII of UNCLOS, a significant restriction on the freedom of scientific research. In either scenario the activity might not qualify as falling within the freedom of marine scientific research. Sea Shepherd’s activity wouldn’t therefore threaten the common interest of the freedom found in UNCLOS, Art. 87(f).

\textsuperscript{295} UNCLOS, Art. 87(1).

\textsuperscript{296} UNCLOS, Art. 87(2).

\textsuperscript{297} (Rothwell & Stephens 2010, supra note 42, p. 155).

\textsuperscript{298} UNCLOS, Art. 101.

\textsuperscript{299} UNCLOS, Art. 88.

\textsuperscript{300} This is arguably another common interest of all states, given Part XII on the protection and preservation of the marine environment applies to all uses of the high seas. In relation to living resources, the right of all states to fishing is subject to Part VII, Section 2. More specifically in relation to the current research question, all states are to co-operate in the conservation of marine mammals including those found on the high seas (see UNCLOS, Arts. 65 & 120).


\textsuperscript{302} This can be seen in for example in UNCLOS, Art. 117. It only mentions state action in conserving the living resources of the high seas. It also only mentions co-operation with other states leaving no room for private parties. Similarly UNCLOS, Art. 192 places the obligation of protecting and preserving the marine environment on states. Although discussing the Sea Shepherd sinking of the “Sierra”, Plant’s observations about a lack of private individual’s ability to uphold “international rights of states” are equally applicable to the case between the Japanese whalers and Sea Shepherd. Plant, G., Civilian Protest Vessels and the Law of the Sea, Netherlands Yearbook of
Politically motivated violence on the high seas is therefore an unjustifiable threat to the common interests of all states. To fit within the rationality of piracy’s universal jurisdiction however there is a further requirement that without such universal jurisdiction the crimes would otherwise go unpunished. Maritime violence motivated by political ends is still a minor threat compared to economically motivated pirates. Jurists also point to the existence of the SUA Convention, which provides extradition and jurisdiction possibilities, as evidence maritime terrorists will not go unpunished. Even the UN Secretary-General described the SUA Convention and protocols as “another more useful vehicle for prosecution than the nineteenth century piracy statutes”, one justification being “[a]cts of piracy for political motives are not covered by article 101”. In the contentious case of politically motivated violence on the high seas, there seems little need to apply the piracy regime despite the threat posed to the common interest. Sufficient jurisdictional bases exist.

However the SUA Convention has not entered customary law and is dependant on flag-states becoming signatories. Treaty law is only binding on Contracting Parties, including the SUA Convention obligations, to make such activity punishable under law, and subject to a ‘prosecute or extradite’ obligation. Should I flag my political organisation to a state that is not a signatory to the SUA Convention then the jurisdictional position reverts back to a position similar to that when the piracy provisions historically developed. The fears of Crockett will once again become

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304 Jesus argues that the original lack of international agreement to punish such terrorists pushed states and authors to qualify such actors incorrectly as pirates. With the adoption of the SUA Convention “the first international legal instrument on a specific legal regime covering sea terrorist acts” came into being. (Jesus 2003, supra note 42, pp. 387-388).


308 Crimes falling under the SUA Convention will arguably be better suppressed than those under the piracy regime, given the prosecute or extradite clause - compared to the co-operation to the ‘fullest possible extent’ of the piracy regime and the optional exercise of jurisdiction by courts. See (Jesus 2003, supra note 42, p. 399).

309 “Thus, it is still of limited application and, for those persuaded that the strictures contained in UNCLOS are unsavory, SUA does not offer much relief” – Azubuike, L., International Law Regime Against Piracy, Annual Survey of International & Comparative Law, Vol. XV: 1, 2009, p. 56.


312 Although examples of ‘extreme’ political organizations the groups al-Qaeda and The Tamil Tigers are said to have maritime fleets. The Economist, Flags of convenience: Brassed off ‘How the war on terrorism could change the shape of shipping’, 16 May 2002. Available at: http://www.economist.com/node/1136592 [last accessed
Defining ‘private ends’ under international law

44

apparent if political ends are excluded from piracy. ‘Flags of convenience’ present a particular problem in that large merchant fleets are reliant on states with little power, whether military or in political weight. “Assuming that negotiations fail in such cases, the acts of violence might go unredressed.” Furthermore, the SUA Convention only deals with adjudicative jurisdiction. It does not “affect in any way the rules of international law pertaining to the competence of states to exercise investigative or enforcement jurisdiction on board ships not flying their flag” [emphasis added]. Thus no jurisdiction to stop, search, arrest or seize is added by the SUA Convention for such offenses.

The motivation of the actor then does not affect whether the rationale for applying universal jurisdiction applies. The freedom of the seas requires all non-state sanctioned piratical-style activity on the high seas to be defined as piracy and subject to universal jurisdiction. But is there any further justification under international law as to why ‘private ends’ should be seen as narrowing universal jurisdiction to not cover politically motivated acts more generally? We cannot simply rely on the reasoning to exclude the acts of insurgents. The piracy regime was seen above to be limited in discussion when subject to repeated codification and adoption under UNCLOS. Yet for the large part the conclusion political ends are excluded faces similar problems, with the conclusion repeatedly reached without reasoning provided.

One suggestion is that the ‘for private ends’ requirement originates in the concern to protect commercial shipping that traditionally had only been the subject of state jurisdictional claims.

313 [Crockett 1977, supra note 104, p. 95].
314 Flags of convenience include those states unwilling or unable to enforce international law; International Transport Workers’ Federation, What are Flags of Convenience?, available at: http://www.itfglobal.org/flags-convenience/sub-page.cfm [last accessed 05.08.2013].
315 (Crockett 1977, supra note 104, p. 95).
317 (Guilfoyle 2012, supra note 30, p. 97, Para. 49). Kaye, S., Threats from the Global Commons: Problems of Jurisdiction and Enforcement, 8 Melbourne Journal of International Law 185, 2007, pp. 192-193. Thus if political ends do not fall within the piracy definition, such actors benefit from the exclusive prescriptive jurisdiction of their flag state.
318 Halbersam reached the same conclusion in relation to ‘terrorists’; “Both the theoretical justification and the pragmatic necessity for universal jurisdiction apply to such acts”. (Halberstam 1988, supra note 92, p. 289).
319 As according to Garmon Art. 101 does - (Garmon 2003, supra note 42, p. 265).
320 Briefly stated, insurgents may use such attack in order to achieve and secure their independence – i.e. the action is part of the process of statehood, and thus a limited form of public power. With such attacks also limited to state vessels of one state the insurgents cannot be seen as an enemy of all, threatening the common interests of all, but rather the enemy of one state threatening exclusively their sovereignty. (Halberstam 1988, supra note 92, pp. 282-283); (Guilfoyle 2009, supra note 13, p. 35).
321 For example Direk, Hamilton, Openshaw & Terry are unconvinced by the arguments ‘private ends’ do not exclude political ends. Despite pointing to state practice and the historical sources described above, no rationality for excluding political activity of private parties is provided. (Direk et al. 2011, supra note 13, pp. 234-239).
322 (Barrios 2005, supra note 17, p. 153). Garmon argues it also made sense to exclude political acts at the time because
Politically motivated acts without a “commercial aspect” were either not subject to such piracy claims, or the possibility of such activists was not even considered. It “made sense” to exclude politically motivated acts. Such reasoning can also be seen in recent state positioning such as Malaysia, Indonesia and Singapore who have all held the view that crimes of terrorism (political motivation) and piracy (in the traditional sense) should be kept separate.

However whilst the ‘private ends’ requirement may be seen as further evidence that the piracy regime exists to protect the common interest of all states in the freedom of the seas, and particularly commerce, that alone does not point to the need to exclude all politically motivated acts. At most it supports the position that politically motivated actors could be excluded from the definition of piracy if their activity was free of any ‘commercial aspect’ – if their activity was to have no direct effect on the freedom of commerce. The only action that could therefore be excluded would be politically motivated activity exclusively targeted at ships in public service. It would not stretch to cover the activities of actors such as Sea Shepherd who target other non-state actors or private ships and thus the commercial shipping industry as a whole. The authors seem to have extended the reasoning to all politically motivated acts based on the incorrect conclusion that intent to rob was also a requirement of private ends following UNCLOS.

In conclusion, although the principle of exclusive flag-state jurisdiction deserves to be respected, the case of piratical acts on the high seas motivated by political ends fits the rationality of the piracy regime exception as much as piratical acts on the high seas motivated by personal ends. Such activity is a threat to the common interest of all states and requires a universal jurisdictional base in order to ensure punishment. It is said “the non-interference principle merits respect, but only to the extent that it remains a valuable and effective tool in promoting the general welfare of the international system and all its participants.” Following the end of WW2 the colonial empires were being dismantled – a transitional era in which a restricted scope of the definition of piracy would necessarily restrict the scope of the signatories obligations (the suggestion being that States didn’t want the burden of enforcing the law of the sea against possible politically motivated attackers emerging at the time), (Garmon 2003, supra note 42, p. 263). This does not seem very convincing though, given the fact there is no duty on States to enforce prescriptive or adjudicative jurisdiction, piracy law only gives those states the possibility to do so.
peaceful purposes threatens at least three fundamental principles of the freedom of the seas\textsuperscript{330}, without the advancement of any corresponding freedom\textsuperscript{331}. Upholding the claim of exclusive flag-state jurisdiction over such actors would be contrary to the common interests of states, place far-reaching restrictions on the inclusive use of the oceans by other states and serve to protect no use of the oceans “critical for another state”\textsuperscript{332}.

\subsection*{2.4 Concluding the definition of ‘private ends’ under international piracy law}

So despite the antiquity of the piracy crime, the term ‘private ends’ remains unclear and ill-defined contrary to the clear-cut position taken by Douglas Guilfoyle or Kevin Heller. We have seen in the drafting history of the provisions that private ends were not equated with state sanctioning. Purely political acts would also be excluded from ‘private ends’ and it was left open whether this extended beyond the acts of insurgents to acts committed by private individuals or groups in pursuit of a political agenda. Thus subsequent state practice and judicial precedent became very important in determining the limits of such an exception and defining what purely political acts entail\textsuperscript{333}. However the subsequent state practice demonstrates a continued confusion, and has failed to delimit the boundaries of ‘private ends’. Positive action by states has been limited, with conflicting opinions. In relation to political activists on the high seas, and particularly eco-activists, the practice has largely been one of omission and inaction as will be shown in Chapter 3. This could have been caused by a number of political reasons, and it is difficult to find the required \textit{opinio juris} that would demonstrate action was not taken because as a matter of law, action could not be taken.

Therefore we are left with an international law definition of piracy for which states have failed to conclusively define the term ‘private ends’, and whether the ‘public end’ exception of ‘purely political ends’ extends beyond insurgents to other non-state actors. Instead we have the limited judicial precedent of one Belgian injunction case, which moved towards a definition of piracy as piratical acts lacking state sanctioning. We can now add a US preliminary injunction case to the same effect. Both cases can be robustly defended in terms of policy as Section 2.3 demonstrated.

\begin{itemize}
  \item \textit{Ius communicationis}, exclusive flag state jurisdiction, and the freedom of scientific research in the case of Sea Shepherd. Other theoretical political activism could equally threaten the other freedoms – overflight, the laying of submarine cable & pipelines, artificial islands, fishing, and any other subsequently recognized freedoms.
  \item Such activity is not a legitimate exercise of navigational freedom or marine protection.
  \item No state claims such use of the oceans by private parties is of critical importance to them. These three requirements are those listed by Klein when assessing if an exclusive claim (such as jurisdiction) should prevail. (Klein 2007, supra note 248, p. 292, quoting: Myres McDougal & William Burke, \textit{The Public Order of the Oceans: A Contemporary International Law of the Sea}, 54 Yale University Press, 1962, p. 749).
  \item 1969 \textit{Vienna Convention on the Law of Treaties}, 1155 UNTS 331, Art. 31(3).
\end{itemize}
The policy and rationale clearly point towards a definition of piracy that includes all acts of violence on the high seas, between two ships, whatever the motivation of the actor involved. The profound changes seen with the rise of non-state actors, particularly after the ‘9/11’ attack on the World Trade Centre, only confirm the unsuitability of allowing the possibility that the pursuit of political goals should excuse activity from being defined as piracy. Thus although the precedents are insufficient to establish a recognised definition of ‘private ends’ under international law, it is hoped they will be followed and therefore not exclude violent acts perpetrated by individuals on the high seas from being effectively punished merely because the actors were motivated by political goals.

Isanga points out the increasing number of violent acts committed linked to political claims, and the rising power of non-state actors who could potentially challenge some states themselves Isanga, J., Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes, American University Law Review, Vol. 59:1267, 2010, p. 1263.
3 The Case of Sea Shepherd and The Institute of Cetacean Research

We will now take a closer look at the case of Sea Shepherd. How have states responded to environmental activists, and was the court correct in defining them as pirates?

3.1 A brief history of Sea Shepherd and the Japanese research whalers

Sea Shepherd Conservation Society formally came into existence in 1981, but the interventionist society has its roots in the Earthforce Environmental Society founded in 1977. Their stated aim is “to end the destruction of habitat and slaughter of wildlife in the world's oceans in order to conserve and protect ecosystems and species”. This broad mandate has resulted in global ‘direct action’ by the society in the ‘interest’ of Bluefin tuna, dolphins, sharks, whales, the Galapagos ecosystem and the wildlife affected by the 2010 Deepwater Horizon oil spill in the Gulf of Mexico. Action against whaling operations has a long history, with the organisation focusing on the illegal whaling vessel The Sierra in 1979. The direct action protest against Japanese research whaling in the Antarctic began in 2002. To date nine campaigns have been launched against the Japanese, and the 10th campaign scheduled for 2013/14 has been announced.

The Institute of Cetacean Research (ICR) was established in 1987 following the International Whaling Commission Moratorium on commercial whaling. The non-profit organisation carries out a variety of research projects as well as being a coordination centre for independent researchers within Japan. The overarching aim is to find solutions to further “conservation, management, and rational utilization of marine resources”.

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339 Sea Shepherd have also targeting whaling vessels of Iceland, St. Lucia, St Vincent and the Grenadines, the Makah people, the Danish Faeroe Islands, Spain, Russia and Norway. *The Sierra* was registered in Cyprus. [http://www.seashepherd.org/whales/sea-shepherd-history.html#1979](http://www.seashepherd.org/whales/sea-shepherd-history.html#1979) [last accessed 12.07.2013].
340 See: [http://www.youtube.com/watch?feature=player_embedded&v=xPZQcmUVTe#at=14](http://www.youtube.com/watch?feature=player_embedded&v=xPZQcmUVTe#at=14) [last accessed 12.07.2013].
342 Institute of Cetacean Research, *Overview and Purpose*. Available at: [http://www.icrwhale.org/abouticr.html](http://www.icrwhale.org/abouticr.html) [last accessed 14.07.2013]. Such solutions are to help the Japanese play a greater role in international organizations such as the IWC, which is seen to regulate whaling in a manner against the Japanese interest and without the necessary
long history, the first feasibility study being carried out in 1987 after the inception of the ICR. The institute’s aim is to resolve the “scientific uncertainty” which may be contributing to an unnecessary moratorium on all commercial whaling. The data is also anticipated to be of use once commercial whaling resumes and management schemes will need to be adopted. Controversy surrounds whether the use of lethal measures is necessary in order to carry out such research. The Institute of Cetacean Research in return is deeply critical of the IWC and any opponent of its research program.

For the purposes of the ICR, their whaling activities meet the legal requirements of an actor whaling under the scientific permit exception. The Japanese Government has sanctioned their project. Whether the Japanese authorisation to hunt whales in the Southern Ocean is in breach of the international moratorium on commercial whaling is a heavily debated issue, with a case between Australia and Japan currently underway at the International Court of Justice. For the purposes of this thesis I do not express my personal opinion on the legality of the whaling under international law, but merely introduce the issue to provide the context of the confrontations in the Southern Ocean. It should also be noted that the violent confrontations are just one of many legal issues which have arisen out of the whaling programme. Within the International Whaling Commission the use of bribery has been alleged, and the competence of the IWC called into question. Allegations of embezzlement by crewmembers, thefts by activists, human rights abuses and

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348 For a negative view see: Moffa, A., Two Competing Models of Activism, One Goal: A Case study of Anti-Whaling Campaigns in the Southern Ocean, 37 The Yale Journal of International Law, 1 2012, pp. 205-207. For a positive interpretation see: Kanehara, A., Legal responses of Japan to the impediments and harassments by foreign vessels against Japanese vessels during research whaling in the Antarctic Sea, 52 The Japanese Yearbook of International Law, 2009, pp. 553-582
349 See: 1946 International Convention for the Regulation of Whaling, 161 UNTS 72, Art. VIII.
the diversion of tsunami funds to the ICR expenditure\textsuperscript{355} have surfaced.

The violence between Sea Shepherd and the ICR occurs many miles from any state jurisdiction or control. The uninhabitable nature of the Antarctic region leads to a lack of politically neutral observers. Each incident is accompanied by conflicting reports from both Sea Shepherd and the ICR on what occurred, and who was to blame\textsuperscript{356}. This is exacerbated by reports of incidents occurring, without any factual evidence to substantiate such claims, largely for the pursuit of media interest\textsuperscript{357}. Therefore this thesis will be limited to those tactics and activities as accepted by the US District court\textsuperscript{358} and Kozinski in the opening of his Court of Appeal preliminary decision\textsuperscript{359}. Therefore beyond the traditional protest activities of blocking the harpoon vessel’s access to the whales, and recording the whale hunt, Sea Shepherd has engaged in:

- Throwing or launching glass containers filled with either paint or butyric acid\textsuperscript{360}. These are targeted at the ship’s deck and any meat thereon.
- Throwing or launching safety flares at the Japanese ships. Some have been modified with metal hooks. These are targeted at the nets on the whaling ship that protect the deck from the glass containers.


\textsuperscript{356} For example see the incident on the 18\textsuperscript{th} January 2012. Sea Shepherd reported the increasing violence of the ICR against the small Sea Shepherd boats as they “were attempting to slow down the Japanese harpoon vessel Yushin Maru No. 2, which is aggressively tailing the Steve Irwin”. The ICR reported the incident as a deterred violent attack on its ship with various weapons including the use of a knife. Sea Shepherd Conservation Society, Three Sea Shepherd Crew Injured in Skirmish with Japanese Harpoon Vessel, 18 January 2012. Available at: http://www.seashepherd.org/news-and-media/2012/01/17/three-sea-shepherd-crewmembers-injured-in-skirmish-with-japanese-harpoon-vessel-1319 [last accessed 14.07.2013]. Institute of Cetacean Research, Steve Irwin activists attempt to sabotage Japanese research vessel Yushin Maru No.2, Media Release, 18 January 2012. Available at: http://www.icrwhale.org/pdf/120118ReleaseENG.pdf [last accessed 14.07.2013].

\textsuperscript{357} E.g. In relation to the assertion of Paul Watson (Sea Shepherd) being shot by the Japanese whalers: “The court finds it highly unlikely that Mr. Watson will prove that any member of the whaling crew has ever shot him with a firearm” The Institute of Cetacean Research v Sea Shepherd Conservation Society, Case No. C11-2043RAJ, US District Court for the Western District of Washington, 2012 U.S. Dist. Lexis 36867, p. 9.

\textsuperscript{358} It should be noted however these are “only preliminary findings based on the evidence currently in the record. Based on that evidence, the court describes the facts as the parties would likely be able to prove them at trial”. The Institute of Cetacean Research v Sea Shepherd Conservation Society, Case No. C11-2043RAJ, US District Court for the Western District of Washington, 2012 U.S. Dist. Lexis 36867, pp. 6-7. It may therefore be that further acts of violent at sea are substantiated, which could constitute piracy at sea.

\textsuperscript{359} The Institute of Cetacean Research v Sea Shepherd Conservation Society, Case No. 12-35266, US Court of Appeals for the Ninth Circuit, 25 February 2013, p. 2.

- Throwing smoke bombs at the whaling ships.
- Pointing a high-powered laser at the whaling ships.
- Towing a metal-reinforced rope\(^{361}\) whilst positioned in front of the whaling ships with the objective of fouling the rudder or propeller of the other ship.
- Breaching navigation regulation by either intentionally causing collisions with the Japanese whaling ships, or piloting their vessel “in such a way that a collision is highly likely”\(^{362}\).

However following the court decision the latest confrontations in 2013 have escalated to further unprecedented levels\(^{363}\). Both the Institute of Cetacean Research personnel and the Sea Shepherd activists have engaged in increasing violence, leading to the third year of the whaling programme being ended early or temporarily suspended\(^{364}\), and the lowest catch since the beginning of the Antarctic research programme\(^{365}\). The incident on the 20\(^{th}\) February 2013 involved multiple collisions between the Japanese flagged *Nisshinmaru* and the *Bob Barker* (Sea Shepherd), the *Nisshinmaru* and the *Steve Irwin* (Sea Shepherd)\(^{366}\), the *Bob Barker* and the *Sun Laurel* (S. Korean fuel tanker), and the *Nisshinmaru* and the *Sun Laurel*. The captain of the *Bob Barker* described the incident as the “most dangerous confrontation he has ever experienced”\(^{367}\). Indeed the video footage demonstrates the failure to refuel the *Nisshinmaru*, the damaging of the *Sun Laurel* lifeboat and the destruction of the *Bob Barker* radar system\(^{368}\). The *Bob Barker* allegedly took on water, flooding the engine room\(^{369}\). All within treacherous ice covered waters\(^{370}\). Both sides claim the responsibility

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\(^{363}\) This is despite a US injunction against Sea Shepherd USA and Paul Watson (founder and, until January 2013 president of Sea Shepherd Conservation Society). Paul Watson claims the injunction actually contributed to the increased violence by “emboldening” the Japanese whalers; [http://www.youtube.com/watch?feature=player_embedded&v=xPZQcmUVTc#at=14](http://www.youtube.com/watch?feature=player_embedded&v=xPZQcmUVTc#at=14). The injunction did not prevent further violent confrontations due to the Antarctic campaign of Sea Shepherd being transferred to Sea Shepherd Australia oversight.


\(^{368}\) *Sea Shepherd* released videos of the incident: [http://www.youtube.com/watch?v=Pj7yPrhk584](http://www.youtube.com/watch?v=Pj7yPrhk584), [http://www.youtube.com/watch?v=ssw3xGlwH1s](http://www.youtube.com/watch?v=ssw3xGlwH1s) [last accessed 12.07.2013]. *ICR* released videos of the incident: [http://www.youtube.com/watch?v=7ATFZJWcF6I](http://www.youtube.com/watch?v=7ATFZJWcF6I), [http://www.youtube.com/watch?v=3Hf-ZQ0LHWE](http://www.youtube.com/watch?v=3Hf-ZQ0LHWE) [last accessed 12.07.2013].

rests on the other party, but like earlier collisions, it is likely both were in breach of navigation rules and engaged in dangerous manoeuvres. Whatever the decision on piracy, it is clear the flag states of both parties should be taking more measures to ensure the safety of lives at sea.

3.2 Previous state practice in relation to Sea Shepherd & environmental activists

With a decade of practice since the first confrontation between Sea Shepherd and the ICR it is possible to examine the response of states to the problem of direct action environmental activists. The practice of ‘particular significance’ can be found by reapplying the reasoning of the ICJ, mentioned above, in relation to environmental activists.

3.2.1 The judgements of national courts in relation to Sea Shepherd’s Antarctic campaign

Interestingly the first point to note is that very few criminal prosecutions of Sea Shepherd members have historically occurred. Specifically in relation to piracy, there has not been a single seizure or prosecution of any protest vessel under criminal law, despite the Castle John ruling such action could be piracy 27 years ago. Looking to the future, there is no evidence as yet any state intends to hold any Sea Shepherd members culpable and exercise the universal jurisdiction applicable to piracy. The founder Paul Watson was subject to two separate Interpol red notices, neither of which suggested a charge of piracy, and one of which has now been dropped.

370 [last accessed 12.07.2013].
371 [last accessed 12.07.2013].
372 [last accessed 12.07.2013].
373 [last accessed 12.07.2013].
374 (Caprari 2010, supra note 232, p. 1509).
375 (Plant 2002, supra note 302, p. 90); (Caprari 2010, supra note 232, p. 1514).
376 [last accessed 08.08.2013].
377 [last accessed 08.08.2013].
Although it may be that prosecution rates for other forms of modern day piracy are also low, such as off the Somalia coast, the ineffectiveness driving those low prosecution numbers is not present. With over 30 years of civil war, abject poverty and a lack of other career options driving a never-ending supply of Somali youth to carry out pirate attacks, criminal prosecution is an unsuitable and unsuccessful option. Yet with Sea Shepherd the crew is drawn from volunteers. Their activities represent a major threat to the interests of Japan. It could be expected that a criminal prosecution on the basis on the universal jurisdiction of piracy would be a significant deterrent to Sea Shepherd’s activities and successful recruitment of volunteers.

3.2.2 The 2009 piracy legislation of Japan, and its relationship to Sea Shepherd

As mentioned above municipal piracy and international law piracy definitions do not need to correlate, they serve separate purposes. However, if the domestic law is an attempt to implement the international regime, then it can demonstrate the implementing state’s interpretation of the international definition, and ‘private ends’ requirement. As a crime which threatens the interests of all states, it cannot truly be said any states have “specially affected” interests. Yet it is beyond the scope of this thesis to review all national law in order to determine whether it aims to implement international law, and then whether it is evidence of the correct interpretation of ‘private ends’. Instead Japan will be used as an example. This is because the Japanese legislation does aim to

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378 Supra note 6. International law piracy establishes a ground of jurisdiction, municipal law piracy a crime punishable by courts.

379 See the background to piracy in Somalia - (Middelburg 2011, supra note 186, pp. 17-27).


381 Supra, note 6. International law piracy establishes a ground of jurisdiction, municipal law piracy a crime punishable by courts.
implement international piracy law and Japan has an interest in the consideration of whether Sea Shepherd activity falls within the definition of Article 101.

The Act of Punishment of & Measures Against Acts of Piracy (hereafter Piracy Act) entered into force in Japan on July 24th 2009. In relation to Sea Shepherd, Atsuko Kanehara concluded “[t]he Japanese Government, however, in principle takes the stance that such obstructive acts against its research whaling are not piracy” and further the latest Piracy legislation “does not contain such obstructive acts as those against Japanese research whaling in its definition of acts of piracy”. But this is in relation to the acts carried out, and not the ‘private ends’ requirement. Despite being a ‘more detailed’ version of the UNCLOS definition, the Piracy Act does not define ‘private ends’ – despite using the term.

The focus on defining the ‘acts’ within the Piracy Act as opposed to the motivation demonstrates the primary focus on tackling piracy around Somalia, and not Sea Shepherd. For discussions of Sea Shepherd we must turn to the debates in the Diet. Whilst it might appear the governmental position on whether Sea Shepherd members would be pirates under the Piracy Act is unclear at first sight, I would argue the statement against demonstrates a clear policy decision to exclude Sea Shepherd. Kazuyoshi Kaneko stated:

“Considering the current debate in international society concerning scientific research whaling and the protesting activities against it, we believe that inclusion of such obstructive acts in acts of piracy is difficult to be generally understood in international society. Thus we decided to exclude such

383 The latest Japanese piracy law specifically aims to implement UNCLOS. (Kanehara 2010, supra note 12, p. 469). The Director General of the International Law Bureau of the Ministry of Foreign Affairs (Kofi Tsuruoka) is quoted, “while in principle, the acts of piracy under the Piracy act are the same as those under the UNCLOS, the piracy act, as a domestic law, concretizes the concept of acts of piracy”. It is a “more detailed” definition – Ibid, p. 475 (quoting: Minutes of the Committee on Diplomacy & Defence, House of Councillors, 171st Session, No. 15 (2 June, 2009), p. 3). See also the quote of Mr Kazuyoshi Kaneko (Minister of Land, Infrastructure, Transport & Tourist) stating, “the piracy act is based upon the UNCLOS” – Ibid, p. 471.


386 Ibid.

387 Thus pertaining to the requirement of “acts of violence or detention or any act of depredation”, UNCLOS, Art. 101.

388 Art 2 of the Piracy Act defines piracy, and arguably the acts of Sea Shepherd only fall within Para. 2(vi) “operating a ship to approach in close proximity to another ship in navigation, or encompassing it, or otherwise obstructing the passage of such ship”. But this is conditioned by being for the “purpose of committing” the acts in Paras. 2(i) – 2(iv). Sea Shepherd has not demonstrated any intent to seize the research vessels, any of their property or undertake kidnappings – the acts of Paras. 2(i)-2(iv).


obstructive activities from the acts of piracy in the piracy Act”.\footnote{392} [emphasis added].

The reference to not being ‘generally understood in international society’ might suggest a belief of a general consensus against such activity being piracy. But Kaneko refers to society’s acceptance, not international law.\footnote{393} Furthermore it is clear from the words ‘we decided’ that consideration was given to including the acts of Sea Shepherd. A policy decision to exclude them necessarily rests on the ability to exercise the international law universal jurisdiction of piracy, and thus evidence of an interpretation of ‘private ends’ that does not exclude environmental activists. This is supported by the views expressed by the Minister of Foreign Affairs.\footnote{394} The Secretary General for Ocean Policy of the Cabinet Secretariat also clearly sees the ‘private ends’ criteria as a question of state sanctioning.\footnote{395} If the political goals of ‘terrorists’ cannot affect the criterion of piracy, then it is difficult to see why the political goals of Sea Shepherd would.\footnote{396}

3.2.3 The claims of piracy advanced by states in relation to environmental activists

Japan has had Ten years of Sea Shepherd and Greenpeace interference with its flag vessels conducting whale research. Despite increasing its efforts to question the legality of non-governmental organisations conducting protest activities, and their position within the international framework,\footnote{398} the official Japanese response has been limited to requesting flag and

\footnote{392} Quoted: (Kanehara 2010, supra note 12, p. 479, referencing; Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 6 (22 April 2009), p. 21).

\footnote{393} Demonstrating a policy choice to exclude Sea Shepherd from piracy is therefore not evidence of State practice to the effect private ends excludes political acts. The decision was not taken on the basis of a general practice, accepted as law. 1945 Statute of the International Court of Justice, 15 UNCIO 355, Art. 38(b).

\footnote{394} Mr Hirojumi Nakasone, “the protesting activities…they are not necessarily excluded from acts of piracy. This is my position.” Quoted: (Kanehara 2010, supra note 12, p. 479, referencing; Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 6 (22 April 2009), p. 21). Although he states ‘not necessarily’ this cannot be in relation to private ends excluding political ends. He clearly recognizes the acts are in protest – a politically motivated act to change the position of the Japanese Government – yet this is not in itself a bar to the classification as piracy.

\footnote{395} Yasuo Oba, “The private ends in the Piracy Act mean, for instance, greed for profit gaining, hatred, revenge and others. In other words, acts such as those with national authorization or those based upon intention of a foreign country are excluded from the acts of piracy in the Act” [emphasis added]. Quoted: (Kanehara 2010, supra note 12, p. 479, referencing; Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 6 (22 April 2009), p. 21). Although the quote leaves the possibility open for more non-private ends (“such as”), both examples given are linking the test to the authority of the actor and whether a state has sanctioned such activity. There is nothing to point towards motivation – See further the Yasuo Oba quote labelled under “way of recognizing private ends”, Ibid, p. 479. Nothing suggests looking at the goals of the actor to determine if they seek private ends.

\footnote{396} “Mr. Oba explained that whether terrorism or not is not related to the criterion of private ends” – (Sata 2010, supra note 392, p. 10, referencing; Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 4 (17 April, 2009), p. 7).


\footnote{398} Following a collision between a Greenpeace vessel (Arctic Sunrise) and a Japanese whaler vessel (Nishin Maru), Japan requested Greenpeace have its observer status at the International Whaling Commission withdrawn due to its “illegal and violent actions”. (Teulings 2011, supra note 398, p. 226).
The case of Sea Shepherd and the ICR

port state action. The emphasis on flag-state jurisdiction and response does not correlate with any suggestion Sea Shepherd would be covered by the definition of piracy. The ICR and a number of Japanese Ministers have labelled Sea Shepherd as pirates in the past. But these appear to be political manoeuvres for support, similar to those seen historically, and not claims under international law. Flag-states of victim vessels have more often denounced the organisation as 'terrorists'.

The response of other states also shows no real evidence that environmental activists are, as a matter of practice, considered piratical. Japan’s proposal to remove Greenpeace’s observer status following collisions in the Southern Ocean was met with little support. Previous flag-states have deregistered Sea Shepherd ships, however the current flag-state, The Netherlands, has taken no noticeable steps against the group. This is despite the Dutch Shipping Inspectorate concluding the Dutch registered Sea Shepherd vessel had caused at least one collision. New Zealand similarly

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399 (Kanehara 2011, supra note 283, p. 199). A second collision between Japanese whalers and Greenpeace resulted in Japanese requests for the Netherlands to carry out an investigation. (Teulings 2011, supra note 398, p. 228). In relation to Sea Shepherd, Japan has similarly called on the relevant flag states to uphold their responsibilities – (Klein 2011, supra note 196, p. 142). For example of port state action, see the requests sent to Australia to refuse access to Sea Shepherd – Foley, M., & McDonald, M., Japan Seeks Australia’s Help to Thwart Whaling Opponents, New York Times, 6 January 2009. Available at: http://www.nytimes.com/2009/01/07/world/asia/07whale.html?_r=0 [last accessed 08.08.2013].

400 All states have a duty to co-operate and the jurisdiction to repress piracy. Japan has however emphasized the “primary responsibility” of the Netherlands; The Guardian, US embassy cables: Japanese pressed US to take action against Sea Shepherd, 6 January 2011. Available at: http://www.theguardian.com/world/us-embassy-cables-documents/2337697?guni=%20body%20link [last accessed 09.08.2013].


402 (Mejia 2003, supra note 73, p. 15). It could also be argued that states failing to brand Sea Shepherd pirates are acting based on political positioning and opposition to Japanese whaling. The extent political bargaining and positioning is having on resolving disputes within the sensitive area of whaling are demonstrable with the attempts to influence the International Whaling Commission Scientific Committee decisions. “[T]he political controversy surrounding the Special Permit programs has been making the scientific discussions at the IWC Scientific Committee unnecessarily difficult and confrontational” Report of the Scientific Committee, Annex P: Scientific Permits, Jeju Island, Republic of Korea, 3-15 June 2013, IWC/65A/Rep 1 Annex P, p. 10.

403 “Officials in Iceland, Norway, Denmark, Japan, Canada and Costa Rica have publicly denounced Watson, comparing his actions to that of a common terrorist” (Roeschke 2009, supra note 402, p. 107).

404 “[T]he US noted that there were conflicting accounts of the incident, whilst New Zealand and the Netherlands “believed this was a legitimate, robust but peaceful protest”. Consequently, Japan ultimately did not ask for a vote.” (Teulings 2011, supra note 398, p. 226).

405 Despite discussions in 2009 of deregistration of the Sea Shepherd ship, Steve Irwin, and the introduction of new legislation, no action was taken. Further in 2010 a second ship used in the Antarctic campaign was registered under the Dutch flag, Bob Barker. Sea Shepherd Conservation Society, The Bob Barker Goes Dutch, 24 May 2010. Available at: http://www.seashepherd.org/news-and-media/news-100524-1.html [last accessed 09.08.2013]. Previous deregistration by other states has been based on not meeting a ‘pleasure-boat’ requirement, unrelated to international piracy law.

406 (Teulings 2011, supra note 398, pp. 231-232). The latest confrontations and collisions of the 2012-2013 season have lead to further calls from Japan for action. The Netherlands has yet to take any formal action. Billones, C., Japan’s whalers call on Netherlands to take action against Sea Shepherd activists, Japan Daily Press, 19 February 2013. Available at: http://japandailypress.com/japans-whalers-call-on-netherlands-to-take-action-against-sea-shepherd-activists-1923649/ [last accessed 09.08.2013].
conducted an investigation as flag-state, but took no action\textsuperscript{407}. Looking to the port state of Sea Shepherd’s campaign, Australia has consistently refused to bring criminal charges against any member in relation to the Southern Ocean incidents\textsuperscript{408}. The United States, where Sea Shepherd has its international headquarters, has taken no formal legal action and refused requests to remove Sea Shepherd’s tax-exempt status\textsuperscript{409}. At most the above-mentioned states have condemned the action of both parties, and emphasised all “are prepared to deal with any unlawful activity in accordance with relevant international and domestic laws”\textsuperscript{410}, but without expanding on what that relevant international law is. The statement clearly hints at the satisfaction of the other requirements under the definition of piracy\textsuperscript{411}, yet the emphasis is on COLREGs\textsuperscript{412} compliance\textsuperscript{413}.

The practice of states through international organisations also demonstrates a lack of defining Sea Shepherd as pirates. The International Whaling Commission Resolution On Safety at Sea\textsuperscript{414}, which focuses on the Sea Shepherd clashes, is silent on piracy, but does not expressly exclude the applicability of piracy law\textsuperscript{415}. The International Maritime Organisation (IMO) however is clear that terrorists are not pirates because their political motivation does not meet the ‘private ends’ test\textsuperscript{416}. A recent circular from the IMO Secretariat supports this conclusion\textsuperscript{417}. Thus if Sea Shepherd are

\textsuperscript{407} (Teulings 2011, supra note 398, pp. 232-233).

\textsuperscript{408} (Moffa 2012, supra note 349, p. 211).

\textsuperscript{409} (Moffa 2012, supra note 349, pp. 211-212).

\textsuperscript{410} Joint Statement on Whaling and Safety at Sea from the Governments of Australia, the Netherlands, New Zealand, and the United States: Call for responsible Behaviour in the Southern Ocean Whale Sanctuary, 13 December 2011. Available at: \textsf{http://www.state.gov/r/pa/prs/ps/2011/12/178704.htm} [last accessed 09.08.2013].

\textsuperscript{411} “

\textbf{Jointly condemn any actions that imperil human life [...] we condemn dangerous or violent activities from all participants on either side”, Ibid. Suggests at least “illegal acts of violence” between two private ships on the high seas.

\textsuperscript{412} 1972 Convention on the International Regulation for Preventing Collision at Sea, 1050 UNTS 16 & 1143 UNTS 346.

\textsuperscript{413} “

\textbf{Our Governments jointly call upon the masters of all vessels involved to strictly observe international collision avoidance regulations”. Joint Statement on Whaling and Safety at Sea from the Governments of Australia, the Netherlands, New Zealand, and the United States: Call for responsible Behaviour in the Southern Ocean Whale Sanctuary, 13 December 2011. However the statement continues, “We also draw their attention to the International Maritime Organization’s 17 May 2010 resolution on assuring safety during demonstrations, protests, or confrontations on the high seas, and the International Whaling Commission’s 2011 Resolution on Safety at Sea”. Ibid. As pointed out below these international organisation resolutions do not rule out the possibility of piracy law being applicable.

\textsuperscript{414} Resolution 2011-2: Resolution on Safety at Sea, 63\textsuperscript{rd} IWC Annual Meeting, 2011.

\textsuperscript{415} The Resolution recognises the common interests of all states (Para.1) and the threat posed by Sea Shepherd’s actions (Para. 5). Thus the rationale for universal jurisdiction is there. The Resolution then goes beyond calling on flag-states (Para. 9), and urges “all Contracting Governments concerned to continue to take actions, in accordance with relevant rules of international law and respective national laws and regulations, to cooperate to prevent and suppress actions that risk human life and property at sea and with respect to alleged offenders” [emphasis added] (Para. 12). Although not evidence of the definition of piracy being applicable, a State exercising such jurisdiction would not be acting contrary to the IWC Resolution. Resolution 2011-2: Resolution on Safety at Sea, 63\textsuperscript{rd} IWC Annual Meeting, 2011.

\textsuperscript{416} (Guilfoyle 2012, supra note 30, p. 81).

\textsuperscript{417} “Pursuant to article 101 of UNCLOS, an act of piracy requires that it be committed for private ends, such as extracting a ransom. Acts that are politically motivated, i.e. done with the objective of intimidating a population or of compelling a Government or an international organization to do, or to abstain from doing any act, will not be acts of piracy”. International Maritime Organization Legal Committee, Piracy: Uniform and consistent application of the
politically motivated they would not be acting for private ends according to the IMO\textsuperscript{418}.

The difficulty comes however in evaluating the requisite \textit{opinio juris}. Recourse may be had to subsequent practice of the parties, but only that practice \textit{relating to the treaty}. Because the practice in relation to Sea Shepherd has largely been one of omission and inaction it is very difficult to argue such practice demonstrates an understanding of ‘private ends’ that excludes political motivation and therefore environmental activists. The dictum of the Permanent Court of International Justice in the \textit{Lotus} case, followed by the ICJ in the \textit{North Sea Continental Shelf Cases}\textsuperscript{419}, is arguably directly applicable to the state practice seen to date:

“Even if the rarity of the judicial decisions to be found […] were sufficient to prove […] the circumstances alleged […] it would merely show that State had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.”\textsuperscript{420}

The conclusion “most nations do not want to burden themselves with apprehending and prosecuting pirates unless it affects their own vessels or their own state interests”\textsuperscript{421} could explain why Sea Shepherd has not been subject to International piracy law. Many nations have no interest in whaling\textsuperscript{422}, and actively condone Japan’s program\textsuperscript{423}. Equally rather than the belief private ends exclude political ends, the question whether the acts of Sea Shepherd meet the ‘violence, detention or depredation’ requirement could be the rationale behind inaction\textsuperscript{424}. But perhaps most importantly the absence of a duty to prosecute and punish pirates is coupled with an absence of a duty to protect vessels flying your flag; a “state attributing its nationality to a ship \textit{assumes a right, but not a duty,}

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\begin{itemize}
\item \textit{provisions of international conventions relating to piracy}, \textit{Note by the Secretariat}, 18 February 2011, LEG 98/8, p. 3, Para. 14.
\item However, similar to the IWC \textit{Resolution On Safety at Sea}, a state exercising universal piracy jurisdiction would not be expressly acting contrary to the IMO Resolution on the Sea Shepherd-Whalers conflict. The IMO Resolution again highlights the common interest of all states, the potential threat of Sea Shepherd’s action, and the need to suppress any threat that does arise. The Resolution then recalls the ‘relevant’ provisions of UNCLOS (arguably Arts. 100-105 as part of the high seas regime), before encouraging all states to address threats to the common interests through appropriate international law. See International Maritime Organization, \textit{Assuring Safety During Demonstrations, Protests or Confrontations on the High Seas}, Resolution MSC.303(87), 17 May 2010, MSC 87/26/Add.1, Paras. 1, 5, 6, 8 & Resolution 6.
\item \textit{North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)}, 20 February 1969, ICJ Reports 1969, p. 3, Para. 78.
\item \textit{SS Lotus Case (France v Turkey)}, 7 September 1927, P.C.I.J. Reports (ser. A), No. 10, p. 28.
\item (Caprari 2010, supra note 232, p. 1513). Isanga reaches a similar conclusion, (Isanga 2010, supra note 335, p. 1275).
\item Or the Japanese flagged vessels, operated by a Japanese company, with Japanese crew.
\item A serious question, discussed below. The difficult of establishing what the actual facts are further exacerbates the difficulty.
\end{itemize}
}
of protection over her” [emphasis added]. In such circumstances evidence of *opinio juris* becomes all the more important to reason an interpretation of ‘private ends’ from the passive state practice.

Therefore, although the state practice to-date in relation to Sea Shepherd does not conform to the conclusion reached in Chapter 2, there is no evidence that this is as a result of the ‘private ends’ requirement excluding politically motivated actions of private organizations.

### 3.3 Evaluation of the US Court’s conclusion that Sea Shepherd are pirates acting for ‘private ends’

Absent of any evidence the current lack of enforcement against Sea Shepherd is based on an acknowledgement that politically motivated violence is excluded as a matter of international law, the position remains that ‘private ends’ is an ambiguous term which does not conclusively exclude the acts of Sea Shepherd from being for private ends. Rather the very limited judicial precedent and rationale of the definition of piracy under international law point towards a developing interpretation that all piratical acts lacking state sanctioning are for private ends and not public ends. In the words of the US Court, “that the perpetrators believe themselves to be serving the public good does not render their ends public.” When deciding the case on merits, the US Court should uphold the preliminary injunction decision of Kozinski, at least in respect to the definition of ‘private ends’. Under the international law of piracy, Sea Shepherd Conservation Society is acting for ‘private ends’.

However ‘private ends’ is just one requirement that necessarily restricts the far-reaching powers and scope of the international piracy universal jurisdiction regime. Other questions have been raised in relation to the Sea Shepherd campaign and whether it falls within the piracy definition.

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425 (Plant 1983, supra note 303, p. 136).
426 One-way this could be demonstrated is if the opposite was found to be true, i.e. that the lack of treatment as pirates was coupled with positive action by states to uphold the freedoms of piratical political action. But, as Plant concluded, “There is no evidence that states have claimed for their merchant ships a separate high seas right freedom to protest or any other right to protest”. (Plant 1983, supra note 303, p. 134). Whilst it may be the IMO & IWC resolutions above mention the purported right to peaceful protest on the high seas, the inherent nature of piratical acts would exclude them from the definition of ‘peaceful’ protest.
427 Purely political ends are thus interpreted as only applicable to piratical acts of insurgents, in relation to the aims of the insurgency.
Firstly the alleged conduct between Sea Shepherd and the Japanese whalers has been conducted within the waters that are claimed by Australia as part of their exclusive economic zone (EEZ). If we put aside that the majority of states do not recognise Australia’s sovereign rights and claim to the Australian Antarctic Territory EEZ, some authors claim that the piracy definition only applies to the ‘high seas’, and not the EEZ. Either Article 86 of UNCLOS defines the ‘high seas’ as excluding the EEZ, or international law is unclear if the piracy definition extends to the EEZ. Another possibility floated is that in exceptional cases of violence between private fishing vessels within the EEZ, any interference by foreign states could conflict with the coastal state’s exclusive sovereign rights. Arguably the conflict between Sea Shepherd and the Japanese whalers is one between private vessels over fishing rights.

None of these arguments find support when looking at UNCLOS as a whole. Article 86 on the high seas specifically points to Article 58, which is abundantly clear “article 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part”. This includes the right to visit, seize, arrest, and prosecute pirates. Nothing in the exercise of those rights would be incompatible with Part V, as the exclusive sovereign rights provided in Article 56 to the coastal state do not extend to any exclusive criminal jurisdiction. The coastal state’s rights are in relation to resources, whilst piracy law enforcement relates to the conduct of the actors. The fact the violence is indirectly related to the conservation of living resources would not remove the activity from the criminals sphere and place it within the exclusive economic competencies the EEZ regime provides. The definition of piracy

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431 Heller, K., Sea Shepherd, Piracy, and the “High Seas”, Opinio Juris, 1 March 2013. Available at: http://opiniojuris.org/2013/03/01/sea-shepherd-piracy-and-the-high-seas/ [last accessed 10.09.2013]. Whilst it is true Art. 86 begins, “the provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone”, Heller does not indicate why he excludes the crucial second sentence from his definition: “This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58”.
432 (Caprari 2010, supra note 232, p. 1513).
433 (Geiss & Petrig 2011, supra note 13, p. 64, note 293).
434 UNCLOS, Art. 58.
435 Art. 110(a).
436 Art. 105.
437 (Guilfoyle 2009, supra note 13, pp. 43-45).
438 E.g. exploring, exploiting, conserving and managing.
439 James Kraska and Raul Pedrozo have collated non-resource related activities military vessels can exercise within the EEZ, including “Maritime law enforcement/constabulary operations (e.g. anti-piracy)”. Kraska, J., & Pedrozo, R., International Maritime Security Law, Martinus Nijhoff Publishers, 2013, p. 326.
The case of Sea Shepherd and the ICR is applicable to all areas beyond the territorial waters, with no ‘exceptional’ cases.

A greater barrier to defining Sea Shepherd as pirates is evidence they have committed “any illegal acts of violence or detention or any act of depredation”. The facts as described in Section 3.1 are those accepted at the preliminary injunction stage as likely to be proven at court. They are far from established, and each incident is subject to conflicting reports without independent observation. Even if we accept them as fact, are they sufficient to be piracy?

Firstly the limits of ‘depredation’ are unclear. Despite the fact Peter Bethune was not charged with piracy in Japan, his boarding of a Japanese vessel in February 2010, although non-violent, was accompanied by the demand for $3 million. This was directed at the Japanese captain, and an intended but frustrated attempt at robbery is still an act of piracy. Klein has argued, “[a] peaceful demand for money may not be an act of piracy”, but violence is in an alternative under UNCLOS, not a necessity. Where the line falls between an act of peaceful protest, and an attempted act of conversion to the detriment of the other ship or persons is not clear.

Perhaps a clearer case would be that of the butyric acid, thrown from the Sea Shepherd vessels with the intent to spoil any whale meat on board the ship. The destruction of property is a right that vests with its owner, and Sea Shepherd’s destruction of any commercial value in the whale meat is as much a ‘depredation’ as removing the property from the ship.

Yet, both the District Court and the Appeal Court looked only at the qualification as “violence” to which we will now briefly turn. The District Court focused on the lack of targeting people on-

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441 Much as it was prior to the development of the EEZ, which happened subsequently to that of piracy. The wording ‘high seas’ is a relic of the High Seas Convention and one would expect express exclusion from applicability if it were decided by States that following UNCLOS an extra 188nm breadth of water was suddenly removed from the definition of piracy.
442 The largest barrier to enforcement within the EEZ would thus be the growing practice of restricting military vessel access without prior consent of the coastal state. This is because Art. 107 restricts piracy enforcement jurisdiction to military and governmental-service vessels.
443 UNCLOS, Art. 101.
445 It is not clear whether the citizen arrest of the captain was to be done through ‘detention’.
446 Thus fulfilling UNCLOS, Art. 101(a)(i).
board, which is not a requirement supported under international law. However the Appeal Court equally concluded, “ramming ships, fouling propellers and hurling fiery and acid-filled projectiles easily qualify as violent activities” without any precedent.

The term must have some meaning under international law, yet it is not defined within the Law of the Sea Convention, and doesn’t appear to be explored in case law. It is not the aim of this thesis to explore the exact meaning of violence, but it may be that “[f]or a forcible act on the high seas to become piracy there are no well-recognized requirements relating to the magnitude of the violence required.”

As an example the Appeal Court ruled ramming vessels is clearly an act of violence, and thus covered by the definition of piracy. Maritime New Zealand concluded the collision between the Sea Shepherd vessel, Ady Gil, and the Japanese, Shonun Maru 2, on the 6th January 2010, was a result of both captains failing to follow COLREGs, and then once a collision became likely, failing to take any avoiding measures. Thus this would be an unintentional collision between the vessels, similar to that which occurred between Greenpeace’s Arctic Sunrise, and the Japanese Nissin Maru. Yet when that collision was described as “illegal and violent action” by Japan, the response of New Zealand and The Netherlands was they “believed this was a legitimate, robust but peaceful protest.” It would certainly be very surprising if a breach of COLREGs, whilst carrying out a peaceful protest, would suddenly become subject to universal jurisdiction due to an unintended collision.

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450 Sea Shepherd does not target people, and although its tactics sometimes target the whalers' ships, it is not apparent that the nations of the world would agree that tactics that resemble malicious mischief amount to piratical ‘violence’ The Institute of Cetacean Research v. Sea Shepherd Conservation Society, Case No. c11-2043RAJ, US District Court for the Western District of Washington, 2012 U.S. Dist. Lexis 36867, p. 15.
451 As pointed out by the Appeals Court, The Institute of Cetacean Research v. Sea Shepherd Conservation Society, Case No. 12-35266, US Court of Appeals for the Ninth Circuit, 25 February 2013, pp. 5-6. UNCLOS, Art. 101(a)(i); piratical violence can be directed “on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft”.
453 There must however be a minimum threshold and not all violent acts will be “violence” in respect of piracy; “If there were to be too low a threshold in qualifying acts as constituting piracy, this could potentially lead to easy negation of the principle of freedom of the high seas and of the flag State principle” (Kanehara 2011, supra note 283, p. 211). The universal jurisdiction of piracy would go beyond a mere exception and become the principal means of high seas jurisdiction to the detriment of all users and states.
454 (Kanehara 2011, supra note 283, p. 208).
457 This is all the more surprising if you consider that if I intentionally cause a collision through the provision of false information I would only be subject to the SUA Convention flag-state authorization regime (assuming both states are party). Should threats to navigation leading to unintended results be subject to universal jurisdiction, whilst intentional threats leading to intentional results require authorization? See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Arts. 3(6) & 8bis.
Furthermore Article 97 of UNCLOS\textsuperscript{458} deals specifically with “collision[s] or any other incident of navigation”\textsuperscript{459}. Adopted in response to the unsatisfactory reasoning of the *Lotus* decision, Article 97(1) establishes \textit{exclusive} criminal jurisdiction over the crew for either the flag state, or the state of which such person is a national. Article 97(3) establishes \textit{exclusive} enforcement powers for the flag state. Thus even if the collisions were intentional, as claimed by the Japanese\textsuperscript{460}, it may be that the definition of piracy in Article 101 is met, but universal jurisdiction cannot be exercised\textsuperscript{461}. It would certainly be odd to conclude Article 97 was included to reverse the reasoning of *Lotus*, but then Article 101 restored it and its outcome.

3.4 Evaluation of the US Court’s decision on the basis ‘political ends’ are taken to be ‘public ends’ – an unworkable test

Until sufficient case law and practice develops to confirm the use of piratical acts at sea by non-governmental organisations and other unauthorised entities to impose their own subjective ‘political’ views is piracy, the possibility exists that political ends might be excluded by the requirement of ‘private ends’. Should that be the case, the piracy definition and enforcement regime becomes wholly unworkable.

Firstly, as noted, the pursuit of political ends does not automatically negate all other aims\textsuperscript{462}, some of which would clearly fall within ‘private ends’\textsuperscript{463}. This would explain the emphasis in the legislative history on \textit{purely} political ends, but there is no evidence of how this would be determined. International criminal law recognises the existence of dual motives\textsuperscript{464}, and a terrorist

\textsuperscript{458} Repeating HSC, Art. 11.

\textsuperscript{459} The recent decision of the Indian Supreme Court in relation to the *Enrica Lexie* provides some suggestion of what ‘other incidents of navigation’ are; “The context in which the expression has been used in Article 97 of the Convention seems to indicate that the same refers to an accident occurring in the course of navigation, of which collision between two vessels is the principal incident. An incident of navigation as intended in the aforesaid Article, cannot, in my view, involve a criminal act in whatever circumstances”, as quoted by; Davids, J., \textit{India v Italy: The Indian Supreme Court Decides}, The {New} International Law, 30 January 2013. Available at: \url{http://thenewinternationallaw.wordpress.com/2013/01/30/india-v-italy-the-indian-supreme-court-decides/} [last accessed 10.08.2013].

\textsuperscript{460} (Kanehara 2011, supra note 283, p. 202).

\textsuperscript{461} See however (Kanehara 2011, supra note 283, pp. 217-219) which suggests there may be some evidence to differentiate unintentional and intentional collisions – intentional still being subject to universal jurisdiction under the piracy provisions.

\textsuperscript{462} (Bahar 2007, supra note 38, pp. 33-34).

\textsuperscript{463} Take the terrorists in the *Achille Lauro* incident for example. Their action was primarily in pursuit of an espoused political end, the release of 50 Palestinian prisoners the Palestinian Liberation Front felt were unjustly detained by Israel. Yet the selection and murder of the Jewish citizen can only be based on a desire for revenge for injustices felt, as perpetrated by the Jewish people.

\textsuperscript{464} Roger Phillips quotes the case \textit{The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana}, Case Nos. ICTR-96-10-A in relation to the crime of genocide; “[I]t is immaterial, as a matter of law, whether the refugees were targeted solely on the basis of their ethnicity or whether they were targeted for their ethnicity in addition to other
motivated by political and financial aims would be acting ‘for private ends’. Yet there is no logical or justified way of drawing a line between an actor acting for dual motives (and thus private ends) and one which acts for primarily, or purely, political ends (and thus not private ends).

Looking at Sea Shepherd, for the sake of argument we will accept they are an environmentally friendly group using piratical acts “in connection with their quest for marine environment protection”. However they are also motivated by their hatred of the Japanese whalers, the quest for publicity and payment, not just from their supporters but also Animal Planet, which televisions the series. At what point would their action no longer be for purely political ends (public ends) but rather dual ends (private ends)?

Furthermore it cannot be the political motivation of the actor excludes all their activity from the definition of piracy. Whilst it may be that the adjudicative system could tackle such difficulties as whether a particular act was committed for purely political ends, the definition of piracy found in Article 101 is also used as the basis of the prescriptive universal jurisdiction. Cyprus and Malta have pointed out the difficulty of distinguishing between a protest vessel and a terrorist vessel, but the same is true of trying to distinguish between a purely politically motivated ship and one pursuing other private ends. A warship must have ‘adequate grounds’ to seize a pirate ship if it wishes to avoid state liability, or ‘reasonable grounds’ if it wishes to exercise the right to visit.

reasons.” Phillips, R., Terrorism as a Defence to Piracy (a definitional problem), Communis Hostis Omnium, 30 January 2011. Available at: http://piracy-law.com/2011/01/30/terrorism-as-a-defence-to-piracy-a-definitional-problem/ [last accessed 11.08.2013]. Thus the law should not distinguish between targeting a ship for revenge or monetary gain, and targeting a ship for revenge or monetary gain and to politically protest whaling. (Jesus 2003, supra note 42, p. 379). See the various quotes of the Sea Shepherd leader, Paul Watson, which suggest such a goal “our objective from the very beginning was to sink the Japanese whaling fleet economically, to bankrupt them […] We’re an interventionist organization […] Sea Shepherd is an anti-poaching organization […] We take action against poaching operations” IWMC, Sea Shepherd’s Shepherds, IWMC Conservation Tribune, IWC64 Panama, 6 June 2012.

In relation to the boarding by Peter Bethune; “We are going to expose the illegality of the Japanese whaling operation at every opportunity” – Paul Watson, quoted in Associated Press, Japan arrests whaling activist for boarding ship, The Guardian, 12 March 2010. Available at: http://www.theguardian.com/environment/2010/mar/12/japan-arrests-whaling-activist-boarding-ship [last accessed 11.08.2013].

Kontorovich takes this further and even questions whether ‘political’ can be defined given the attacks of the ‘Movement for the Emancipation of the Niger Delta’ which pursues the political goal of ‘oil wealth redistribution’; “I have no idea how one excludes the possibility of non-political motives, or even how one defined “political” in a world where money and its distribution is a major political issue” Kontorovich, E., In Other Pirate News, The Volokh Conspiracy, 1 March 2012. Available at: http://www.volokh.com/2013/03/01/in-other-pirate-news/ [last accessed 11.08.2013].

Piracy refers to any act…for private ends. The political goals of one act would not automatically exclude the liability of other related acts if they were not also political acts. Samuel Menefee as one solution suggested a strict balancing test. (Menefee 1990, supra note 201, p. 60). (Plant 2002, supra note 302, p. 111).

UNCLOS, Art. 106.
This can be much more easily determined if the test of private ends rests on the status of the ship as opposed to the motivation of the parties involved\textsuperscript{474}. If purely political ends were found to be non-private ends a warship encountering a ship which just violently attacked another would have to; first determine whether the ‘pirate’ is motivated by political ends; then whether the activity conducted ‘fits’ within the realm of their political motivation and thus is an act committed for purely politically ends\textsuperscript{475}. A definition of private ends, which excludes political acts beyond those of insurgents, would produce an unworkable definition of piracy.

\textsuperscript{473} UNCLOS, Art. 110(1).

\textsuperscript{474} In relation to the exercise of enforcement powers, Singapore’s Home Affairs Minister, Wong Kan Seng, is quoted (Dillon 2005, supra note 327, p. 162); “if it’s piracy we treat it just like terrorism because it is difficult to identify the culprits concerned unless you board the ship”. If international law was to distinguish between the two based on their motivation, then those boarding powers would be restricted and Singapore would face such difficulties of identification in order to determine if a right to visit exists. If proven unfounded and not engaged in piracy, but only political piratical acts, Singapore would then need to compensate such terrorists under UNCLOS Art. 110(3).

\textsuperscript{475} Or whether they happened to come across a ship and undertook such violence in pursuit of a private end, unconnected to their political goals. Or whether they exceeded the political ends they seek to achieve and entered the realm of hatred.
Conclusion

The *High Seas Convention* attempted to codify the definition of piracy according to international law. The *United Nations Convention on the Law of the Sea* followed suit (Section 1.1). Private ends was a necessary condition of piracy under international law in order to exclude acts traditionally seen as public ends – those sanctioned by states and therefore better left to the rules of state responsibility. However it was also evident from the historical sources that certain purely political acts should also be excluded, the established example being the piratical acts of insurgents in their quest for independence. The position of other political organisations was subject to conflicting evidence and very much within a ‘grey area’ of the limits of ‘private ends’. The drafters did not limit purely political ends to only insurgents, but the extent the exception extended beyond insurgents was not established in the historical sources (Section 2.1).

Subsequent state practice has demonstrated continued confusion and uncertainty by states as to the exact boundaries of the purely political ends exception, and necessarily the ‘private ends’ test (Section 2.2). Therefore it has failed to demonstrate subsequent agreement or application regarding the correct interpretation.

Sea Shepherd is an example of a non-governmental organisation that could be classified as pursuing political ends. It pursues its political goals on the high seas against the Institute of Cetacean Research; the Japanese flagged scientific research fleet (Section 3.1). By looking at state practice in relation to Sea Shepherd it has been seen states have not punished or exercised piracy jurisdiction over environmental activists. Yet it is difficult to demonstrate this is evident because of an *obligation* to exclude such actors from the definition of piracy due to their proclaimed ‘political’ motivation. Rather other justifications exist for these omissions that do not affect the definition of ‘private ends’ (Section 3.2).

Therefore, despite the popularity of the conclusion, it *cannot* be said that ‘private ends’ excludes piratical acts in the pursuit of political ends. Instead the very limited judicial precedent points towards an interpretation that removes the ‘grey area’ and ignores the motives of the actor (Section 2.4). The policy and rationale, which underlies the law of the sea, and the piracy regime contained, justify this conclusion. Private individuals who use violence on the high seas against other ships should be subject to the universal jurisdiction of all states. They represent a serious threat to the freedoms of the seas, with no authorisation to disturb the peaceful reserve of the high seas (Section...
2.3). No justification could be reached for creating an exception based on the political ends of those actors.

Should courts and states continue to follow this precedent a definition of private ends will develop that retains the monopoly of states for the use of force and property conversion. The definition of private ends as committed without sanction from any public authority or sovereign power requires further continued confirmation as the correct interpretation before we can see it has become established in international law.

This thesis therefore set out to help settle the debate over the definition of private ends that has resurfaced due to the recent US preliminary injunction decision against Sea Shepherd. A thorough analysis of the term under international law has demonstrated the instability of both theories. Yet with a workable definition developing, the way is now open for the US Court, when deciding the merits, to contribute and remove any lingering confusion.

Whether Sea Shepherd fulfils the other requirements of piracy however can be questioned, and requires further research (Section 3.3). This will be of serious concern once it is established the political ends of Sea Shepherd and other activists will not shield them from universal jurisdiction if they carry out piratical attacks. The definition of piracy in such circumstances will revolve on the limits of violence, detention and depredation. Even if a working definition of these terms under international law was evident from such research, the exact boundaries in each scenario would not be set and the heat of the moment could lead to unforeseen action. For those political activists who use direct action techniques such uncertainty will make it extremely difficult to plan a protest that is robust, but nonetheless does not cross the line into piracy.

Whatever the decision on piracy however, serious questions need to be asked on why the various flag-states have allowed the actions of both parties to continue unregulated and unpunished beyond political rhetoric. Whether you support the resumption of commercial whaling, or the protection of magnificent creatures, acquiescence to clashes between vessels threatening human life and the environment is an unacceptable approach.

"As long as pirates perceive that the International community is unwilling or lacking the capacity to prosecute, piracy will continue to thrive."476

476 (Isanga 2010, supra note 335, p. 1273).
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United Nations General Assembly


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**Permanent Court of International Justice (PCIJ)**

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*North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, 20 February 1969, ICJ Reports 1969.

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The M/V “Saiga” (No.2) Case (Saint Vincent and The Grenadines v Guinea), Separate Opinion of Judge Laing, 1 July 1999.


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Belgium

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United Kingdom


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United States of America


Annex III: Other Resources

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**Newspaper Articles**


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http://www.youtube.com/watch?feature=player_embedded&v=xPZQccmUVTe#at=14.