

2014

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Recommended Citation

Barry Hart Dubner & Claudia Pastorius, On the Ninth Circuit's New Definition of Piracy: Japanese Whalers v. the Sea Shepherd-Who are the Real "Pirates" (i.e. Plunderers)?, 45 J. Mar. L. & Com. 415 (2014).

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On the Ninth Circuit's New Definition of Piracy: Japanese Whalers v. the Sea Shepherd—Who are the Real “Pirates” (i.e. Plunderers)?

Barry Hart Dubner* & Claudia Pastorius**

I PREFACE

No good deed goes unpunished!

I was recently in St. Malo, Brittany, France, walking on top of a fortress wall that was built centuries ago to protect and forewarn the local people from marauding pirates/corsairs. As I was walking along and observing the water and the two fortresses built near the wall, I wondered how on earth a group of courageous people who were attempting to curtail the Japanese whalers from killing untold numbers of whales under an unenforceable whaling treaty could be called “pirates” by the Ninth Circuit? Was plundering a whale population in the Antarctica under the guise of “scientific research” considered lawful commerce? Were the environmental activists seeking to rob, murder or otherwise engage in piratical acts? Or, were they seeking to defend a resource?

As the author of the first book on the subject of piracy in the late 1970s and numerous articles on the law of the sea, and a member of the December 2009 “think tank” panel at the Harvard Kennedy School which convened to combat the Somali piracy crises,¹ I was taken aback by the Ninth Circuit’s decision in the *Institute of Cetacean Research v. Sea Shepard Conservation*

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¹See Robert I. Rotberg, World Peace Found. (WPF), *Combating Maritime Piracy: A Policy Brief with Recommendations for Action*, at 2, POL’Y BRIEF SUPRAF #11 (Jan. 26, 2010).

Society case.² The Ninth Circuit applied the “plain meaning” rule to a 1982 international treaty article defining piracy,³ which was anything but “plain.”⁴ The Court also used the United States Alien Tort Statute (ATS)⁵ to obtain jurisdiction over an act that was not recognized as a crime requiring universal jurisdiction by the international community,⁶ (i.e. environmental interventionism).⁷ Further, the Ninth Circuit may have misinterpreted the proper treatment of the comity concept in regards to international jurisdiction.⁸ Since other authors have previously discussed the issues regarding the ATS and comity in the Ninth Circuit decision, however, this article is limited to the court’s erroneous redefinition of piracy using the plain meaning rule.⁹ On this aspect, I find it necessary to set forth my thoughts on the historical and legal development of the crime of piracy.

II INTRODUCTION

You don’t need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.¹⁰

²*Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y*, 708 F.3d 1099 (9th Cir. 2013), amended by 725 F.3d 940 (9th Cir. 2013).

³United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, S. Treaty Doc. No. 39, 103d Cong., 2d Sess. 1833 U.N.T.S. 397, art. 101 (1982) [hereinafter UNCLOS], available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

Furthermore, the United States has not even ratified 1982 UNCLOS. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements as at 29 October 2013* (Sept. 20, 2013), available at http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm# The United Nations Convention on the Law of the Sea (last visited Aug. 25, 2014).

⁴*Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y*, 725 F.3d at 943-44.

⁵*Id.*

⁶Samuel Shnider, *Universal Jurisdiction Over “Operation of a Pirate Ship”: The Legality of the Evolving Piracy Definition in Regional Prosecutions*, 38 N.C. J. INT’L L. & COM. REG. 473, 482-85 (2013). “. . . jurisdiction over piracy is recognized only over conduct ‘which constitutes piracy by international law . . .’ However, while UNCLOS provides a definition of piracy, it does not criminalize the offense, prohibit individual conduct, or provide for the punishment for the offense.” *Id.* at 483, 496.

⁷Anthony L.I. Moffa, *Comment: Two Competing Models of Activism. One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean*, 37 YALE J. INT’L L. 201, 203-04 (2012).

⁸See Keefe, *infra* note 134 (criticizing the Ninth Circuit’s treatment of the comity concept in the case).

⁹See Shnider, *supra* note 6.

¹⁰*Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y*, 725 F.3d at 943-44.

In the *Institute of Cetacean Research (Cetacean) v. Sea Shepherd Conservation Society (Sea Shepherd)* case, the lower court in the Western District of Washington first denied granting an injunction for Cetacean, who engages in lethal whaling activity in the Southern Sea for “research,” against Sea Shepherd, who engages in anti-whaling interventionism.¹¹ As the court noted, Sea Shepherd’s direct activism techniques include throwing butyric acid in glass containers, smoke bombs, and flares with hooks at the whaling ships and attempting to foul the rudders with reinforced towing lines.¹² The lower court also noted that Sea Shepherd’s activities have resulted in no documented harm to a person, and *de minimus* damage to the whaling ships in over eight seasons.¹³ The lower court did not find that Cetacean made a valid claim for piracy under the Alien Tort Statute because environmental interventionism to protect marine life was not recognized as a crime constituting a “specific, obligatory, and international norm.”¹⁴

On appeal, the Ninth Circuit reversed the lower court decision, holding that the court erred by limiting the scope of the term “private ends” in the definition of piracy to private financial gain.¹⁵ The lower court reasoned that “[i]n the ordinary case, pirates seek financial enrichment, the prototypical private end. Sea Shepherd is uninterested in financial gain; it seeks to save the lives of whales in the Southern Ocean.”¹⁶ The Ninth Circuit disagreed and granted Cetacean an injunction, by holding that “private ends” includes “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.”¹⁷

The purpose of this article is to stop courts from misinterpreting the “private ends” requirement of the piracy definition of the 1982 United Nations Convention on the Law of the Sea Treaty (UNCLOS),¹⁸ by including environmental interventionists who seek to protect mankind from such persons who seek to destroy wildlife and the environment. In addition, this article seeks to stop courts from incorporating a specious definition of piracy into the United States’ domestic criminal law, considering that the term “private ends” is ambiguous at best.

¹¹Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 860 F. Supp. 2d 1216, 1233 (2012), rev’d Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 725 F.3d at 943-44.

¹²Id. at 1223-24.

¹³Id. at 1225.

¹⁴Id. at 1233.

¹⁵Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 725 F.3d at 943-44.

¹⁶Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 860 F. Supp. 2d 1216, 1233 (2012), rev’d Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 725 F.3d at 943-44.

¹⁷Id. at 944.

¹⁸See UNCLOS, *supra* note 3.

The questions this article raises include, *inter alia*: If pirates are considered enemies of mankind,¹⁹ how should we consider persons who devastate and destroy our environment? Who are the real enemies of mankind and earthly inhabitants? Who would you rather describe as a “pirate”—a company that is seeking to dump toxic waste in our waters or interventionists who seek to stop it? Are pirates a group of whalers who openly ignore commercial whaling provisions of an international treaty by killing minke whales in the Antarctica and elsewhere? Or, are pirates interventionists who seek to protect the whales from these massive killings by attempting to show the people of the world the catastrophe of the hunting of whales? Who are the real “pirates?”

For the purposes of understanding the customary/conventional definition of piracy, how does one measure an act of “violence?” Does throwing a rock against a ship qualify?²⁰ Would we be best served calling the rock thrower a “pirate?” Navigation and commerce have been cherished goals since the time of Grotius because shipping goods by the sea is the most common and least expensive form of transportation.²¹ Of course, the “freedom of navigation” includes the right to use the ocean without being under attack from pirates or terrorists.²² That freedom, of course, implies that the navigation and commerce are being done for lawful purposes.

Why would a Japanese whaling outfit use a United States district court to obtain a preliminary injunction against alleged “pirates?” Was it the fact that no other country saw fit to interrupt the Watson²³ group from continuing their “interventionist” ways? Why did the Ninth Circuit reverse the district court’s decision in such a disconcerting manner?

In so doing, the Ninth Circuit turned centuries of historic understanding of customary law regarding the definition of piracy on its head by use of a “plain meaning rule.” The Court used the Webster’s dictionary to define the “public ends” requirement of the conventional definition of the crime of the sea piracy, in order to apply it to environmental interventionists who were seeking to prevent the killing of thousands of whales by a Japanese government-sponsored industry.²⁴ The Ninth Circuit also relied on an obscure Belgian case as “international precedent” and piracy statutes that were enacted by Belgium after the case was decided.²⁵

¹⁹See, e.g., Shnider, *supra* note 6, at 489.

²⁰See *United States v. Abdi Wali Dire*, 680 F.3d 446, 453 (4th Cir. 2012).

²¹See generally Hugo Grotius, *MARE LIBERUM, THE FREEDOM OF THE SEAS*, trans. R. van Deman Magoffin, ed. J. B. Scott (New York: Oxford University Press, 1916).

²²H.E. Jose Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT’L J. MARINE & COASTAL L. 363, 363 (2003).

²³Paul Watson is the notorious leader of the Sea Shephard organization. See *infra* note 121.

²⁴*Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y*, 725 F.3d at 943-44.

²⁵*Id.* at 944.

The word “piracy” conjures up images that have caused terror to mankind throughout history.²⁶ A pirate was a robber, a murderer, and a plunderer who attacked merchant vessels and towns by the coast.²⁷ To call the Watson-led group of Sea Shepherd people “pirates” is simply beyond the pale.

This article will review the Ninth Circuit’s decision to see if it was correct in holding that these interventionists were “pirates,” rather than considering their acts of violence as maritime torts. In order to discuss the proper use of terms, it is necessary to look at the “legislative” history of the definition of piracy found in UNCLOS.²⁸ Even though the Ninth Circuit used a “plain meaning” rule to define “private ends,”²⁹ this article will demonstrate that the Sea Shepherd participants and the Sea Shepherd Corporation have not actually committed acts of “piracy.”

III HARVARD DRAFT

A. On Arriving at the Definition of Piracy Including the Term “Private Ends”

The Harvard Draft Convention on Piracy first developed the term “private ends” to distinguish piracy—those acts which are committed for private ends—from those acts committed for “political” ends, such as acts of terrorism.³⁰ Under the Harvard Draft discussion, the commentators stated that,

[i]f the forces or employees of any state or government by mutiny or otherwise should seize a ship and use it to plunder on or over the high seas on their own account, this, of course would be piracy and fall under the common jurisdiction. The acts would be committed for private ends, not for public ends, and there would be no question of the immunity, which pertains to state or governmental acts.³¹

It is quintessential to the law of treaties that the plain meaning of terms should be used as the first step of interpreting treaty obligations, but not as

²⁶Jesus, *supra* note 22, at 363.

²⁷See, e.g., *Id.*

²⁸Although the United States has ratified the 1958 convention on the high seas, it has yet to ratify the 1982 UNCLOS. See *supra* note 3 and accompanying text.

²⁹*Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y*, 725 F.3d at 943-44.

³⁰See Harvard Research in International Law, *Draft Convention on Piracy with Comments*, 26 AM. J. INT’L L. SUP. 739, 798 (1932) [hereinafter Harvard Draft].

³¹*Id.*

a means of invoking an outcome that contravenes the intentions of the parties. In the authoritative text, *The Law of Treaties*, Lord McNair explained,

Plain terms. Many references are to be found in judgments, opinions, and other documentary sources (British and others) to the primary necessity of giving effect to the 'plain terms' of a treaty, or construing words according to their 'general and ordinary meaning' or their 'natural signification' and so forth, and of not seeking *aliunde* for a meaning 'when the terms are clear.' But, this so called rule of interpretation like others is merely a starting-point, a *prima facie* guide, and cannot be allowed to obstruct the essential quest in the application of treaties, namely to search for the real intention of the contracting parties in using the language employed by them.³²

Furthermore, Emmerich de Vattel enunciated that when the common understanding of a term by the parties of a treaty has been established, such meaning should not be more strongly construed as a means to resolve particular conflicts. An example of this principle follows that,

[i]n the interpretation of Treaties, compacts, and promises, we ought not to deviate from the common use of the language, unless we have very strong reasons for it. And,—'When we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to contrary meaning.' It is plain that the framers of this Treaty intended to exclude the 'mouths of Rivers' from the common possession. Ought we, by construing the terms of the Treaty most strongly against the nation where the River in dispute may happen to be, to 'wrest their words to a contrary meaning?' I think not.³³

. . . [I]n the first place you must examine whether the words in their natural meaning make sense in the circumstances before seeking to attach any other meaning to them, well and good. But it is constantly employed, both by advocates and tribunals, as an argument against seeking to find out what was the intention of the parties in using the words, having regard to the surrounding circumstances. It is in truth a *petition principia* because it begs the question whether the words used are, or are not, clear—a subjective matter because they may be clear to one man and not clear to another, and frequently to one or more judges and not their colleagues.³⁴

Therefore, we turn to the Harvard Draft in order to have a better understanding of jurisdictional concepts concerning the crime of piracy. The importance of the Harvard Draft is that it was the basis of the definition of

³²Lord McNair, *THE LAW OF TREATIES* 366 (1961) (emphasis added).

³³*Id.* at 373 (quoting Emmerich de Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* § 267 (1758) (chapter 2, On the Interpretation of Treaties)).

³⁴*Id.* at 372.

piracy in the 1958 Geneva Convention on the high seas and the 1982 definition of piracy in the UNCLOS, which are the same. The 1932 Harvard Draft was based upon the works of experts and professors, led by Joseph Bingham.³⁵ The study itself was very comprehensive and it has been used and cited in different texts.³⁶ The main question they were addressing was: What significance did piracy have on the law of nations?³⁷

Specifically, the drafters of these articles considered the questions:

[h]ow are we to treat the problem of piracy today in light of the possibility of international agreement for suppression? Ought we simply to give conventional form to international usage in the matter, without any reference to theoretical controversies? Or ought we, within reasonable limits, to combine the principles of penal and international law and so prepare a draft showing specific characteristics of piracy, and at the same time, by the strict application of the universally accepted principles, settling all controversies hitherto regarded as insoluble?³⁸

The perspective of the drafters on the issues was influenced by the fact that by 1932, all forms of sea piracy had virtually ceased to exist.³⁹ Therefore, the drafters were interested in putting together articles that could easily be ratified by various nations with hardly any dispute with the resulting definition of piracy (i.e., it was “expeditious”).⁴⁰

In response to the queries at hand, the Harvard Draft set forth the opinions of various legal philosophers, historians as well as famous jurists.⁴¹ The “comments” to the draft articles demonstrated a wealth of knowledge on the nature of piracy and the intent of the participants in arriving at each term, including “private ends.” The Harvard Draft articles were originally prepared for “expeditious reasons,” which established consistency in the definition of piracy and an important point of reference for the international community.⁴² Significantly, a close look at the study indicates that the Ninth Circuit should not have applied the “plain meaning” rule because the crime of piracy has historically been defined as a crime involving murder, mayhem, hijacking, kidnapping for ransom and plunder.⁴³

³⁵Harvard Draft, *supra* note 30, at 749–65, 786.

³⁶See generally Harvard Draft, *supra* note 30.

³⁷Harvard Draft, *supra* note 30, at 749.

³⁸Harvard Draft, *supra* note 30, at 753.

³⁹See generally Royal Naval Museum Library, *A BRIEF HISTORY OF PIRACY* (2002), available at http://www.royalnavalmuseum.org/info_sheets_piracy.htm (last visited Sept. 15, 2014); See also *id.* at 755–56.

⁴⁰See Harvard Draft, *supra* note 30, at 755–56.

⁴¹*Id.* at 749–65.

⁴²See *id.* at 786.

⁴³See *id.* at 790.

Article 3 of the Harvard Draft addressed piracy as including an act of violence or depredation, committing rape, wounding, enslaving, imprisoning, or killing a person with intent to steal or destroy property, for private ends "without bona fide purpose of asserting a claim or right."⁴⁴ Article 4 of the original Harvard Draft indicated the elements that were necessary in order to be considered a "pirate ship."⁴⁵ Article 4 states that "[a] ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1, of Article 3"⁴⁶

Was piracy considered a crime or an offense against the law of nations? The draft indicates that expressions " . . . like the additional one that pirates are enemies of the human race, have a vituperative quality which emphasizes the gravity of the former dangers of piratical enterprises to the sea-borne commerce of the world and the coasts of sea-fearing nations."⁴⁷ Continuing, the drafters said,

[e]xtravagant hyperboles, though they are common they are used as a reason for the legal rule that every state participates in a common jurisdiction to capture pirates and their ships on the high sea, and to prosecute and punish for piracy persons who lawfully are seized and against whom there is proper ground for prosecution [. . .]. Piracy is by the law of nations a special, common basis of jurisdiction beyond the familiar grounds of personal allegiance, territorial dominion, dominion over ships, and injuries to interests under the state's common protection.⁴⁸

According to Blackstone, pirates are the ones that have "renounced all the benefits of society and government has reduced himself afresh to the savage state of nature, by declaring war against all mankind, [and] all mankind must declare war against him: so that every community hath a right, by the rule of self defence, to inflict that punishment upon him"⁴⁹

In the discussion regarding whether piracy is subject to universal jurisdiction or not, the commentators stated that, "[i]nternational law piracy is only a special ground of state jurisdiction—jurisdiction in every state."⁵⁰ The drafters further elucidated that

The theory of this draft convention, then, is that piracy is not a crime by the law of nations. It is the basis for an extraordinary jurisdiction in every state to

⁴⁴Id. at 743 (emphasis added).

⁴⁵Id. at 822.

⁴⁶Id.

⁴⁷Harvard Draft, *supra* note 30, at 757.

⁴⁸Id. at 757.

⁴⁹Id. at 758.

⁵⁰Id. at 759.

seize and to prosecute and punish persons, and to seize and dispose of property, for factual offences which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests. The purpose of this convention is to define this extraordinary jurisdiction in general outline. Universal adoption of the draft convention would not make the piracy defined by it a legal crime or tort by force of a convention alone. Such a result would be reached under the law of a state only through the operation of the state's legal machinery.⁵¹

Regarding the definition of the word "ship," the drafters placed no restriction on the type of boat. For example "junks . . . motor boats and even rafts may be used by pirates."⁵² Off the coast of Somalia they use skiffs.⁵³ One draft comment noted that in "history and fiction commonly used ships and the pirate ship and the pirate are associated in one's mind much as are the Cossack and his horse."⁵⁴

According to Article 3 of the Harvard Draft,

[p]iracy includes any of the following acts, committed outside of the territorial jurisdiction of any state: any act of violence or depredation committed with intent to rob, rape, wound, enslave, imprison, or kill a person or with intent to steal or destroy property, for private ends without any bona fide purpose, of ascertaining a claim of right provided the act is connected with an attack on or from the sea or in the air.⁵⁵

Article 3 reveals that one difficulty of drafting a definition of piracy for the purpose of conventional law is that:

The traditional idea of a pirate is a bold and definite one. It pictures a professional robber who sails the sea in a pirate ship to attack and plunder other ships or communities which can be reached from the sea. At least if they do not discriminate between nationalities in choosing ships or settlements to attack, such pirates are a menace to the interest of every state which has access to the sea, and therefore this traditional conception seems to justify in favor of all such states a common legal right, and perhaps reciprocal duties, to prevent piracies and to punish pirates.⁵⁶

⁵¹Id. at 760. This is an interesting view and it applies really to a discussion of the application of the alien tort doctrine to this particular case.

⁵²Id. at 768.

⁵³See generally *The Dhow Project. Identification guide for Dhows, Skiffs and Whalers in the High Risk Area* (2011), available at <http://www.shipping.nato.int/Documents/Identification%20guide%20for%20Dhows%20Skiffs%20and%20Whalers.pdf>.

⁵⁴Harvard Draft, *supra* note 30, at 768.

⁵⁵Id. at 768–69.

⁵⁶Id. at 769.

The commentators agreed that there was no authoritative definition but they spoke in terms of a "typical piracy" and referred to the acts aforementioned.⁵⁷

Sir Leoline Jenkins, who was judge of the Admiralty, defined piracy as robbery, which is committed on the sea.

A robbery when it was committed upon the land, does imply three things: (1) that there be a violent assault; (2) that a man's goods be actually taken from his person or possession; (3) that he who is despoiled be put in fear thereby. When this is done upon the sea, when one or more persons enter on board a ship with force and arms, and those in the ship have their ship carried away by violence, or their goods taken away out of their possession and put in a fright by the assault, this is piracy . . .⁵⁸

Historically, a "pirate," according to Hall, either belongs to no state or organized political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject."⁵⁹

The Harvard Draft professors, jurists, *et. al.*, addressed many historical elements of piracy to arrive at a definition of piracy for expeditious reasons.⁶⁰ Notably, each element concerned some form of violence and depredation in connection with the act of piracy for "private purposes" (i.e., for profit). The main sentiment regarded the pirate as "merely a robber of the vulgarest and cruelest kind; but they also took into consideration that these acts could be done for political ends, although the act *animus furandi* was wanting and there was no thought of discriminatory aggression upon vessels of all nations."⁶¹

The act of piracy had to be an act of violence adequate to a degree but it did not necessarily have to be an act of depredation. The commentators cited in the Harvard Draft thought the acts on the high seas should include robbery committed by using a private pirate ship to attack another ship.⁶² This is the typical piracy of history and fiction; or intentional, unjustifiable homicide for private ends; unjustifiable imprisonment of a person accomplished for private ends; and any unjustifiable violent act a person similarly committed for private ends; and any unjustifiable deprivation or malicious destruction of property committed for private ends.⁶³

⁵⁷Id.

⁵⁸Id. at 770.

⁵⁹Id. at 771.

⁶⁰Id. at 786.

⁶¹Id. at 773 (quoting Lawrence, *INTERNATIONAL LAW*, Sec. 102, 232-34 (5th ed.)).

⁶²Id.

⁶³Id.

Oppenheim, in his fourth edition of his International law treatises, is cited throughout the Harvard Draft.⁶⁴ He believed that “in the regular case of piracy, the pirate wants to make booty; it is the cargo of the attack vessel which is the center of his interest, and if he might free the vessel and crew after appropriating the cargo . . .”⁶⁵ The act of piracy according to the commentator seemed to include cruising (in a pirate ship) with the purpose of committing any of the offenses aforementioned.⁶⁶ According to the recommendation, “cruising as professional robbers in a ship devoted to the commission of such offences,” is also an act of piracy.⁶⁷

The definition of piracy arrived at in treaty law was very restrictive to the classic form of piracy because the relative diminution of piracy at the time left little question as to the essential acts being proscribed. Among other elements that are considered in the comments are robbery on land; robbery at sea; various acts of depredation committed for private ends on land, either by professional robbers or by other than professional robbers.⁶⁸ Further elements included, “an intention to acquire wealth; an intention to attack indiscriminately the nationals and ships of all states; an intention to disclaim all state allegiance and state authority; [and] a menace to the commerce or other interests of all states.”⁶⁹ According to the report of the Sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law,

[t]he confusion of opinion on the subject of piracy is due to failure to draw a clear distinction between piracy in the strict sense of the word, as defined by international law, and piracy coming under the private laws and treaties of individual States. In our view, therefore, it would be preferable for the Committee to adopt a clear definition of piracy applicable to all States in virtue of international law in general.⁷⁰

In the end, “[t]he draft convention exclude[d] from its definition of piracy all cases of wrongful attacks on persons or property for political ends.”⁷¹

Again, the crime of sea piracy was always connected with the violence or depredation in the crimes of robbery, murder, plundering, kidnapping, and others historically associated with sea piracy. Today, the word “depredation” and the conventional definition of piracy are accompanied by the word

⁶⁴See, e.g., *id.* at 774.

⁶⁵*Id.* at 774.

⁶⁶*Id.* at 775.

⁶⁷*Id.*

⁶⁸*Id.* at 781.

⁶⁹*Id.* (emphasis added).

⁷⁰*Id.* at 782.

⁷¹*Id.* at 786.

“force” in order to “color our mental pictures of piratical enterprises.”⁷² As far as the commentators were concerned,

it is clear that the function of this draft convention—the definition of the common jurisdiction of all states of certain types of major offences committed beyond the territorial jurisdiction of every state—will not be well accomplished unless the common jurisdiction (and therefore as a matter of convenient terminology, the definition of piracy) covers all serious offences otherwise like traditional piracy, although the motive of the offender may be an intention to slay, wound, rape, enslave or imprison or to destroy property, and not an intention to rob or to gain wealth otherwise.⁷³

So, it is apparent what the drafters of the convention meant by the term piracy. This clear meaning is not found in any dictionary under the term “private ends.”

Justice Story in *U.S. v. The Malek Adhel* stated,

[i]f he (a pirate) willfully sinks or destroys an innocent merchant ship without any other object then to gratify his lawless appetite for mischief, it is just as much piratical aggression, in the sense of the law of nations, and of the act of congress as if he did it solely and exclusively for the sake of plunder, *lucri causa*.⁷⁴

According to Wheaton on his treatise on International Law,

[t]o constitute piracy *jure gentium* it is necessary, 1st, [t]hat the offence, being adequate in degree,—for instance, robbery, destruction by fire, or other injury to persons or property,—must be on the high seas, and not within the territorial jurisdiction of any nation; and, 2d, [t]hat the offenders, at the time of the commission of the act should be in fact free from lawful authority . . . In short, they must be in the predicament of *outlaws*.⁷⁵

The Ninth Circuit decided to expand the meaning of “private ends” by use of the plain meaning rule and also by citing, as precedent, a Belgian case, which will be discussed later.⁷⁶ However, according to the intention of the Harvard drafters, citing Bynkershoek, “pirates” are

. . . persons who depredate by sea or land without authority from a sovereign. The definition, like most other definitions of pirates and piracy, is at once too wide and too narrow to correspond exactly with the acts which are now held to be piratical, but it may serve as a starting point by directing attention to the

⁷²Id. at 790.

⁷³Id.

⁷⁴Id. at 792.

⁷⁵Id.

⁷⁶*Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y*, 725 F.3d 940, 943-44 (9th Cir. 2013).

external characteristic by which, next to their violent nature, are chiefly marked. Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common; they are done under conditions, which render it impossible or unfair to hold any state responsible for their commission. A pirate either belongs to no state or organized political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject.⁷⁷

According to the Harvard Draft, the term “private ends” is also used to distinguish piracy from acts committed for political ends, such as acts of terrorism.⁷⁸

According to the Report of the Sub-Committee of the League of Nations, it was believed that,

[c]ertain authors take the view that the desire for gain is necessarily one of the characteristics of piracy. But the motive behind the acts of violence might be not the prospect of gain, but rather hatred or a desire for vengeance. In my opinion it is preferable not to adopt the criterion of desire for gain, since it is both too restrictive and contained in the larger qualification both for ‘private ends.’ It is better, in laying down a general principle, to be content with the external character of facts without entering too far into the often delicate question of motives. Nevertheless, if the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime. Such a rule does not assure any absolute impunity for the political acts in question, since they remain subject to the ordinary rules of international law.⁷⁹

Missing from the Sea Shepherd situation are truly “wicked” and morally depraved motives on the part of the environmental interventionists. According to the address of Nicholas Trott, Judge of the Vice-Admiralty and Chief Justice of the Province of South Carolina, “the evil and wickedness [of piracy] . . . is evident to the reason of all men. So that it needs no words to aggravate the same: it is so destructive of all trade and commerce between nation and nation . . .”⁸⁰ The word “*hostis humani generis*” is neither a definition, nor as much as a description of a pirate, but a rhetorical invective to shew the odiousness of the crime.”⁸¹

Also missing from the Sea Shepherd situation is “belligerent” conduct similar to what Justice Brown described in the *Ambrose Light* case.⁸² When

⁷⁷Harvard Draft, *supra* note 30, at 799.

⁷⁸*Id.* at 798.

⁷⁹*Id.* at 802.

⁸⁰*Id.* at 804 (emphasis added).

⁸¹*Id.*

⁸²*Id.* See *The Ambrose Light*, 25 F. 408, 413 (S.D.N.Y. 1885).

discussing the acts of a “belligerent” vessel, he mentioned that the term “piracy” describes an offense “as committed in ‘a spirit and intention of universal hostility,’ which has occasionally been employed in describing the practice of general pirates, rather than the essential elements of piracy itself.”⁸³ The *Sea Shepherd* case did not contain a situation where there was indiscriminate violence and robbery on the high seas. *Sea Shepherd*’s intended purpose was to protect whales and block the Japanese whalers from killing whales for commercial purposes indiscriminately in violation of a treaty that Japan (and the United States) signed on to.⁸⁴

Extremely important is the fact that “the intention of universal hostility,” in any special sense, is applicable to professional pirates only (i.e., those who make piracy a business and who indiscriminately plunder, those who are “general pirates”).⁸⁵ Professional pirates are, in other words,

... a description of the supposed practice of one class of pirates only; just as the *animus furandi* is descriptive of the particular motive of most piracies. But neither the general intent in the one case, nor the particular and common motive of plunder in the other, is necessary or essential to the offense of piracy itself. And it is manifest that the offense may be as complete, though but a single act be committed or intended, as if such acts were practiced as a business and indiscriminately on all vessels to procure a livelihood.⁸⁶

One modern example of piracy conducted as a business is the Somali piracy, which is executed for financial gain by organized “professionals” and funded by financiers.⁸⁷

Furthermore, missing from the *Sea Shepherd* situation is the fact that piracy traditionally involves a declaration of hostility to the social order of the whole world. According to the commentators,

[i]ndeed a clever plunderer might diminish greatly his risks of punishment under such a limitation of jurisdiction, strictly and impartially applied, by attacking the commerce only of the weaker and distant states or by conceding immunity to the commerce of one or two great states where police forces were uncomfortably potent.⁸⁸

⁸³Id.

⁸⁴See SEA SHEPHERD.ORG, WHO WE ARE, available at <http://www.seashepherd.org/who-we-are/> (last visited Sept. 16, 2014). During the drafting of this article, the International Court of Justice ruled that the Japanese whaling activity in the Southern Seas violated the 1946 International Convention for the Regulation of Whaling. *Australia v. Japan: New Zealand intervening*, Int’l Ct. of Justice, March 14, 2013, available at <http://www.icj-cij.org/docket/files/148/18136.pdf>.

⁸⁵See Harvard Draft, *supra* note 30, at 805.

⁸⁶Harvard Draft, *supra* note 30, at 805.

⁸⁷Jeffrey Gettleman, *Somali Pirates Tell Their Side: They Want Only Money*, NEWYORKTIMES.COM, Sept. 30, 2008, available at http://www.nytimes.com/2008/10/01/world/africa/01pirates.html?_r=0.

⁸⁸Harvard Draft, *supra* note 30, at 807.

The Harvard drafters also considered a report of the Sub-Committee of the League of Nations that stated,

According to international law, piracy consists in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons. The pirate attacks merchant ships of any and every nation without making any distinction except in so far as will enable him to escape punishment for his misdeeds. He is a sea-robber, pillaging by force of arms, stealing or destroying the property of others and committing outrages of all kinds upon individuals.⁸⁹

One could hardly classify Sea Shepherd's conduct as hostile to the whole of the world and adverse to the interests of all nations.

The many attempted definitions of piracy have been considered both too wide and too narrow according to Wheaton.⁹⁰ In considering the subjective aspect of the crime of piracy, Dana stated, "the motive may be gratuitous malice, or the purpose may be to destroy, in private revenge for real or supposed injuries done by persons of classes by a particular national authority."⁹¹ The Harvard Draft commentators thought that it would be "important to exclude thus specifically cases of violence committed in asserting a claim of right which should not be assimilated to piracy, or at any rate, could not be assimilated by common consent of all states."⁹² In deciding that piracy does not include acts with the purpose of "asserting a claim of right," the drafters noted that the element of the "intent to rob" in the definition of piracy can be alternately met with the "intent to slay, wound, imprison, or enslave."⁹³ Therefore, the drafters excluded from consideration as piratical acts common conflicts at sea such as, the "quarrels of fishermen of different nationalities."⁹⁴

Thus, it is clear that the Sea Shepherd's acts were neither contemplated as a form of piracy by the Harvard drafters, nor do their acts meet the essential elements of piracy as acts universally hostile to humanity, imbued with violence and depravity, and committed with deplorable motives. Furthermore, it is plain that the term "private ends" originated as a means of distinguishing true piracy, which offends every state, from sanctioned "public" acts of particular states. Your authors leave the subject of the Harvard Draft and the intent shown therein in connection with drafting the piracy articles expedi-

⁸⁹Id. at 808.

⁹⁰Id. at 806.

⁹¹Id.

⁹²Id. at 809.

⁹³Harvard Draft, *supra* note 30, at 808-09.

⁹⁴Id.

tiously and turn to the definition of piracy as adopted by the 1958 Geneva Convention on the high seas and the United Nations under the 1982 UNCLOS.

IV CONVENTIONAL DEFINITIONS OF PIRACY

The definition of “piracy” was not based on centuries of customary international law.⁹⁵ Rather, it was proposed for “expeditious” drafting of articles on piracy that the Harvard drafters thought had been dead for centuries.⁹⁶ The definition is, at best, ambiguous, due to the “private ends” requirement. By calling the environmental interventionists “pirates,” the Ninth Circuit decision will provide fodder for criminalizing a tort.⁹⁷ In fact, the Sea Shepard group was not charged with the crime of piracy.⁹⁸ How could they be found guilty of the crime of piracy under this ambiguous and vague definition? Without being charged? The Japanese called them “pirates” and the Ninth Circuit agreed.⁹⁹ The court has opened the door for severe repercussions, without even finding them guilty of the crime of piracy. In fact, the question remains unsettled as to whether the conventional definition of piracy is too vague for criminal prosecution.

A. Definitions

Piracy was defined the same way in both the Geneva Convention on the High Seas and UNCLOS, as a crime committed on the high seas:

Article 101. Definition of piracy

Piracy consists of any of the following acts:

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:

On the high seas, against another ship or aircraft, or against persons or property on board such ship or air craft.

⁹⁵See generally *id.*

⁹⁶See generally *id.* See also The Dhow Project, *supra* note 53.

⁹⁷See R. Chuck Mason, *Piracy: A Legal Definition*, Congressional Research Service, Dec. 13, 2010, available at <http://fas.org/sgp/crs/misc/R41455.pdf>.

⁹⁸See generally *Inst. of Cetacean Research v. Sea Shepard Conservation Soc'y*, 725 F.3d 940, 943-44 (9th Cir. 2013).

⁹⁹Compare *Id.*, with *SeaShepherd.nl, Japanese Government Prepares Special Anti-Sea Shepherd Laws*, Aug. 2008, available at <http://www.seashepherd.nl/news-and-media/news-080824-1.html>.

Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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;

Any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).

Article 102. Piracy by warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in Article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103. Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the person guilty of that act.

Article 104. Retention or loss of the nationality of a pirate ship or aircraft.

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 105. Seizure of a pirate ship or aircraft

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.

Article 106. Liability for seizure without adequate grounds.

Where seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.¹⁰⁰

¹⁰⁰UNCLOS, S. Treaty Doc. No. 39, 103d Cong., 2d Sess., 1833 U.N.T.S. 397, art. 101-107 (1982).

Prior thereto, the 1958 Geneva Convention on the High Seas had defined "piracy" as follows:

Article 15.

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:

On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft.

Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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;

Any act of inciting or of intentionally facilitating an act described in sub-paragraph (1) or (2) of this article.¹⁰¹

There was no change in the conventional definitions of "piracy" from 1958 through 1982.¹⁰² Before explaining why there was no change and why the crime of piracy was defined in international law as taking place on high seas rather than in territorial waters, it is first necessary to look at another definition.

The International Maritime Bureau (IMB) is a specialized division of the International Chamber of Commerce (ICC).¹⁰³ The IMB is a non-profit organization, which was established in 1981 to gather material and act as a focal point in the fight against all types of maritime crimes and malpractice.¹⁰⁴ For statistical purposes, the ICC defined piracy as, "an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act."¹⁰⁵ The ICC definition covers both actual and attempted acts at sea or otherwise, excepting only unarmed petty thefts.¹⁰⁶

¹⁰¹Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312 (1962), 450 U.N.T.S. 82 [hereinafter *Geneva Convention*], available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf.

¹⁰²See *supra* notes 100 & 101.

¹⁰³INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL MARITIME BUREAU, <http://www.icc-ccs.org/icc/imb> (last visited Sept. 16, 2014).

¹⁰⁴*Id.*

¹⁰⁵See ICC, *Piracy and Armed Robbery against Ships Annual Report*, Jan. 1 – Dec. 31, 2009, at 3, available at http://www.icpat.org/index.php/documentation-a-articles-mainmenu-97/doc_download/1-piracy-report. Starting in 2010, the IMB annual reports adopted the UNCLOS, art. 101, definition of piracy. ICC COMMERCIAL CRIME SERVICES, IMB PIRACY REPORTING CENTRE, <http://www.icc-ccs.org/piracy-reporting-centre> (last visited Sept. 16, 2014).

¹⁰⁶*Id.* at 3.

The rationale for the IMB's use of the above definition was that the majority of piracy acts occur under the jurisdiction of States, and the piracy definition under the Geneva Convention and UNCLOS only applies to piratical acts that occur on the high seas.¹⁰⁷ The IMB noted that the International Maritime Organization (IMO) at its 74th meeting of the Maritime Safety Committee (MSC) addressed this definitional matter in the Draft Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against ships.¹⁰⁸ The Code of Practice defines "Piracy" and "Armed Robbery against ships" as follows:

Piracy means unlawful acts as defined in article 101 of the 1982 United Nations Convention on the Law of the Sea UNCLOS. Piracy consists of any of the following acts:

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

On the high seas; against another ship or aircraft or against persons or property on board such ship or aircraft;

Against a ship, aircraft, persons or property in a place outside the jurisdiction any State;

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;

Any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).

Armed Robbery against Ships means "any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of "piracy," directed against a ship or against persons or property on board such ship, with in a State's jurisdiction over such offences."¹⁰⁹

The IMB definition was established "for statistical purposes" and defines piracy and armed robbery in such a way that the definition covers actual or attempted attacks in any water, be it internal, territorial or the high seas.¹¹⁰ The difference in the treaty and the trade association definitions highlights the pragmatic significance of actual piratical acts to the international community.¹¹¹ While the piracy definitions established through the Harvard Draft

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰See *id.*

¹¹¹See *id.*

and international treaties resulted from a careful examination of historical acts and legal principles, the definition that was used to compile data on piracy acts served the purpose of combating actual piracy and informing the maritime stakeholders of the incidents that might affect their day to day operations.¹¹²

The definition of piracy under both the Geneva Convention and UNCLOS is lacking, in the sense that it does not give notice to potential defendants that their conduct is criminally punishable.¹¹³ For adequate due process notice on what conduct will be punishable, there has to be “a generally accepted interpretation of [the] defined crimes and a custom for all conduct falling within the broad scope that is actually punishable in national courts.”¹¹⁴

The Ninth Circuit found that the defendants committed acts of sea piracy based upon a definition that does not define the acts in a manner that would give defendants notice.¹¹⁵ Prior to the *Sea Shepherd* case, Judge Davis of the District Court of the Eastern Virginia found that, contrary to his colleague Judge Jackson, the “crime of ‘piracy’ as defined by the UNCLOS, is customary law, and proceeded to read the provisions of article 101 as though they were written into the U.S. criminal statute.”¹¹⁶

The definition of “pirate ship” under UNCLOS Article 103 is ambiguous and “is circular because it defines ‘pirate ship’ as a ship intended to commit any of the acts of Article 101, which includes the voluntary operation of a pirate ship, if ‘acts’ is interpreted to include Article 101(b).”¹¹⁷

According to Shnider,

[a] reading that narrows Article 103 to ships intended for illegal acts of violence would also give piracy two different meanings in the Convention: piracy resulting from a violent attack (Article 101 (a) only), and other ‘nonviolent’ forms of piracy, including crew and facilitators. This distinction might mean that the right of visit in Article 110 and the right of arrest in Article 105 are only applicable to violent piracy. It might also mean that Article 101 (b) only applies to crew who assist a violent attack, but not those who assist cruising.¹¹⁸

¹¹²See *id.* at 2.

¹¹³See *supra* notes 100 & 101.

¹¹⁴Shnider, *supra* note 30, at 527.

¹¹⁵Compare *id.*, with *Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y*, 725 F.3d 940, 943-44 (9th Cir. 2013).

¹¹⁶*Id.* at 527-28 (citing *United States v. Hasan*, 747 F. Supp. 2d 599, 640-42 (E.D. Va. 2010) (“Defendants were fairly warned of the potential criminal liability they faced for their conduct.”)).

¹¹⁷*Id.* at 509.

¹¹⁸*Id.* at 509-10.

As previously noted, the Harvard Draft, due to the different views on the subject, was attempting to arrive at a definition of piracy for expeditious reasons, and not as a substantive crime.¹¹⁹ The Harvard Draft was a compilation and clarification of existing international law, which led directly to the Geneva Convention and UNCLOS definitions of piracy.¹²⁰ While international law develops over time, expanding or re-interpreting the treaty definitions to include “crimes” that are not mentioned in or even related to the crimes in the Harvard Draft (like acts to protect marine life), is a baseless leap.

It is difficult to believe how the Sea Shepherd participants could reasonably foresee that their acts could be seen as piratical in nature, even though they foolishly called themselves “pirates” for publicity purposes.¹²¹ It is also confusing to call them pirates in the case because, unlike in the Eastern District of Virginia cases, Sea Shepherd has not been indicted for the crime of piracy.¹²² They are being classified as pirates under jurisdiction obtained by the Alien Tort Statutes.¹²³ It is the opinion of your authors that it would be wiser not to expand a definition of piracy in this situation but rather, if necessary, to find that Sea Shepherd committed tortious acts. Ultimately, there is no sound basis for finding their acts to be piratical in nature and there is no historical basis in the definition of piracy.

In an interesting article on the matter, Debra Doby set forth a detailed discussion of the “private ends” requirement in the UNCLOS definition of piracy.¹²⁴ She pointed out the fact that in distinguishing between an objective and subjective definition of the term piracy,

an objective definition may remove the legal impediments to capturing pirates; however, it does not resolve the states’ continued and well-grounded reluctance to classify a broader range of ship attacks as piracy. The state’s reluctance may be prudent as the mere label of “piracy” carries broad powers which grants the courts of any nation jurisdiction over any citizen suspected of piracy.¹²⁵

¹¹⁹Harvard Draft, *supra* note 30, at 786.

¹²⁰See generally *id.*

¹²¹For example, see the film on Sea Shepherd founder, Paul Watson, entitled “Pirate for the Sea.” *PIRATE FOR THE SEA*, SYNOPSIS, <http://www.artistsconfederacy.com/pirateforthesea/> (last visited Sept. 16, 2014).

¹²²See, e.g., *United States v. Hasan*, 747 F. Supp. 2d 599, 599 (E.D. Va. 2010); *United States v. Abdi Wali Dire*, 680 F.3d 446, 446 (4th Cir. 2012).

¹²³*Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y*, 725 F.3d 940, 943-44 (9th Cir. 2013).

¹²⁴Debra Doby, *Whale Wars. How to End the Violence on the High Seas*, 44 J. MAR. L. & COM. 135 (2013).

¹²⁵*Id.* at 164.

Doby points out that the obvious problem with the Ninth Circuit's decision is that they are attempting to "broadly interpret" private ends to encompass violence committed for core personal, moral or philosophical grounds.¹²⁶ She also points out that this interpretation has significant consequences because,

first, this interpretation allows a greater number of acts of violence, depredation, to qualify as piracy. Further, when an attack is labeled as piracy, it becomes subject to universal jurisdiction and it carries an inherent, serious obligation for all nations to respond with all due haste and prosecute to 'the fullest extent.' This far-reaching obligation to eradicate piracy carries political consequences in each state.¹²⁷

It is your authors' contention that if a court has to use a "plain meaning" definition of "private ends" to describe the blanks left by the international definition, created originally by the Harvard Draft professors, then there is no criminal act of piracy by those standards. Even defining piracy as a tort is a novel legal concept. The international definition is not suitable enough to follow as a doctrine of law except in clear instances, such as Somali piracy, where certain Somalis in skiffs or mother ships attack and hijack ships, kidnapping and murdering passengers aboard.¹²⁸ Somali piracy represents the classical view within the definition of the universal definition of piracy in UNCLOS.¹²⁹ Taking the leap from a criminal element in piracy consisting of hijacking, murder, plunder (e.g., Somali piracy), to environmental interventionism, left the court defining the crime of sea piracy in an uncommon manner, with highly questionable results.

The interventionists were trying to block Japanese whalers from killing whales, in violation of the International Convention for the Regulation of Whaling.¹³⁰ The United States recognizes this treaty.¹³¹ The rest of the interventionist countries (except Australia and New Zealand) did nothing to intervene. The plain language rule led the court to stray, as the court's holding does not fit within the bounds of the definition of the crime of piracy.

To prevent these acts of the interventionists, the Japanese filed a lawsuit. One author, Ryan A. Keefe, was even more conservative than the Ninth

¹²⁶*Id.*

¹²⁷*Id.* 3

¹²⁸*See, e.g.,* Gettleman, *supra* note 87.

¹²⁹*See id.*

¹³⁰*See* International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW].

¹³¹*See* Michael Bowman, "Normalizing" *The International Convention For The Regulation Of Whaling*, 29 MICH. J. INT'L L. 293, 416 (2008).

Circuit in his analysis of the Ninth Circuit's decision.¹³² In both Keefe and the Ninth Circuit's analysis, there is silence concerning the events that led up to the acts of the interventionists. Both the Ninth Circuit and Keefe operated on the assumption that the Japanese were simply issuing permits for "scientific" reasons that they claimed were allowed by the whaling convention.¹³³ However, after the Ninth Circuit decided this case, the International Court of Justice chastised the Japanese government for creating sham scientific studies.¹³⁴ This was something that the rest of the international community understood for a long period.¹³⁵ Keefe pointed out that,

the injunctive and declaratory relief sought in the U.S. District Court for the Western District of Washington, was based on four grounds of the United States Alien Torts Statute (ATS) piracy claims; ATS safe navigation claims; admiralty claims; and civil conspiracy. The Ninth Circuit held that the District Court had erroneously failed to issue the preliminary injunction against Sea Shepherd, and wrongfully dismissed the Institute's ATS piracy claims. All federal district courts are granted subject matter jurisdiction to establish whether a violation of the law of nations is actionable under the ATS.¹³⁶

Keefe cited the *Sosa v. Alvarez-Machain* case, where, "the Supreme Court held that the ATS might permit suits of violations of modern norms comparable to the paradigmatic late-eighteenth century norms of the law of nations, namely offenses against ambassadors, violations of safe conduct, and acts of piracy."¹³⁷ Further, he was quick to point out that the "actionable ATS violations of international law must concern specific international and obligatory norms."¹³⁸ The Ninth Circuit decision to expand the definition of piracy under the ATS is more confounding considering that U.S. courts within the same district have been split on whether the "typical" acts of piracy meet the "specific, universal and obligatory standards of international law claims."¹³⁹

Nonetheless, the Ninth Circuit held that UNCLOS and the Suppression of Unlawful Acts established international norms for ATS purposes, and the plain language of the treaties defines piracy in a way that certainly included

¹³²Ryan A. Keefe, *Case Comment: International Law, Ninth Circuit Issues Preliminary Injunction Recognizing Activist Conservation Society As Pirates - Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 708 F.3d 1099 (9th Cir. 2013), 36 SUFFOLK TRANSNAT'L L. REV. 461, 472 (2013).

¹³³See *id.* See also *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 943-44 (9th Cir. 2013).

¹³⁴*Australia v. Japan: New Zealand intervening*, Int'l Ct. of Justice, March 14, 2013, available at <http://www.icj-cij.org/docket/files/148/18136.pdf>.

¹³⁵See generally Bowman, *supra* note 133.

¹³⁶Keefe, *supra* note 134, at 465.

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹*Id.* at 465-66.

Sea Shepherd's Conservation Society's actions.¹⁴⁰ All of this discussion was premised on the fact that, "the activities on the Japanese whalers were authorized and in compliance with the International Whaling Commission of which the United States is a member."¹⁴¹

Additionally, the court relied on a Belgian case, *Castle John v. NV Mabeco*, that they called "precedent" on the matter.¹⁴² The court in Belgium held that environmental activism qualifies as a private end.¹⁴³ In citing the case, the Ninth Circuit said that the *Abbott* case was "entitled to considerable weight."¹⁴⁴ Thus, it concluded that the term "private ends" included "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."¹⁴⁵

In the *Castle John* case,

the members of the environmental group "Green Peace" took action on the high seas against two vessels engaged in the discharge of noxious waste, in order to attract attention to the harmful effects of such discharge at sea. The action included boarding, occupying and causing damage to the two vessels. The operators of the vessels instituted proceedings before the Belgian courts for injunctions to prevent interference with their discharge operations on the high seas

The Court of Appeal of Antwerp held that the Belgian courts were entitled to exercise jurisdiction over their own nationals in such circumstances because the action at issue amounted to piracy for which the exclusive application of the law of the flag State could not be claimed [and] the defendants appealed. The appeal was dismissed.¹⁴⁶

The court in the *Castle John* case pointed out also that "[t]he applicants did not argue that the acts at issue were committed in the interest or to the detriment of a State or State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a

¹⁴⁰*Inst. of Cetacean Research v. Sea Shepard Conservation Soc'y*, 725 F.3d 940, 943-44 (9th Cir. 2013).

¹⁴¹Keefe, *supra* note 132, at 465. The ICJ case refuting the notion that the Japanese whalers were in compliance with the ICRW was not decided at the time of the Ninth Circuit's decision, however, the knowledge of violations of Japanese whaling violations were notorious. See *Australia v. Japan: New Zealand intervening*, Int'l Ct. of Justice, March 14, 2013, available at <http://www.icj-cij.org/docket/files/148/18136.pdf>.

¹⁴²*Inst. of Cetacean Research v. Sea Shepard Conservation Soc'y*, 725 F.3d at 944.

¹⁴³See Cour de Cassation [Cass.] *Castle John v. NV Mabeco*, Dec. 19, 1986, 77 I.L.R. 537 (Belg.).

¹⁴⁴*Inst. of Cetacean Research v. Sea Shepard Conservation Soc'y*, 725 F.3d at 944 (citing *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993, 176 L. Ed. 2d 789 (2010)).

¹⁴⁵*Id.*

¹⁴⁶*NV Mabeco*, 77 I.L.R. at 537.

political perspective.”¹⁴⁷ There was no other basis for the Belgian court’s decision. There was really no explanation as to why the Belgian court called this act of attempting to prevent toxic waste from being dumped in the waters by two ships, an act of piracy encompassed by the term “private ends.”¹⁴⁸ However, the decision did lead to proper legislation creating legal repercussions for “pirates” causing environmental harm caused at sea.¹⁴⁹

The *Castle John* case was decided in 1986, before the government of Belgium had a piracy statute on the books.¹⁵⁰ That statute was enacted December 30, 2009.¹⁵¹ It was created so that Belgium could try Somali pirates that might attack one of the flagged vessels (i.e., when such an attack occurred earlier Belgium did not believe that they had jurisdiction).¹⁵² Interestingly enough, the Belgian statute includes a provision stating that if an act of piracy endangers the safety of shipping or the “protection of the environment” its punishment ranges from the normal 10-15 years imprisonment to 15-20 years of imprisonment.¹⁵³ So, damage to the environment is an aggravating factor as far as punishment of acts of piracy is concerned in Belgium.

The Ninth Circuit, however, rejected the idea that the Japanese whalers came into court with “unclean hands” and decided that the equities in this situation favored the Sea Shepherd.¹⁵⁴

While your authors do not think that the claim of piracy should have been found and upheld in the Sea Shepherd situation, of course, acts of violence at sea should not go unpunished. However, addressing environmental interventionist acts that become violent under the legal guise of sea piracy is not the proper legal ground. After all, if a United States appellate court found that they committed acts of piracy, then the Japanese may argue that they can employ any means to stop them. By calling the environmental interventionists “pirates,” the Ninth Circuit encourages the Japanese to retaliate with violence at sea against Sea Shepherd for interfering with their whaling operations or seeking their prosecution as “pirates” in Japan.

¹⁴⁷NV Mabeco, 77 I.L.R at 540.

¹⁴⁸See id.

¹⁴⁹See Belgian legislation on combating piracy at sea, art. 4, section 3, Dec. 30, 2009.

¹⁵⁰Id.

¹⁵¹Belgian legislation on combating piracy at sea, Dec. 30, 2009, available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BEL_legislation_to_combat_piracy.pdf.

¹⁵²Public International Law & Policy Group, Piracy Definitions in Domestic and Regional Systems, March 2013, available at http://law.case.edu/Academics/AcademicCenters/Cox/WarCrimesResearchPortal/show_document.asp?id=321.

¹⁵³Belgian legislation on combating piracy at sea, art. 4, section 3, Dec. 30, 2009.

¹⁵⁴Inst. of Cetacean Research v. Sea Shepard Conservation Soc’y, 725 F.3d at 947.

IV ON THE REGULATION OF INTERNATIONAL WHALING

A. The Decision of the International Court of Justice: 31 March 2014

The International Court of Justice (ICJ) accepted Australia's case against Japan for breaching obligations under the International Convention for the Regulation of Whaling (ICRW).¹⁵⁵ Spearheaded by the United States, the ICRW was signed in 1946 in order to observe the proper conservation of whale stocks.¹⁵⁶ In 1982, the IWC incorporated Morley in the schedule into the convention and effectively created a moratorium on Japanese commercial whaling and further incorporated paragraphs in 7(b) of the schedule, stating, "commercial whaling . . . is prohibited in a region that is designated as a southern ocean sanctuary."¹⁵⁷

Naturally, Japan responded to this moratorium by ceasing whaling for commercial purposes, allegedly, but launched the Japanese Whale Research Program (JARPA I and II) on this special permit.¹⁵⁸ Under the JARPA II research plan, the court noted that the plan stated that "the sample size is calculated in a range of 800 to 1,000 animals with more than 800 being desirable."¹⁵⁹ In paragraph 195 of the 2014 *Australia v. Japan* decision, the court stated that in regards to the minke whale sample size "there was a lack of transparency regarding the decisions made in selecting these individual sample sizes . . ."¹⁶⁰ Further, there was no showing that the sample size was reasonable in relation to achieving the program's objectives when compared with other possible sample sizes that were required for fuel whales.¹⁶¹ Japan essentially flaunted its own permit issuance by using a factory ship in hunting down the whales.¹⁶² The ICJ ultimately decided that Japan violated three

¹⁵⁵Whaling in the Antarctic (Austl. v. Japan), 2014 I.C.J. 148 (Mar. 31, 2014).

¹⁵⁶See Bowman, *supra* note 130.

¹⁵⁷See International Convention for the Regulation of Whaling, 1946 Schedule, 64th Annual Meeting, at 3 (2012), available at <http://iwc.int/private/downloads/f2cfobr18sg0gc8o4884sgg4w/Schedule-August-2012.pdf>; see also William C.G. Burns & Geoffrey Wandesforde-Smith, *The International Whaling Commission and the Future of Cetaceans in a Changing World*, IWC RECIEL II 199, 201, n. 20 (2002), available at http://www.cbialdia.mardecetaceos.net/archivos/download/burns2006iwc_and_future_of_cetaceansik14169.pdf. Elliot Morley, the UK Minister of Fisheries and Agriculture, gave the opening speech at the convention, calling for a permanent moratorium on whaling. *Id.*

¹⁵⁸Whaling in the Antarctic, 2014 I.C.J. 148 at 35.

¹⁵⁹*Id.* at 54.

¹⁶⁰*Id.* at 57.

¹⁶¹*Id.*

¹⁶²*Id.* at 67. A factory ship is defined as "one on which whales are treated wholly or in part" and a whale catcher on board a ship is defined as one "for the purpose of hunting, taking, towing, holding onto or scouting for whales." *Id.*

paragraphs of the Schedule and that the issuance of special permits for JARPA II was not for purposes of scientific research within the meaning of article 8.¹⁶³

Following the court's decision, an Associated Press article reported that Tokyo asserted that the Antarctic Program was nearly bankrupt, but "... if the government had overhauled it on its own, it would have incurred the wrath of a strong anti-whaling lobby, and could have been criticized for caving in to foreign anti-whaling activists."¹⁶⁴ Further, with the ICJ decision, Japanese "officials can say that the courts forced their hand."¹⁶⁵ The article also pointed out that the ruling was really an example of "'*gaiatsu*,' the external pressure that Japan has relied on to bring about change when vested interests are strong..." and that, "[u]nfortunately, Japan cannot change its policies without *gaiatsu* and the ruling definitely serves that role to finally bring about a change."¹⁶⁶ The costs of the JARPA programs to Japan are considerable and were sharply increased by the costs of measures required to respond to Sea Shepherd's activities such as patrol boats and repairs.¹⁶⁷

The Sea Shepherd protests impact the JARPA programs not only by curtailing the catch, but also by putting Japan into a negative light by internationally focusing attention on the hunting of the whales.¹⁶⁸ The impact of Sea Shepherd's efforts is tangible as the Japanese fleet returned home at the end of the 2013/2014 season with only a quarter of its quota (251 minke whales).¹⁶⁹

However, the remorseful sounding reactions in Japan may have been short lived, because new press releases appeared thereafter, which stated that Japan intends to resume whaling in the southern seas.¹⁷⁰ The Minister of Agriculture said that Japan would submit a new plan for "research" whaling to the International Whaling Community this fall.¹⁷¹ Even though the ICJ questioned whether the program was for research, and pointed out that the JARPA programs yielded few scientific results, Japan has stated that its 26-year old research program is needed to monitor whale populations in the

¹⁶³*Id.*

¹⁶⁴Mari Yamaguchi, *AP Analysis: Japan Anti-Whaling Ruling Saves Face*, April 12, 2014, AP.ORG, available at <http://bigstory.ap.org/article/ap-analysis-japan-anti-whaling-ruling-saves-face>.

¹⁶⁵*Id.*

¹⁶⁶*Id.*

¹⁶⁷*Id.*

¹⁶⁸*Id.*

¹⁶⁹*Id.*

¹⁷⁰*Japanese Whaling Group Intends to Resume its Hunts*, REUTERS.COM, April 15, 2014, available at <http://www.reuters.com/article/2014/04/15/us-japan-whaling-idUSBREA3E05D20140415>.

¹⁷¹Elaine Lies, *Japan will conduct Pacific Whale Hunt in Wake of Court Ruling*, REUTERS.COM, April 18, 2014, available at <http://www.reuters.com/article/2014/04/18/us-japan-whaling-idUSBREA3G08C20140418>.

Southern Ocean.¹⁷² Opponents, however, are calling Japan's assertions a "crude cover" for the continuation of commercial whaling.¹⁷³

Environmentalists have said that Japan's decision to continue whaling is a sign of the political power of conservative members of parliament, who strive to preserve "whaling as a facet of traditional Japanese culture," which they perceive is threatened by the demands of foreigners.¹⁷⁴ In fact, a group of Japanese pro-whaling politicians called for the revival of the whaling programs, while making "tongue-in-cheek" demands that whale meat should be served to President Obama at a state dinner in Japan.¹⁷⁵ Further, seemingly undaunted, Japan's minister of agriculture has alluded to plans for new countermeasures to "thwart unfortunate obstruction activities," presumably referring to the Sea Shepherd Conservation Society's marine life defense activities.¹⁷⁶

The ICJ decision will go a long way to add to the Japanese belief that they can continue to whale under the guise of a new permit system, because now they can say that the Sea Shepherd members are "pirates" and should be liable for their interventionist acts.

VI CONCLUSION

It is really unfortunate that by using the "plain meaning" doctrine to create "universal" jurisdiction over crime based on an "expeditious" definition in UNCLOS, innocent persons can now be subjected to punishment as pirates rather than tortfeasers. The Ninth Circuit created a new definition for an eighteenth century crime called piracy. By doing so, it put innocent people in danger of harsh treatment. To your authors, it really seems that any violation committed was perpetrated in the name of the public good, and not as an offense to the international community and civilized society. The district court decision analyzed the events between Sea Shepherd and the Institute for Cetacean "Research" with a more realistic assessment of the state of international law and the true meaning of piracy. Of course, the problem with letting the Sea Shepherd group abscond from any responsibil-

¹⁷²Martin Fackler, *Japan Plans to Resume Whaling Program, With Changes to Address Court Concerns*, NYTIMES.COM, April 18, 2014, available at http://www.nytimes.com/2014/04/19/world/asia/japan-says-it-will-resume-whaling-off-antarctica.html?_r=0.

¹⁷³*Id.*

¹⁷⁴*Id.*

¹⁷⁵*Id.*

¹⁷⁶*Id.*

ity for their acts would be to create a justification for any group in the future who thought that their cause was proper and just to do the same things and get away with it. However, the members of the Sea Shepherd group are definitely not pirates. They are merely persons that should be held responsible for any tortious damage they have caused. Of course, now that the ICJ has decided that the Japanese were violating the ICRW treaty by whaling commercially instead of conducting proper research, courts in the United States would be remiss to respond to any further pleas for relief from Japan's whaling groups. Thus, in the end, the Sea Shepherd group succeeded in their goal!