

THE 'PRIVATE ENDS' OF INTERNATIONAL PIRACY: THE NECESSITY OF LEGAL CLARITY IN RELATION TO VIOLENT POLITICAL ACTIVISTS

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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 one requirement, that piratical acts be committed 'for private ends', excludes politically motivated actors from piracy under international law. With the 2015 submission by Sea Shepherd to the US judiciary arguing, amongst others, that 'private ends' is ill defined under the international law of piracy, this article revisits the definition of 'private ends' as developed by states. After espousing the requirement for 'private ends' under the international law definition of piracy, this article demonstrates the lack of clarity in relation to the coverage of violent high seas activists pursuing purely political ends. The necessity of defining 'private ends', which, in turn, defines the universal piracy jurisdiction of states, is elaborated upon, before offering suggestions as to why courts should follow the limited precedents of not excluding 'political ends' from 'private ends'.

Keywords: Piracy; Universal Jurisdiction; Private ends; Law of the Sea; Sea Shepherd.

I. INTRODUCTION

Arguably one of the oldest, and foundational, crimes of international criminal law is that of piracy. Developed through custom, and crystallised around the adoption and codification of the 1958 *Convention on the High Seas*,¹ the definition of international piracy, as a matter of binding customary and treaty law, can be found reconfirmed within the 1982 *United Nations Convention on the Law of the Sea* (hereinafter *UNCLOS*).² This widely accepted definition of piracy as an international crime, attracting the universal jurisdiction of all states, is found within article 101:

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¹ *Convention on the High Seas* (29 April 1958) 450 UNTS 82, entry into force 30 September 1962, art. 15, and the *preamble*'s intention 'to codify the rules of international law relating to the high seas'. Prior to the codification efforts, a 'chaos of expert opinion as to what the law of nations includes' existed, J. W. Bingham, 'IV Draft Convention on Piracy, with Comment' (1932) 26(1) *American Journal of International Law Supplement: Research in International Law* 739, p. 769. '[V]irtually every aspect of piracy was controversial', Ö. F. Direk et al., 'Somalia and the Problem of Piracy in International Law' (2011) 4 *Usak Yearbook of International Politics and Law* 223, p. 238.

² *United Nations Convention on the Law of the Sea* (10 December 1982) 1833 UNTS, entry into force 16 November 1994.

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) (emphasis added).³

Yet, as a 'living' framework agreement,⁴ which is to be 'a comprehensive constitution for the oceans which will stand the test of time',⁵ UNCLOS and its definition of piracy are, at times, couched in broad terms; to be defined at their grey 'limits' through authoritative interpretations and state practice. Thus, terms such as 'violence' or 'private ends' are used, which, whilst having clear cases to hand, are not so restrictive that their scope cannot be redefined to meet the current needs of the international community of states. Private political activists, pursuing their political agenda on the high seas against other vessels, and using violence, detention or depredation, present a problem for the application of this definition. Does the pursuit of political objectives mean such otherwise piratical activity is 'committed for private ends'? Taking Sea Shepherd as an example, if we assume the other conditions are fulfilled,⁶ would the non-profit organisation's self-proclaimed mission 'to "defend, conserve, and protect" marine wildlife and ocean ecosystems',⁷ preclude their actions from the international definition of piracy based upon the requirement, 'for private ends'?

³ UNCLOS, art. 101.

⁴ 'Therefore, it must 'grow' in accordance with the times', *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) [Separate Opinion of Judge Lucky](#), p. 5 para. 9.

⁵ T. T. B. 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* (New York 1983) xxxiii.

⁶ It should be noted Sea Shepherd also contested the other conditions as being met in this case, most notably the threshold of 'violence' required. See threshold discussion; R. Churchill, 'The Piracy Provisions of the UN Convention on the Law of the Sea – Fit for Purpose?' in P. Koutrakos and A. Skordas, *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, 2014) 9-32, pp. 12-16.

⁷ [Sea Shepherd Conservation Society v. The Institute of Cetacean Research \(Petition for Writ of Certiorari\)](#), Supreme Court of the United States of America No. 14-1300, 28 April 2015, p. 7.

Herein lies the problem with the subsequent development of the term 'private ends', and the lack of domestic court or nation state implementation, discussion, or practice, which could conclusively define the current breadth of 'private ends' under international law for violent political activists. The historical context suggests the term 'private ends' was first introduced to exclude insurgent and independence movements, which due to the potential they could become recognised states, were not suitable to be subject to the universal jurisdiction of all states should they pursue their interests at sea.⁸ Such universal jurisdiction could have clearly been abused by those on either side of the political/territorial dispute as to the legitimate government, thus subjecting an inherently internal dispute to external influences. The position of other political actors, such as environmental activists, was not established, but left in a 'grey area' of application with authors pointing to their exclusion, without supportive practice.⁹ States had not thereby conclusively established whether it excludes or includes private actors pursuing 'political' ends from the international law definition of piracy. The increasing role of private actors within international law, and more generally in attempting to implement their interpretation of political decisions through violent means, will demonstrate the importance of settling the debate on the scope of 'private ends'; a debate which re-erupted in 2013 with the US court decision of *The Institute of Cetacean Research v. Sea Shepherd Conservation Society* (hereinafter *Sea Shepherd*).¹⁰

This debate on 'private ends' in the international crime definition of piracy can be split into two essentially mutually exclusive positions. On one side, which will be called *private/political* proponents, proponents argue that those pursuing political motives, such as environmental activists, have traditionally never been seen as pirates, or are performing what could be termed a 'public' end for the purposes of international piracy. This is the traditional

⁸ The origin of the term 'private ends' as a condition of piracy is found within; M. Matsuda and M. Wang Chung-Hui, '[Report by the Sub-Committee of Experts for the Progressive Codification of International Law, questionnaire No. 6](#)' (1926) 20 *American Journal of International Law* Supplement, pp. 223-224. It may have been adapted from legal scholarship, which used the term to distinguish the now defunct necessity of an 'intention to rob' – D. Guilfoyle, '[Political Motivation and Piracy: What History Doesn't Teach Us About Law](#)' (17 June 2013) *Blog of the European Journal of International Law (EJIL: Talk!)*; D. Guilfoyle, 'Piracy and Terrorism', in P. Koutrakos and A. Skordas, *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, 2014) 33-52, p. 52. Intention to rob has been dismissed as a requirement e.g. as stated by the International Law Commission in its drafting work that would form the basis of the *Convention on the High Seas*; International Law Commission, '[Articles concerning the Law of the Sea with commentaries](#)' (1956) II *Yearbook of the International Law Commission*, p. 282.

⁹ E.g. in Russian literature; 'In our view the expansion of the concept of piracy to include politically motivated violent actions at sea is unlawful' (not noting the assumption that political motivated violence was ever excluded), A. L. Kolodkin et al. (translation: W. E. Butler), *The World Ocean: International Legal Regime* (Eleven International Publishing, 2010), p. 150, or in Western literature; 'by limiting the definition to acts committed for 'private ends' any actions taken for political motives such as terrorist attacks are excluded' D. Rothwell and T. Stephens, *The International Law of the Sea* (Hart Publishing, 2010), p. 162.

¹⁰ [The Institute of Cetacean Research v. Sea Shepherd Conservation Society](#), Case No. 12-35266, US Court of Appeals for the Ninth Circuit, 25 February 2013.

standpoint, having long been supported within the literature of the law of the sea and jurisdiction.¹¹ On the other hand, the proponents of a *private/public* end distinction hold a much more restrictive interpretation of 'public' and essentially argue 'private ends' are those activities which are lacking in 'state sanctioning'.¹² This is the position that was adopted by the US Court of Appeals in *Sea Shepherd*, which 'defines acts taken for private ends as those not taken on behalf of a state'.¹³

Contrary to both clear cut positions, I have argued that the exception to piracy provided by the requirement of 'private ends' was unsettled beyond insurgents attacking their own state's vessels – albeit with strong policy support, based upon the principles enshrined in the law of the sea, to suggest 'private ends' should follow the limited practice to date and only exclude from piracy those acts by private parties with 'state sanctioning'.¹⁴ In an interesting turn of events, this ambiguity was the position adopted by Sea Shepherd, in their claim that the Alien Torts Statute cannot be relied upon by the Institute of Cetacean Research, given the lack of a clear definition of 'private ends':

This Court has made clear in both *Kiobel* and *Sosa* that the ATS does not give courts authority to craft new norms of international law and then apply them as U.S. law. *Sosa*, 542 U.S. at 727-28; *id.* at 748-50 (Scalia, J., dissenting); *Kiobel*, 133 S. Ct. at 1664-65. Rather, the courts may entertain ATS claims only for alleged violations of international norms that are "specific, universal, and obligatory." *Kiobel*, 133 S. Ct. at 1665; *Sosa*, 542 U.S. at 725 (claims must "rest on a norm of international character accepted by the civilized world and defined with . . . specificity").

[...]

In interpreting the UNCLOS requirement that piracy be committed for "private ends," the Ninth Circuit once again resorted to *Webster's* [dictionary] and its own sense of

¹¹ See, *supra* n 9. Ö. F. Direk et al., *supra* n 1, p. 234; 'They have attempted to overcome the majority view which still holds that acting for 'private ends' excludes anybody acting for political, religious or ethnic reasons from the definition of piracy found in the two treaties'.

¹² Chief proponents; D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2011) pp. 32-42; M. 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, p. 40.

¹³ [The Institute of Cetacean Research v. Sea Shepherd Conservation Society](#), *supra* n 10, p. 4.

¹⁴ Utrecht University PIL Master Thesis; A. N. Honniball, [Anti-whaling activism in the Southern Ocean and the international law on piracy: An evaluation of the requirement to act for 'private ends' and its applicability to Sea Shepherd Conservation Society](#), kindly awarded the 2013 Prof. Leo J. Bouchez Prize and 2014 J.P.A. François Prize. An article based upon this thesis is currently under review and under conditional offer; A. N. Honniball, 'Private Political Activists And The International Law Definition Of Piracy: Acting For 'Private Ends'', *forthcoming*, (2015) 36(2) *Adelaide Law Review*.

“common understanding,” in addition to a Belgian court case, to conclude that “private” is merely an antonym for “public,” and includes any act “not taken on behalf of a state.” App. 64a.8 The court thus found that under UNCLOS, “‘private ends’ include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd’s professed environmental goals.” *Ibid*. But the court ignored a wealth of authority that indicates its interpretation of “private ends” is erroneous—and which, at the very least, leaves no doubt that the court’s interpretation is *not* “universally” accepted.¹⁵

The Supreme Court untimely denied the review.¹⁶ But in light of this submission, this ICD Brief will summarise the support available for such a proposition (part 2), before expanding upon why it is of such importance that the current breadth of the term ‘private ends’ is settled beyond the historical precedent of excluding recognised insurgencies from universal piracy jurisdiction (part 3). It shall conclude with a review of the principles enshrined within the law of the sea, which support the continued evolution of international law towards the proposition that violent political activists should not be excluded from the universal jurisdiction of international piracy on the sole ground that the aims they pursue are ‘political’ (part 4).

II. INTERNATIONAL PIRACY AND ‘PRIVATE ENDS’: THE GREY AREA OF POLITICAL ACTIVISTS¹⁷

The first solution to such a query when reviewing treaty law is to apply the customary international law rules on treaty interpretation, as codified and reflected in the *Vienna Convention on the Law of Treaties* (hereinafter *VCLT*), article 31.¹⁸ A good faith interpretation of the piracy definition and the term ‘private ends’, in accordance with the ordinary meaning, in its context, and in the light of its object and purpose, arguably produces an ambiguous meaning in respect of private political activists, and thus justifies recourse to supplementary means as mandated by *VCLT*, article 32. There is no accepted ordinary meaning of ‘private ends’, as demonstrated by the conflicting interpretations and applications of the term by domestic courts and academics. Even if one were to suggest private ‘is

¹⁵ [Sea Shepherd Conservation Society v. The Institute of Cetacean Research \(Petition for Writ of Certiorari\)](#), *supra* n 7, pp. 15-22 (emphasis original).

¹⁶ Sea Shepherd, [Supreme Court Declines To Hear Sea Shepherd’s Case Against Whalers](#) (8 June 2015) <http://www.seashepherd.org/>.

¹⁷ This section is based upon the previous Master Thesis and forthcoming article, A. N. Honniball, *supra* n 14. Please consult these for more in-depth coverage.

¹⁸ [Vienna Convention on the Law of Treaties](#) (23 May 1969), 1155 UNTS 331, entry into force 27 January 1980.

normally used as the antonym to public',¹⁹ the question of whether an activity in the interest of political views is either a 'public' or a 'personal' end (and thus private) is left wide open to further interpretation.²⁰

There is little context in *UNCLOS* which could provide guidance on this interpretation, given the only other reference to 'private' is in reference to private ships.²¹ Whilst *UNCLOS*, article 102, does clarify that governmental ships lacking governmental authority due to the mutiny of its crew are assimilated to a 'private' ship, this does not attribute 'private' with a special meaning of non-governmental, which could then be transposed to the term 'private ends'.²² If such a meaning as 'non-governmental' were to be clearly attributable to the term private, one would expect consistent use throughout *UNCLOS*. The fact that 'private' is not used beyond articles 101-102, and what is more, that *UNCLOS* articles 169 and 139(1) use other terms when discussing non-governmental scenarios, attest to the fact that 'private', and thus 'private ends', have not been given such a special meaning for the purposes of interpreting *UNCLOS*.

Nevertheless, in interpreting treaties one can look beyond the text and take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.²³ The two most notable examples in this case are the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (hereinafter *SUA Convention*),²⁴ and the Belgium Court of Cassation case of *Castle John*.²⁵

With regard to the *SUA Convention*, this was adopted in light of the *Achille Lauro* incident, which involved 'politically motivated'²⁶ violence at sea by the Palestinian Liberation Front. At the time, Austria, Egypt, Italy and the Special Representative of the Secretary-General for the Law of the Sea (Nandan) pointed to the 'private ends' requirement and argued the fact that it did not cover political actors or terrorists as one of the reasons why the *SUA*

¹⁹ [The Institute of Cetacean Research v. Sea Shepherd Conservation Society](#), *supra* n 10, p. 4.

²⁰ Compare, J. W. Bingham, *supra* n 1, p. 798, and *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, Belgium Court of Cassation (1986) 77 ILR 537 (discussed below).

²¹ *UNCLOS*, arts. 101-102.

²² I.e. as possible under *VCLT*, art. 31(4). For contra argument see, E. Kontorovich, '[Yes, Sea Shepherd Engages in Piracy Under International Law](#)' (27 February 2013) *The Volokh Conspiracy*.

²³ *VCLT*, art. 31(3)(b).

²⁴ [Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation](#) (10 March 1988) 1678 UNTS 221, entry into force 1 March 1993.

²⁵ *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, *supra* n 20. Further cases and discussion can be found in the Master Thesis and forthcoming article, A. N. Honniball, *supra* n 14.

²⁶ The demanded release of 50 Palestinian prisoners incarcerated by Israel.

Convention was required.²⁷ Some authors have taken the subsequent adoption as support that politically motivated actors were, thus, not covered by the piracy provisions due to political ends not being 'private ends'.²⁸ But it remains the fact that the views of three states cannot be taken as uniform practice, and other major maritime powers, most notably the USA, viewed such political motives as 'private ends'. Indeed, those involved in the *Achille Lauro* incident were charged with piracy based upon the universal jurisdiction of piracy *jure gentium* (the customary principle, codified by *UNCLOS*, article 101).²⁹ Guilfoyle has also placed the *SUA Convention* within its historical context, together with the subsequent 1994 *Declaration on Measures to Eliminate International Terrorism*³⁰ and the 2005 *SUA Protocol*,³¹ to convincingly argue such state practice represented further evidence that political motives could never exclude criminal responsibility.³² Given the trend to not exclude political ends from criminal responsibility, it would be counterintuitive to interpret 'private ends' in a narrow way which excluded political ends. To exclude 'political ends' would ensure on the high seas, and with an uncooperative flag state, such actors would unjustifiably escape criminal responsibility. The other notable benefits of the *SUA Convention* for

²⁷ See discussion; D. Guilfoyle, 'Written evidence from Dr Douglas Guilfoyle: Legal Issues Relating To Counter-Piracy Operations Off The Coast Of Somalia', House of Commons Foreign Affairs Committee, [Piracy off the Coast of Somalia: Tenth Report of Session 2010–12](#) (5 January 2012) HC 1318 Annex: Evidence, p. 93 paras. 24-25; N. Ronzitti, 'The Law of the Sea and the Use of Force Against Terrorist Activities' in, N. Ronzitti (ed.), *Maritime Terrorism and International Law* (Martinus Nijhoff Publishers, 1990) 1-14, p. 2.

²⁸ H. E. J. L. 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 pp. 388-389.

²⁹ See coverage; T. E. Madden, '[An Analysis of the United States' Response to the Achille Lauro Hijacking](#)' (1988) 8 *Boston College Third World Law Journal* 137, pp. 140-143. The USA is not party to *UNCLOS*, and thus relied on the customary law definition. Whilst this cannot be taken as subsequent practice for treaty interpretation, there is no indication that the treaty and customary definitions of international piracy are divergent on the matter of 'private ends'. Note however the lack of 'two-ships' in the incident; 'this lingering two ships requirement in the definition of piracy makes it doubtful that the United States could have successfully asserted its piracy charge against the Achille Lauro hijackers', Madden, *ibid*, p. 144.

³⁰ UNGA, 'Declaration on Measures to Eliminate International Terrorism' (9 December 1994), annexed; UNGA, '[Measures to Eliminate International Terrorism](#)' (17 February 1995) GA Res 49/60, UN Doc A/RES/49/60. Furthermore; '[Reiterates](#) that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them', UNGA, '[Measures to Eliminate International Terrorism](#)' (16 January 1997), GA Res 51/210, UN Doc A/RES/51/210, p. 2, para. 2. For further terrorism related treaties excluding a 'political offence' exception to extradition requests, see D. Guilfoyle, *supra* n 12, p. 38, n 58.

³¹ '[Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation](#)' (14 October 2005), IMO Doc. LEG/CONF.15/21, entry into force 28 July 2012, art. 11Bis; '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'.

³² D. Guilfoyle, *supra* n 12, pp. 38-40.

maritime governance might rather explain the wide state participation and adoption, beyond the narrow 'private ends' definition put forward by the above three sponsoring states.³³

The case of *Castle John*, prior to the *Sea Shepherd* decision, and a few conflicting decisions by the courts of the Seychelles,³⁴ has been taken by the US Appeals Court and academic writers as the principal examples of evidence that purely political acts by private actors are nonetheless for 'private ends'.³⁵ In brief, the case involved the environmental group Greenpeace engaging in piratical acts on the high seas against a private vessel, with the 'end' of alerting the public to the dangers of discharging waste from vessels into the sea.³⁶ In response to the question of whether such political ends were 'private ends', the Belgium Court of Cassation adopted the private/public distinction and stated:

The applicants do not argue that the acts at issue were committed in the interest or 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* (emphasis added)³⁷

No state opposition to the court's interpretation has been found by the author, and notably the flag state of the Greenpeace vessel which would have been restricted by the restraining order application, the Netherlands, did not protest. But by defining what would not be a public end, rather than directly what would be a personal or 'private ends',³⁸ the case does not

³³ The jurisdiction provided by the *SUA Convention* is available in tandem with that of universal jurisdiction over piracy. In comparison to a regime of maritime governance which only relied upon piracy jurisdiction, the rules of *SUA* offer many jurisdictional advantages for Contracting States. Notably; the lack of a two-ship requirement (art. 3), a wider number of disruptive acts covered beyond violence, depredation and detention (art. 3(1)(f)), a larger geographical scope in comparison to piracy which is limited to enforcement on the high seas or within the exclusive economic zone (arts. 4(1), 6) and finally the increased likelihood of bringing offenders to justice provided by the duty to prosecute or extradite (arts. 6, 10). For a timely example, see the Permanent Court of Arbitration conclusion that Greenpeace protests directed at a fixed platform (the *Prirazlomnaya*) did not meet the requirement of piracy to be directed 'against another ship'; [Arctic Sunrise Arbitration \(Netherlands v. Russia\) \(Award on the Merits\)](#), Permanent Court of Arbitration Case N° 2014-02, 14 August 2015, paras. 238-241.

³⁴ Compare the case of *Dahir*, which suggested acts with a 'governmental objective', such as the political motives of terrorists were not included within the concept of acts committed for 'private ends', with the case of *Abdugar Ahmed* which suggested 'private ends' was anything 'without authorization by public authority'. See; [The Republic vs. Mohamed Ahmed Dahir & Ten \(10\) Others](#), Supreme Court of Seychelles (2009) Criminal Side No. 51, pp. 18-19, para. 37; [The Republic vs. Abdugar Ahmed & Five \(5\) Others](#), Supreme Court of Seychelles (2011) Criminal Side No. 21, p. 15, para. 21. Discussed; M. Gardner, 'Piracy Prosecutions in National Courts' (2012) 10(4) *Journal of International Criminal Justice* 797, p. 811.

³⁵ [The Institute of Cetacean Research v. Sea Shepherd Conservation Society](#), *supra* n 10, p. 5.

³⁶ *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, *supra* n 20, pp. 537-539. Detailed facts and analysis; S. P. 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, p. 11.

³⁷ *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, *supra* n 20, p. 540.

³⁸ As highlighted by S. P. Menefee, *supra* n 36, p. 15.

provide a conclusive interpretation to guide international law. For example, the political acts of private organisations directed at governmental ships (as opposed to the private vessel in *Castle John*) might still be open to interpretation as an act committed in the 'interest or detriment of a State' and of a non-personal nature. It also stands that two injunction proceedings, *Sea Shepherd* and *Castle John*, can hardly be taken as yet sufficient to say an established agreement of the 167 *UNCLOS* parties regarding interpretation in this grey area between clearly private and clearly public ends has been met.³⁹

Finally, additional recourse could be made to the historical precedents and development of the term 'private ends' in order to help resolve the ambiguity of whether jurisdiction is provided for in respect of this international crime and political ends. These are not official preparatory works of *UNCLOS*, and so their use has been debated and argued as unreflective of the drafters' intention.⁴⁰ But given that *UNCLOS* was an attempt to codify the law of the sea and involved minimal discussion on the definition of piracy and 'private ends', this historical context is the legal context that the drafters were reaffirming.⁴¹ The International Tribunal for the Law of the Sea, for example, has made recourse to such supplementary means in trying to solve ambiguities unresolved by the application of the rules on treaty interpretation.⁴² Space limits a thorough elaboration, but one can track the term 'private ends' through its first origins in the League of Nations Committee of Experts' attempt at codifying piracy,⁴³ to the discussions of the *Harvard Draft Convention on Piracy*,⁴⁴ which formed the basis for the International Law Commission's *Draft Articles Concerning the Law of the Sea*⁴⁵ and subsequent adoption by states of the *Convention on the High Seas*. *UNCLOS* repeated near verbatim the piracy provisions of the *Convention on the High Seas*, and can be seen as a continuation of this historical development for the purposes of 'private ends'.⁴⁶

³⁹ 167 parties, as of 21.09.2015;
https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en.

⁴⁰ D. Guilfoyle (2013), *supra* n 8. But whilst not part of the 'traditional' documents used as supplementary means, the documents are not *per se* excluded by *VCLT*, art. 32 which does not provide a closed list of supplementary means; 'Recourse may be had to supplementary means of interpretation, *including* the preparatory work of the treaty and the circumstances of its conclusion' (emphasis added).

⁴¹ *UNCLOS*, preamble; *Convention on the High Seas*, preamble.

⁴² *The M/V 'Saiga' (No.2) Case (Saint Vincent and The Grenadines v. Guinea (Judgement) (Merits)* (International Tribunal for the Law of the Sea Case No 2, 1 July 1999) p. 26 paras. 80-81; [Separate Opinion of Judge Laing](#), pp. 5-6 paras. 12-13.

⁴³ M. Matsuda and M. Wang Chung-Hui, *supra* n 8.

⁴⁴ J. W. Bingham, *supra* n 1.

⁴⁵ International Law Commission, *supra* n 8.

⁴⁶ The small differences in defining piracy did not concern 'private ends'.

Whilst the earliest codification efforts suggested 'purely political objectives' were not 'private ends', the elaboration of the term beyond belligerents, who were not seen as the enemies of mankind, was not provided.⁴⁷ It was, nevertheless, clear that it would be a very narrow exception,⁴⁸ and the following *Harvard Draft* focused the 'private ends' test as an exclusion of insurgents, but leaving the door open via article 16 for other 'public ends' by other 'unrecognised organisations' to not fall within piracy.⁴⁹ The *ILC Draft Articles* generally agreed with the Harvard conclusions, and there is little supporting evidence to suggest this did not extend to the discussion of purely political ends as a form of public end, excluded by the 'private ends' requirement of piracy. The rich history of the international law definition of piracy did not, therefore, clearly define 'private ends' as acts 'not taken on behalf of a state';⁵⁰ but nor did it expressly include politically motivated violence by private individuals or organisations within its purely political ends as a public end exception.

In summary, despite the rise of politically motivated private organisations and individuals who are willing to use violence against other vessels at sea to pursue their 'ends', there has been insufficiently consistent discussion and practice to demonstrate agreement by states as to whether the exclusion of insurgents from the universal jurisdiction of piracy could also extend to such actors by means of the 'private ends' requirement. The limited practice of the courts in *Castle John* and *Sea Shepherd* have merely provided some evidence for a working definition which restricts 'private ends' to only those 'not taken on behalf of a state'. The next section will demonstrate why piracy and the requirement of 'private ends' needs to be settled as a matter of international law.

III. INTERNATIONAL PIRACY AND 'PRIVATE ENDS': A DELIMITATION OF JURISDICTION

The international crime of piracy is a transnational crime which requires domestic legislative implementation and the exercise of domestic courts' jurisdiction in order to ensure

⁴⁷ M. Matsuda and M. Wang Chung-Hui, *supra* n 8, pp. 224-228. Belligerents pursuing their political recognition would focus their attacks on strategic targets, which would not lead to indiscriminate attacks that would threaten the 'security of commerce'.

⁴⁸ *Ibid*, p. 224.

⁴⁹ 'The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals and ships and its commerce against interference on or over the high seas, when such measures are not based upon jurisdiction over piracy [...] *inter alia* the troublesome matter of illegal forcible acts for political ends against foreign commerce, committed on the high seas by unrecognised organizations', J. W. Bingham, *supra* n 1, pp. 746, 857. Discussed, along with further supporting quotes to exclude 'political ends' from 'private ends': K. J. Heller, ['Why Political Ends are Public Ends, Not Private Ends'](#) (1 March 2013) *Opinio Juris*.

⁵⁰ [The Institute of Cetacean Research v. Sea Shepherd Conservation Society](#), *supra* n 10, p. 4.

prosecution. Unlike other examples of international crimes, no international court exists to deal with piracy. Therefore, the primary importance of a clearly defined concept of piracy under international law is to set the limits of a state's universal jurisdiction, and thus its legitimacy to take enforcement action against accepted pirates and pirate vessels.⁵¹ The universal jurisdiction of piracy allows all states to take action against offenders on the high seas, and subsequently try them in national courts without any specific connection to the event or persons involved.⁵²

However, in respect of politically motivated piratical actors, *UNCLOS*, article 101 can only operate as a principle of jurisdiction under international law if the scope of piracy and 'private ends' is (near) universally agreed. Such grey areas of jurisdiction are ill fitted to serve their function as a matter of international law.⁵³ International law, in general, is founded upon the principle of sovereignty, protecting it from unjustified interference via the principles of non-intervention and territoriality.⁵⁴ The rules of jurisdiction are intimately tied up with the protection of such sovereignty, limiting any exercise of jurisdiction beyond a state's territory to those based upon the narrowly defined principles of extraterritorial jurisdiction that have been accepted by all states.⁵⁵ In areas beyond national jurisdiction, such as the high seas, we could substitute the principle of territoriality with flag state exclusivity as the guiding value. Clearly beyond the avoidance of unjustified foreign intervention in the internal affairs of the flag state/territorial state, such delimitation of jurisdiction helps avoid conflict between states.⁵⁶ Potential conflicts hopefully only arise in those cases where states willingly go beyond the jurisdiction provided under international law.⁵⁷ Beyond delimitation, the rules of jurisdiction, as summarised by Ryngaert, could increase 'efficiency and procedural economy [...] [and] prevent courts and prosecutors from wasting scarce state resources to address

⁵¹ States may wish to provide a wider definition of piracy as a matter of *domestic* law – but for such 'pirates' the state will need to rely on another basis of jurisdiction, given universal jurisdiction only covers those acts within *UNCLOS*, art. 101.

⁵² *UNCLOS*, art. 105 – Again reflective of customary international law.

⁵³ Of course open terms such as 'private ends' allow for the limits of jurisdiction to evolve to meet social necessities, but a balance needs to be struck between flexibility and legal certainty for states. Continued uncertainty on diametrically opposite viewpoints on the nature of 'private ends' serves neither purpose.

⁵⁴ C. Ryngaert, *Unilateral Jurisdiction and Global Values* (Eleven International Publishing, 2015), pp. 23-24

⁵⁵ For a good overview; C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2nd ed., 2015); V. Lowe and C. Staker, 'Jurisdiction' in Malcolm Evans (ed.), *International Law* (Oxford University Press, 3rd ed, 2010) 313-339. Whilst the Permanent Court of Justice might have put it differently for prescriptive jurisdiction in its famous *Lotus* decision, it never extended such freedom to enforcement jurisdiction which has always been limited to territory but in the most exceptional circumstances; [SS *Lotus Case \(France v. Turkey\) \(Judgement\)*](#) (1927) PCIJ Rep (ser. A) No 10, para. 64; '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'.

⁵⁶ C. Ryngaert, *supra* n 54, pp. 24-25.

⁵⁷ However for the continued blurring of the territorial/extraterritorial, see J. Scott, '[Extraterritoriality and Territorial Extension in EU Law](#)' (2014) 62(1) *American Journal of Comparative Law* 87.

problems which are another state's concern',⁵⁸ and taking a more cosmopolitan approach, serve the ideals of 'corrective justice'.⁵⁹ Whilst piracy does not carry the ethical imperative and duty to exercise jurisdiction or extradite seen in other international crimes, it does at least carry the duty to cooperate to the fullest extent possible in its repression.⁶⁰ For those states attempting to fulfil this duty, as an objective of *UNCLOS*,⁶¹ the lack of clarity in jurisdictional scope provides lack of clarity in the duty's 'fullest possible extent'.⁶²

What should be clear is that without a specific 'universally' accepted interpretation of 'private ends', the jurisdictional principle of piracy under international law cannot efficiently or adequately meet these objectives. Legal clarity is desperately needed; indeed, the lack of certainty brings further complications. For example, for those who argue 'private ends' excludes political ends, such vessels may not be afforded the exclusive flag state jurisdiction protection to which they are supposedly attributed on the high seas. Without the assumption of a clear and defensible jurisdictional trigger of what piracy is under *UNCLOS*, article 101, there is little defence to foreign state enforcement based on the argument political ends are 'private ends'. In the words of Colangelo, the principle is 'gutted' of its restriction on a state's ability to project its laws extraterritorially.⁶³ Ambiguous restrictions on universal jurisdiction will do little to dissuade the powerful, or 'interested', states in extending their jurisdiction to private political activists.

More generally, the lack of legal certainty in the scope of 'private ends' may undermine the universality principle as a rule of jurisdiction more broadly. As noted for other international crimes, 'African states and China have recently started to voice doubts over the lawfulness of universal jurisdiction over international crimes, doubts which may well weaken the lawfulness of universal jurisdiction under customary international law'.⁶⁴ This has become a regular feature of the UN General Assembly agenda.⁶⁵ Whilst the universal criminal jurisdiction of piracy appears to still be accepted by all states, if an increase in politically motivated violence at sea between vessels was to lead to the spill-over of the academic disagreement on

⁵⁸ C. Ryngaert, *supra* n 54, p. 24.

⁵⁹ *Ibid*, p. 25.

⁶⁰ *UNCLOS*, art. 100.

⁶¹ [UNCLOS at 30](#), published by the United Nations (November 2012), 12-57609, p. 5.

⁶² I.e. when faced with politically motivated piratical acts the duty to cooperate may or may not extend.

⁶³ 'The central challenge for the international legal system regarding universal jurisdiction is to devise a regime that allows States to exercise jurisdiction over serious international crimes, but not to manipulate the definition and scope of those crimes to claim an unwarranted authority to project domestic law onto the sovereign entitlements of other States in what are often highly charged and politically sensitive situations', A. J. Colangelo, '[Universal Jurisdiction as an International 'False Conflict' of Laws](#)' (2009) 30 *Michigan Journal of International Law* 881, p. 903.

⁶⁴ C. Ryngaert, *supra* n 54, pp. 60-61, and n 147-148, for further discussion.

⁶⁵ UNGA, [The scope and application of the principle of universal jurisdiction: Report of the Sixth Committee](#), (14 November 2014) UN Doc A/69/503.

'private ends' into state practice, such support will inevitably weaken. Many would suggest the principle of universal jurisdiction to deal with common problems was a positive evolution of international law and its support in relation to other crimes would be better served by a clear and accepted definition in the classical case of piracy.

IV. INTERNATIONAL PIRACY AND 'PRIVATE ENDS': A CALL FOR CONTINUED INCLUSION OF POLITICAL ACTORS

As demonstrated by the practice to date, the cases that exist are few and far between. It is expected that legal clarity on the limits of 'private ends', and its applicability to politically motivated actors, will develop slowly as further cases arise. Whilst it is true that the rulings of domestic courts, such as the *Sea Shepherd* and *Castle John* decisions, are only persuasive 'soft law' and not determinative of the international law definition of piracy,⁶⁶ it should be remembered that domestic courts are amongst the principal actors in developing the rules of jurisdiction within international law.⁶⁷ A body of consistent practice would provide clarity to the requirement of 'private ends' and the limits of state jurisdiction for piracy. It is, therefore, worth considering a few policy rationales as to why 'private ends' should follow the *Sea Shepherd* case definition as those 'not taken on behalf of a state'.⁶⁸

Firstly, 'private ends' is a requirement of piracy for the purposes of defining jurisdiction. Jurisdiction under international law denotes 'a relationship between the government [broadly defined as a rule-setter and –adjudicator] and individuals [or resources], mediated by space'.⁶⁹ Whilst territory is one 'space', the principles of extraterritorial jurisdiction are based upon other spaces, such as nationality or global necessity. For the international crime of piracy, states have consented to 'pool their sovereignty' and accept universal jurisdiction to tackle the global problems presented by piratical acts on the high seas.⁷⁰ Given that exceptions to the exclusive jurisdiction of the flag state on the high seas are to be restrictively interpreted, the rationale for universal jurisdiction over piratical acts must equally apply to politically motivated acts to accept the above definition of 'private ends'. This

⁶⁶ [Statute of the International Court of Justice](#) (26 June 1945), 3 Bevans 1179, entry into force 24 October 1945, art. 38(1)(d).

⁶⁷ C. Ryngaert, 'The Concept of Jurisdiction in International Law', *Working Paper* (2014), p. 9 forthcoming in, A. Orakhelashvili (ed.) *Research Handbook on Jurisdiction and Immunities* (Edward Elgar, 2015); A. Aurst, *Handbook of International Law* (Cambridge University Press, 2nd ed., 2010), p. 42.

⁶⁸ [The Institute of Cetacean Research v. Sea Shepherd Conservation Society](#), *supra* n 10, p. 4.

⁶⁹ R. T. Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97(4) *Michigan Law Review* 843, p. 904; quoted and discussed, C. Ryngaert, *supra* n 54, p. 79. Bracketed text Ryngaert's.

⁷⁰ Applying the language of C. Ryngaert, *supra* n 54, p. 29.

rationale is not the denationalisation of piratical vessels, or the heinous nature of the acts, but rather the threat piracy poses to the common interest of all states in the freedom of the high seas.⁷¹ Acts of violence, depredation or detention threaten the rights to freedom of navigation which all states enjoy.⁷² For state sanctioned piratical acts, the victim state may call on the responsibility of the other state to protect its freedom of navigation. But for punishing and dissuading piratical acts by private individuals or organisations, it matters little whether the actors are motivated by political desires or other ambitions. Such violence, depredation or detention presents as much a threat to the universal open access to the oceans and freedom of navigation by all states, whatever the motives of the individual.⁷³

The argument that 'private ends' excludes political acts would also conflict with the principle of exclusive flag state jurisdiction; a principle which ensures the freedoms of the sea can be exercised by states and their flagged vessels.⁷⁴ Vessels on the high seas are only to be subject to those restrictions imposed by their flag state or international law. Allowing 'political' private individuals to commit acts of violence, depredation or detention against other vessels on the high seas, would be to accept that *UNCLOS* provides an exception for private individuals to enforce their political decisions against other individuals, organisations or states.⁷⁵

Finally it should be noted that the jurisdiction provided for piracy is one of a discretionary maximum nature. There is no duty to exercise jurisdiction and, therefore, the inclusion of political ends would not lead to an opening of the floodgate.⁷⁶ As demonstrated in *Sea Shepherd*, states with jurisdiction over the vessel or individuals involved, based upon other principles of international law, have not acted. 'While the governments of the United States, Australia, New Zealand, and the Netherlands have criticized the "dangerous or violent activities" of all participants in the standoff, none have taken any action to interfere with Sea

⁷¹ See discussion in forthcoming article A. N. Honniball, *supra* n 14.

⁷² *UNCLOS*, arts. 87(1)(a); 90. Depending on the political objectives of the organisation, it may threaten further freedoms of the sea e.g. marine scientific research, *UNCLOS*, art. 87(1)(f) or fishing, *UNCLOS*, art. 87(1)(e).

⁷³ The concerns of 'maritime security and the safety of life at sea' (*UNCLOS* at 30, *supra* n 61, p. 4) could equally be threatened.

⁷⁴ *UNCLOS*, art. 92(1).

⁷⁵ Contrary to *Le Louis* which suggested; 'all nations being equal, all have an equal right to uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another', *Le Louis*, High Court of Admiralty (1817) 165 English Reports 1464, p. 1479.

⁷⁶ Even in clear cases of piracy, violence and threats to the global values of navigation and unhindered commerce, states' enforcement action is often not forthcoming, due to a lack of ability or will. '[W]hile the crime is nominally an injury to all countries and the international legal order, individual states perceive few benefits to enforcing the norm themselves', E. Kontorovich, "[A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists](#)" (2010) 98 *California Law Review* 243, p. 274.

Shepherd's activities'.⁷⁷ This may be based upon the deference to a particular political cause,⁷⁸ or a political preference to promote the freedom to protest over the unhindered freedom of navigation of others, but it has been suggested the human rights of freedom of speech and assembly, as well as the law of the sea freedom of navigation,⁷⁹ do not incorporate protests involving violence, and detention.⁸⁰ Therefore, the decision to limit the exercise of enforcement action against protest vessels involving piratical violence, detention or depredation, should be left as a matter of domestic law and policy preference, not as a matter of an international law limiting jurisdiction through the qualification of 'private ends'. To do otherwise is to impose the acceptance of a limitation on piracy jurisdiction, based upon a wider interpretation of the freedom of speech and assembly than that found within current international law; i.e. one that allows violence and depredation.

V. CONCLUSIONS

This ICD Brief has attempted to highlight the ongoing debate surrounding the requirement within the international law definition of piracy that such piratical acts be 'for private ends'. The focus has been on whether such a 'private ends' requirement covers politically motivated private individuals and organisations. But whether the exception that public ends (and thus not private) extends beyond the original insurgency example to other non-state actors has yet to be conclusively resolved within international law. Nevertheless, the importance of resolving this ambiguity has been discussed, and the limited court practice to date demonstrates an understanding that the political ideals of an organisation should not protect it from the jurisdiction of all states. Whatever the motives of the actor, piratical acts represent a threat to the common interests of all states. A limitation to universal jurisdiction based upon the actors' political ends would not appear to be in keeping with the general thrust of the law of the sea or human rights requirements; and nor is it demanded from the legislative history of *UNCLOS*. Therefore, states wishing to make use of piracy jurisdiction to

⁷⁷ [Sea Shepherd Conservation Society v. The Institute of Cetacean Research \(Petition for Writ of Certiorari\)](#), *supra* n 7, p. 8.

⁷⁸ '[T]here has been a discernible degree of tacit toleration of confrontational protests, especially where the central motivation of the activists is broadly aligned with that of the state in question', R. Caddell, 'Regulating the Whale Wars: Freedom of Protest, Navigational Safety and the Law of the Sea in the Polar Regions', (2014) 6(1) *The Yearbook of Polar Law* 497, p. 543. In this case, the lack of will to support the Japanese whaling programme found contrary to international law; [Whaling in the Antarctic \(Australia v. Japan: New Zealand Intervening\) \(Judgement\) \(Merits\)](#), International Court of Justice, General List No. 148, 31 March 2014.

⁷⁹ 'Indeed, there appears to be near universal support for a right to non-obstructive protest at sea', R. Caddell, *Ibid*, p. 504.

⁸⁰ Reviewing European court practice, '[t]he Court has tended to offer little protection to protest activities that are not conducted in a peaceful and unobtrusive manner [...] "physically impeding the lawful activities of others" lay outside the protection accorded to freedom of expression under the Convention', *Ibid*, p. 509.

prosecute violent political activists at sea should continue to develop an understanding of 'private ends' as those 'not taken on behalf of a state'.

And what of those activists who have a legitimate role in raising political concerns for activities being undertaken at sea, often outside the purview of landbound citizens' awareness? In the face of legal uncertainty as to the scope of states which may take enforcement action against them, one conclusion of R. Caddell appears to be sound advice; 'maritime activists may pursue their ideals without committing acts of violence or depredation towards other vessels and thereby remain outside the parameters of the offence'.⁸¹

⁸¹ *Ibid*, p. 525.