

CHALLENGES OF PIRACY IN THE TWENTY FIRST CENTURY AND TREATY PROVISIONS RELATING THERETO UNDER THE UNITED NATIONS CONVENTION ON LAW OF THE SEA 1982*

Abstract

*This paper attempts to critique the prevailing concept of piracy as contained in the Law of the Sea Convention 1982 in order to see whether the provisions contained therein are sufficient to meet the present challenges of piracy especially the glaring problems of sanctity of the sovereignty of coastal States over their territorial seas and a seeming lack of political will to prosecute pirates. In doing this, the paper looks at the concept of piracy as it was understood from old times, through the period of privateering to the modern era of international treaties culminating in the Law of the Sea Convention 1982. It specifically x-rays the modern day treaty provisions of what amounts to piracy, highlighting its elements as contained in the law and juxtaposing same with the reality of the modus operandi of modern day deprecators by sea. In particular, the study comments on the geographical requirement of the offence and the academic fireworks generated by phrase 'for private ends', with this writer showing a bias for the argument that the phrase means actions without State sanction and nothing more. Finally, the study examines the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter, SUA Convention) and its test case applicability in *United States v Shi*¹.*

Keywords: Piracy, Treaty, United Nations Convention on the Law of the Sea 1982, 21st Century

1. Introduction

Piracy is a subsisting international problem that has in the last two decades attracted unprecedented attention. This is as a result of an unusual upsurge in such activities in the Gulf of Guinea, the Malacca and Singapore Straits and also in East Africa, off the coast of Somalia². The International Maritime Bureau reports that a total of 156 incidents of piracy and armed robbery against ships were reported to the ICC³, International Maritime Bureau's (IMB) Piracy Reporting Centre (PRC) in the first nine months of 2018 compared to 121 for the same period in 2017. The 2018 figure is broken down as 107 vessels boarded, 32 attempted attacks, 13 vessels fired upon and four vessels hijacked. It reports further that, the Gulf of Guinea accounts for 57 of the 156 reported incidents. While most of these incidents have been reported in and around Nigeria, the Nigerian Navy has actively responded and dispatched patrol boats when incidents have been reported promptly. There has also been a noticeable increase in the number of vessels boarded at the Takoradi anchorage, in Ghana. It is noted that 37 of the 39 crew kidnappings for ransom globally have occurred in the Gulf of Guinea region, in seven separate incidents. A total of 29 crew members were kidnapped in four separate incidents off Nigeria—including a 12-crew kidnapping from a bulk carrier off Bonny Island, Nigeria in September 2018⁴. The negative colossal effect of this on International Commerce cannot be overemphasized when looked at against the backdrop of the fact that ninety percent of world trade is carried out by the international shipping industry with about fifty thousand merchant ships carrying all sort of cargo around the world, in addition to hundreds of cruise liners carrying hundreds of thousands of people and over one million seafarers from every nationality of the world⁵The desperation of these pirates is shown in the ferocity with which they attack, many

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¹*United States v Shi* (2008)525f.3d 709 United States Court of Appeals for the Ninth Circuit.

² In 2007, attacks at sea or in port saw twenty mariners killed, over 153 injured and 194 kidnapped or taken hostage. 16 ships were hijacked and three crews remained unaccounted for in April 2008. Figures were lower in 2006 with 13 death, 112 injured, 180 kidnappings and 10 hijackings. In 2004, 30 crew and passengers were killed and in 2005 an astonishing 652 crew members were kidnapped. -Piracy Reports of 2007,2006,2004,2005 quoted by D. Guilfoyle (2012) Shipping Interdiction and the Law of the Sea (Cambridge Studies in International and Comparative Law) Cambridge University Press. Page 52

³ International Chamber of Commerce

⁴ Sourced from International Chamber of Commerce official website. Available at: <https://www.icc-ccs.org/index.php/1254-record-low-hijackings-yet-danger-persists-in-gulf-of-guinea-shows-latest-global-piracy-report> Accessed 18/2/2019

⁵ Z. O. Ozcayir, (2010) International and Regional Organizations: Journal of International Maritime Law. JIML IMO: P.16

times with resultant loss of life and property. This is best graphically explained by an IMO⁶ report in reference to the attack on a vessel, 'TM Buck' thus,

Eight Pirates armed with automatic weapons and grenades in two speed boats fired upon the ship...master took evasive maneuvers ...sent distress alert and all crew closed doors and hid in the super structure. Two grenades hit a lifeboat which caught fire. Pirates continued shooting and at 1000 UTC (Coordinated Universal Time), they boarded using a portable ladder. Pirates could not enter superstructure but continued shooting at the bridge. Pirates left at 1100UTC.....There were bullet holes in superstructure and masters cabin window. No injuries to crew⁷.

2. What Is Piracy

The crime, piracy has for centuries gained international notoriety and alongside slavery has attained the status of *Jus gentium*⁸, so that every State has jurisdiction to try suspects for the offence of piracy without recourse to the flag State of the vessel or the nationality of the suspects⁹. This universal jurisdiction is traceable to ancient Rome and particularly the postulation by Roman Lawyer, Cicero who had argued that '*pirata non est ex perdullium numero definitus, sed communis hostis omnium*' i.e., [piracy is not a crime directed against a definite number of persons but rather aggression against the community as a whole]¹⁰. Between the period 1400-1600 prominent jurists at the time like Hugo Grotius and Alberico Gentili further shaped the concept with Gentili arguing in his work¹¹ that acts of piracy were *contra ius gentium, et contra humanae societates communion* [against the law of nations and against the community of human society]¹². However, arriving at what actually amounts to piracy as provided by the Law of the Sea Convention has created wide and varying debates with different opinions canvassed. This is occasioned by the nebulous nature of the concept from historical times. According to Hall¹³, 'Pirates are persons who deprecate by sea or land'. The shortcoming of this definition however is that if piratical acts include actions on land then piracy will not occasion universal jurisdiction because International law respects sovereignty of States and will not grant States jurisdiction to try pirates for offences committed within the territory of another State. The inclusion of acts on land effectively removes the crime from the jurisdiction of International Law and places it within the ambit of the territorial jurisdiction of the coastal State. William Blackstone viewed piracy as committing acts of robbery and depredation upon the high seas which if committed on land will amount to a felony¹⁴. According to Lauterpatcht, piracy is 'every unauthorized act of violence against persons or goods committed in the open sea by a private vessel against another vessel or by a mutinous crew or passengers against their own vessel'¹⁵. Guilfoyle in his essay cited above points out that it is only recently that the term 'piracy' has been able to have a settled meaning as in historical times it was usually contrasted with State licensed privateers¹⁶. He states

⁶ International Maritime Organisation.

⁷ *ibid*@ footnote 1 pg. 52

⁸ International Customary Law acknowledged as binding on all nations and peoples of the earth.

⁹ The UN Security Council in 2011 restated the crime of Piracy as occasioning universal jurisdiction in Resolution 1976(2011) par 14. A full text of the resolution can be sourced at <http://unscr.com/en/resolutions/1976> Accessed 18/02/2019

¹⁰ Anderson J. (2013) A Sea of Change Reforming the International Regime to Prevent, Suppress and Prosecute Sea Piracy *Journal of Maritime Law & Commerce* Vol. 44 No 1pg 47. States that it is from Cicero's argument that the phrase '*pirata est hostis generi humani* (pirates are the enemy of all mankind) was coined.

¹¹ 'De iure belli'(1589)

¹² *ibid*

¹³ Hall, W (1880). *International Law*. Oxford University Press. Pp. 214-215

¹⁴ William Blackstone *Commentaries on the Law of England 1765-1769* BOOK 4, CHAPTER 5 Available at <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-405/> Accessed 18/02/2019

¹⁵ Jennings, R and Watts, A (2008) *Oppenheim's International Law: Volume 1 Peace* 9th Edition. Oxford University Press. PP 608-609

¹⁶ Anderson J, offers a brief history of privateering thus, 'In 1602 the Portuguese captured a Dutch Ship near Canton and Macau. This was most likely due to the Treaty of Tordesilla (1494) and the Treaty of Saragossa (1529), which divided the Oceans and islands between Spain and Portugal. This division resulted in Spain and Portugal treating any non-Iberian ship as a pirate regardless of whether or not any acts of piracy or sea robbery had been committed. The English, French and Dutch gave no validity to these treaties and considered any act hindering free passage on the high seas by Spain and Portugal as acts of piracy. Thus in this context, Grotius wrote in *De iure praedae* (1606) that Portuguese pirates were worthy objects of universal hatred in that they were harmful to all mankind....In an effort to justify Dutch retaliation without being considered a common enemy of mankind, clever legal scholars such as Grotius began developing a legal

further that the term was actually used to describe a range of activities in the renaissance, many of which were either lawful or seen as self-help such as exacting taxes on vessels using disputed sea lanes. It was thus common for sixteenth and seventeenth century sovereigns to refer to political allies as privateers and to enemies as pirates. A second confusion often also resulted from failing to distinguish between piracy at international law and various national offences more widely or normally called piracy. The second problem is compounded by the absence of a dedicated International Court for piracy thereby making reliance on national authorities to prosecute and punish the offence inevitable¹⁷.

The first international instrument relating to piracy can be said to be the Declaration of Paris (1856) which among other things abolished privateering. The declaration was signed by all the major imperial powers at the time and later acceded to by Japan (1886), Spain (1908) and Mexico (1909)¹⁸. In 1932 a group of legal scholars met at Harvard and drew up a convention on piracy known as the Harvard Draft. It was largely a codification of customary international law and its articles formed the bedrock for the 1958 Geneva Convention on the high seas and the 1982 Convention on the Law of the Sea¹⁹. The most prominent contemporary source of the International law of piracy is in Articles 100-107 and 110 of the Law of the Sea Convention 1982. These provisions are on all fours with Articles 14-22 Geneva Convention on the High Seas. This fact therefore lends credence to the postulation that the provisions relating to piracy in the LOSC 1982 are in fact a codification of Customary International Law because the States which are not signatories to the LOSC 1982 are inadvertently parties to the 1958 Geneva Convention. The nebulous nature of the concept of piracy is put to rest by the subsisting definition provided in the Law of the Sea Convention 1982 which provides in Article 101, that piracy is defined as

- (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 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, person 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 the knowledge of facts making it a pirate ship or aircraft
- (c) Any act of inciting or of intentionally facilitating an act described in sub paragraph (a) or (b)²⁰.

From the definition provided by the LOSC it can be seen that five elements are needed for an act to qualify as an act of piracy, namely that;

*The act must be acts of violence, detention and or depredation

* These acts must be carried out for private ends

* These acts must be perpetrated by crew or passengers of one ship against another ship

* These acts must occur in the high seas or in waters outside the jurisdiction of any State.

Academics have tended towards seeing the elements of the definition as too narrow and one writer points out that;

‘The definition of piracy is rather narrow as it includes only actions on the high seas and only actions undertaken by one ship against another ship. So forms of violence conducted on the territorial seas as well as without the involvement of two ships such as the violent taking of control of a ship by members of crew or passengers even when the follow up consists of holding to ransom the ship and its crew and passengers are not included’²¹.

distinction between the unlawful and lawful seizure of property on the high seas. Sea robbery was bifurcated’ on the side of the unlawful seizure of spoils we find the pirate, on the other side the privateer his lawful brother’ Sourced at - Anderson J. (2013) A Sea of Change Reforming the International Regime to Prevent, Suppress and Prosecute Sea Piracy Journal of Maritime Law &Commerce Vol. 44 No 1pg 47.

¹⁷Guilfoyle (2012) Shipping Interdiction and the Law of the Sea (Cambridge Studies in International and Comparative Law) Cambridge University Press. Pg. 27

¹⁸ J. Anderson (2013) A Sea of Change Reforming the International Regime to Prevent, Suppress and Prosecute Sea Piracy Journal of Maritime Law &Commerce Vol. 44 No 1pg 51.

¹⁹ ibid

²⁰ These provisions namely Article 101-107 are on all fours with the Articles 14-22 Geneva Convention on the High Seas

²¹ T. Treves, T. (2009) Piracy, Law of the Sea and Use of Force. Developments off the Coast of Somalia- European Journal of International Law Vol. 20.2

The fears of the above referenced writer is real as the position of the law in relation to vessel to vessel attacks may not be applicable where for example, armed men on an offshore platform seize a distressed vessel that has anchored on it, or where armed men attack an offshore installation or even a situation could also arise where a crew or passengers forcefully take control of a vessel and carry out acts of violence and robbery and it will not amount to piracy under the convention because it had occurred from within the ship. The incident aboard the *Achille Lauro* is a pointer to this shortcoming²². Furthermore, reference to acts of violence or detention or any act of depredation without further provisions of a threshold may leave room for doubts as to the extent of violence that will suffice for an act of piracy. Another shortcoming on this point is the fact that the definition does not cover attempts to commit piracy. So while there may be *mens rea*²³ present in the acts of potential pirates, a failed attempt to commit acts of piracy will not qualify as piracy²⁴. Beyond the above highlighted conceptual shortcomings of piracy as contained in the Law of the Sea Convention, three other very contentious issues emanating from the definition of piracy in the LOSC deserving special mention are; Whether the requirement that piracy be committed for private ends excludes politically motivated offences or other altruistic pursuits jeopardizing maritime safety; The consequence of limitation upon jurisdiction that the crime must occur on the high seas or outside the jurisdiction of any State; The meaning of universal jurisdiction over piracy. They are discussed hereunder.

3. Politically Motivated Violence and Other Altruistic Pursuits

A major source of academic debates stems from the postulation as provided in Article 101 that for an act to amount to piracy, it must have been committed for private ends. The question is therefore asked that, if some sort of Robin Hood were to attack and rob a vessel and thereafter distribute the loot to the poor, will he be said to be acting for ends other than private ends? Interestingly, one school of thought holds this view and posits that illegal acts of violence for political reasons are excluded from the definition. Malcolm Shaw holds the view that, 'The essence of piracy under international law is that it must be committed for private ends'. In other words, any hijacking or takeover for political reasons is automatically excluded from the definition of piracy²⁵. The shortcoming of this position put forward by this school of thought is that private ends will be decided based on subjective reasoning. The opposing school of thought holds that any action without State or government sanction is for private ends. They posit that no matter how moral or altruistic ones objectives may be, as long as it does not have State sanction, it will amount to acts geared towards private ends. There however is a very thin line in determining if people who act for political ends and without State support will on all fours be termed pirates as Shaw's position above is not final. Consideration must be had for factors like status of the government against whom the individuals act and response of third States to the incident. In this regard, the *Santa Maria* incident is relevant. Here the Portuguese liner, *Santa Maria* was hijacked by a group of dissidents with the aim of overthrowing the Portuguese government. While Portugal tagged the dissidents as pirates, other saw them as freedom fighters. Indeed Brazil granted them asylum and there is a strong view that their action was not for private ends since among the comity of nations at that time, the Portuguese government headed by dictator, Salazar was perceived as a rogue regime²⁶.

Another issue having direct bearing on the point of motives of private ends is the actions of militant environmental protection activists who go to any length in pursuit of their objectives and deny that they fall into the category of pirates since in their estimation they are not acting for private ends. Two cases are crucial here: *The Castle John v NV Babeco*²⁷ and *Institute of Cetacean Research &ors v Sea Shepherd & Paul*

²² On October 7th 1985, four members of the Palestinian Liberation Front aboard the eponymous Italian Passenger ship hijacked the ship and demanded the release of Palestinian prisoners in foreign jails. Since the offenders operated from within the ship, their action fell short of being correctly classified as piracy

²³ The mental element which together with the actus reus (physical element) constitute the commission of an offence

²⁴ Yoshifunmi Tanaka reports that at UNCLOS 1 negotiations a proposal by the British delegation to include attempts in the definition of piracy was defeated. Y. Tanaka (2001) *International Law of the Sea*. Cambridge University Press Pg. 355 footnote 6.

²⁵ M. Shaw (2010) *International Law*. 6th Ed. Cambridge University Press. Pg. 615

²⁶ Another incident of note is the 1975 capture of an American merchant vessel, *The Maraguez* by a Cambodian State owned Vessel. The United States Government did not recognize the Khmer Rouge regime thus they considered the Cambodian ship a private ship and labeled the incident as an act of piracy. China on its part considered the recapture of the ship by the US as an act of piracy. However whether a ship is private or public may ultimately be a question of international relations

²⁷ (1988) 77 ILR 380

Watson²⁸. In the former case, Green Peace activists boarded, occupied and caused damage to two Dutch vessels engaged in dumping toxic waste. The Belgian Court de Cassation²⁹ ruled that the acts were committed for private ends and consequently Green Peace had committed piracy. The Sea Shepherd Conservation Society has attracted a lot of attention on account of its unusual methods of protecting the environment especially its Whale wars so its case with the Institute of Cetacean Research in an American Court deserves more than a passing reference. In 1986, the International Whaling Commission established a moratorium on commercial whaling with an exception in regard only to whaling for purposes of scientific research. Japan however disregarded this moratorium and continually engaged in commercial whaling in the Southern Ocean under the guise of scientific whaling³⁰. In the last 20 years, the Japanese with its fleet of Whaling vessels under the agency, Institute of Cetacean Research has plundered these areas without regard to prevailing international norms³¹. The Sea Shepherd Conservative Society on the other hand is a splinter group that broke off from Greenpeace based on its belief that more radical approaches were required to effectively checkmate the activities of those it believes are engaged in activities detrimental to the sustainability of the marine environment. It is under the command of an eccentric Paul Watson³².

Sea Shepherd has in pursuit of its objectives of stopping whaling and protecting the marine environment generally, engaged the Institute of Cetacean Research in the Southern Ocean with different untoward means ranging from the throwing of glass bottles containing paint or butyric acid, launching of safety flares with metal hooks, throwing of smoke bombs, use of high powered lasers, dragging towing lines to destroy the propellers of ships to the direct ramming of the institutes vessels at sea³³. The Institute therefore filed claims before a United States Court, among other things claiming that the activities of Sea Shepherd amounted to piracy. The district court dismissed the claims but on appeal, the Ninth Circuit gave judgment to the plaintiffs holding that the LOSC and SUA Conventions defined piracy in such plain language that certainly includes the modus operandi and actions of the Sea Shepherd Conservation Society, holding famously that ‘Pirating activities cannot be relegated to storybook peg legged plunderers roaming the high seas in order to gain material wealth. A plain reading of the internationally agreed definitions of pirating found in UNCLOS and the SUA, the private ends requirement of pirating includes those ends of a personal nature, including private conservation efforts’³⁴. The United States Court of Appeal, Ninth Circuit held in effect that private ends include those pursued on personal, moral and philosophical grounds and that the perpetrators believe

²⁸ Institute of Cetacean Research (A Japanese Research Foundation); Kyodo Senpaku Kaisha, Ltd, (A Japanese Corporation); Tomoyuki Ogawa, (An Individual) ; Toshiyuki Miura, an Individual (Plaintiffs/Appellants) v Sea Shepherd Conservation Society, (An Oregon Nonprofit Corporation)& Paul Watson (Defendants/Appellees), Appeal. 708 F.3d Court of Appeals 9th Circuit 2013 , Opinion (Judgment available at: <https://caselaw.findlaw.com/us-9th-circuit/1687415.html> Accessed 20/2/2019

²⁹ Court of last resort in Belgium

³⁰ The ICJ has very recently ruled against Japan outlawing its bogus research program which it has used as a decoy to engage in commercial whaling

³¹ It whaling fleet is made up of three small ships for pursuing whales, one large ship for holding whale carcasses and another large ship dedicated to protecting the others from intruders.

³² Over the past thirty years, Paul Watson has used his privately funded navy to enforce international conservation law by chasing, harassing, scuttling and in some cases ramming illegal whaling and fishing vessels on the high seas. As of 2008, Watson claimed responsibility for sinking ten ‘illegal’ whaling ships. He claims that the United Nations World Charter for Nature (Charter for Nature) provides Sea Shepherd with the authority ‘to act on behalf of and enforce international conservation laws’ in areas outside national jurisdiction. J. Roeschke,(2009); ‘Eco- Terrorism and Piracy on the High Seas. Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters.’20 Villanova. *Environmental Law Journal*. Pg. 99-137

³³ In one case, *Fish & Fish Ltd v Sea Shepherd UK &Ors*, it is reported that, ‘ In 2010, Sea Shepherd launched ‘Operation Blue Rage’ campaign in the Mediterranean ,acting against what it claimed to be violations of International fisheries law by the claimant, alleging that it was illegally buying blue fin tuna in Libya..... On June 17 2010, Sea Shepherds vessel, the Steve Irwin, attacked two vessels belonging to the claimant that were towing cages of blue fin tuna. One of the vessels was rammed by the Steve Irwin, while divers from the Steve Irwin cut open the cages, releasing a significant volume of fish into the wild at an estimated cost of 760,000 pounds to the claimant’ – Analysis and Comments: *Fish & Fish Ltd V Sea Shepherd UK*; R. Caddell, (2013) *Journal of International Maritime Law*. Pg. 19

³⁴ R. Keefe, (2013) *International Law*. Ninth Circuit Issues Preliminary Injunction Recognizing Activists Conservation Society as Pirates-*Institute of Cetacean Research v Sea Shepherd Conservation Society*. 36 *Suffolk Transnational Review*. Pg. 461

themselves to be serving the public good does not render their ends public³⁵. The court therefore granted an order against the defendants, Sea Shepherd and its leader Paul Watson restraining them from physically attacking any vessel engaged by the plaintiffs or from navigating in a manner that is likely to endanger the safe navigation of any such vessel³⁶. Although this judgment is not of binding effect in other jurisdictions, it has persuasive effect and will very much affect the direction in which other cases that may come up in the United States or in other jurisdictions will be decided.

A leading light in the school of thought postulating that private ends do not exclude acts of mischief for political ends is Douglas Guilfoyle³⁷. He stresses in his essay³⁸ that the phrase ‘private ends’ in conventional definitions of piracy does not exclude acts of mischief based on altruistic pursuits. He states that the common interest of all States which is served by the rule against piracy is the safety of navigation upon the high seas. Therefore acts of violence in form of rape, revenge, hijackings etcetera, are all hazards to navigation whether or not they are carried out for political purposes. He states further that while many writers historically refer to piracy as robbery on the high seas, the intent to rob was not necessarily part of the offence and credence is given to this postulation by the holding of the court in *Re Piracy Jure Gentium*³⁹ where the court held that , ‘...armed men sailing the high seas on board a vessel without any commission from any State could attack and kill everybody on board another vessel...without committing the crime of piracy unless they stole say an article worth sixpence...One is almost tempted to say a little common sense is a valuable quality in the interpretation of International Law’. Applying the approach of the court in this case Guilfoyle holds that the private ends requirement does not exclude politically motivated acts. He posits that the origin of the definition and the phrase ‘private ends’ is the Harvard Draft and the phrase, private ends was included there with the intent of excluding civil war insurgents⁴⁰. Thus insurgents whose actions on the high seas were limited to attacking vessels of the government they were trying to overthrow enjoyed a limited exception from being classed as pirates. The exception could therefore be understood as not being about motive but the class of vessel attacked being those that are legitimate targets for insurgents in the course of a civil conflict i.e. insurgents will be excepted where they attack only the ships of their own government⁴¹ and this is based on the premise that insurgents attacking legitimate targets in an armed conflict are exercising a limited form of public power⁴². He holds further that the test of piracy lies not in the pirate’s subjective motivation but in the lack of public sanction for his or her acts. To claim that a political motive can exclude an act from the definition of piracy is to mistake applicable concept of public and private ends. Public acts will not be ascertained by political or subjective motives of action but by reference to state sanction or authority. Acts of violence on the high seas perpetrated by people without State backing is an infringement on the exclusive

³⁵ This position has been very recently reemphasized by the Arctic Sunrise incident , where Green Peace activists operating from the Arctic Sunrise tried to gain access to Russian oil giant, Gazprom offshore oil rig in the believe that they were trying to avert impending marine pollution. They were arrested by the Russian Coast Guard. It took international pressure before the Russian Government dropped charges of terrorism against them. <http://www.independent.co.uk/news/uk/home-news/russia-arrests-30-environmental-activists-during-arctic-protest-8830165.html> Accessed 20/2/2019

³⁶ 708 F.3d Court of Appeals 9th Circuit 2013: <https://caselaw.findlaw.com/us-9th-circuit/1687415.html> Accessed 20/2/2019

³⁷ Senior Lecturer at University College, London

³⁸ Guilfoyle (2011) *Shipping Interdiction and Law of the Sea* (Cambridge University Press. Pg. 33-41

³⁹ (1934) AC 586

⁴⁰ <https://heinonline.org/HeinDocs/HarvardResearchbrochure.pdf> accessed 20/2/2019

⁴¹ In such an instance, the applicable law will be The Geneva Conventions relating to armed conflict

⁴² A very basic hypothetical analogy on this point is the subsisting conflict in Syria. If the so called Syrian rebels were to attack a Syrian State owned vessel in the high seas, they would not be said to be acting for private ends. This is primarily because they are exercising some measure of public power and have attained recognition by States not party to the conflict. According to Guilfoyle ‘Insurgents can thus be distinguished from both pirates and terrorists on the ground that they have the recognized capacity at international law to become a lawful government. This limited public power or status has nothing to do with the subjective intent of the insurgency per se, but rather the qualified form of international personality it holds as a potential future government and the fact that the exception is predicated on an objective condition; the choice of targets. Again this can be understood on the basis that any other class of vessel (foreign flagged or not) would not be a legitimate target in a civil war.

right of a State to use violence and redistribute wealth. Therefore all acts of violence on the high seas that lack State sanction and backing are for private ends.⁴³

The fact that criminal acts and by extension piratical acts cannot be excused based on political grounds is granted verve by the 1985 UN General Assembly Resolution which condemned terrorist acts wherever and by whomever committed⁴⁴ ⁴⁵. Other writers oppose the position of Guilfoyle by stating that an action will not be for private ends as long as the individual or group carrying out the activity does not derive any personal economic benefit. They give blanket exclusion to political activities and place reliance on the *Santa Maria* and *Achille Lauro* incidents. Quoting directly from one of such writers who put strong reliance on the lack of any successful prosecution of Sea Shepherd activities operating violently under the leadership of Paul Watson, she states thus, '*Sea Shepherd members also likely cannot be prosecuted as pirates because their actions are not done for private ends. Under the UNCLOS definition, illegal acts of violence and degradation are considered acts of piracy if committed for private ends on the high seas. Sea Shepherds actions of ramming whaling vessels and disabling their propellers would most likely be considered acts of violence and degradation. Although private ends is not clearly defined under UNCLOS, Sea Shepherd derives no financial profit from its harassment of whaling fleet and it's unlikely that its actions would be considered as done for private ends thus excluding the group's activities from piracy under UNCLOS much less be successful in that prosecution*^{46c} . Another writer⁴⁷ commenting on the controversy opines that the requirement of private ends has historical roots in the fact that States once sponsored or employed pirates and used them against enemy States. Also on the fact that the very nature of piracy entails that pirates must not be acting for any recognized State⁴⁸ .

4. Limitation of Jurisdiction To Piratical Acts Occurring Only in the High Seas

One of the fundamental basis for labeling acts of violence and depredation as piracy is that it must have occurred on the high seas⁴⁹. The Law of the Sea Convention 1982 stratifies the waters of the sea into, the territorial sea which is twelve nautical miles into the sea measured from the baseline of a littoral State⁵⁰, the contiguous zone which is a further twelve nautical miles from the outer edge of the territorial sea⁵¹, the Exclusive economic zone measuring two hundred nautical miles from the baseline. Beyond the Exclusive

⁴³ This much was held in *Castle John v NV Babeco (Belgian Court de Cassation 1986)* 77 ILR 537, where the court concluded that Greenpeace activists by attacking a Dutch vessel had committed piracy and could not rely upon the rule of exclusive flag state jurisdiction to exclude the jurisdiction of the Belgian court

⁴⁴ GA Res. 40/61(9th December 1985) Par 1.
<http://unispal.un.org/UNISPAL.NSF/0/2F6FF235ADA9974B85256DCC006C00A2> Accessed on 22/2/2019

⁴⁵ Guilfoyle's position is summarized in his own words thus, 'Further as seen in international treaty practice, violent acts political motivation should not be seen as relevant to its characterization as an ordinary crime. The words 'for private ends' simply emphasize that the violence involved lacks State sanction or authority. This lack of authority is a question that may be tested objectively and without reference to subjective motives. The only possible exception is a limited one for insurgents attacking the government vessel of their own State of nationality. Even so, the test is not the subjective motive of the insurgents but turns out the objective questions of its status as an insurgency at international law and its choice of targets under the laws of war'. Guilfoyle (2012) *Shipping Interdiction and the Law of the Sea* (Cambridge Studies in International and Comparative Law) Cambridge University Press @Pg.41

⁴⁶ Campari. A. (2010) *Lovable Pirates? The Legal Implications of the Battle between Environmentalists and Whalers in the Southern Ocean*. Connecticut Law Review Vol. 42. This writer goes further to buttress her point by stating that the Belgian Court of Cassation decision against Greenpeace has not been followed by any other court more than two decades after the decision was given.

⁴⁷ L. Azubuike, https://www.researchgate.net/publication/254606791_International_Law_Regime_Against_Piracy Accessed 22/2/2019

⁴⁸ In his words, 'However it is a commonly held view that acts of violence committed on religious, ethnic grounds or for political reasons cannot be treated as piracy. It has been suggested that the phrase 'for private ends' must be understood to distinguish between State sponsored piracy or privateering which can be redressed under the laws of war and piracy which cannot. Again essential to piracy's definition is not the actor intent but whether any State can be held liable for the actions- L. Azubuike (2009) 'International Law Regime Against Piracy,' *Annual Survey of International & Comparative Law*: Vol. 15: Iss. 1, Article 4. Available at: https://www.researchgate.net/publication/254606791_International_Law_Regime_Against_Piracy Accessed 22/2/2019

⁴⁹ Art. 101 (a) LOSC

⁵⁰ Art.3 LOSC

⁵¹ Art. 33 LOSC

Economic Zone are the high seas⁵². The Law of the Sea Convention 1982 provides that it is acts that occur in the high seas that qualify as piracy. The question is therefore asked; what of such acts of violence and depredation that occur in the EEZ or in the territorial waters of the littoral State? Such acts as a matter of necessity fall under the purview of internal laws of the littoral State and in such a situation where a vessel is attacked within these zones, the flag State of such attacked vessel has a right to demand redress from the littoral State in whose territory the attacks occurred. The plank upon which the geographical restriction of piracy to the high seas rests is that, it ensures orderliness and respect for the principles of sovereignty as the grant of universal jurisdiction for acts of piracy would mean that if the offence is not restricted to the high seas at international law, other States will find themselves having the authority to try offences occurring within the territory of a littoral State. That would be an ugly situation. Guilfoyle reports that during the third UN Conference on the Law of the Sea⁵³, Peru mooted the idea of amending the definition of piracy to include acts committed within the EEZ. The suggestions were rejected⁵⁴. It should however be noted that Article 58(2) LOSC seems to suggest that the high seas regime of criminal law enforcement will be applicable in the EEZ thus suggesting that acts of piracy within this zone can be subject of International Law⁵⁵.

5. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

Several acts of maritime mischief have escaped being termed piracy on account of the customary international law definition of the offence as contained in the Law of the Sea Convention which makes it compulsory that for the offence to be rightly termed piracy, it must have occurred in the high seas or in areas beyond the jurisdiction of any State; the attack must have proceeded from one vessel against the victim vessel and that the act must have been for private ends. In order to plug the loopholes in the LOSC and particularly as a response to the politically motivated hijackings of the '80s especially the Achille Lauro incident, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988⁵⁶ was drafted and adopted. A brief relay of the background to the convention's birth will suffice at this point. In 1985, The Achille Lauro, an Italian flagged cruise ship which was sailing from Alexandria to Port Said was seized by some members of the Palestine Liberation Front, a faction of the Palestine Liberation Organisation. The hijackers killed one passenger, a physically challenged American. Some characterized the hijacking as piracy while others did not see it as such because of the perceived political motives of the hijackers and the fact that a second ship or vessel was not involved. The supposed gaps coupled with the stark reality of the incident gave the impetus for Italy supported by Austria and Egypt to propose a convention to address maritime terrorism. Essentially, the resulting SUA Convention eliminates the three restrictions contained in the LOSC. It is imperative to note however that unlike the LOSC which is reflective of customary international law and therefore has universal application, the SUA Convention is only binding on State parties to it. Thus it is still of limited application and for those persuaded that the structures contained in LOSC are unsavory, SUA does not for this reason offer much relief⁵⁷. Article 2 of the SUA Convention states that the convention does not apply to a warship or a ship used for law enforcement by the Navy, police or customs. Article 3 criminalizes situations where a person unlawfully and intentionally seizes or exercises control over a ship by force or threat of force or intimidation; carries out acts of violence on board a ship if such act is likely to endanger the safe navigation of the ship; communicates false information likely to endanger safe navigation; injures or kills any person aboard a ship, destroys or damages maritime navigational facilities or interferes with their operation; places or causes to be placed on a ship any device or substance likely to destroy the ship or its cargo or endanger safe navigation. Article 3(2) criminalizes attempts to carry out any of the acts stated above. Article 4 includes the territorial sea as part of areas under which the convention will apply. Article 6 mandates State parties to compulsorily establish jurisdiction over offences listed in Article 3 whenever the offences are committed⁵⁸. Article 10 makes it obligatory for a State party to where an offender is found in its territory hand over the

⁵² Art. 86-120 LOSC

⁵³ This conference lasted for nine years; 1973-1982

⁵⁴ Guilfoyle (2012) *Shipping Interdiction and the Law of the Sea* (Cambridge Studies in International and Comparative Law) Cambridge University Press. Pg. 43-44

⁵⁵ Y. Tanaka (2001) *International Law of the Sea* Cambridge University Press. Pg.357.

⁵⁶ Hereinafter referred to as the SUA Convention

⁵⁷ L. Azubuike (2009) 'International Law Regime against Piracy,' *Annual Survey of International & Comparative Law*: Vol. 15:Iss. 1, Article 4, page 56. Also available at: https://www.researchgate.net/publication/254606791_International_Law_Regime_Against_Piracy Accessed 22/2/2019

⁵⁸ SUA Convention can be accessed online at <https://www.jus.uio.no/english/services/library/treaties/07/7-04/safety-maritime-consolidated.xml> Accessed 28/2/2019.

person to competent authorities without delay if it is not going to extradite him or her. The person shall be prosecuted in accordance with the laws of that State. Article 12 calls on State parties to assist each other in respect of prosecutions under the convention especially in relation to obtaining evidence at their disposal⁵⁹.

Following after the September 11 2001 terrorist attacks on the United States of America and the realization that global terrorism had taken a more threatening dimension, the International community fearing that the seas could be another avenue for terrorist attacks started the process for drafting a protocol to the 1988 convention that will meet with the realities of the time⁶⁰. The SUA Protocol of 2005 was therefore drafted and adopted. A major significance of the 2005 SUA Protocol is that it broadens the list of offences by adding three more categories of new offences. The first category of new offences relates to the using of a ship as a weapon and this must be done with knowledge and a desire to intimidate a government or State to carry out the wishes of the perpetrators⁶¹. The second aspect is in respect of non-proliferation offences that are intended to strengthen the war against the proliferation of weapons of mass destruction⁶². This is in addition to the initial convention which focused on acts which threaten the safety of maritime navigation. The third category relates to aiding and abetting. It makes it an offence to transport any person by sea who has committed an offence under the SUA Convention, its 2005 protocol or any other UN terrorism convention with the aim of evading prosecution⁶³. Article 8bis provides for the power to board a ship seaward of the outer limit of the territorial sea where there are reasonable grounds to suspect that the ship or a person on board the ship is, has been or is about to be involved in the commission of an offence under the protocol.

One very important case, and in fact the first case in 200 years where the United States has put into effect its right to exercise universal jurisdiction in relation to piracy is the case of *United States v Shi*⁶⁴. The case is even more important because it is the first trial in which the provisions of the SUA Convention were tested in a court room throughout the world. Here, the defendant was a Chinese national aboard a sailing vessel employed as a cook. He deposed to the fact that the captain and other officers on the vessel maltreated him and severely taunted him. On one of such instances of maltreatment, the defendant stabbed and killed the captain and first officer. He with the aid of knives commandeered other members of the crew and ordered them to sail for China. The surviving members of the crew overpowered Shi after two days, bound him with ropes and confined him to a storage compartment. They thereafter sailed for Hawaii in the United States. Few days later, the vessel was boarded by the US Coast Guard and brought into harbor. The flag State Seychelles waived jurisdiction and Shi was indicted for violating 18 USC 2280⁶⁵. In court, the District Court upheld jurisdiction and ruled that the SUA Convention does not give jurisdictional priority to the flag or home state over a nation in which the alleged offender is later found. Shi's defence was predicated on the position that the SUA Convention did not apply to non-terrorist acts and in support of the postulation, his lawyers presented to the court the writings of Malvina Halberstan⁶⁶. Her academic writings posited that the convention will not cover anything that is not terrorism related. The court however rejected this position and held that the wordings of the statute were clear and unambiguous in making illegal any 'act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship as well as forcible seizure of vessels'⁶⁷. Shi was therefore handed a 36 years sentence to be served in a Hawaiian jail. According to Anderson 'However, the ninth circuit erred in its finding since the use of violence and subsequent acts never met the legal definition of piracy for two main reasons. First, Mr. Shi simply wanted to return to China. Thus

⁵⁹ *ibid*

⁶⁰ After the 9/11 attacks the IMO adopted Assembly Resolution A 924 calling for a review of the existing measures and procedures to prevent acts of terrorism that threaten the security of passengers and crews and safety of ships. In October 2001 the legal committee of the IMO decided to review the 1988 SUA Convention in the wake of the terrorist attack on the United States. The legal committee agreed to include the review of the SUA Convention as a priority item in its work program. –Information sourced from, Lloyds MIU Handbook on Maritime Security. Ed Sam Bateman et al-2009 Chapter 12. The 1988 SUA Convention and 2005 Protocol: Tools to Combat Piracy and Armed Robbery and Maritime Terrorism pg 187 Robert Beckman

⁶¹ Article 3bis(1)(a) SUA Protocol 2005

⁶² Article 3bis(1)(b)

⁶³ Article 3ter SUA Protocol 2005

⁶⁴ *United States v Shi* (2008)525f.3d 709 United States Court of Appeals for the Ninth Circuit.

⁶⁵ American municipal law which domesticates within the United States of America the SUA Convention.

⁶⁶ American professor who led the American delegation to the diplomatic conference that produced the SUA Convention.

⁶⁷ Article 3(1) SUA Convention

the ship was never converted into a pirate ship as the intention of the ship was never piratical in nature. Second and most importantly, there was no act of violence, detention, or depredation against a second ship⁶⁸. This writer however does not agree with Anderson on the grounds that Mr. Shi was convicted based on the clear and unambiguous provisions of the SUA convention as stated above and not based on the definition of piracy as contained in the LOSC. Strengths of the SUA Convention include that it has effectively expanded the type of unlawful acts for which one could be convicted without having to pass through the rigors put in place by the customary definition of piracy as contained in the LOSC 1982. It did away with the ‘private ends’ requirement under LOSC and expanded geographic areas to include ships travelling to and from State parties irrespective of whether they are in the territorial sea or not. It also removes the two ship requirement and unlike the LOSC which encourages permissiveness in relation to prosecution of suspects, the SUA Convention mandatorily requires State parties to prosecute or extradite an alleged pirate. Its major shortcoming is that it is binding only between State parties and as such a State that is not party to the convention cannot prosecute under it.

6. Conclusion and Recommendations

In concluding, it is pertinent to note that the assumption that the offence of piracy is obsolete is apparently untrue and misleading. The offence still thrives and requires evolving measures to curb it. Although measures put in place in terms of the ReCAAP⁶⁹, United Nations Resolutions, the SUA convention and soft law like IMO Resolutions and the Djibouti Code of Conduct have been helpful, much more needs to be done to effectively deal with the offence. In relation to the SUA Convention, the initial response to the 1988 Convention was not very encouraging as it garnered less than enough signatories to make its effect as widely felt as it ordinarily should be. The response after the September 11 2001 attacks on America culminating in the SUA 2005 Protocol and the wide acceptance it gathered among States making it more far reaching is commendable. However, there is still the need for States who have not ratified it to do so in order to fill the vacuum created by the customary definition of piracy contained in the LOSC. This is important because as pointed out earlier, the SUA Convention and its protocol are only applicable between States which are party to it. As it relates to the LOSC, it is suggested that a longer and more enduring solution will be to amend the definition of piracy as contained in the LOSC to remove the two ship requirement and the geographical limitation of being effective only on the high seas. The permissiveness suggested by the provisions relating to State duty to arrest and prosecute should be amended to be more compelling and obligatory. Also the issue of ‘private ends’ which inevitably leads to defences for violent idealism and politically motivated acts of violence should be either expunged or explained in definite manner. In addition to this, there needs to be in place, a clearly defined judicial process for handling cases of apprehended suspects⁷⁰. By creating such international judicial process, States will have a ready and adequate forum if they are unable or unwilling to prosecute pirates in their home countries. Pending when such International or regional mechanism for prosecution is put in place, International organizations like the United Nations and the International Maritime Organisation should work towards encouraging countries that agree to prosecute suspects from piracy hotspots and also take into consideration the concerns of other nations that have refused to prosecute for one reason or the other. This is particularly important because the overall number of suspects successfully prosecuted will serve as a deterrent to would be offenders in the future. The importance of a lack of a judicial mechanism is captured by the report of a workshop organized by the American Society of International Law thus, ‘*Although the unprecedented anti- piracy naval operations undertaken by the international community have thwarted several hijacking and kidnapping attempts on the high seas, their utility is limited by the lack of political will and capacity for prosecuting pirates*’⁷¹.

⁶⁸ J. Anderson (2013) A Sea of Change Reforming the International Regime to Prevent, Suppress and Prosecute Sea Piracy *Journal of Maritime Law & Commerce* Vol. 44 No 1. P. 54.

⁶⁹ Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia

⁷⁰ International law regime against piracy L Azubuike (2010) - *Annual Survey of International & Comparative Law*. This writer suggests that this should be within the framework of the International Criminal Court

⁷¹ Suppressing maritime piracy: exploring the options in international law E. Andersen, B. Brockman-Hawe & P. Goff, Workshop report, One Earth Future, 2009. Also available at http://oceansbeyondpiracy.org/sites/default/files/attachments/human_rights_law_-_saoirse_de_bont.pdf Accessed 28/2/2019.

It must also be noted that piracy is in itself a symptom of a larger problem which is land based namely poor socio-economic circumstances in the coastal States⁷². It has been suggested that a long term solution to piracy would seem to require capacity building at the domestic level. Piracy is an extension of land based violence, itself rooted in weak State institutions, poverty, domestic lawlessness and corruption. Local institutions must therefore be supported by promoting the rule of law and adding value to local economics. It has been suggested elsewhere that the permission of hot pursuit into the territorial sea in cases of piracy may be a viable option since it has been seen that the illegality of such pursuit has given room for pirates to exploit the geographical features of the Straits of Malacca and Singapore and also the failed State status of Somalia in the Gulf of Aden. It is noteworthy that this suggestion forms one of the Articles of the Harvard Draft that was jettisoned in the 1958 High Seas Convention and UNCLOS 1982⁷³. It is also suggested that in the absence of an International tribunal in the mold of the International Criminal Court, regional bodies could where there is high prevalence of piracy put in place regional courts to try suspects. In Asia for example, the ReCAAP could be amended to include a judicial system and in the Gulf of Aden, and Gulf of Guinea, the countries in the region could set up a regional court for such purposes. This off-course will encompass jurisdiction in relation to piracy and armed robbery at sea and one major result it is likely to bring will be reduction or extinction of the situation where suspected pirates are apprehended but later released on account of the lack of zeal to prosecute. Finally when the problem of piracy is looked upon the backdrop of the effect of the LOSC on one hand and regional or bilateral and multilateral initiatives on the other hand, It will be seen that while the LOSC provides a bedrock, the regional initiatives build upon the foundation laid by the LOSC to achieve their aims within the context of the varying regions. It will be seen that the regional initiatives have been more effective in tackling the problems. Against this background it is suggested that the regional bodies like the ECOWAS⁷⁴, AU⁷⁵ and ASEAN⁷⁶ take the initiative to lead the fight against piracy as they have been shown to be more effective than International responses. If the regional initiatives keep growing, it is likely that before long what may amount to piracy in one region may not be piracy in another region. Such development will effectively relegate the provisions on piracy in the LOSC to the status of a relic. That, in the long run should not matter as what matters most is that the crime of piracy and its negative effects in society are stamped out or at best reduced to the barest minimum.

⁷² According to Anderson, ‘ Over 22 years ago the threat from Barbary pirates lingered until Europeans began colonizing and occupying Northern Africa beginning with the conquest and colonization of Algeria in 1830 by France. It is the lack of rule of law in Somalia that makes the State impotent in stopping their citizens from pursuing piracy. However as long as foreign ships poach in Somalia waters and dump toxic waste, there will be a need for fishermen pirates to defend their waters. Thus not only must the rule of law be imposed on land, but also on the sea against foreign IUU (illegal, unregulated, unreported) fishing vessels. In that respect some have argued for an international task force to protect Somalia’s EEZ from illegal fishing and dumping in the hope that it will have a corresponding effect in reducing piracy’- J. Anderson (2013) A Sea of Change Reforming the International Regime to Prevent, Suppress and Prosecute Sea Piracy *Journal of Maritime Law & Commerce* Vol. 44 No 1. P. 54.

⁷³ Ibid

⁷⁴ Economic Community of West African States

⁷⁵ African Union

⁷⁶ Association of South East Asian Nations