

PRIVATE POLITICAL ACTIVISTS AND THE INTERNATIONAL LAW DEFINITION OF PIRACY: ACTING FOR ‘PRIVATE ENDS’

ABSTRACT

Piracy under international law grants states the right to exercise universal jurisdiction, provided that all conditions of its definition are cumulatively met. Yet academic debate continues as to whether the requirement that piratical acts be committed ‘for private ends’ excludes politically motivated non-state actors. This article attempts to resolve the dispute through a thorough analysis of the term ‘private ends’. An application of the rules of treaty interpretation is followed by an in-depth examination of ‘private ends’ historical development. State practice is examined in an attempt to resolve the ambiguities found. Finally the rationale of universal jurisdiction underlying the definition of piracy is explored, in order to answer whether such actors should be excluded. This article argues that a purely political ends exception developed, but its application beyond insurgents was never resolved. Limited state practice has ensured such ambiguity survived. Nevertheless given the objective of providing discretionary universal jurisdiction over violence and depredation between vessels at sea, violent actors should not be excluded solely upon their political motivations. Instead the limited (but growing) precedents of equating ‘private ends’ to a lack of state sanctioning should be followed.

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I 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.¹

So said Judge Kozinski, as the US Court of Appeals for the 9th Circuit overturned the US District Court’s refusal to grant a preliminary injunction against Sea Shepherd Conservation Society.² For the past decade the private environmentalist organisation had harassed vessels of the Institute of Cetacean Research during its seasonal hunting of whales in the Antarctic Sea. The relatively short judgment reopened various debates on defining piracy under international law, perhaps the most surprising conclusion being that acts ‘committed for private ends’ under international piracy law should be interpreted as acts ‘not taken on behalf of a state’.³ The conclusion is contrary to the common, though not uniformly held, view of academics that ‘private ends’ exclude ‘political ends’, such as those of environmental activists.

The importance of settling the ambiguities of ‘private ends’ is manifest when one considers its necessity for exercising universal jurisdiction under the international law definition of piracy. As mutually exclusive interpretations, the adoption of one opens the gateway to enforcement and co-operative action by all interested states; the adoption of another allows enforcement only by those states with the ability to assert jurisdiction upon another more restrictive head, or basis, of jurisdiction.⁴ For states, legal certainty is a necessity for knowing over whom they may exercise jurisdiction,⁵ over whom they should exercise jurisdiction in upholding international law⁶

¹ *Institute of Cetacean Research v Sea Shepherd Conservation Society*, 708 F 3d 1099, 1101 (9th Cir, 2013) (‘*Sea Shepherd*’).

² For the District Court decision: *Institute of Cetacean Research v Sea Shepherd Conservation Society*, 860 F Supp 2d 1216 (WD Wash, 2012). The United States Supreme Court denied certiorari to review the 9th Circuit’s decision: *Sea Shepherd Conservation Society v Institute of Cetacean Research*, 135 S Ct 2816 (2015).

³ *Sea Shepherd*, 708 F 3d 1099, 1102 (9th Cir, 2013).

⁴ At sea this will primarily be the flag state and state of nationality of the offenders. If pirates later enter the territory of the state of nationality of the injured party, it could potentially also exercise jurisdiction. For jurisdiction theory, see Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2nd ed, 2015).

⁵ Political activists, or not.

⁶ ‘All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State’: *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 100 (‘UNCLOS’). See Yaron Gottlieb, ‘Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing’ (2013) 46(1–2) *Case Western Reserve Journal of International Law* 303, 305–316.

and when they must respect the exercise of jurisdiction by other states, even when it concerns their self-interests.⁷ For individuals, it represents whether their politically motivated violence may be susceptible to prosecution by all states, and vice versa, which states a ‘victim’ vessel or organisation may appeal to for assistance in dissuading and prosecuting their violent political opponents. Finally, for international law it represents the test of coherence, the rule of law and its adaptability to meet contemporary challenges. As will be seen, environmental activism was not a consideration when the ‘private ends’ test emerged. Nevertheless, if the law of the sea is to be a ‘constitution for the oceans which will stand the test of time’,⁸ it must evolve to meet contemporary challenges. The scope of ‘private ends’ represents such a challenge. If it is not to lead piracy into the dangers and criticisms of universal jurisdiction more generally,⁹ it needs to be conclusively defined.¹⁰

Therefore, in order to determine whether politically motivated actors are ‘private ends’ actors, subject to international piracy law, the article will first explore the definition of piracy under international law (Part II). It will be established that the requirement of acts committed for ‘private ends’ is part of the customary and treaty law definitions of piracy, before introducing the conflicting academic interpretations that have resurfaced following the 9th Circuit’s decision (Part III). In order to settle the debate on interpreting ‘private ends’, the article embarks on an assessment of different sources available to determine if political ends are excluded from piracy under international law (Part IV). These sources will necessarily include the historical documents that developed the term (Part IV(A)), the state practice in relation to politically motivated actors on the high seas (Part IV(B)) and, finally, the policy and rationale behind the definition of piracy (Part IV(C)). It is hoped by looking at these various sources collectively the definition of ‘private ends’, as interpreted by states, will become apparent and a clearer position on politically motivated violence under international piracy law can be concluded (Part V).

⁷ Eg a vessel flagged to that state. Furthermore if ‘private ends’ is unclear, states are likely to be less forthcoming in exercising universal jurisdiction over ‘piratical’ political activists for fear of flag state protest.

⁸ Tommy TB Koh, ‘A Constitution for the Oceans’ in *The Law of the Sea — Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (St Martin’s Press, 1983) xxxiii, xxxiii; *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No 21, 2 April 2015) 5 [9] (Judge Lucky): ‘The convention is regarded as the constitution of the oceans and, in my opinion, is akin to (*comparable with*) a national constitution. Therefore, it must “grow” in accordance with the times’.

⁹ A regular feature of the UN General Assembly agenda, see references within *The scope and application of the principle of universal jurisdiction: Report of the Sixth Committee*, 69th sess, Agenda Item 83, UN Doc A/69/503 (14 November 2014).

¹⁰ The suggestions of ‘abuse’ and ‘manipulation’ of universal jurisdiction more generally are pertinently applicable if ambiguities in ‘private ends’ lead to state disagreements over the application of piracy jurisdiction to political activists.

II DEFINING PIRACY UNDER INTERNATIONAL LAW

Before discussing what ‘private ends’ are, it is necessary to establish such a requirement exists in international law — in *piracy jure gentium*.¹¹ As a matter of treaty law, the definition of piracy under the *United Nations Convention on the Law of the Sea* (‘UNCLOS’) is binding upon its 167 contracting parties.¹² Those states which only ratified the *Convention on the High Seas* (‘HSC’) are bound by its near identical definition.¹³ Both require an act ‘for private ends’, yet neither provide an explanation of what that entails.¹⁴

The *HSC* defines piracy as:

Piracy consists of any of the following acts:

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

UNCLOS defines piracy as:

¹¹ Municipal piracy is a separate matter defined under national law. International piracy law sets the limits of universal jurisdiction exercised by states, whilst municipal piracy stipulates what that state will prosecute via criminal law. As a separate issue municipal definitions, which may be more or less extensive, do not affect the international definition.

¹² *UNCLOS* art 101. See <<https://treaties.un.org/>> for a list of the 167 parties.

¹³ *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962) (‘HSC’). See <<http://treaties.un.org/>> for a list of the 63 parties. *Afghanistan* (signatory *UNCLOS*), *Cambodia* (signatory *UNCLOS*), *The Holy See*, *Iran* (signatory *UNCLOS*), *Israel*, *the USA* and *Venezuela* are all party to the *HSC*, but not *UNCLOS*.

¹⁴ The five elements of piracy: (1) any illegal acts of violence or detention, or any act of depredation (2) committed *for private ends* by crew or passengers (3) of a private ship or 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.

¹⁵ *HSC* art 15 (emphasis added).

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, *committed for private ends* by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹⁶

As for the position under customary international law, the *HSC* Preamble confirmed the contracting parties' desire 'to codify the rules of international law relating to the high seas'. Yet Rubin argues the resulting piracy rules 'are incomprehensible and codify nothing'.¹⁷ Essentially, some claim *HSC* drafters failed to successfully codify piracy, and under customary law the definition was much wider.¹⁸

Some support can be found in early efforts by Harvard Law School to codify the rules of piracy, where it was proclaimed a 'chaos of expert opinion [exists] as to what the law of nations includes'.¹⁹ 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, with the definition being too narrow.²⁰

¹⁶ *UNCLOS* art 101 (emphasis added).

¹⁷ Alfred P Rubin, *The Law of Piracy* (Transnational Publishers, 1988) 393, cited in Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, 2011) 52.

¹⁸ '[T]he *UNCLOS* definition is too narrow to be considered the authoritative definition of piracy under customary international law ... *UNCLOS* presented a significant departure from what the international community accepted as piracy': Erik Barrios, 'Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia' (2005) 28(1) *Boston College International and Comparative Law Review* 149, 161–162.

¹⁹ Joseph W Bingham, 'IV Draft Convention on Piracy, with Comment' in Harvard Law School, *Research in International Law* (Harvard Law School, 1932) 739, reprinted as Joseph W Bingham, 'Part IV — Piracy' (1932) 20(3) *American Journal of International Law — Supplement* 739, 769 ('*Harvard Draft*').

²⁰ See United Nations, *Chapter XXI Law of the Sea* (2015) United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21&lang=en>.

However, this article supports the more widely accepted position that piracy, as defined within *UNCLOS*, reflects customary law.²¹ The general state consensus crystallised with the codification efforts at Geneva.²² Subsequent widespread state practice and *opinio juris* can be pointed to as required in the formation of customary law.²³ The extensive ratification and adherence to this definition, including by major maritime powers, provides great weight to the drafters’ intent to codify customary law. Consistent adoption demonstrates a further commitment to that definition. If piracy was wider prior to codification, the successive re-enactment of the same definition and declarations on its customary nature would surely have had an effect and restricted it to that found within *UNCLOS*.²⁴ The disapproving declarations mentioned above were not repeated upon *UNCLOS* ratification, and states within the Horn of Africa and South-East Asia (the principal areas affected by modern piracy) have incorporated the *UNCLOS* definition into co-operative anti-piracy agreements.²⁵

Further evidence of customary international law including a requirement for ‘private ends’ is the affirmation of states through their action in international organisations. The United Nations Security Council has reaffirmed the *UNCLOS* art 101 definition

²¹ Geiss and Petrig, above n 17, 41; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2011) 30; Ömer F Direk et al, ‘Somalia and the Problem of Piracy in International Law’ (2011) 4 *USAK Yearbook of International Politics and Law* 223, 238. The United States, though not a contracting party, has stated that the *UNCLOS* piracy provisions reflect customary law: ‘Declaration of Legal Adviser Harold Hongju Koh’ in *United States v Hasan*, 747 F Supp 2d 599 (ED VA, 2010), cited in Maggie Gardner, ‘Piracy Prosecutions in National Courts’ (2012) 10(4) *Journal of International Criminal Justice* 797, 813. It would be difficult to argue any state has displayed the characteristics necessary to be classified as a persistent objector, *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) (Judgment)* [1969] ICJ Rep 3.

²² It may be customary law only became sufficiently defined once the law was codified. The chaos of opinion means it is difficult to judge what customary law would have been prior to codification. ‘[V]irtually every aspect of piracy was still controversial’: Direk et al, above n 21, 238.

²³ *Statute of the International Court of Justice* art 38(1)(b).

²⁴ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 31.

²⁵ Gardner, above n 21, 813. See: International Maritime Organisation, *Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in The Western Indian Ocean and The Gulf of Aden*, C 102/14 Annex (29 January 2009) art 1; *Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia*, concluded 11 November 2004, 2398 UNTS 199 (entered into force 4 September 2006).

in the fight against piracy,²⁶ describing it as ‘reflective’ of international law.²⁷ The International Maritime Organisation and other relevant UN bodies have also invoked the same definitive definition.²⁸ Whilst the International Maritime Bureau used to invoke a very wide non-legally binding definition for commercial and statistical purposes,²⁹ it is now the case that even they have adopted the *UNCLOS* definition.³⁰

Finally, it is largely in relation to (a) the geographical scope of piracy and (b) the two-ship requirement that suggestions of a wider customary international law of piracy still exist.³¹ Disagreements on ‘private ends’ revolve around the precise meaning and not existence of the requirement under customary law. Thus, piracy under international law requires parties to act for ‘private ends’; the meaning of which is now debated.

III A DIFFERENCE OF OPINION ON ‘FOR PRIVATE ENDS’

Despite applying the same definition of piracy to the same facts, the District Court for the Western District of Washington and the Court of Appeals for the Ninth Circuit

²⁶ Robert C Beckman, ‘The Piracy Regime Under *UNCLOS*: Problems and Prospects for Cooperation’ in Robert C Beckman and J Ashley Roach (eds), *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (Edward Elgar Publishing, 2012) 17, 28.

²⁷ Gardner, above n 21, 813, n 90, gives three examples: SC Res 1976, 6512th mtg, UN Doc S/RES/1976 (11 April 2011), Preamble; SC Res 1950, 6429th mtg, UN Doc S/RES/1950 (23 November 2010), Preamble; and SC Res 1918, 6301st mtg, UN Doc S/RES/1918 (27 April 2010), Preamble. Furthermore, *UNCLOS* ‘sets out the legal framework applicable to combating piracy and armed robbery at sea’: SC Res 2020, 6663rd mtg, UN Doc S/RES/2020 (22 November 2011) para 2, quoted in *United States of America v Ali Mohamed Ali*, 718 F 3d 929, 936 (CAD, 2013).

²⁸ See, eg, UN Division for Ocean Affairs and the Law of the Sea and the UN Office on Drugs and Crime. Gardner, above n 21, 813.

²⁹ The International Maritime Bureau definition contained no ‘private ends’ requirement. ‘[A]n act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act’, quoted in Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer, 2007) 18; and Adam J Young, *Contemporary Maritime Piracy in Southeast Asia; History, Causes and Remedies* (ISEAS Publishing, 2007) 10.

³⁰ ‘The *IMB Piracy Reporting Centre (IMB PRC)* follows the definition of Piracy as laid down in Article 101 of the 1982 United Nations Convention on the Law of the Sea’: International Chamber of Commerce — Commercial Crime Services, *IMB Piracy Reporting Centre* <<http://www.icc-ccs.org/piracy-reporting-centre>>.

³¹ ‘[I]t has been suggested that the customary international law of piracy: (1) extended to acts in territorial waters; or (2) extended to events occurring aboard only one vessel’: Douglas Guilfoyle, ‘Written Evidence from Dr Douglas Guilfoyle’ in House of Commons Foreign Affairs Committee, *Piracy off the Coast of Somalia*, House of Commons Report No 10, HC 1318, Session 2010–12, (2012) Ev 80, Annex I (‘*The Law of Piracy — Treaty Provisions and Explanatory Note*’) Ev 88 [13].

reached opposite conclusions. This difference is attributable to interpretation on whether Sea Shepherd’s conduct was for private ends.³²

On one hand the District Court decided financial enrichment was the ‘prototypical private end’.³³ Financial gain may have been a by-product of Sea Shepherd’s conduct, but it was not their purpose.³⁴ The purpose of Sea Shepherd’s conduct was preventing slaughter of marine life, a purpose for which the District Court found no universal international norm preventing the use of violence.³⁵ Whilst suggesting financial gain was the ‘ordinary case’, it gave no further examples of private ends for which violent conduct would be prohibited. Sea Shepherd’s conduct was only assessed against whether it was for financial gain.³⁶

The 9th Circuit interpreted private ends as falling at the other side of the scale, reversing the District Court decision. Private was given a wide definition, which according to its ‘ordinary meaning’ is the antonym of public.³⁷ 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’,³⁸ are private ends.

Within academia this public–private theory finds its greatest supporter in Guilfoyle.³⁹ States alone can legitimately use violence or claim, seize and redistribute property.⁴⁰ Thus private ends must be an objective test evaluating the ‘relationship among the act, actors and states’.⁴¹ If violence on the high seas between two ships or aircraft lacks state sanctioning, then it is committed for private ends and thus piracy.

³² The District Court also felt ‘malicious mischief’ did not constitute violence. *Institute of Cetacean Research v Sea Shepherd Conservation Society*, 860 F Supp 2d 1216, 1233 (WD Wash, 2012).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.* Sea Shepherd argued piracy was ‘no more or less than robbery at sea’. The Institute of Cetacean Research argued a broader ‘private ends’, but provided no authorities on definition and no authorities on political activity as within private ends.

³⁷ *Sea Shepherd*, 708 F 3d 1099, 1101–2 (9th Cir, 2013).

³⁸ *Ibid* 1102.

³⁹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 32–42. See also Edward Duncan Brown, *The International Law of the Sea: Volume 1 Introductory Manual* (Dartmouth Publishing Company, 1994) vol 1, 301; Michael Bahar, ‘Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations’ (2007) 40(1) *Vanderbilt Journal of Transnational Law* 1, 26–37. For Sea Shepherd specifically, see Eugene Kontorovich, ‘Yes, Sea Shepherd Engages in Piracy Under International Law’ on The Volokh Conspiracy (27 February 2013) <<http://www.volokh.com/2013/02/27/yes-sea-shepherd-engages-in-piracy-under-international-law/>>.

⁴⁰ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 37.

⁴¹ Bahar, above n 39, 17.

However, many authors disagree with this interpretation and do not equate private ends with a lack of state sanctioning. Private ends are seen to exclude *purely* politically motivated violence.⁴² This can be referred to as the private–political theory. Proponents suggest either politically motivated violence has traditionally not been seen as a private end, or political action is another form of public end, or both. Thus, actions of terrorists or political activists pursuing the political agenda of their organisation would not be classified as piracy and therefore not be subject to the universal jurisdiction it entails.

Under both interpretations the District Court clearly erred in restricting the definition to financial gain. Sea Shepherd’s arguments based on an analogy to robbery at sea were also out-dated because it is near universally accepted that private ends do not refer to personal gain.⁴³ It is equally true they do not refer to non-state action.⁴⁴ For example, a limited exception for recognised belligerents’ action against the state to which they are fighting is recognised by all as non-private ends.⁴⁵ Yet where the private ends distinction lies between these two extremes is debatable in international law. It is not as clear-cut as the 9th Circuit suggests in its short and under referenced opinion.

⁴² See, eg, Samuel Pyeatt Menefee, ‘Foreign Naval Intervention in Cases of Piracy: Problems and Strategies’ (1999) 14(3) *The International Journal of Marine and Coastal Law* 353, 357; Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2010) 162; HE José Luis Jesus, ‘Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects’ (2003) 18(3) *The International Journal of Marine and Coastal Law* 363, 378; Tina Garmon, ‘International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th, (2002) 27 *Tulane Maritime Law Journal* 257, 258. ‘[T]he majority view which still holds that acting for “private ends” excludes anybody acting for political, religious or ethnic reasons from the definition of piracy as found in the two treaties’: Direk et al, above n 21, 234. For blog posts referencing Sea Shepherd specifically, see Kevin Jon Heller, ‘Judge Kozinski’s “Rich History” of Piracy’ on *Opinio Juris* (27 February 2013) <<http://opiniojuris.org/2013/02/27/judge-kozinskis-rich-history-of-piracy/>>; Kevin Jon Heller, ‘Why Political Ends are Public Ends, Not Private Ends’ on *Opinio Juris* (1 March 2013) <<http://opiniojuris.org/2013/03/01/a-final-word-about-politically-motivated-piracy/>>.

⁴³ *Re Piracy Jure Gentium* [1934] AC 586. The International Law Commission equally concluded intent to rob was unnecessary, ‘Articles Concerning the Law of the Sea with Commentaries: 1956’ [1956] II *Yearbook of the International Law Commission* 265.

⁴⁴ ‘Private ships’ excludes state action.

⁴⁵ Guilfoyle interprets the exception as the basis for requiring ‘private ends’: Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 33. The most restrictive interpretation requires both a recognised belligerent acting against a state and that such acts are in ‘furtherance of their rebellion’, Tracey E Madden, ‘An Analysis of the United States’ Response to the Achille Lauro Hijacking’ (1988) 8(1) *Boston College Third World Law Journal* 137, 142, quoting Gerald P McGinley, ‘The Achille Lauro Affair — Implications for International Law’ (1985) 52 *Tennessee Law Review* 691, 699.

Are political ends private ends? One of the few articles referenced by the 9th Circuit 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.⁴⁶

Given the debate over political ends being public or private ends, the 9th Circuit failed to inquire into whether this proposition is adequately supported. It will therefore require independent assessment.

IV DEFINING ‘PRIVATE ENDS’ UNDER INTERNATIONAL LAW

Whilst the *UNCLOS* definition of piracy reflects customary law, difficulty arises in the fact that the term ‘private ends’ is not elaborated upon in either treaty. The starting point is thus the *Vienna Convention on the Law of Treaties* (*‘VCLT’*),⁴⁷ which is generally understood as reflective of customary law.⁴⁸

The US Appeals Court in *Sea Shepherd* began by looking into the ordinary meaning of ‘private’.⁴⁹ This approach was mistaken. Firstly, the term of *UNCLOS* is ‘private ends’, not ‘private’. By removing the word from its context and surrounding text one risks differing interpretations from the term itself.⁵⁰ More importantly, the ‘ordinary meaning’ of private does not provide a decisive interpretation that either excludes or includes politically motivated ends. If private ‘is normally used as an antonym to public’ and ‘matters of a personal nature’ as the Court suggested,⁵¹ then a working definition only exists if those terms (public and personal) are clear. But these terms are equally ambiguous. Action ‘taken on behalf of a state’ is one definition of public, but other interpretations remain available.⁵² These ambiguities are highlighted

⁴⁶ Bahar, above n 39, 30.

⁴⁷ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31–33 (*‘VCLT’*).

⁴⁸ *Kasikili/Sedudu Island (Botswana/Namibia) (Judgment)* [1999] ICJ Rep 1045, 1059[18].

⁴⁹ *Sea Shepherd*, 708 F 3d 1099, 1101 (9th Cir, 2013).

⁵⁰ ‘Public’ acts as an adjective to the noun ‘ends’, modifying the terms. Therefore the words should be interpreted collectively, and not in isolation. Article 31(1) of the *VCLT* requires: ‘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.’

⁵¹ *Sea Shepherd*, 708 F 3d 1099, 1101 (9th Cir, 2013).

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*’: *The American Heritage Dictionary of the English Language* (Houghton Mifflin Harcourt Publishing Company, 5th ed, 2011). Political action is generally acting in the public interest for the public good — political disagreements being what is for the

when examining politically motivated activity. As discussed below, a Belgian Court equated political views as personal views, and so action in support of political views will be in support of personal ends (ie private ends). But equally, Bingham in 1932 interpreted politically motivated action as another form of public action.⁵³ Political ends could be private, they could be personal or they could be public ends. '[S]upplementary means of interpretation' are required to confirm which meaning is correct.⁵⁴

Kontorovich suggests art 101 of *UNCLOS* should be read in conjunction with art 102, which clarifies governmental ships operated by mutineers are assimilated to private ships.⁵⁵ 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 '[t]hus "private" clearly means "non-governmental"'.⁵⁶ The term 'private', in the context of *UNCLOS*, should therefore be taken to mean 'non-governmental' throughout the Convention.⁵⁷

However, this argument is unconvincing, given art 102 deals specifically with issues of piracy by warships and governmental ships whose crews have mutinied. This relates to the term 'private ship' found within art 101, which is of course broader than art 102 and includes all non-governmental ships.⁵⁸ Whilst art 102 may confirm 'private ship' as any non-governmental ship, it does not help define the term 'private' in *UNCLOS*. It does not attribute 'private' a special meaning of non-governmental within the treaty, which could then be transferred from the term 'private ship' to 'private ends'.⁵⁹ 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 arts 101 and 102, yet other non-governmental situations arise. Article 169(1) refers to consultation and cooperation with 'non-governmental' organisations, and art 139(1), when discussing liabilities of 'private' persons, uses the term 'natural or juridical persons'. If 'private' was used consistently to refer to non-governmental purposes or situations the argument could be convincing. But the fact private is used once within the term 'private ship', to refer

public good. On the other hand definition No 5 would point to sanctioned activity and the corresponding state responsibility; the 'acting' being on behalf of Government. If you define private as the antonym to public, then the 'private' definition depends on which 'public' definition you adopt. Adopting the first definition, political activity would be 'public' activity, thereby excluded from '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': *Harvard Draft*, above n 19, 798 (emphasis added).

⁵⁴ *VCLT* art 32.

⁵⁵ Kontorovich, above n 39.

⁵⁶ *Ibid.*

⁵⁷ *VCLT* art 31(1).

⁵⁸ Geiss and Petrig, above n 17, 62 n 285.

⁵⁹ 'A special meaning shall be given to a term if it is established that the parties so intended': *VCLT* art 31(4).

to non-governmental ships, is insufficient to conclude ‘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 of *UNCLOS*, and relevant state practice. The *UNCLOS* piracy provisions resulted from a long process beginning with the League of Nations.⁶⁰ It is through examining this history that the drafters’ intended meaning of the term ‘private ends’ may be found. More specifically, did they intend to exclude purely politically motivated ends?

A History of Piracy Codification and ‘Private Ends’

The use of historical sources in determining drafters’ intentions has been questioned in relation to the *Sea Shepherd* case.⁶¹ Guilfoyle argues historical sources discussed below have been ‘overestimated’ in usefulness, given they are representative of the intentions of different *codifiers* and not *UNCLOS drafters*. Treaty interpretation aims to ascertain the intention of the drafters and so, given the documents are not part of the preparatory work, or within any of the other usual sources for interpretation under *VCLT* Pt III s 3, they are of limited relevance. This argument is said to gain support from the recent US decision, *United States of America v Ali Mohamed Ali*.⁶² Mr Ali, indicted with aiding and abetting piracy, attempted to rely on the *Harvard Draft*⁶³ in order to avoid prosecution for activities on land and within 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.⁶⁴

⁶⁰ Tullio Treves, *1958 Geneva Conventions on the Law of the Sea* (2008) United Nations Audiovisual Library of International Law, 1 <http://legal.un.org/avl/pdf/ha/gclos/gclos_e.pdf>. Treves makes this point for the *Geneva Conventions*, however it is equally applicable to the *UNCLOS* piracy provisions. *UNCLOS* introduced many novel concepts and rules, but piracy provisions were re-enacted from the *HSC* with minimal difference and without debate, Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 31. Thus *UNCLOS* is another step in this history — albeit one without a change in definition.

⁶¹ Douglas Guilfoyle, ‘Political Motivation and Piracy: What History Doesn’t Teach Us About Law’ on *Blog of the European Journal of International Law (EJIL: Talk!)* (17 June 2013) <<http://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/>>.

⁶² (DC Cir, No 12-3056, 11 June 2013) (*‘US v Ali’*).

⁶³ *Harvard Draft*, above n 19. See below IV(A)(2).

⁶⁴ *US v Ali* (DC Cir, No 12-3056, 11 June 2013) slip op 15.

However, to ignore the historical context of art 101 is to remove the definition from its legal context. The supplementary means of interpretation ‘include’ but are not limited to preparatory works of the treaty. The International Tribunal for the Law of the Sea has referenced both the *HSC* and the International Law Commission *Articles Concerning the Law of the Sea with Commentaries: 1956* (‘*ILC Draft Articles LOS*’),⁶⁵ when interpreting *UNCLOS*.⁶⁶ National courts applying international law prior to *UNCLOS* also made approving references to the *Harvard Draft*.⁶⁷ *UNCLOS* re-enacted the *HSC* provisions on piracy with minimal 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 *Matsuda Draft Provisions for the Suppression of Piracy* (‘*Matsuda Draft*’).⁶⁸ Indeed the preamble to *UNCLOS* makes clear the

⁶⁵ ‘Articles Concerning the Law of the Sea with Commentaries: 1956’ [1956] II *Yearbook of the International Law Commission* 265 (‘*ILC Draft Articles LOS*’). See below IV(A)(3).

⁶⁶ *M/V ‘Saiga’ [No 2] (Saint Vincent and The Grenadines v Guinea) (Judgment)* (International Tribunal for the Law of the Sea, Case No 2, 1 July 1999) 26 [80]–[81]:

the Tribunal notes that the provision in article 91, paragraph 1, of the Convention ... 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, proposed the concept of a ‘genuine link’ as a criterion not only for the attribution of nationality to a ship but also for the recognition by other States of such nationality ... while the obligation regarding a genuine link was maintained in the 1958 Convention, the proposal that the existence of a genuine link should be a basis for the recognition of nationality was not adopted. The Convention follows the approach of the 1958 Convention.

‘[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*: *M/V ‘Saiga’ [No 2] (Saint Vincent and The Grenadines v Guinea) (Judgment)* (International Tribunal for the Law of the Sea, Case No 2, 1 July 1999) 5 [12] (Judge Laing). Furthermore, in *‘Ara Libertad’ (Argentina v Ghana) (Order)* (International Tribunal for the Law of the Sea, Case No 20, 15 December 2012), the joint separate opinion of Judge Wolfrum and Judge Cot critiqued the order of the tribunal for not taking account of the legislative history of *UNCLOS* including the *ILC Draft Articles LOS* 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”: *Re Piracy Jure Gentium* [1934] AC 586, 599.

⁶⁸ League of Nations Committee of Experts for the Progressive Codification of International Law, *Questionnaire No 6: Piracy*, 2nd sess, Doc C.196.M.70.1927.V (26 January 1926) reprinted as *Matsuda’s Draft Provisions for the Suppression of Piracy, 1926* (1926) 20(3) *American Journal of International Law — Supplement* 222, 228 (‘*Matsuda Draft*’). See below IV(A)(1).

drafters intended to codify the law of the sea,⁶⁹ a desire that hardly points to putting aside the historical origins of the piracy definition. Rather than of limited relevance, as proposed by Guilfoyle, they become of critical importance in resolving remaining ambiguities — despite the text and *travaux préparatoires*.

Secondly, one can disagree with Guilfoyle’s interpretation of *US v Ali*. It did 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’.⁷⁰ *US v Ali* rests on the reasoning that a clear meaning within *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 US Court of Appeals for the DC Circuit went on, ‘treaty interpretation — both domestic and international — direct courts to construe treaties based on their text before resorting to extraneous materials’.⁷¹ Had *UNCLOS* been unclear on the issue, the Court *then* could have examined these further materials to confirm a particular meaning or resolved ambiguity (as other courts have). As seen above, ‘private ends’ remains unclear after looking to its legal context. Therefore resort to historical sources is a necessity. The date of thinking should not matter if consistently confirmed. Indeed ‘the definition of piracy has been frozen in what Dubner refers to as “the thinking of 1932”’.⁷² Whilst states and treaty drafters felt it necessary to update thinking on maritime zones, piracy remained much the same. Tracing the term ‘private ends’ through the documentation may reveal what the term meant when it was included within the *UNCLOS* definition of piracy.

1 *The Draft Provisions of the League of Nations Committee of Experts on International Law*

The *Matsuda Draft*⁷³ provisions submitted in 1926 as part of the League of Nations’ attempts to progressively codify international law are certainly far removed from the adoption of the *HSC* and *UNCLOS*. Indeed not many states responded to the draft. The few comments received ‘did not evidence either interest or enthusiasm for the topic and were disparate’.⁷⁴ The project was eventually dropped, with difficulties in reaching agreement and perceived unimportance in piracy codification.⁷⁵

⁶⁹ In addition to progressive development. However, given the piracy definition is quoted near verbatim from the *HSC* it is clear they wished to codify and crystallise the said definition.

⁷⁰ Guilfoyle, ‘Political Motivation and Piracy’, above n 61.

⁷¹ *US v Ali* (DC Cir, No 12-3056, 11 June 2013) slip op 2, 16.

⁷² Max Mejia Jr, ‘Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and Other Acts of Maritime Violence’ (2003) 2(2) *Journal of International Commercial Law* 153, 161, citing Barry Hart Dubner, ‘Human Rights and Environmental Disaster — Two Problems That Defy the Norms of the International Law of Sea Piracy’ (1997) 23(1) *Syracuse Journal of International Law and Commerce* 1, 33.

⁷³ *Matsuda Draft*, above n 68.

⁷⁴ P W Birnie, ‘Piracy: Past, Present and Future’ (1987) 11(3) *Marine Policy* 163, 169.

⁷⁵ Geiss and Petrig, above n 17, 38.

However, the report represents the first stage of codification and importantly the origin of ‘private ends’. The term has persisted to this day throughout each codification.⁷⁶ As will be seen in discussions on the *Harvard Draft* and *ILC Draft Articles LOS* a continuity of meaning can be attributed to ‘private ends’.⁷⁷ Thus, if ‘private ends’ is used in the same context, for the same purposes, the origins of that term should help highlight whether the requirement of an undertaking for private ends in *UNCLOS* art 101 excludes political activity from the international piracy framework. If, however, during evolution of the definition of piracy the meaning departed from its original, as applied in the *Matsuda Draft*, it will be of limited use.

Such departure is not evident in the continued use of ‘private ends’. Although the *ILC Draft Articles LOS* commentary only refers to the *Harvard Draft*,⁷⁸ the *Matsuda Draft* was used as an authority on the subject of politically motivated violence during the ILC discussions on ‘private ends’.⁷⁹

Reviewing the *Matsuda Draft*, a clearly private–political distinction is made and not one that turns on public power or state sanctioning.⁸⁰ Article 1 provides:

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.

⁷⁶ Guilfoyle’s research revealed, ‘[a]s 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 *animo furandi* (intention to rob, now generally dismissed as being a necessary element of piracy)’: Guilfoyle, ‘Political Motivation and Piracy’, above n 61. Bishop’s ‘private ends’ is clearly different to that of Matsuda, as *animo furandi* was specifically rejected by Matsuda; it being ‘contained in the larger qualification for private ends’. It seems reasonable to conclude the term private ends, as used to distinguish ‘piracy and practices similar to piracy’, has its origins in the *Matsuda Draft*. See also *Matsuda Draft*, above n 68, 223–224.

⁷⁷ See below Part IV(A)(2), IV(A)(3).

⁷⁸ *ILC Draft Articles LOS*, above n 43, 282.

⁷⁹ International Law Commission, ‘Summary record of the 290th meeting’ (1955) 1 *Yearbook of the International Law Commission* 37, 41 [40]–[45] (emphasis added):

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.*

The political motives thinking of the *Matsuda Draft* was carried through to the *ILC Draft Articles LOS* under ‘private ends’. The *ILC Draft Articles LOS* formed the basis of the *HSC*.

⁸⁰ Kevin Jon Heller, ‘A response to Kontorovich and Gallagher About Piracy (Updated)’ on *Opinio Juris* (27 February 2013) <<http://opiniojuris.org/2013/02/27/a-response-to-kontorovich-and-gallagher-about-piracy/>>.

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.⁸¹

The reason politically motivated violence did not qualify as piracy in the *Matsuda Draft* was the realisation of the ‘important consequences which follow upon the commission of that crime’.⁸² In short, it was felt such criminals should be subject to ordinary rules of jurisdiction because they would not classify as ‘enemies of the community of civilised States’.⁸³ *Purely* politically motivated violence would not indiscriminately target vessels or be a threat to all states and the ‘security of commerce’ against which piracy is a crime.⁸⁴ 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 any examples provided. It can, however, be concluded that the exception did not rest on whether violence was state sanctioned,⁸⁵ and secondly, 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’.⁸⁶ This was the reasoning applied for rejecting a personal gain criterion, but would be equally applicable to establishing political motives. Thus it would need to be objectively clear that action was purely political, the absence of which suggests violence for private ends.

⁸¹ *Matsuda Draft*, above n 68, 228.

⁸² *Ibid* 224.

⁸³ *Matsuda Draft*, above n 68, 225. When discussing *unrecognised* 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 Draft*, above n 68, 225. Guilfoyle’s proposed intention of the Harvard drafters including ‘private ends’ to exclude insurgents attacking governmental vessels of those they seek to overthrow is clearly inapplicable to the *Matsuda Draft*, Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 33–35. Matsuda also sought to exclude attacks on third party vessels.

⁸⁴ *Matsuda Draft*, above n 68, 224.

⁸⁵ Matsuda began, ‘According to international law, piracy consists in sailing the seas for private ends without authorization from the Government of any State’: *Matsuda Draft*, above n 68, 223. Authorisation is treated as a separate issue from private ends, although most likely distinguishes public ships and private ships. Nonetheless at no point is ‘political acts’ equated with state sanctioning.

⁸⁶ *Matsuda Draft*, above n 68, 224 (emphasis added).

2 *The Harvard Law School Draft Convention on Piracy*

The *Harvard Draft* Convention on Piracy was prompted by the League of Nations' work.⁸⁷ Despite its status as an academic endeavour it had a major impact on piracy development throughout the 20th century.⁸⁸ This is because the *Harvard Draft* was the basis of the International Law Commission's work.⁸⁹ The draft text produced by Dutch Rapporteur François was a French translation of the *Harvard Draft*.⁹⁰ This draft was then adopted by the ILC, including the 'private ends' requirement.⁹¹ The *ILC Draft Articles LOS* in turn formed the basis of the *HSC* and the subsequent *UNCLOS* definition. The *ILC Draft Articles LOS* 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.⁹²

Despite the definition of piracy being the most difficult article to draft and the 'chaos of expert opinion' at the time,⁹³ 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'.⁹⁴ Collection of piracy laws and doctrinal debate of 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 treaty law. The ILC and *UNCLOS* drafters were free to disagree or demonstrate a differing view on 'private ends' (having only agreed 'in general'), but this does not appear to be the case.

Those who argue an expansive view of piracy based on lack of state sanction look to the purpose and historical context of the *Harvard Draft*. 'Private ends' was included for the sole purpose of excluding civil-war insurgents.⁹⁵ That is, those 'acts by unrecognized insurgents who limited their attacks to the state from which they were seeking independence'.⁹⁶ The *HSC* similarly included 'for private ends' for such purpose. Insurgencies attacking ships of their state was one tool used for gaining

⁸⁷ *Harvard Draft*, above n 19, 739–886. Geiss and Petrig, above n 17, 38.

⁸⁸ Geiss and Petrig, above n 17, 39.

⁸⁹ Beckman, above n 26, 17.

⁹⁰ Geiss and Petrig, above n 17, 39.

⁹¹ The ILC Report to the General Assembly explicitly adopted the rapporteur's position. Malvina Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) 82(2) *The American Journal of International Law* 269, 278.

⁹² *ILC Draft Articles LOS*, above n 43, 282 art 38, Commentary.

⁹³ *Harvard Draft*, above n 19, 769.

⁹⁴ Jesus, above n 42, 382.

⁹⁵ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 33.

⁹⁶ Halberstam, above n 91, 277.

independence.⁹⁷ This would be a public end,⁹⁸ which only threatens the state from which independence is sought and *not* the international community.⁹⁹ The historical exception included by the Harvard drafters was based on an objective test of ships targeted by insurgents,¹⁰⁰ not the subjective intentions of actors.¹⁰¹

The *Harvard Draft* commentary focused on issues of insurgency, and the exception to art 3 of the Draft does appear to apply in ‘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’.¹⁰² Guilfoyle suggests this is a closed list of contentious cases, seemingly excluding political actors like Sea Shepherd.¹⁰³ Thus ‘private ends’ was formulated to remove only insurgency attacks on state vessels.¹⁰⁴ This is the only ‘political end’ outside the definition of piracy.¹⁰⁵

But as Heller observes, art 16 of the *Harvard Draft*, which deals with non-piratical cases, does *not* adopt a limited list approach.¹⁰⁶ 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 sea’.¹⁰⁷ Article 16 ‘covers *inter alia* the troublesome matter of illegal forcible acts for political ends against foreign commerce, committed on the high sea by unrecognised organizations’.¹⁰⁸ Article 16 covers the examples of art 3 quoted above, but with no indication

⁹⁷ Halberstam, above n 91, 275; Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 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 attain limited public status unlike terrorists or pirates, Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 35.

⁹⁹ Halberstam, above n 91, 275.

¹⁰⁰ Governmental ships of the state to which insurgents are seeking independence from.

¹⁰¹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 37.

¹⁰² *Harvard Draft*, above n 19, 786.

¹⁰³ Guilfoyle, ‘Political Motivation and Piracy’, above n 61.

¹⁰⁴ Both recognised and unrecognised. Clyde H Crockett, ‘Toward a Revision of the International Law of Piracy’ (1976) 26 *DePaul Law Review* 78, 93.

¹⁰⁵ 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, its ships and its commerce against interference on or over the high sea, *when such measures are not based upon jurisdiction over piracy*’, *Harvard Draft*, above n 19, 746 (emphasis added).

¹⁰⁶ Kevin Jon Heller, ‘Comment 2’ on Guilfoyle, ‘Political Motivation and Piracy’, above n 61. Furthermore, see Heller, ‘A Response to Kontorovich’, above n 80.

¹⁰⁷ *Harvard Draft*, above n 19, 857 (emphasis added).

¹⁰⁸ *Ibid* (emphasis added). ‘*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 unrecognised organisations, although not anticipated by the Harvard

of limitation to only such cases.¹⁰⁹ Thus political violence by unrecognised organisations and not just insurgents *could* fall within art 16, which covers cases unqualified as piracy under art 3.¹¹⁰

Furthermore, concluding exclusion rests on the class of vessels as legitimate insurgent targets, as opposed to motives, seems unsupported.¹¹¹ Academic writings referenced by the Harvard drafters do restrict the exception to insurgents attacking vessels of the state they wish to seek independence from.¹¹² This is presumably the ‘better view’ the drafters support.¹¹³ 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.¹¹⁴ Nor does it distinguish groups targeting a single government and those affecting multiple states.¹¹⁵ The rationale for exclusion is rather that: (a) there is no reasonable justification for extending universal jurisdiction;¹¹⁶ (b) such acts would

drafters, could fall as another example of excluded conduct. Such conclusions would be dependent on subsequent state practice in shaping the law.

¹⁰⁹ Ibid. Harvard drafters gave the example of a revolutionary organisation attacking or blockading foreign commerce. This is however ‘for instance’. Terrorism does not seem to have been considered by the drafters. Presumably if the list is not closed it could 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 an *offended state* as it sees fit’ (ie within art 16).

¹¹⁰ 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 a private end: Heller, ‘Why Political Ends are Public Ends, Not Private Ends’, above n 42.

¹¹¹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 33–35. Also see Halberstam, above n 91, 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.

¹¹² Halberstam, above n 91, 279.

¹¹³ *Harvard Draft*, above n 19, 857.

¹¹⁴ Crockett, above n 104, 94. Also see *Harvard Draft* commentary to art 16, which when discussing acts not covered by piracy refers to attacks on ‘foreign commerce’, ‘persons or 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: *Harvard Draft*, above n 19, 857.

¹¹⁵ Crockett, above n 104, 87.

¹¹⁶ 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.

not fall indisputably within the common jurisdiction of traditional piracy law;¹¹⁷ and (c) such cases involve political considerations that could direct the action of the offended state.¹¹⁸ Theoretically, therefore, if the listed contentious cases are not exhaustive, and comparable cases of purely politically motivated violence fulfilled the rationale above, it would not be for ‘private ends’. Insurgency is the primary incident the test addresses, but other violence for non-private ends lacking state sanction could exist.

In summary, the *Harvard Draft* restricts piracy to acts pursuing private ends. Similar to Matsuda, political ends are not private ends. They are the opposite; they are public ends. The offended state is to prosecute under ordinary jurisdictional rules of international law: ‘The cases of acts committed for *political or other public ends* are covered by Article 16’.¹¹⁹ Looking at that article, whilst state sanctioned violence would be non-piratical, there is no indication this is the *only* conduct that would not qualify. Insurgents were the focus of discussion and 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 never considered, the reasoning behind excluding insurgents could equally apply.¹²⁰

3 *The International Law Commission Draft and the UN Conferences on the Law of the Sea*

The *ILC Draft Articles LOS*¹²¹ is an indispensable tool in interpreting the *HSC*, and *UNCLOS* piracy provisions which borrow from that convention. As the ILC noted:

its 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

¹¹⁷ *Harvard Draft*, above n 19, 857.

¹¹⁸ *Ibid.* The Japanese refrained action against Sea Shepherd could only be explained on grounds of a political decision.

¹¹⁹ *Ibid.* 798 (emphasis added).

¹²⁰ See Part IV(C), for whether reasonable justification exists for applying universal jurisdiction, and Part IV(B) for state practice.

¹²¹ *ILC Draft Articles LOS*, above n 43.

¹²² *Report of the International Law Commission: Fifty-fifth session (5 May–6 June and 7 July–8 August 2003)*, UN GAOR, 58th sess, Supp No 10, UN Doc A/58/10 (2003) 277 [442].

As mentioned, the *ILC Draft Articles LOS* generally agreed with the Harvard Law School research and *Harvard Draft*. This is highlighted within the piracy section.¹²³ However, whether agreeing in general includes the *Harvard Draft* interpretation on private ends, and whether ‘private ends’ excludes purely political motivation is unclear.¹²⁴ The *Matsuda Draft* was discussed during sessions of the ILC approvingly, and language within the *ILC Draft Articles LOS* is taken from that draft.¹²⁵ But noticeably, the political exception Matsuda went on to describe is not featured in the commentary, which some authors take to suggest such an exception was not accepted.¹²⁶ This is not a convincing argument, however, when placed in the context of the *ILC Draft Articles LOS*. Point (1) (i) of the art 39 commentary on possibilities of piracy driven by hatred or revenge is immediately followed by (ii): ‘The acts must be committed for private ends’.¹²⁷ Thus, the commentary makes two distinct points; firstly an intention to rob (*animus furandi*) is not required, and secondly, the act must be for private ends. If private ends were non-political then the fact the commentary does not mention a political exception cannot be taken as rejection of previous codification attempts.¹²⁸

¹²³ *ILC Draft Articles LOS*, above n 43, 282, art 38, Commentary.

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’: Beckman, above n 26, 23, citing ‘Summary Records of the Seventh Session (2 May–8 July 1955)’ (1955) 1 *Yearbook of the International Law Commission* 1, 40 [38]. 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, above n 26, 23.

¹²⁵ ‘Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain’: *ILC Draft Articles LOS*, above n 43, 282, art 39, Commentary. This is very similar to the language and examples used in the *Matsuda Draft: Matsuda Draft*, above n 68, 224.

¹²⁶ Eugene Kontorovich, “‘Private ends’ in the Travaux Préparatoires of the Law of the Sea Treaty” on *The Volokh Conspiracy* (28 February 2013) <<http://www.volokh.com/2013/02/28/private-ends-in-the-travaux-preparatoires-of-the-law-of-the-sea-treaty/>>.

¹²⁷ *ILC Draft Articles LOS*, above n 43, 282, art 39, Commentary.

¹²⁸ Different viewpoints were raised during the ILC discussions, but such an interpretation of private ends could be seen in the Special Rapporteur’s phrasing of the question to the commission:

Mr. FRANÇOIS (Special Rapporteur) said that finally the Commission had to decide whether to restrict piracy to *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. *It was decided, by 11 votes to 2, that those words should be retained.*

‘Summary Records of the Seventh Session (2 May–8 July 1955)’ (1955) 1 *Yearbook of the International Law Commission* 1, 55 [16] (emphasis added), 57 [35].

Sir Gerald Fitzmaurice, on the other hand, seems to have adopted the state sanction–lack of state sanctioning approach during the ILC discussions, see Halberstam, above n 91, 281.

In the absence of convincing contrary evidence, it must be taken that ILC approval and references to previous codification efforts extended to discussions on political violence. Indeed this was the position taken by Czechoslovakia, which criticised the ILC for failing to include piracy committed for political ends when the draft was discussed during negotiations.¹²⁹ The Czech proposal was part of a number of criticisms pointing to a very wide interpretation of piracy never seen within international law,¹³⁰ and subsequently rejected by other states.¹³¹

The only major change brought about was the addition of ‘any *illegal* acts’ to the original *Harvard Draft* definition. The addition is best understood to broaden conduct falling 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 to some degree dissociated from a lawful authority”’¹³² in support of the public–private theory of private ends. But the link between the two phrases is not explained or argued. It is difficult to see, if the term illegal does restrict piracy to exclude privateers sanctioned by governments,¹³³ how that conclusion affects the interpretation of private ends. The political exception theory does not suggest the action would be legal. It is perfectly reasonable for actions to be illegal (non-state sanctioned), but still unqualified as ‘private ends’ due to its political nature.¹³⁴

Finally, differences between *UNCLOS* and *HSC* are minimal, merely confirming custom. A variation is visible within the French text, but this does not tell us much, and does not demonstrate a changing approach, given the consistency of the English text.¹³⁵ It might be thought re-enactment without debate tells us little about the

¹²⁹ Natalino Ronzitti, ‘The Law of the Sea and the Use of Force Against Terrorist Activities’ in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff Publishers, 1990) 1, 2. See also *United Nations Conference on the Law of the Sea — Summary Records of Meetings and Annexes*, UN GAOR, vol IV, 2nd Comm, UN Doc A/CONF.13/40 (24 February–27 April 1958) 78 [33].

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 — Summary Records of Meetings and Annexes*, UN GAOR, vol IV, 2nd Comm, UN Doc A/CONF.13/40 (24 February–27 April 1958) 78 [33].

¹³¹ *Ibid* 84 [4]. The Albanian–Czechoslovak joint proposal was rejected by 37 votes to 11 (with one abstention).

¹³² Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 43, quoting Clyde H Crockett, ‘Toward a Revision of the International Law of Piracy’ (1976) 26 *De Paul Law Review* 78, 82.

¹³³ Beckman, above n 26, 22.

¹³⁴ An alternative view of the addition of ‘illegal’ acts is to highlight an intention to rob is not required. Gardner, above n 21, 809.

¹³⁵ The French text of the *HSC* referred to ‘*but*s personnels’ (personnel goals) in art 15, whilst *UNCLOS* uses the term ‘*fins privées*’ (private purposes) in art 101. Neither term would appear to be conclusively clear as to whether political motives are included or

private ends debate. But ‘private ends’ was maintained despite academic preferences to broaden the definition by deleting the term.¹³⁶ Clearly states were unwilling to enlarge the scope of piracy.

But perhaps 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,¹³⁷ yet the drafters as a minimum agreed with Matsuda that purely political ends fell outside piracy.¹³⁸ Whilst the limits were never expanded or established beyond political insurgent attacks, by the time of drafting *UNCLOS* the problem of political activity at sea and the doctrinal debate would have been apparent. Yet the drafters still left the issue unaddressed. With terrorism no definition exists because no will exists at UN level to do so.¹³⁹ Perhaps the grey area of politically motivated violence at sea faces similar insecurity, with states unwilling to delineate the point at which individuals should be subject to universal jurisdiction.

What is clear from piracy’s history is thus that the exact position of politically motivated violence by private individuals or organisations remains unclear. The ‘rich history’ alluded to in *Sea Shepherd* does not define private ends as acts ‘not taken on behalf of a state’.¹⁴⁰ Crockett argues ‘private ends’ was added to settle debate on whether acts of political groups and states were piracy.¹⁴¹ If so, the ‘sledgehammer’ private ends test failed to do so.¹⁴² It can hesitantly be concluded, however, that *purely* political acts perpetrated against a particular state or states are not included within the definition of piracy, although the exact boundaries remain ill-defined. Very much will depend on state practice and the policy underlying piracy. This shall be reviewed to evaluate whether it confirms such interpretation, and what the limits of political ends are.

B *State Practice on Defining ‘Private Ends’*

The history of piracy codification was clear that public ends are not private ends. It was equally clear political acts could be public acts. Although discussions of ‘private

excluded under the definition of piracy. The change is simply to bring the French text into line with that of the English text. Joe Verhoeven concludes both terms are to be treated as substantially equivalent. (*‘Les termes doivent sans doute être tenus pour substantiellement équivalents, la version anglaise étant identique dans l’un et l’autre instruments’*): Joe Verhoeven, *Droit International Public* (De Boeck & Larcier, 2000) 568.

¹³⁶ Ronzitti, above n 129, 2.

¹³⁷ *Harvard Draft*, above n 19, 769.

¹³⁸ *Ibid* 857 (art 16).

¹³⁹ ‘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, above n 72, 172.

¹⁴⁰ *Sea Shepherd*, 708 F 3d 1099, 1102 (9th Cir, 2013).

¹⁴¹ Crockett, above n 104, 79.

¹⁴² *Ibid* 87.

ends’ were limited, and at times mixed, it appears ‘political’ acts might extend beyond those sanctioned by state authority and acts by insurgents against their government. Despite such distinction, the *Matsuda Draft*, and subsequent *HSC–UNCLOS* codifications, have not defined the boundaries of ‘purely political acts’ beyond insurgency acts — since the introduction of ‘private ends’ to *primarily* deal with insurgency acts.

Nevertheless, concluding public ends, as opposed to private ends, could extend beyond state sanctioned violence is one thing. But concluding politically motivated violence by individual groups *is* a public end is quite another.¹⁴³ It remains unclear.¹⁴⁴ State practice will confirm or deny whether political acts of private organisations on the high seas are ‘for private ends’ under customary law¹⁴⁵ and treaty law.¹⁴⁶ The 2012 ICJ decision on immunities provides the nature of such an evaluation. Whilst dealing with the question of immunity, the case demonstrates how and when domestic implementation and application of an international law rule can be used to interpret and define international law of a treaty and customary nature:

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

¹⁴³ Thus the conclusion that private ends are *all* acts lacking state sanction does not 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, above n 91, 278.

¹⁴⁵ A customary rule will be ‘in accordance with a constant and uniform usage practised by the States in question’: *Asylum (Colombia v Peru) (Judgment)* [1950] ICJ Rep 266, 276. ‘[T]he 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 the recognition of a new rule’: *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 98 [186]. State practice should be accompanied by *opinio juris* — the recognition that a legal obligation obligates a particular behaviour. ‘[N]ot only must the acts concerned “amount to a settled practice”, but they must 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”’: *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 108–9[207], quoting *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) (Judgment)* [1969] ICJ Rep 3, 44 [77]. See Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 72–93.

¹⁴⁶ *VCLT* 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’.

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 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

Such reasoning applies when evaluating universal jurisdiction exercised by states over pirates. If the exercise of jurisdiction, or state assertions, based on either a wider or narrower interpretation of ‘private ends’ is not accompanied by the requisite *opinio juris* (or evidence of), it will be of little use. Equally ‘judgments of national courts’ must be those faced with the question of piracy under international law. States are free to define piracy under national law; art 101 of *UNCLOS* merely provides definition for the purposes of exercising universal jurisdiction.¹⁴⁸ Municipal piracy is a separate crime, the judgments of which provide no evidence.¹⁴⁹ This applies equally to state legislation, 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 ILC have already been discussed. But other treaty law, as state practice,¹⁵¹ may help identify the limits of ‘private ends’ as understood by states involved.

¹⁴⁷ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (Judgment)* [2012] ICJ Rep 99, 122–3 [55] (emphasis added).

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’: *Harvard Draft*, above n 19, 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’: *Harvard Draft*, above n 19, 785 (emphasis added).

¹⁵⁰ Atsuko Kanehara, ‘Japanese Legal Regime Combating Piracy: The Act on Punishment of and Measures Against Acts of Piracy’ (2010) 53 *Japanese Yearbook of International Law* 469, 469. For an overview of the different municipal definitions see: *Letter dated 23 March 2012 from the Secretary-General to the President of the Security Council*, UNSC Doc S/2012/177 (26 March 2012) annex (‘*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*’).

¹⁵¹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 38. Shaw, above n 145, 82 n 37, citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 23–4.

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 Convention’)¹⁵² currently has 156 contracting parties representing 94.62 per cent world tonnage.¹⁵³ Various protocols have been adopted, with those of 2005 entering into force in 2010.¹⁵⁴ 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 necessary.¹⁵⁵

¹⁵² *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 222 (entered into force 1 March 1992) (‘SUA Convention’), as amended by *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992), *Protocol of 2005 to the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 14 October 2005, IMO Doc LEG/CONF.12/22 (entered into force 28 July 2010) and *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21 (entered into force 28 July 2010).

¹⁵³ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: Extension by the Kingdom of the Netherlands to Bonaire, Sint Eustatius and Saba*, Circulars for the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, 79, SUA.1 (8 November 2010).

¹⁵⁴ *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992) — 145 parties as of 2 December 2010, see <<http://cil.nus.edu.sg/1988/1988-protocol-for-the-suppression-of-unlawful-acts-against-the-safety-of-fixed-platforms-located-on-the-continental-shelf/>>; *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/22 (entered into force 28 July 2010) — 13 parties as of 2 December 2010, see <<http://cil.nus.edu.sg/2005/2005-protocol-for-the-suppression-of-unlawful-acts-against-the-safety-of-fixed-platforms-located-on-the-continental-shelf/>>; *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21 (entered into force 28 July 2010) — 17 parties as of 2 December 2010, see <<http://cil.nus.edu.sg/2005/2005-protocol-to-the-convention-for-the-suppression-of-unlawful-acts-against-the-safety-of-maritime-navigation/>>.

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.

SUA Convention, 1678 UNTS 221, Preamble para 6.

Although crimes under the *SUA Convention* and piracy are not exclusive crimes,¹⁵⁶ some authors take adoption of the *SUA Convention* as evidence piracy did not cover terrorists and other politically motivated actors.¹⁵⁷ This is supported by the fact adoption was in direct response to the *Achille Lauro* incident.¹⁵⁸ The sponsoring states that introduced the draft convention, Austria, Egypt and Italy, cited the two-ship restriction and the private ends requirement as why a new convention on terrorism was needed.¹⁵⁹ Both the Special Representative of the UN Secretary General for the Law of the Sea (Satya Nandan), and the Italian Minister of Justice (Guiliano Vassalli) stated at the opening of the International Maritime Organisation conference where the Convention was drafted that the private end criterion would not be met by maritime terrorism; thereby making piracy inapplicable.¹⁶⁰ The *SUA Convention* does appear to adopt the wider interpretation, covering acts within art 3 that lack

¹⁵⁶ See *SUA Convention* art 3. The UN Security Council has ‘stressed the potential simultaneous applicability of the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* (“*SUA Convention*”) to certain acts of piracy’: Douglas Guilfoyle, ‘Combating Piracy: Executive Measures on the High Seas’ (2010) 53 *Japanese Yearbook of International Law* 149, 159–160, citing SC Res 1846, 6026th mtg, UN Doc S/RES/1846 (2 December 2008) para 15; SC Res 1851, 6046th mtg, UN Doc S/RES/1851 (16 December 2008) Preamble; SC Res 1897, 6226th mtg, UN Doc S/RES/1897 (30 November 2009) Preamble.

¹⁵⁷ ‘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, above n 42, 389.

¹⁵⁸ Briefly, members of the Palestinian Liberation Front, a splinter group from the Palestinian Liberation Organization, hijacked an Italian cruise liner on the 7 October 1985 and demanded the release of 50 Palestinian prisoners incarcerated in Israel.

¹⁵⁹ Guilfoyle, ‘Written Evidence’, above n 31, Annex II (*The SUA Convention – Treaty Provisions and Explanatory Note*) Ev 93 [24], citing International Maritime Organisation, IMO Doc PCUA 1/3 (3 February 1987) annex [2]. The crimes covered by the *SUA Convention* 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 of 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 in Tullio Treves, ‘The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation’ in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff Publishers, 1990) 69, 87 n 13 (emphasis in original).

¹⁶⁰ Ronzitti, above n 129, 2 n 7, citing International Maritime Organisation, *Record of Decisions of the Sixth Meeting Held at 11 am on 10 March 1988* (International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 1–10 March 1988), IMO Doc SUA/CONF/RD 13 (20 February 1989).

state sanctioning.¹⁶¹ 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 be 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, interprets the *SUA Convention* within its historical context, and concludes the treaty represents state practice condoning the idea political motives could ever exclude criminal responsibility.¹⁶² Later terrorism suppression treaties excluded a ‘political offences exception’ from applying in extradition requests.¹⁶³ Although the exception is not expressly excluded in the *SUA Convention*, this is due to debate at the time within the UN General Assembly on whether acts in furtherance of self-determination were legitimate acts of politically motivated violence, or whether they were terrorist attacks.¹⁶⁴ Since the 1994 *Declaration on Measures to Eliminate International Terrorism* the position has been settled that no such considerations exist — all such violent attacks are unjustifiable.¹⁶⁵ The 2005 Protocol to the *SUA Convention* adopts this position, expressly excluding any ‘political offence’

¹⁶¹ Article 2 provides the *SUA Convention* does not apply to:

(a) a warship; or

(b) a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or

(c) a ship which has been withdrawn from navigation or laid up.

2 Nothing in this Convention affects the immunities of warships and other governmental ships operated for non-commercial purposes.

¹⁶² Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 38–40.

¹⁶³ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 38, n 58, citing *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 256 (entered into force 23 May 2001) art 11; *International Convention for the Suppression of Terrorist Financing*, opened for signature 10 January 2000, 39 ILM 268 (entered into force 10 April 2002) art 14; *International Convention for the Suppression of Acts of Nuclear Terrorism*, opened for signature 14 September 2005, 2445 UNTS 89 (entered into force 7 July 2007) art 15, annexed to, *Measures to Eliminate International Terrorism — Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc A/59/766 (4 April 2005).

¹⁶⁴ Guilfoyle, *Shipping Interdiction and the Law of the Sea* above n 21, 39.

¹⁶⁵ ‘Criminal acts ... are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them’: *Measures to Eliminate International Terrorism*, GA Res 49/60, 49th sess, 84th plen mtg, Agenda Item 142, UN Doc A/RES/49/60 (9 December 1994) annex para 3. Reiterated: *Measures to Eliminate International Terrorism*, GA Res 50/53, 50th sess, 87th plen mtg, Agenda Item 146, UN Doc A/RES/50/53 (11 December 1995) para 2.

ground to refuse extradition.¹⁶⁶ Thus subsequent state practice confirms political motivation cannot excuse otherwise criminal acts. Private ends should thus be interpreted as not excluding action just because it was politically motivated.

Furthermore, although the states introducing the *SUA Convention* were of the opinion politically motivated attacks were excluded from piracy, that is merely 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 US, clearly did not view politically motivated attacks as excluded. The US charged those involved in the *Achille Lauro* incident with piracy, citing domestic law pointing towards the ‘law of nations’, and basing jurisdiction on the universal jurisdiction principle applicable to *piracy jure gentium*.¹⁶⁷ It is perfectly reasonable to look to other reasons for introducing the *SUA Convention*, which could explain the vast state practice beyond the three states that introduced the draft. The Convention suppresses a broader array of acts equally disruptive to navigation,¹⁶⁸ it provides a working regime applicable to a larger geographical area than piracy,¹⁶⁹ and most importantly, it provides a duty to prosecute or extradite.¹⁷⁰

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 ‘private ends’ has not been fulfilled, and so universal criminal jurisdiction should not be extended. 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’.¹⁷¹ Freedom of navigation is upheld by exclusive flag state jurisdiction, which prevents unnecessary restrictions or impediments to high seas navigation. ‘[I]t cannot be taken for granted that remedies which states are allowed to take against the more traditional instances

¹⁶⁶ *SUA Convention*, as amended by *2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Dox LEG/CONF.15/21 (entered into force 28 July 2010) art 10(2) inserting art 11bis:

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.

¹⁶⁷ Madden, above n 45, 140.

¹⁶⁸ See, eg, if a person ‘unlawfully and intentionally ... communicates information which he knows to be false, thereby endangering the safe navigation of a ship’: *SUA Convention* art 3(1)(f). The *SUA Convention* also does not have a two-ship requirement.

¹⁶⁹ See *SUA Convention* arts 4(1), 6.

¹⁷⁰ *SUA Convention* arts 6, 10.

¹⁷¹ Anna van Zwabenberg, ‘Interference with Ships on the High Seas’ (1961) 10(4) *International and Comparative Law Quarterly* 785, 805.

of maritime violence are also available in the case of maritime terrorism’.¹⁷² So it goes, states adopted the *SUA Convention* to regulate violence that was not for private ends or involving two ships, but which nonetheless demanded further exceptions to flag state jurisdiction.

Expansive interpretations of piracy, however, are premised on the general rule being that freedom of navigation means ships should not be subject to violence at sea. Only states, and belligerents or insurgents targeting state vessels, can legitimately use violence.¹⁷³ The lack of state responsibility for private political organisations means the international community must rely on criminal law to hold those responsible accountable.¹⁷⁴ Thus one turns to piracy law; the general rule excluding all violence lacking in 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.¹⁷⁵

Thus, those who see purely political violence as a public end ask whether purely political violence falls within the piracy exception of universal jurisdiction,¹⁷⁶ 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.¹⁷⁷ Put simply, is ‘private ends’ a requirement for exercising 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 justifications for universal jurisdiction. This question is dealt with

¹⁷² Ronzitti, above n 129, 1.

¹⁷³ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 37.

¹⁷⁴ Bahar, above n 39, 17; Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 37; Direk et al, above n 21, 233. 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.

¹⁷⁵ This can be seen in Douglas Guilfoyle’s responses, eg:

Analysing from that historical context to say that the words ‘private ends’ now cover terrorists (who do not seek to establish the government or territorial control) or political protesters, is effectively to confer belligerent powers (or a privileged belligerent status) on actors who are not party to an armed conflict.

Douglas Guilfoyle, ‘Comment 6’ on Guilfoyle, ‘Political Motivation and Piracy’, above n 61. Equally the interpretation of the *SUA Convention* above suggests that political violence is not an exception. If it is not an exception it falls into the general rule of piracy.

¹⁷⁶ An exception to the exclusive flag state jurisdiction on the high seas.

¹⁷⁷ 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.

in Part IV(C) below, the answer to which determines how the *SUA Convention* is interpreted.¹⁷⁸

2 *Judicial Precedents and International Incidents*

Despite the fact piracy has existed ‘since the early days of mankind’s adventure into the seas’,¹⁷⁹ the discussion of case law must be limited for numerous reasons. As mentioned above in Part II, municipal piracy cases need to be excluded. National courts are tasked with the prosecution of all pirates, but only those based on international piracy are examined.¹⁸⁰ Secondly, the concern is the modern definition of piracy. Therefore, only cases subsequent to codification and definition of piracy, or those that played a crucial role in defining private ends, will be examined. The Harvard drafters already conducted thorough research into case law and academic literature at the time, the results of which were discussed above in Part IV(A)(2). There is also some suggestion the boundaries of customary piracy prior to codification were unclear, allowing states to exercise wide discretion.¹⁸¹ Prior to the *Harvard Draft*, states agreed ‘an international crime granting them universal jurisdiction’ existed, but not its definition.¹⁸² The complex task of defining piracy prior to the codification process is beyond the limits of this article, and therefore such jurisprudence cannot be relied upon.¹⁸³

¹⁷⁸ 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.

¹⁷⁹ Jesus, above n 42, 364.

¹⁸⁰ 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 or the law of nations (as the US law in the *Sea Shepherd* case is).

¹⁸¹ [I]t 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, above n 42, 375. See also Direk et al, above n 21, 238.

¹⁸² Penny Campbell, ‘A Modern History of the International Legal Definition of Piracy’ in Bruce A Elleman, Andrew Forbes and David Rosenberg (eds), *Piracy And Maritime Crime: Historical and Modern Case Studies* (Naval War College Press, 2010) 19, 23. States have however been exercising universal jurisdiction over pirates on the high seas since the 16th Century — Annemarie Middelburg, *Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast* (Wolf Legal Publishers, 2011) 29.

¹⁸³ ‘To use the notion of “piracy” to achieve results which had nothing to do with classical piracy at all became an established international practice’: Jacob W F Sundberg, ‘Piracy: Air and Sea’ (1971) 20 *DePaul Law Review* 337, 340.

The seminal case *Re Piracy Jure Gentium*¹⁸⁴ is consistently referenced both in academic literature and case law. It was heavily relied upon in *United States of America v Dire*,¹⁸⁵ which in turn was one of the few cases referenced in *Sea Shepherd*.¹⁸⁶ The case involved a failed robbery attempt upon another ship. In a special reference, the English Privy Council reasoned actual robbery was not an essential element of piracy under the law of nations.¹⁸⁷ ‘Vengeance ... anarchistic or other ends’¹⁸⁸ could equate to piracy, should violence be committed on the high seas between two ships. The Court emphasised the lack of state sanctioning,¹⁸⁹ and endorsed piracy as ‘any armed violence at sea which is not a lawful act of war’ as the definition ‘nearest to accuracy’.¹⁹⁰ This landmark case, having referenced the *Matsuda Draft* and *Harvard Draft* approvingly,¹⁹¹ concluded lack of state sanctioning and liability was the key to piracy.¹⁹²

However, that court explicitly refused to endorse a general definition of piracy after discussing the *Matsuda Draft* and the question of armed takeovers by crew.¹⁹³ The decision appears silent on the issue of politically motivated violence.¹⁹⁴ The question asked was whether actual robbery was a necessity of piracy; ‘All that their Lordships propose to do is to answer the question put to them’.¹⁹⁵ Thus, whilst history demonstrates ‘gradual widening of the earlier definition of piracy’¹⁹⁶ in response to new or

¹⁸⁴ [1934] UKPC 54.

¹⁸⁵ 680 F 3d 446 (4th Cir, 2012).

¹⁸⁶ *Sea Shepherd*, 708 F 3d 1099, 1101 (9th Cir, 2013).

¹⁸⁷ The reference asked ‘whether actual robbery is an essential element of the crime of piracy jure gentium or whether a frustrated attempt to commit a piratical robbery is not equally piracy jure gentium’: *Re Piracy Jure Gentium* [1934] AC 586, 588. Special references do not affect the court ruling; the decision of the Hong Kong Court was final.

¹⁸⁸ *Re Piracy Jure Gentium* [1934] AC 586, 600.

¹⁸⁹ Referencing the definition of Wheaton, the Court said, ‘[t]his 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 the high seas without the authority or commission of any State’: *Re Piracy Jure Gentium* [1934] AC 586, 595.

¹⁹⁰ *Re Piracy Jure Gentium* [1934] AC 586, 598, quoting Courtney Stanhope Kenny and J W Cecil Turner (eds), *Kenny’s Outlines of Criminal Law* (Cambridge University Press, 14th ed, 1847–1930) 332. Although noting it was far too expansive to include violence on-board a single ship.

¹⁹¹ *Re Piracy Jure Gentium* [1934] AC 586, 599.

¹⁹² Bahar, above n 39, 31; Halberstam, above n 91, 273; Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 119.

¹⁹³ *Re Piracy Jure Gentium* [1934] AC 586, 600.

¹⁹⁴ Keven Jon Heller, ‘Comment 6’ on Julian Ku, ‘Whale Wars, Round II! US Court of Appeals Issues Preliminary Injunction Against Sea Shepherd “Pirates”’ on *Opinio Juris* (27 February 2013) <<http://opiniojuris.org/2013/02/27/whale-wars-round-ii-u-s-court-of-appeals-issues-preliminary-injunction-against-sea-shepherd-pirates/>>.

¹⁹⁵ *Re Piracy Jure Gentium* [1934] AC 586, 600.

¹⁹⁶ *Ibid.*

unconsidered situations, the case *only* reflects that attempted robbery is also piracy, not that the lack of state sanctioning is the necessary test in all cases.

The 1960s *Santa Maria* incident involved the seizure of a Portuguese *merchant* ship by Captain Henrique Galvão and his men posing as passengers.¹⁹⁷ This was claimed in the interest of the Independent Junta of Liberation.¹⁹⁸ The action was branded as piracy by the Portuguese, which requested assistance from the US, the Netherlands and the UK.¹⁹⁹ British refusal to the use of force,²⁰⁰ and House of Commons discussions,²⁰¹ suggested doubt for the case of piracy, whilst the US had no hesitation in branding the act piracy. This soon changed, however, and the US declared it was unclear whether piracy had occurred.²⁰² The incident was a publicity stunt to achieve political change in Portugal, much like Sea Shepherd's harassment, which is largely a media event aimed at political change in Japan. The many legal commentaries upon the case 'almost without exception, declined to label Galvão a pirate'.²⁰³ Although some commentaries were based on the two-ship requirement,²⁰⁴ others felt political aims were not considered private ends.²⁰⁵

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. Political motives alone were insufficient; it was the political decision of states on their international status that absolved them from piracy.²⁰⁶

But given the attack involved an innocent third party merchant vessel, involving interests of many states, one could also adopt the reasoning of Jesus and conclude

¹⁹⁷ In-depth facts available, see: Samuel Pyeatt Menefee, 'Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective' in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff Publishers, 1990) 43, 56–58. Also Zwanenberg, above n 171, 799–801.

¹⁹⁸ General Humberto Delgado who had lost the Portuguese Presidential election led the group from Brazil. The group had no politically organised presence within Portugal, only those in exile in Brazil. See Zwanenberg, above n 171, 816.,

¹⁹⁹ Menefee, above n 197 57.

²⁰⁰ Ibid.

²⁰¹ The comments by the Civil Lord of the Admiralty rest on the request for assistance and did not suggest the incident was piratical. Zwanenberg, above n 171, 800.

²⁰² Menefee, above n 197, 58.

²⁰³ Ibid.

²⁰⁴ Halberstam discusses Whiteman's interpretation that such action was for private ends, but not involving two ships. Halberstam, above n 91, 287, quoting M Whiteman, *Digest of International Law* (US Government Printing Office, 1965) vol 4, 666.

²⁰⁵ Klein, above n 192, 119. Green and Franck are quoted by Halberstam to argue such political acts are not for private ends. Halberstam, above n 91, 287, quoting L C Green, 'The *Santa Maria*: Rebels or Pirates' (1961) 37 *British Yearbook of International Law* 496, 503; T M Franck, "'To Define and Punish Piracies' — The Lesson of the *Santa Maria*: A comment' (1961) 36 *New York University Law Review* 839, 840.

²⁰⁶ Bahar, above n 39, 35.

that the political objectives of Galvao and his men would be excluded under the traditional definition.²⁰⁷ Piracy rules were developed for particular situations and acts. The Portuguese definition of piracy was a stretch in definition and application beyond the traditional rule.²⁰⁸ In the words of the Privy Council, history demonstrated a ‘gradual widening’ of the definition.²⁰⁹ Stretching the definition to cover political activists and terrorists would be beyond ‘gradual widening’. It may, therefore, be evidence of practice that 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 piracy and the need for novel approaches.²¹⁰ Although case law has helped develop the understanding of other piracy requirements,²¹¹ few have evaluated private ends. This is because such pirates are driven by the classic example of financial gain.²¹²

The Supreme Court of the Seychelles discussed ‘private ends’ in relation to Somali pirates under customary law, but with mixed results. The decision of *Republic v Dahir* reasoned: ‘piracy deals with illegal acts of violence committed for *private ends* ... and does not include acts with governmental objectives’.²¹³ The ‘private ends’ requirement conflicted with political motivation underlying terrorism, and therefore each crime was to be dealt with in the alternative.²¹⁴ The more recent

²⁰⁷ Jesus, above n 42, 378.

²⁰⁸ *Ibid.*

²⁰⁹ *Re Piracy Jure Gentium* [1934] AC 586, 600.

²¹⁰ 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, above n 182, 29–74. The use of private security firms has raises a host of other legal issues, see, eg, Oscar Rickett, ‘Piracy Fears Over Ships Laden With Weapons in International Waters: Private Security Companies Rely on Unregulated ‘Floating Armouries’ in Red Sea, Gulf of Aden and Indian Ocean’, *The Guardian* (online), 10 January 2013 <<http://www.guardian.co.uk/world/2013/jan/10/pirate-weapons-floating-armouries>>.

²¹¹ See the issue of a high seas requirement for inciting and facilitating piracy (*UNCLOS*, art101(c)) and its recent rejection in *US v Ali*, 718 F 3d 929 (CA DC, 2013). See debate: Douglas Guilfoyle, ‘Committing Piracy on Dry Land: Liability for Facilitating Piracy’ on *Blog of the European Journal of International Law (EJIL: Talk!)* (26 July 2012) <<http://www.ejiltalk.org/committing-piracy-on-dry-land-liability-for-facilitating-piracy/>>.

²¹² Direk et al, above n 21, 241.

²¹³ *Republic v Dahir* [2009] SCSC 81 (25 July 2010) 18 [37] (emphasis in original). ‘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 involves the influence of Governments for ‘political ends’: 18 [37].

²¹⁴ Gardner, above n 21, 811.

decision of *Republic v Ahmed*, however, rested on interpreting ‘private ends’ as all violence, depredation or detention on the high seas ‘without authorization by public authority’.²¹⁵ But discussions within that case continued, making it unclear whether ‘authorization’ and ‘ends’ were different issues, or equivalent.²¹⁶ Modern case law has done little to clarify the position of politically motivated violence.

Finally, perhaps the most important decision on piracy and environmental activists is *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin*.²¹⁷ The 9th Circuit in *Sea Shepherd*²¹⁸ and academic writers take the ruling as evidence purely political acts by private actors are private acts.²¹⁹ Environmentalists from Greenpeace boarded, occupied and damaged two vessels attempting to discharge waste on the high seas (the *Wadsy Tanker* and the *Falco*).²²⁰ 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 of dangers in discharging waste into the sea, a goal set out in Greenpeace’s articles of association.²²¹ The Belgian Court of Cassation held that 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.²²²

²¹⁵ *Republic v Ahmed* [2011] (Unreported, Supreme Court of Seychelles, Criminal Side No 21, 30 June 2011) 15[21] (emphasis in original):

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, piracy is generally understood as violence or depredation or detention on the seas for private ends *without authorization by public authority*.

²¹⁶ *Ibid.* ‘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. Yet the lack of any state sanctioning for Ahmed was taken as evidence the ‘accused were acting on their own *and* for their own private ends’: 16 [22] (emphasis added).

²¹⁷ (1986) 77 ILR 537 (Court of Cassation, Belgium) (‘*Castle John*’).

²¹⁸ *Sea Shepherd*, 708 F 3d 1099, 1102 (9th Cir, 2013).

²¹⁹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 38; Brown, above n 39, 301–2.

²²⁰ *Castle John* (1986) 77 ILR 537, 537. More extensive facts are found in Samuel Pyeatt Menefee, ‘The Case of the *Castle John*, Or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law’ (1993) 24(1) *California Western International Law Journal* 1, 11.

²²¹ *Castle John* (1986) 77 ILR 537, 539.

²²² *Ibid* 540 (emphasis added).

The Court clearly equated private ends to personal ends. Action in support of non-state goals would be personal ends, 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’.²²³ Thus, environmental violence, like Sea Shepherd’s campaigns or those of Greenpeace, may qualify as piracy if the Belgian Court is followed. Although the case was a restraining order application, and not the exercise of criminal jurisdiction, it is interesting the Netherlands (Greenpeace’s flag state) did not protest.

However, some reservations must be made. Firstly, the decision still does not stand for defining 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 political views.²²⁴ What would be committed ‘in the interest or to the detriment of a State or a State system’ and thus constitute ‘public ends’ is not clear.²²⁵ Thus, if a private party targeted a governmental vessel to compel changes in public policy, would that be to the detriment of a state?

Secondly, Menefee called the decision ‘evolutionary’,²²⁶ given it is not based on any judicial precedent. Belgium has been described as the ‘world capital of universal jurisdiction’,²²⁷ with the *Arrest Warrant*²²⁸ case demonstrating over-application of universal jurisdiction and necessity for subsequent legal revisions.²²⁹ If the *Castle John* decision’s acceptance in international law is based on, (a) similar decisions being possible with similar situations arising, and (b) it being generally held that such action is piratical,²³⁰ then clearly one cannot say such acceptance has been reached. Apart from the *Sea Shepherd* decision, no other case law has followed *Castle John*.²³¹

²²³ Ibid 538–9, quoted in Menefee, above n 220, 13.

²²⁴ ‘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, above n 220, 15 (emphasis in original).

²²⁵ Ibid 14.

²²⁶ Ibid.

²²⁷ Diane F Orentlicher, ‘Universal Jurisdiction After Pinochet: Prospects and Perils’ (Paper presented at Symposium Series — ‘Prosecuting Perpetrators: International Accountability for War Crimes and Human Rights Abuses’, University of California, 21 February 2003) 3.

²²⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3.

²²⁹ Middelburg, above n 182, 33.

²³⁰ Menefee, above n 220, 14.

²³¹ Amanda M Caprari, ‘Lovable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean’ (2010) 42(5) *Connecticut Law Review* 1493, 1514; Middelburg, above n 182, 33; Klein, above n 192, 141 refers to a Dutch court ruling on Greenpeace, but this is a typographical error.

*C Squaring the Rationale of Universal Jurisdiction with the Definition of
'Private Ends'*

As Bahar 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 piracy.²³²

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'.²³³ The high seas regime is founded upon the freedoms of the high seas; evidenced by its prominence in *UNCLOS* art 87. Freedom, coupled with denial of any sovereignty claims, means the general principle of jurisdiction is that of flag state exclusivity.²³⁴ Any jurisdictional claim over another vessel, unless provided for under international law, would be tantamount to a high seas sovereign right claim, which is detrimental to all states.²³⁵ Exclusive flag state jurisdiction is found in both customary law and *UNCLOS* art 92:

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.²³⁶

Universal jurisdiction over pirates under *UNCLOS* art 105²³⁷ is one such exception to flag state exclusivity.²³⁸ As an exception it should thus be restrictively interpreted and cautiously extended in scope. A restrictive approach is demonstrated by state practice, which has not followed piracy in granting universal jurisdiction over

²³² Bahar, above n 39, 30.

²³³ Beckman, above n 26, 18.

²³⁴ *Ibid* 19.

²³⁵ 'No State may validly purport to subject any part of the high seas to its sovereignty': *UNCLOS* art 89.

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' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 25 [64].

²³⁷ 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.

UNCLOS art 105. The same text is found in *HSC* art 19.

²³⁸ Kenneth C Randall, 'Universal Jurisdiction Under International Law' (1988) 66 *Texas Law Review* 785, 793. See, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 38[5], 42[12] (President Guillaume).

other threats to high seas interests,²³⁹ such as illegal fishing or passenger hijacking. Indeed flag state exclusivity encroachments are permitted to the ‘minimum extent possible’.²⁴⁰ Thus, one must ask what the rationale for universal jurisdiction over piracy is, and does it extend to politically motivated violence?

1 *Piracy as an Exception to Exclusive Flag State Jurisdiction*

A number of theories have been advanced on why piracy is a crime of universal jurisdiction. The oldest, and once popular, theory argued that once someone became involved (or a ship used) in piracy,²⁴¹ they were denationalised,²⁴² and hence open to the jurisdiction of all states.²⁴³ This is based on pirates being enemies of all mankind.²⁴⁴ By such action a pirate rejects ‘the authority of that to which he is properly subject’,²⁴⁵ and therefore no state can be held accountable.²⁴⁶ 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.²⁴⁷ This self-imposed

²³⁹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 25. States have rather followed an approach based on ‘consensual interdiction’ to deal with other threats which need to be tackled on the high seas.

²⁴⁰ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 24, quoting Natalie Klein, ‘Legal Limitations on Ensuring Australia’s Maritime Security’ (2006) 7 *Melbourne Journal of International Law* 306, 334.

²⁴¹ Or, following *Re Piracy Jure Gentium* [1934] AC 586, once someone became involved in an attempted piracy attack, or, following HSC art 103, if the ship is intended to be used so.

²⁴² ‘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” also’: *Harvard Draft*, above n 19, 825.

²⁴³ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 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 very often are not registered in any State’: Wendel, above n 29, 22.

²⁴⁴ *Hostis humani generis*.

²⁴⁵ *Harvard Draft*, above n 19, 818.

²⁴⁶ Natalie Klein, ‘The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation’ (2007) 35 *Denver Journal of International Law and Policy* 287, 298.

²⁴⁷ Universal jurisdiction becomes a necessity if piracy prosecution is desired. The active personality principle would not provide jurisdiction, given the pirate vessel may no longer be a national of any state. Nor would there be territorial jurisdiction, as the act must be committed on the high seas. See Geiss and Petrig, above n 17, 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

denationalisation would, as quoted by the Harvard drafters, take pirates ‘out of the protection of all laws and privileges’.²⁴⁸ Without nationality and flag state protection, pirates could be subject to the ancient and well-established universal jurisdiction existent since the 17th century.²⁴⁹

However, this theory has been widely rejected.²⁵⁰ Under *UNCLOS*, denationalisation is not an automatic or necessary step, but rather left to flag states under art 104. Arguably the same exists under customary law, with universal jurisdiction existing whatever the position on nationality.²⁵¹ *Piracy jure gentium* is indifferent to a ship’s nationality, and whether it is kept or lost. Denationalisation clearly cannot be the rationale.²⁵²

Another possibility is to compare piracy to other crimes of universal jurisdiction such as genocide or crimes against humanity. These are the most heinous crimes under international law and therefore subject to universal jurisdiction.²⁵³ Judges Higgins, Kooijmans and Buergenthal follow such reasoning, 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’.²⁵⁴ Thus, universal jurisdiction was extended beyond piracy to these other crimes, given the interest of all states in repressing such heinous activity.

and therefore universality was the only established option. Even today the use of the principle beyond prosecuting terrorists is contested — see Vaughan Lowe and Christopher Staker, ‘Jurisdiction’ in Malcolm Evans (ed), *International Law* (Oxford University Press, 3rd ed, 2010) 313, 330.

²⁴⁸ *Harvard Draft*, above n 19, 819, quoting *Sir L Jenkins Works*, ii, 714.

²⁴⁹ Randall, above n 238, 791 n 28, citing L Oppenheim, *International Law — Volume I: Peace* (Longmans, Green & Co, 8th ed, 1955) 609; Middelburg, above n 182, 29 — suggests that this has existed since the 16th century. Furthermore: ‘Because no state has any greater connection to pirates and their vessels than any other state, every state therefore has universal jurisdiction to capture and punish pirates’: Randall, above n 238, 793.

²⁵⁰ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 28.

²⁵¹ It could be that customary law differed on this point, and denationalisation was a necessary result of piratical acts — but no arguments have been found to this effect. The *HSC* sought to codify customary international law and if one looks to art 18 of the *HSC*, then art 104 of *UNCLOS* can be seen to be a verbatim copy of that article. Therefore the indifference to nationality is well established under customary law.

²⁵² 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: *Harvard Draft*, above n 19, 825. If a pirate were denationalised, she would have as much persuasion to follow the safety regulations of the old flag state, as any other state in the world. Yet pirates clearly do not lose all their other obligations just because they have committed piratical acts.

²⁵³ Lowe and Staker, above n 247, 326.

²⁵⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 81 [60]–[61] (Judges Higgins, Kooijmans and Buergenthal). This point is highlighted by, Geiss and Petrig, above n 17, 145.

However, this seems equally unconvincing and piracy is certainly not comparable to other universal crimes in terms of severity.²⁵⁵ Piracy as defined in *UNCLOS* art 101 is broad enough to capture minor violence or depredation that could never be described as heinous. One would expect if it were based on heinousness it would be restricted to uses of force that could be classified as heinous. Equally, other more heinous crimes such as murder would have developed into universal jurisdiction.²⁵⁶ What is more, if seafarers were to rape and pillage ships less than three nautical miles (nm) off the coast,²⁵⁷ these would be crimes just as heinous and would similarly make such actors enemies of mankind as if they were to do so 15 nm off the coast. Only for the second instance would universal piracy jurisdiction become applicable — an arbitrary restriction unexplained by the heinousness rationality.

Rather, the correct rationale for universal jurisdiction over piracy is the common interest of all states. This involves two elements. Firstly, piratical attacks, particularly as a whole,²⁵⁸ threaten the common interest of all states in high seas freedoms, notably the freedom of navigation.²⁵⁹ Secondly, despite the threat of piracy to states’ common interests, the *locus delicti* (the high seas) leads to a lack of state jurisdiction and the possibility such crime goes unpunished.²⁶⁰ 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’.²⁶¹ Modern day shipping complexities only broaden the possible states threatened.²⁶² Such theory is more compatible with a territorial waters distinction whereby activity within 12 nm is not classified as piracy.²⁶³

²⁵⁵ Geiss and Petrig argue piracy is more ‘comparable to property offenses or hostage taking committed at land’ than say genocide, Geiss and Petrig, above n 17, 145.

²⁵⁶ Lowe and Staker, above n 247, 327.

²⁵⁷ Falling within territorial waters, whether based on the old ‘cannon-shot rule’, or 12 nm as now established in *UNCLOS* art 3. International piracy law does not extend to action within territorial waters.

²⁵⁸ Randall, above n 238, 794. Piracy can even threaten the economic development of an entire region as seen with the Horn of Africa. See Wendel, above n 29, 20.

²⁵⁹ *UNCLOS* art 87(a). See Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 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), a threat exists which needs to be repressed. See Crockett, above n 104, 81.

²⁶⁰ Lowe and Staker, above n 247, 326–327.

²⁶¹ Geiss and Petrig, above n 17, 147.

²⁶² ‘[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, above n 182, 30, quoting N J Arajärvi, *Universal Jurisdiction: End of Impunity or Tyranny of Judges?* (Master Thesis, University of Helsinki, 2006) 7–8.

²⁶³ Seen as an extension of the state’s territory and control, primacy is given to the territorial jurisdiction of the coastal state: *UNCLOS* art 2. Therefore such crimes can be equated with land-based crimes and the traditional heads of jurisdiction that

Such rationality, as raised by Geiss and Petrig,²⁶⁴ can also be witnessed in states' attempts to build a working international regime in response to the Gulf of Aden situation and the difficulties to international law enforcement presented by the coastal state Somalia, which lacks maritime enforcement capabilities.²⁶⁵ Both elements of 'common interest' rationality are found within the Security Council resolutions building the unique regime. Resolution 1846 provided temporary authorisation to 'cooperating' states to use all necessary means within Somalian territorial waters to repress piracy.²⁶⁶ Such authorisation was based on the first element of 'common interest' rationality, the threat posed to the common interest of international navigation and commerce.²⁶⁷ The *locus delicti* differs, it being Somalian territorial waters, yet the same threat of serious crimes going unpunished due to a lack of effective state jurisdiction prevails.²⁶⁸ Modern efforts are guided by 'common interest' rationality just as the original justifications for universal jurisdiction were.

However, one can disagree with Guilfoyle's interpretation that rather than being an exception to exclusive flag-state jurisdiction, 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'.²⁶⁹ Guilfoyle argues this by examining the extent of powers granted over pirate ships, which go beyond the other limited exceptions such as the right to visit.²⁷⁰

theoretically prevents crimes going unpunished — nationality (the flag state) and a territorial link (the coastal state).

²⁶⁴ Geiss and Petrig, above n 17, 147.

²⁶⁵ Often referred to as a 'failed state'. The term however seems to be falling out of fashion, see William Easterly and Laura Freschi, 'Top 5 Reasons Why "Failed State" Is a Failed Concept' on *Aid Watch Blog* (13 January 2010) <[http://aidwatchers.com/2010/01/top-5-reasons-why-"failed-state"-is-a-failed-concept/](http://aidwatchers.com/2010/01/top-5-reasons-why-)>.

²⁶⁶ SC Res 1846, UN SCOR, 6026th mtg, UN Doc S/RES/1846 (2 December 2008) para 10.

²⁶⁷ *Ibid* 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'.

²⁶⁸ SC Res 1851, UN SCOR, 6046th mtg, UN Doc S/RES/1851 (16 December 2008) Preamble para 5 (emphasis added):

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, including the international sea lanes and Somalia's territorial waters.

²⁶⁹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 29 (emphasis in original).

²⁷⁰ *Ibid* 28. A state can seize the ship and any property on-board. They can also arrest those on-board and punish them under national law. See *UNCLOS* art 105. The right to visit under art 110 however is much more limited and subject to a step-by-step process.

Instead, flag-state jurisdiction exclusivity still applies, but once piratical acts have been committed, attempted or intended, exclusivity *in terms of piracy law enforcement only* is relinquished. There is not an absence of ‘any flag state immunity from boarding’ when you look at the results piracy jurisdiction does not have. Piracy does not affect exclusive flag state jurisdiction over navigation rules, safety regulation or nationality requirements. Piracy does not affect 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 universal jurisdiction over piracy results from a balance of competing navigational interests. In upholding freedom of the seas, the principal starting point is exclusive flag-state jurisdiction. However, once an activity presents a threat to the common interest of states in the freedom of the seas, the rationality points to an exception.²⁷¹ An exception which ensures the activity goes punished and freedom is restored for all users. Bearing this rationality in mind, does the policy justification for universal jurisdiction point to an interpretation of ‘private ends’ that excludes political ends? Do political ends fit within the ‘motives behind the establishment of universal jurisdiction’?²⁷²

2 Balancing Flag State Sovereignty and the Collective Interests in the Freedoms of the Seas

Should purely political ends not extend to the acts of non-state sanctioned private parties pursuing political objectives, then Sea Shepherd will be subject to the universal jurisdiction to seize and prosecute pirates.²⁷³ As an exception, however, the starting point is *UNCLOS* art 92 and the exclusive flag-state jurisdiction.²⁷⁴ Holding political activists who use violence at sea as subject to universal piracy jurisdiction has a significant effect.²⁷⁵ Firstly, an enforcement jurisdiction exception is provided allowing warships of any state to arrest those aboard and seize the

²⁷¹ Crockett, above n 104, 81.

²⁷² Bahar, above n 39, 30.

²⁷³ Excluding the other requirements of the piracy definition.

²⁷⁴ 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.

²⁷⁵ Beckman, above n 26, 20. ‘UC Law Expert Disagrees With US Court Decision’ on *University of Canterbury Communications* (4 March 2013) <<http://www.comsdev.canterbury.ac.nz/rss/news/?feed=news&articleId=735>>. University of Canterbury Law 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 Part of the article 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 Draft*, above n 68, 224.

ship and its contents.²⁷⁶ For adjudicative jurisdiction an exception is provided allowing jurisdiction to prosecute in any court of the world where the pirate is under lawful custody.²⁷⁷ If it is now conclusively stated that political ends are private ends subject to universal jurisdiction, the threat of this 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 universal jurisdiction, the ‘presumption is against the legitimacy of any exception and the burden of proof in contentious cases rests with the state asserting the exception’.²⁷⁸

Firstly, it is plainly evident politically motivated violence is as much a threat to the common interests of navigational freedom and freedom of the seas as any other motivated high seas violence, depredation or detention. It matters little to victims,²⁷⁹ potential victims and the shipping sector as a whole whether violence is pursued in the interest of a political objective or a personal end. Even if it were conceded that an ‘indifference of target’²⁸⁰ was required 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’,²⁸¹ but rather ‘all [illegal] whaling by any people, anywhere for any reason’.²⁸² Any ship conducting what Sea Shepherd deems ‘illegal’ could

²⁷⁶ This also includes the right to create the law applicable, within the boundaries of the International definition of piracy in *UNCLOS* art 101. See *UNCLOS* art 105: ‘[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed’.

²⁷⁷ It is debated whether art 105 restricts prosecution to the country of seizure, or whether art 100 (the ‘Duty to co-operate in the repression of piracy’) and the *SUA Convention* allow jurisdiction to be established in other states. This is beyond the scope of this article, see further: Middelburg, above n 182, 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 — see Douglas Guilfoyle, ‘Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes’ (Working Paper, 3rd Meeting of Working Group 2 on Legal Issues: The Contact Group on Piracy off the Coast of Somalia, 26–27 August 2009) 5 <<http://ssrn.com/abstract=1537272>>.

²⁷⁸ Klein, above n 192, 108 quoting Robert C F Reuland, ‘Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction’ (1989) 22 *Vanderbilt Journal of Transnational Law* 1161, 1167. See also Atsuko Kanehara, ‘So-Called “Eco-Piracy” and Interventions by NGOs to Protest against Scientific Research Whaling on the High Seas: An Evaluation of the Japanese Position’ in Clive R Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, 2011) 195, 219.

²⁷⁹ Both those targeted by the piratical style action and those who are indirectly affected, such as other users or the insurers.

²⁸⁰ Kanehara, above n 278, 210.

²⁸¹ Halberstam, above n 91, 279.

²⁸² Sea Shepherd Conservation Society, *Whaling Around the World*, <<http://www.seashepherd.org/whales/whaling-around-the-world.html>>.

be targeted.²⁸³ Such action threatens universal open access of the oceans — the principle of *ius communicationis*.²⁸⁴

Furthermore, cases such as *Sea Shepherd* demonstrate political violence threatens high seas freedom beyond unhindered navigation. Flag-state jurisdiction embodies freedom by ensuring ships are not subject to restrictions other than those imposed by their flag state and international law.²⁸⁵ This goes beyond preventing other states from exercising jurisdiction. As seen in *Le Louis*, ‘[i]n places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another’.²⁸⁶ To allow subjects to exercise control over ships on the high seas which in their personal opinion have violated international conservation law would be a significant watering down of the principle of exclusive flag-state jurisdiction, perhaps to non-existence.²⁸⁷ Such a possibility poses as much a threat to freedom of navigation as the traditional idea of restricting unhindered access.²⁸⁸

Finally, freedom of the high seas also includes the freedom to carry out scientific research. Once an implicit freedom under the *HSC*,²⁸⁹ the freedom of scientific research is now reflected in *UNCLOS* art 87(f). Targeting research vessels threatens the common interest of scientific research.²⁹⁰

²⁸³ This becomes more evident when you consider other theoretical environmental activists. Klein defines these as not pursuing private ends, but ‘marine environmental protection’, Klein, above n 192, 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 states and threaten the common interests of commerce.

²⁸⁴ The freedom of entry and unhindered navigation extends beyond the interference by states to interference by all entities, including *Sea Shepherd*. Wendel, above n 29, 5–6.

²⁸⁵ ‘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, above n 246, 292.

²⁸⁶ *Le Louis*, High Court of Admiralty (1817) 2 Dods 210; 165 ER 1464, 1479 (emphasis added), quoted in Klein above n 246, 292 n 25.

²⁸⁷ *Sea Shepherd* appears to justify their action based on the upholding of international law. *Sea Shepherd Conservation Society, International Laws and Charters* <<http://www.seashepherd.org/who-we-are/laws-and-charters.html>>.

²⁸⁸ Freedom of navigation on the high seas is upheld by (1) *ius communicationis* (2) exclusive flag state jurisdiction. Wendel, above n 29, 6. Indiscriminate citizen justice on the high seas against an entire industry threatens both aspects.

²⁸⁹ Klein, above n 246, 294 n 37 — pointing to the International Law Commission conclusion such a freedom existed.

²⁹⁰ Kanehara, above n 278, 210. Unless it was decided the activity was not good faith research under the *International Convention for the Regulation of Whaling*: see *UNCLOS* art 240(d). Or if the Australian Antarctic Exclusive Economic Zone was

However, it is important to note the freedoms of the high seas are not absolute. They must be exercised consistently with international law,²⁹¹ and with ‘*due regard*’ to ‘the interests of other States in their exercise of the freedom of the high seas’.²⁹² In certain situations the exercise of Japanese authorised researchers’ freedom of navigation could be balanced against the general right of others to exercise their freedom.²⁹³ Yet if political ends are pursued by an organisation it is difficult to see what interest the flag state could have which would legitimise action as a necessary restriction on others. Piracy requires an act of violence, detention or depredation, which would take any such ship outside the realm of exercising freedom of navigation. The high seas are ‘reserved for peaceful purposes’,²⁹⁴ restricting any flag-state interest to only unobstructed peaceful navigation of its subjects. Similar reasoning can be applied to any suggestion that political parties are upholding the common interest of states in environmental protection.²⁹⁵ Sea Shepherd has claimed they are an environmental law enforcement organisation.²⁹⁶ Not only is there no authority to use force in upholding marine protection within *UNCLOS*, but also any enforcement ability (and therefore foreseeable restrictions on other users) falls exclusively upon states parties.²⁹⁷

Politically motivated violence on the high seas is therefore an unjustifiable threat to the common interests of all states. However, it is further required that without universal jurisdiction the crimes would go unpunished. Maritime violence motivated by political ends is still a minor threat compared to economically

internationally recognised: see *UNCLOS* art 246. Both provisions are found within Part XIII of *UNCLOS* and place a significant restriction on the freedom of marine scientific research.

²⁹¹ *UNCLOS* art 87(1).

²⁹² *UNCLOS* art 87(2) (emphasis added).

²⁹³ Rothwell and Stephens, above n 42, 155.

²⁹⁴ *UNCLOS* art 88.

²⁹⁵ This is arguably another common interest of all states, given pt XII of *UNCLOS* 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 pt VII, s 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 in the high seas. See *UNCLOS* arts 65, 120.

²⁹⁶ G Plant, ‘International Law and Direct Action Protests at Sea: Twenty Years On’ (2002) 33 *Netherlands Yearbook of International Law* 75, 80.

²⁹⁷ 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 a private individual’s ability to uphold ‘international rights of states’ are equally applicable to the case between the Japanese whalers and Sea Shepherd. Glen Plant, ‘Civilian Protest Vessels and the Law of the Sea’ (1983) 14 *Netherlands Yearbook of International Law* 133, 139.

motivated pirates.²⁹⁸ Jurists also point to the existence of the *SUA Convention*, which provides extradition and jurisdiction possibilities, as evidence maritime terrorists will not go unpunished.²⁹⁹ Even the UN Secretary-General described the *SUA Convention* as ‘another more useful vehicle for prosecution than the nineteenth century piracy statutes’,³⁰⁰ one justification being ‘[a]cts of piracy for political motives are not covered by article 101’.³⁰¹ In the contentious case of politically motivated violence there seems little need to apply the piracy regime, despite the threats posed to the common interest.³⁰² Sufficient jurisdictional basis exists.³⁰³

However, the *SUA Convention* has not entered customary law and is dependent on flag states’ membership.³⁰⁴ Treaty law is only binding upon contracting parties, including the *SUA Convention*’s obligations to make such activity punishable,³⁰⁵ and subject to a ‘prosecute or extradite’ procedure.³⁰⁶ Should one register and flag their political organisation’s vessels to a non-signatory state, then the jurisdictional position reverts back to a position similar to when piracy provisions historically developed.³⁰⁷ The fears of Crockett will once again become apparent if political ends are excluded.³⁰⁸

²⁹⁸ ‘Despite the terrorist threat, most maritime violence continues to be perpetrated by those who are motivated by economic rather than political considerations’: Scott Davidson, ‘International Law and the Suppression of Maritime Violence’ in Richard Burchill, Nigel D White and Justin Morris (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge University Press, 2005) 265, 268. ‘[T]errorism at sea ... has [not] been a long-standing and pervasive practice’: Jesus, above n 42, 387.

²⁹⁹ 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, above n 42, 388.

³⁰⁰ *Oceans and the Law of the Sea: Report of the Secretary-General*, UN GAOR, 53rd sess, Agenda Item 38(a), UN Doc A/53/456 (5 October 1988) 25 [151].

³⁰¹ *Ibid* 25 [153].

³⁰² Davidson, above n 298, 273–274.

³⁰³ 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, above n 42, 399.

³⁰⁴ ‘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’: Lawrence Azubuike, ‘International Law Regime Against Piracy’ (2009) 15(1) *Annual Survey of International & Comparative Law* 43, 56.

³⁰⁵ *SUA Convention* art 5.

³⁰⁶ See *ibid* arts 6, 10.

³⁰⁷ Although examples of ‘extreme’ political organisations, the groups al-Qaeda and The Tamil Tigers are said to have maritime fleets. ‘Flags of Convenience: Brassed Off — How the War on Terrorism Could Change the Shape of Shipping’, *The Economist* — *Business* (online) 16 May 2002 <<http://www.economist.com/node/1136592>>.

³⁰⁸ Crockett, above n 104, 95.

‘Flags of convenience’³⁰⁹ present a particular problem in that large merchant fleets are reliant on states with little power, whether militarily or political. ‘Assuming that negotiations fail in such cases, the acts of violence might go unredressed’.³¹⁰ 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’.³¹¹ Thus no jurisdiction to stop, search, arrest or seize is added for such offences.³¹²

The motivation of actors does not affect whether the rationale for applying universal jurisdiction applies.³¹³ Freedom of the seas requires *all* non-state sanctioned high seas piratical-style activity to be defined as piracy, subject to universal jurisdiction. But is there any justification under international law as to why ‘private ends’ should be interpreted as narrowing universal jurisdiction to exclude politically motivated acts?³¹⁴ One cannot simply rely on the reasoning used to exclude insurgent acts.³¹⁵ It was seen above that repeated codification efforts have not been accompanied by extensive discussion. Yet for the large part the suggestion political ends are excluded faces similar problems, with the conclusion repeatedly reached without reasoning provided.³¹⁶

³⁰⁹ ‘Flags of convenience’ include those states unwilling or unable to enforce international law: International Transport Workers’ Federation, *What are Flags of Convenience?* <<http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/>>.

³¹⁰ Crockett, above n 104, 95.

³¹¹ *SUA Convention*, art 9 (emphasis added). Article 8bis, added by the 2005 Protocol, provides a notification procedure, but this still leaves flag-state exclusivity intact.

³¹² Guilfoyle, ‘Written Evidence’, above n 31, Annex II (‘*The SUA Convention – Treaty Provisions and Explanatory Note*’) Ev 97 [49]; Stuart Kaye, ‘Threats From the Global Commons: Problems of Jurisdiction and Enforcement’ (2007) 8 *Melbourne Journal of International Law* 185, 192–193. Thus if political ends do not fall within the piracy definition, such actors benefit from the exclusive enforcement jurisdiction of their flag state.

³¹³ Halberstam reached the same conclusion in relation to ‘terrorists’: ‘Both the theoretical justification and the pragmatic necessity for universal jurisdiction apply to such acts’, Halberstam, above n 91, 289.

³¹⁴ As, according to Garmon, *UNCLOS* art 101 does — Garmon, above n 42, 265.

³¹⁵ Briefly stated, insurgents may use such attack in order to achieve and secure their independence — ie 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, above n 91, 282–283; Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 35.

³¹⁶ For example Direk et al 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, above n 21, 234–239.

One suggestion was ‘for private ends’ originates in the concern to protect commercial shipping that traditionally had only been the subject of state jurisdictional claims.³¹⁷ Politically motivated acts without a ‘commercial aspect’ were either not subject to piracy claims,³¹⁸ or the possibility of such activists was not considered.³¹⁹ It ‘made sense’³²⁰ to exclude politically motivated acts. Such reasoning can also be seen in recent state positions such as Malaysia, Indonesia and Singapore who have held the view crimes of terrorism (political motivation) and piracy (in the traditional sense) should be kept separate.³²¹

However, whilst ‘private ends’ may be seen as further evidence 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 demonstrate a need to exclude *all* politically motivated acts. At most it supports the position politically motivated actors could be excluded if their activity was free of any ‘commercial aspect’ — if their activity was to have no direct effect on freedom of commerce. The only action that could, therefore, be excluded would be politically motivated activity exclusively targeting ships in public service.³²² It would not cover activists who target other non-state actors or private ships and thus the commercial shipping industry as a whole. Authors appear 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*.³²³

In conclusion, acts motivated by political ends fit the rationality of the piracy exception as much as acts motivated by personal ends. It is said ‘[t]he non-interference principle merits respect, but only to the extent that it remains a valuable and effective tool in

³¹⁷ Barrios, above n 18, 153. Garmon argues it also made sense to exclude political acts at the time because following the end of World War II 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 is that states didn’t want the burden of enforcing the law of the sea against possible politically motivated attackers emerging at the time, Garmon, above n 42, 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.

³¹⁸ Azubuike, above n 304, 52–53.

³¹⁹ Garmon, above n 42, 263.

³²⁰ *Ibid.*

³²¹ Dana Dillon, ‘Maritime Piracy: Defining the Problem’ (2005) 25(1) *SAIS Review* 155, 155, quoting the Deputy Prime Minister of Malaysia, Datuk Seri Mohd Najib Tun Razak. Dillon continues: ‘Each category of maritime crimes requires different resources, methods of approach and agencies, and the lack of distinction in defining the problem complicates targeting resources and disperses efforts to *unrelated and inconsequential issues*’, 155 (emphasis added).

³²² A ship ‘owned or operated by a State and used only on government non-commercial service’ — *UNCLOS* art 96.

³²³ Garmon, above n 42, 265; Barrios, above n 18, 153.

promoting the general welfare of the international system and all its participants'.³²⁴ It is argued that to allow political protest beyond peaceful purposes threatens at least three fundamental principles of the freedom of the seas,³²⁵ without advancing any corresponding freedom.³²⁶ Upholding claims of exclusive flag-state jurisdiction would be contrary to the common interests of states, place far-reaching restrictions on inclusive use of the oceans by other states and will not serve to protect ocean use 'critical for a particular state'.³²⁷

V CONCLUSION

So despite the antiquity of piracy, the term 'private ends' remains unclear and ill-defined, contrary to the clear-cut positions taken by Guilfoyle or Heller. Within the drafting history private ends were not equated with state sanctioning. *Purely* political acts would be excluded from 'private ends', and it was left open whether this extended beyond acts of insurgents to include acts committed by private individuals/groups in pursuit of political agendas. Thus, subsequent state practice and judicial precedents became extremely important in determining the limits of the exception and defining what purely political acts entail.³²⁸ However, subsequent state practice demonstrates continued confusion, which has failed to delimitate the boundaries of 'private ends'. Positive action by states has been limited, with conflicting opinions. In relation to political activists, and particularly eco-activists, practice has largely been one of omission and inaction. A number of political reasons could drive inaction, and it is difficult to find *opinio juris* that would demonstrate action was not taken because, as a matter of law, action could not be taken.

Therefore, one is left with an international law definition of piracy for which states have failed to conclusively define the term 'private ends', and define whether the 'public end' exception of 'purely political ends' extends beyond insurgents to other non-state actors. Instead there exists the limited judicial precedent of one Belgian

³²⁴ Michael A Becker, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46(1) *Harvard International Law Journal* 131, 230, quoted in Klein, above n 192, 143 n 604.

³²⁵ *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 and pipelines, artificial islands, fishing and any other subsequently recognised freedoms.

³²⁶ Such activity is not a legitimate exercise of navigational freedom or marine protection.

³²⁷ 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. Myres Smith McDougal and William Thomas Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962) 749, quoted in Klein, above n 246, 292 n 23.

³²⁸ See, eg, *VCLT* art 31(3).

injunction case, which moved towards a definition of piratical acts as lacking state sanction. One can now add a US preliminary injunction case to the same effect.

Both these cases can be robustly defended on policy grounds, as Part (IV)C demonstrated. 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 those involved. Profound changes seen with the rise of non-state actors, particularly following the ‘9/11’ attacks, only confirm the unsuitability of allowing the idea that pursuing political goals should excuse activity from being piracy.³²⁹ Thus, although current 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 from effective punishment merely because such actors were motivated by political goals.

³²⁹ Isanga points out the increasing number of violent acts committed that are linked to political claims, and the rising power of non-state actors who could potentially challenge some states themselves, Joseph M Isanga, ‘Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes’ (2010) 59 *American University Law Review* 1267, 1283.