

By Charlie Rae

Are environmental activists pirates?



Environmental activism and acts of 'eco-terrorism' on the high seas have become commonplace in recent years. Every summer, the Sea Shepherd Conservation Society attracts media attention for its aggressive protest methods against Japanese whaling in the Southern Ocean. More recently, Greenpeace activists have been detained for protesting against Russian oil drilling in the Arctic. In both cases, allegations of maritime piracy have been levelled at the activists despite their conduct not bearing the traditional hallmarks of piracy.

This article critically analyses whether the actions of organisations such as the Sea Shepherd or Greenpeace can properly be characterised as acts of piracy. In particular, the paper considers whether the universally accepted definition of piracy set out in article 101 of the *United Nations Convention on the Law of the Sea* (UNCLOS) can be satisfied in circumstances where the actions are motivated not by the prospect of financial gain, but to protect the environment. Recent judicial comment indicates that, notwithstanding their lofty motivations, environmental activists may not be mere pirates of compassion but *hostes humanis generis* – the enemy of all mankind.

WHAT IS PIRACY?

Article 101 of UNCLOS provides the globally accepted or 'black letter law' definition of piracy.¹ This definition has become part of customary law, and as such it is applicable to all nations and not just those which are signatories of UNCLOS.² According to article 101, piracy consists 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, or
 - (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).³

It is important to recognise that article 101 does not prescribe the elements of an international crime of piracy.³ Rather, it asserts the circumstances in which the concept of universal jurisdiction will be invoked: 'a special ground of jurisdiction permitting the exercise of a state's own national laws' on the high seas.⁴ Ordinarily, a ship on the high seas is subject only to the jurisdiction of its flag state.⁵ However, article 101 provides an important exception to that general principle, giving any nation state the right to seize the pirate ship and its crew and prosecute them according to that nation's domestic law.⁶ As such, universal jurisdiction effectively extends state jurisdiction to the high seas in limited circumstances, enabling any state:

...to visit, search and seize the ship, cargo and other property, arrest offenders, whatever their citizenship may be, try and punish such offenders according to the state's own domestic laws and dispose of the ship and other properties seized, as well.⁷

The extraordinary authority conferred on states by article 101 is a powerful tool in that it provides a legal basis for states to subject individuals to domestic law and legal process on the assumption that their acts constitute piracy.⁸ However, universal jurisdiction can be legitimately invoked

only where the elements of piracy set out in article 101 are met.

MEANING OF 'PRIVATE ENDS'

The requirement that the acts of violence be committed 'for private ends' is undoubtedly the most controversial aspect of the definition of piracy in article 101. As the term 'private ends' is not defined by UNCLOS, the exact scope of the term ultimately remains unclear.

To determine the meaning of 'private ends' it is necessary to consider the actor's intent or motivations in committing the acts of violence. Therefore, the relevant inquiry is the motivation or *mens rea* behind the person's actions: are the acts of violence committed for personal gain, to further a political agenda or government policy, or to exact revenge for a personal wrong?

The phrase 'private ends' is generally regarded as a synonym for financial gain or profit, leading to the perception that intent to steal or plunder is an essential requirement for piracy. This perception derives from romantic notions of pirates as plunderers and the fact that 'in almost all cases of known piracy, the motive is personal gain'.⁹ This perception has recently been reinforced by the numerous incidences of armed robbery which have taken place off the Horn of Africa where ships and their crew have been held hostage in order to secure a large ransom. In these circumstances, it is clear that the attacks are committed for 'private ends', as the actors are motivated by personal financial gain.

However, a narrow construction of 'private ends' which includes only acts that are motivated by monetary or material gain cannot be supported. The *travaux préparatoires* for the *Geneva Convention on High Seas 1958*¹⁰ (from which the definition in article 101 is derived) clearly outline that the *animus furandi* or intent to rob is not a necessary element of the definition of piracy.¹¹ As such, acts of violence committed on the high seas need not be accompanied by a desire for gain, but may be 'prompted by feelings of hatred or revenge'.¹² As the intent to rob is not necessary, the fact that environmental organisations are generally non-for-profit and not motivated by financial gain is irrelevant. However, does the fact that environmental activism is politically motivated or addresses an issue of public interest operate to exclude their actions from being characterised as piracy?

Some commentators have suggested that the definition of piracy in article 101 categorically excludes political objectives from consideration, and as such 'acts of piracy undertaken for political ends are not to be considered piracy'.¹³ It has been argued that based on the Harvard Draft Convention on Piracy it is clear that an 'expeditious decision' was made to ostensibly exclude political acts from the definition of piracy, by emphasising that the acts must be committed for 'private' ends.¹⁴ It is widely accepted that 'private ends' is limited to acts of 'private piracy' and does not cover 'political crimes' such as insurgency.¹⁵ As such, when the Italian-flagged cruise ship the *Achille Lauro* was hijacked by members of the Palestinian Liberation Front (PLF), some commentators asserted that allegations of piracy were unjustified as the attack was motivated by a seemingly political purpose: the >>

Without state authorisation, acts of environmental activists are likely to be construed as having been committed for private ends, irrespective of the intention to benefit the public.

release of 50 Palestinian prisoners held by Israel.¹⁶ Similarly, the seizure of the Portuguese ship *Santa Maria* by insurgents attempting to overthrow the ruling Salazar regime in Portugal appeared outside the scope of the definition of piracy as the ends for which the acts were committed were of a political as opposed to a private nature.

If the term 'private ends' was included in article 101 for the purpose of excluding political acts, a further question arises as to the scope of the term 'political ends'. A broad interpretation of 'political ends' would mean that any act with a political aspect would be excluded from being regarded as an act of piracy. However, as any act can be construed as having a public or political dimension,¹⁷ such an interpretation is arguably too broad. A preferable construction of 'political ends' is that it is limited to acts committed for a *direct* or *purely* political purpose or acts which have no personal motive whatsoever.¹⁸

Acts committed with state authorisation are clearly political and consequently are not acts committed for 'private ends'.¹⁹ So, too, are acts of recognised insurgents exercising belligerent rights against the state from which they are seeking independence.²⁰ This narrow construction of 'political ends' ensures that a person's conduct will not simply be regarded as having been committed for non-private ends because there is some political aspect to their conduct. As such, an act may nevertheless be committed for 'private ends' notwithstanding it has both a political and private aspect.²¹

ENVIRONMENTAL ENDS: PRIVATE OR PUBLIC?

So are the actions of environmental activists committed for *direct* or *pure* political purposes? Environmentally motivated actions are notoriously difficult to characterise simply as a private or non-private end.²² This difficulty lies in the fact that environmental groups aim to preserve or conserve common areas or resources for all mankind (and other living creatures on Earth), which is clearly a matter of public interest. Further, it is arguable that environmentalists do not seek to gain personally from their conduct; rather, their motives are largely selfless in that their aim is to preserve resources for future generations or to protect animals from human harm. For example, the Sea Shepherd's mission is to defend, conserve and protect global marine life which it considers 'equal (or if not, very close) to that of human life'.²³ Alternatively, it can be argued that environmentalists act according to a particular set of private and personal beliefs

(which are not universally accepted) and that because any actions they take are in furtherance of those beliefs, the ends being pursued are private rather than public.

Leading jurists such as HG Jose Luis Jesus, a member of the Law of the Sea Tribunal, have expressed the view that environmentally motivated actions are not 'committed for private ends':

'Likewise, the "private ends" criterion seems to exclude acts of violence and depredation exerted by environmentally friendly groups or persons, in connection with their quest for marine environment protection. This seems to be clearly a case in which the "private ends" criterion seems to be excluded.'²⁴

However, this is not a view that is supported by international jurisprudence. In *Institute of Cetacean Research & Ors v Sea Shepherd Conservation Society & Anor*,²⁵ the United States Ninth Circuit Court of Appeals expressed strong views that the actions of the Sea Shepherd were committed for 'private ends' on the basis that their actions were motivated by their own personal, moral or philosophical goals. Chief Judge Kozinski, who delivered the judgment of the Court, said:

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

...

The district court construed "private ends" as limited to those pursued for "financial enrichment". But the common understanding of "private" is far broader. The term is normally used as an antonym to "public" (eg, private attorney general) and often refers to matters of a personal nature that are not necessarily connected to finance (eg, private property, private entrance, private understanding and invasion of privacy).

...

We conclude that "private ends" include *those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public.*' (emphasis added)

The Court of Appeal's decision is significant in two respects. First, it provides the first judicial definition of the term 'private ends'. Secondly, it expressly approved the decision of the Belgian Court of Cassation in *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin*,²⁶ noting that it was authority for the proposition that 'environmental activism qualifies as a private end'.²⁷

In that case, the issue was whether the actions of Greenpeace, in attempting to prevent Dutch vessels from dumping titanium oxide in the North Sea by boarding the ships and damaging property, constituted piracy within the meaning of article 15 of the *Convention on the High Seas*²⁸ (which contains the same 'private ends' requirement as article 101 of UNCLOS). The Court interpreted non-private or public ends as limited to acts committed 'in the interests

or to the detriment of a state or state system', while private ends extended to acts committed 'in furtherance of a personal point of view on a particular problem, albeit with a political perspective'.²⁹ The Court determined that Greenpeace's actions had been motivated by a desire to 'alert public opinion to the danger inherent in the discharge at sea of waste products harmful to the environment',³⁰ which constituted a 'private end'. Similarly, the actions had been somewhat driven by personal motives such as 'hatred, the desire for vengeance or the wish to take justice into their own hands'.³¹

In determining that the acts in question were committed for private ends, the Court noted that the actions were in pursuit of the objects set out in the organisation's articles of association.³² As such, despite having an ostensible political or public purpose (alerting the public to the damage caused by the dumping of waste), the acts were properly construed as committed for private ends as they were in furtherance of a personal belief or point of view on a particular problem.

Like most environmental causes, the aims and goals of organisations such as Greenpeace and the Sea Shepherd may be characterised as having public utility or as being in the public interest. It is also accepted that environmental conservation and protection is generally a public as opposed to a private issue because it concerns the preservation of common areas or resources. However, the decisions in *Institute of Cetacean Research* and *Castle John* indicate that an altruistic intent is not sufficient to exclude activists' conduct from the scope of article 101. Even if their actions are intended to benefit the public at large, the actions of activists remain an expression of a personal point of view on a particular problem and are therefore to be regarded as having been committed for 'private ends'. This same point has been made by Michael Bahar:

'The fact that a raider may intend to give away his booty like Robin Hood does not render his actions "for a public end" any more than would a fundamentalist's hijacking a vessel in the name of his organisation, no matter how political that organisation. An eco-warrior who hobbles an oil tanker may say that he is working for the world public, but has that public authorised him to do so? No. All three are acting as individuals, not as states empowered with the ability to declare war.'³³

These decisions make it clear that without state authorisation, acts of maritime violence committed by a private organisation are likely to be construed as having been committed for private ends, regardless of whether or not those acts are considered to be for public benefit.

CONCLUSION

While the actions of environmental groups such as the Sea Shepherd and Greenpeace may be motivated by altruistic ideals, this does not suffice to prevent their actions from being regarded as having been committed for 'private ends'. International jurisprudence indicates that courts are willing to adopt a broad definition of the private ends requirement to cover instances of environmental activism on the basis that their conduct is motivated by a desire to advance their own personal agendas of what they perceive to be in the public

interest. Such an interpretation has serious consequences for environmentalists. The concept of universal jurisdiction means that activists whose actions fall within article 101 may find themselves subject to the domestic laws, and legal processes, of foreign countries – a risk that some environmentalists may not wish to take. ■

Notes: 1 Michael Bahar, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations' (2007) 40 *Vanderbilt Journal of Transnational Law* 1, 17. 2 *Ibid*.

3 Thomas A Clingan Jr, 'The Law of Piracy' in Eric Ellen (ed), *Piracy at Sea* (1989) 168, 169. 4 P W Birnie, 'Piracy Past, Present and Future' in Eric Ellen (ed), *Piracy at Sea* (1989) 131, 132. 5 See, generally, UNCLOS, opened for signature 10 December 1982, 1833 UNTS 3, art 217 (entered into force 16 November 1994).

6 The right of any state naval vessel to seize a pirate ship is entrenched in international customary law and reflected by Article 105 of UNCLOS which provides:

'On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.'

7 HG Jose Luis Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18(3) *The International Journal of Marine and Coastal Law* 363, 374. 8 *Ibid*. 9 M J Peterson, 'An Historical Perspective on the Incidence of Piracy' in Eric Ellen (ed), *Piracy at Sea* (1989) 41. 10 *Geneva Convention on the High Seas*, opened 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962). 11 *Report of the International Law Commission on Work of its Eight Session*, UN GAOR, 11th sess, UN Doc A/2934 (1956) 282. 12 *Ibid*. 13 Tina Garmon, 'International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th' (2002) 27 *Tulane Maritime Law Journal* 257, 259.

14 *Ibid* at 263. 15 Barry Hart Dubner, 'Human Rights and Environmental Disaster – Two Problems that Defy the 'Norms' of International Law of Sea Piracy' (1997) 23 *Syracuse Journal of International Law and Commerce* 1, 19. 16 Gerald P McGinley, 'The Achille Lauro Affair – Implications for International Law', *Tennessee Law Review* (1985) 691, 697. 17 *Ibid*. 18 Martina Halberstam 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) 82 *American Journal of International Law* 269, 269. See also I R Hyslop, 'Contemporary Piracy' in E Ellen (ed), *Piracy at Sea* (1989) 8. 19 Michael Bahar above note 1, 17. 20 Martina Halberstam above note 18, 277.

21 Samuel P Menefee, 'The Achille Lauro and Similar Incidents as Piracy: Two Arguments' in E Ellen (ed), *Piracy at Sea* (1989) 180. 22 Samuel P Menefee, 'The Case of the Castle John, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law' (1993) 24 *California Western International Law Journal* 1, 5. 23 Gerry Nagtzaam and Pete Lentini, 'Vigilantes on the High Seas: the Sea Shepherd and Political Violence' (2008) 20 *Terrorism and Political Violence* 110, 121. 24 Jose Luis Jesus, above note 7, 379. 25 *Institute of Cetacean Research & Ors v Sea Shepherd Conservation Society & Anor* 708 F.3d 1099 (9th Cir. 2013).

26 *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin* (1986) 77 ILR 537. 27 *Institute of Cetacean Research & Ors v Sea Shepherd Conservation Society & Anor* 708 F.3d 1099 (9th Cir. 2013), 1106. See also Samuel P Menefee, 'The Case of the Castle John, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law' (1993) 24 *California Western International Law Journal* 1, 14. 28 *Geneva Convention on the High Seas*, opened 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962). 29 *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin* (1986) 77 ILR 537, 537. 30 *Ibid*. 31 *Ibid*, 539. 32 *Ibid*, 540. 33 Michael Bahar, above note 1, 32.

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