CHAPTERS

MARINE CONSERVATION CAMPAIGNERS AS PIRATES: THE CONSEQUENCES OF *SEA SHEPHERD*

BY

WHITNEY MAGNUSON*

Sea Shepherd Conservation Society, the infamous environmentalist group featured on Animal Planet's Whale Wars, was recently convicted of piracy by the Ninth Circuit Court of Appeals. To be condemned as a pirate under international law, a defendant must have committed the alleged piratical act for "private ends." This Chapter analyzes the nexus between piracy law and marine conservation efforts to determine whether environmental goals should fall within the purview of the "private ends" element. In the process of answering this question, this Chapter explores the conflicting district court and Ninth Circuit opinions in the Sea Shepherd *case, surveys the development of piracy law, and critically examines the implications of labeling marine conservationists as pirates under international law, ultimately concluding that environmental goals should not constitute "private ends."*

* Online Managing Editor, *Environmental Law* (2014–2015); J.D. Candidate, Lewis & Clark Law School (expected 2015); B.A., magna cum laude, Kalamazoo College (2012). The author would like to thank Professor John P. Grant for his enthusiasm, advice, and insight. This Chapter was the first place recipient of the 2014 Davis Wright Tremaine International Law Writing Award, and the author would like to express her gratitude to Davis Wright Tremaine and the reviewing committee for that honor.

I. INTRODUCTION

Over the last decade, the Southern Ocean has become the center of confrontation between Japanese whalers and environmentalist protesters. Sea Shepherd Conservation Society (Sea Shepherd) is the most radical of these protest groups and has become notorious for its distinctive direct action campaign.[1] Every whaling season, Sea Shepherd journeys into Antarctic waters and seeks out whaling ships with the hope of disrupting whale hunting activities. Most often, Sea Shepherd employs smoke bombs, liquid-filled projectiles, and prop foulers, in its attempts to ruin whale meat on board the Japanese vessels, slow down and distract the whaling ships, and ultimately minimize the number of whales killed each season and the profits resulting from their deaths.[2]

While subjective views of Sea Shepherd range from "conservation police force" to "terrorist,"[3] most recently, in *Institute of Cetacean Research*

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

2 Amanda M. Caprari, *Lovable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean*, 42 CONN. L. REV. 1493, 1505, 1508 (2010).

3 Doby, *supra* note 1, at 136.

v. Sea Shepherd Conservation Society (*Sea Shepherd II*),[4] the Ninth Circuit controversially labeled the organization "pirates" under international law.[5] The accuracy of the holding in *Sea Shepherd II* hinges on the requirement of customary international law that to be piratical, an act must be committed for "private ends."[6] The "private ends" element has been judicially interpreted both narrowly, to denote "financial enrichment," and broadly, to encompass all violent conduct on the high seas committed by nonstate actors.[7] In the context of *Sea Shepherd II*, the question of whether "private ends" should include "environmental ends" inevitably arises.[8] This Chapter explores the development of the "private ends" element of the international crime of piracy and its application to modern conflicts on the high seas, in which the alleged "end" of the accused group is marine conservation.

The relevancy of the whale wars controversy will likely increase in the future as it underscores a clash of interests governed by international law: the rights of modern conservationists to protest environmental decimation, and the protection afforded the whale hunting industry. Conservation efforts will presumably continue to intensify, along with competition for the ownership of marine resources. According to the United Nations, eighty-seven percent of the world's fish stock has been exploited or depleted.[9] Oceans are being cleared at twice the rate of forests.[10] These statistics speak to the growing necessity of marine environmentalism.

Conversely, incidents of traditional piracy have skyrocketed in the last decade, primarily in the waters of Africa and Southeast Asia.[11] The International Chamber of Commerce reports that in 2011, there were 439 incidents of recorded piracy, during which 802 crewmembers were taken hostage, 45 vessels were hijacked, 176 were boarded, 113 were fired upon, and 8 crewmembers were killed.[12] These figures illustrate the need for

4 725 F.3d 940 (9th Cir. 2013).

5 *Id.* at 942.

6 *See* U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 397 [hereinafter UNCLOS] (defining piracy in Article 101 as requiring four elements: 1) illegal acts of violence, detention or depredation, 2) directed against another vessel, 3) committed on the high seas, 4) for private ends). Although Article 101 defines piracy, the topic is covered in totality in Articles 100–107. *Id.*

7 Doby, *supra* note 1, at 145–47 (summarizing disagreements on the scope of piracy under international law).

8 *See Sea Shepherd II*, 725 F.3d at 944 (concluding that environmental goals qualify as "private ends" under international law).

9 *See* FISHERIES AND AQUACULTURE DEP'T, FOOD AND AGRIC. ORG. OF THE U.N., THE STATE OF WORLD FISHERIES AND AQUACULTURE 11 (2012), *available at* http://www.fao.org/docrep/016/i2727e/i2727e.pdf (estimating that 12.7% of the world's fish stock is not fully exploited or overexploited).

10 U.N. Env't Programme, *Overfishing: A Threat to Marine Biodiversity*, *available at* http://www.un.org/events/tenstories/06/story.asp?storyID=800.

11 *See* Int'l Com. Crime Servs., Int'l Chamber of Com., *Piracy Attacks in East and West Africa Dominate World Report*, Jan. 19, 2012, http://www.icc-ccs.org/news/711-piracy-attacks-in-east-and-west-africa-dominate-world-report (last visited July 26, 2014) (discussing statistics regarding recent pirate attacks).

12 *Id.*

international cooperation, legal reform, and harsh punishments to effectively deter violence on the high seas.

This Chapter uses the *Sea Shepherd II* case to explore the nexus between international piracy and marine conservation efforts. Section II features a comparative analysis of *Institute of Cetacean Research v. Sea Shepherd Conservation Society* (*Sea Shepherd I*)[13] and *Sea Shepherd II* to establish the legal framework and rationales utilized by American courts in addressing this issue. Section III provides the necessary historical context through an evaluation of piracy law development. Section IV analyzes the "private ends" element as it pertains to *Sea Shepherd I* and *II*, along with the complex implications of applying piracy law to environmental activists. Through this assessment, it becomes evident that marine activism does not amount to "private ends," and that such a designation amplifies the gap between the original intent of the "private ends" element and its current application.

II. THE WHALERS VERSUS THE CONSERVATIONISTS

Sea Shepherd I involved ongoing confrontations between Sea Shepherd, an environmentalist group of anti-whaling crusaders, and the Institute of Cetacean Research (the Whalers), a group of Japanese whalers involved in whale hunting under the auspices of scientific research.[14] The opinions issued in *Sea Shepherd I and II* offer insight into modern U.S. piracy jurisprudence, and represent the recent philosophical collision of marine conservation efforts and international maritime law.[15] Consequently, a summary is provided below, to illustrate the context and framework in which the issue of marine conservation as piracy has been recently perceived.

In 2011, the Whalers sued Sea Shepherd for injunctive and declaratory relief.[16] If granted, the injunction would have prohibited attacks on the Japanese crewmembers and ships, and would have required Sea Shepherd's vessels to stay at least 800 meters away from those of the Whalers.[17] The U.S. District Court for the Western District of Washington (Washington District Court) rejected the Whalers' request for a preliminary injunction because the Whalers failed to prove that Sea Shepherd was violating international norms under the Alien Tort Statute.[18] The Ninth Circuit reviewed the Washington District Court's denial of the Whalers' request for abuse of discretion and

13 860 F. Supp. 2d 1216 (W.D. Wash. 2012), *rev'd*, 725 F.3d 940 (9th Cir. 2013).

14 *Id.* at 1220.

15 *See Sea Shepherd II*, 725 F.3d 940, 943–44 (9th Cir. 2013) (discussing the modern approach to the relationship between piracy law and environmental activism).

16 *Sea Shepherd I*, 860 F. Supp. 2d at 1226.

17 *Id.*

18 *Id.* at 1231, 1246; Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

overturned the decision,[19] granting the preliminary injunction after concluding that Sea Shepherd had engaged in acts of piracy.[20]

A. History of the Whaling Dispute

The factual and legal background of the whale wars inform the divergent rationales behind the contrary decisions of *Sea Shepherd I* and *Sea Shepherd II*. The first part of this Section addresses the history and status of whaling on an international scale. The second part surveys the specific facts concerning the confrontation between the Whalers and Sea Shepherd.

1. International Response to Whaling on the High Seas

The International Whaling Commission (IWC) established the nonbinding International Convention for the Regulation of Whaling (Whaling Convention) in 1946, and enacted a ban on commercial whaling.[21] Nonetheless, whaling was authorized for purposes of scientific research and permits were self-issued by member nations.[22] Japan has issued scientific permits since 1987, despite failing to produce empirical scientific studies or data verifying that killing whales is necessary to conduct its research.[23] Further, it is undisputed that whale meat collected on annual hunts is sold for consumption in Japan.[24] The IWC dedicated the Southern Ocean as a whale sanctuary in 1994,[25] but that has not deterred Japanese whalers from hunting there.[26]

Many governments have verbally condemned the tradition of "scientific whaling,"[27] but Australia is the only country to have taken legal action.[28]

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19 *Sea Shepherd II*, 725 F.3d at 944, 947.

20 *Id.* at 947.

21 *See* Convention for the Regulation of Whaling art. 3, § 2, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

22 *Id.* art. 8, § 1.

23 Joseph E. Roeschke, *Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters*, 20 VILL. ENVTL. L.J. 99, 106 (2009).

24 *Sea Shepherd I*, 860 F. Supp. 2d 1216, 1221 (W.D. Wash. 2012), *rev'd*, 725 F.3d 940 (9th Cir. 2013).

25 Roeschke, *supra* note 23, at 111; International Whaling Commission, *Whale Sanctuaries*, http://iwc.int/sanctuaries (last visited July 26, 2014).

26 A.W. Harris, *The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 375, 384 (2005). *See* Judith Berger-Eforo, *Sanctuary for the Whales: Will This Be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?*, 8 PACE INT'L L. REV. 439, 467 (1996).

27 U.S. DEP'T. OF STATE, Joint Statement on Whaling and Safety at Sea from the Governments of Australia, the Netherlands, New Zealand, and the United States: Call for Responsible Behavior in the Southern Ocean Whale Sanctuary, http://www.state.gov/r/pa/prs/ps/2011/12/178704.htm (last visited July 26, 2014).

28 *See* Application Instituting Proceedings, Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), 2014 I.C.J. 148 (Mar. 31, 2014) (instituting proceedings against Japan for alleged breach of international obligations concerning whaling).

Australia attempted to resolve the whale wars by creating the Australian Whale Sanctuary (AWS) in 1999.[29] But Australia's jurisdiction over the 200 nautical mile area of the Antarctic is only recognized by a handful of nations.[30] Australian courts have issued various injunctions estopping the Whalers from hunting within the AWS, but the judgments have been routinely ignored.[31] Most recently, Australia raised an action against Japan in the International Court of Justice (ICJ) in response to Japan's flagrant disregard of the IWC's whaling moratorium.[32] Australia alleged that through the continuance of its whale research program (JARPA II),[33] Japan breached its obligations under the IWC, which mandates the preservation of marine life.[34] Australia requested the termination of JARPA II, revocation of authorizations allowing JARPA II to continue its practices, and demanded assurances that if JARPA II remained, or another whaling research program was created, the program would operate in conformity with international law.[35]

In March 2014 the ICJ found that while JARPA II could be broadly considered a program of "scientific research," as required by the IWC, its design and implementation did not reasonably relate to its stated scientific objectives.[36] First, Japan failed to provide significant evidence concerning the practicability of using non-lethal methods to conduct its desired research.[37] Second, there was little analysis or reasoning given for its selection of species-specific sample sizes.[38] Third, there was consistently a gap between annual target sample sizes and the actual take, which weighed against Japan's claim that sample sizes were selected due to ecosystem and

29 *Environmental Protection and Biodiversity Conservation Act of 1999* (Cth) div. 3, §§ 224–247 (Austl.), *available at* http://www.austlii.edu.au/cgi-bin/download.cgi/au/legis/cth/consol_act/epabca1999588 ("The Australian Whale Sanctuary is established in order to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas and prescribed waters."); *see Humane Soc'y Int'l, Inc. v. Kyodo Senpaku Kaisha Ltd.* (2008) FCA 3, ¶¶ 2, 5 (Austl.) (describing the creation of the AWS), *available at* http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2008/2008fca0003 [hereinafter *Kyodo*].

30 *Id.* ¶ 12. Only the United Kingdom, France, Norway, and New Zealand recognize the AWS. *Id.* ¶ 13.

31 *See id.* ¶ 55.

32 Application Instituting Proceedings, *supra* note 28, at 4.

33 Australia alleged that JARPA was a whaling program under the guise of scientific research. In 2005, Japan terminated JARPA, and created a larger whale research program, JARPA II. The newer program's intended number of kills per season exceeds those of JARPA, doubling the number of minke whales targeted, and including the killing of humpback and fin whales as its objective. JARPA II currently has no set end date. Australian Memorial, Whaling in the Antarctic (Austl. v. Japan), 2011 I.C.J. Pleadings 2 (May 9, 2011), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148&code=aj&p3=1.

34 *See id.* at 3.

35 *Id.* at 279–80.

36 Whaling in the Antarctic (Austl. v. Japan), Judgment, ¶ 97 (Mar. 31, 2014), *available at* http://www.icj-cij.org/docket/files/148/18136.pdf.

37 *Id.* ¶ 141.

38 *Id.* ¶ 181.

multi-species competition considerations.[39] Other factors undermining the characterization of JARPA II's actions as "for the purposes of scientific research" consisted of a lack of scientifically valuable information resulting from the annual whale hunts, absence of a timeframe for the program, and failure to cooperate with other Antarctic research programs.[40] The court concluded that Japan had violated international law. Japan's current whale hunting permits were revoked, and it was proscribed from issuing new licenses authorizing the killing of whales under JARPA II.[41] It remains to be seen whether this judgment will deter Japan's future whale hunting activities in the Southern Ocean.

2. Confrontations Between the Whalers and Sea Shepherd

Pending the ICJ's ruling on the merits, annual confrontations between the Whalers and Sea Shepherd continued. While the characterization of tactics used by Sea Shepherd was debatable, there was no disagreement regarding what had actually occurred. Sea Shepherd regularly threw glass projectiles filled with butyric acid,[42] an odorous substance, to deter use of the deck and to spoil whale meat onboard whaling ships. Sea Shepherd also hurled smoke bombs at the vessels to obscure crewmembers' vision, and pointed a high-powered laser at the ships to confuse and annoy the Whalers.[43] To counter the encroachment, the Whalers erected large nets around the decks of their ships.[44] In response, Sea Shepherd began using flares, often attached to hooks, to burn down the protective netting.[45] Sea Shepherd also used prop foulers—strong cables released in front of the Whalers' bows—in attempts to slow down the whaling ships. There is only one recorded instance in which prop-fouling efforts proved successful.[46] Lastly, Sea Shepherd often navigated its boats dangerously close to those of the Whalers to execute the attacks, thus increasing the chance of collision.[47] Despite the array of harassment perpetuated by Sea Shepherd, no whaler has ever been injured.[48]

The Whalers employed various countermeasures to thwart Sea Shepherd. The Whalers regularly used high-powered water cannons, grappling hooks, and bamboo poles to keep Sea Shepherd's vessels at bay.[49] Additionally, the Whalers used concussion grenades and long-range acoustic

39 *Id.* ¶ 212.

40 *Id.* ¶¶ 213–222.

41 *Id.* ¶¶ 244–247.

42 Butyric acid is a colorless liquid emitting the unpleasant odor of rancid butter. It poses no serious risk to human health. WEBSTER'S THIRD INTERNATIONAL NEW DICTIONARY 306 (2002); *Sea Shepherd I*, 860 F. Supp. 2d 1216, 1223 (W.D. Wash. 2012), *rev'd*, 725 F.3d 940 (9th Cir. 2013).

43 *Sea Shepherd I*, 860 F. Supp. 2d at 1223.

44 *Id.*

45 *Id.*

46 *See id.* at 1224.

47 *Id.*

48 *Id.*

49 *Id.*

devices to frustrate Sea Shepherd and to mitigate the advances of its ships and helicopter.[50] There is no evidence that these countermeasures have ever resulted in injury to the Sea Shepherd crew.[51]

B. Bases for the Issuance of the Whalers' Preliminary Injunction

A preliminary injunction can be granted where a party establishes four elements: 1) likelihood of success on the merits, 2) likelihood of irreparable harm, 3) balance of equities in its favor, and 4) public interest in its favor.[52]

In *Sea Shepherd I*, the Whalers asserted four claims in seeking declaratory and injunctive relief. The first three claims—protecting freedom of navigation at sea, freedom from piracy, and freedom from terrorism—were grounded in international law.[53] The fourth claim, civil conspiracy, arose under Washington law.[54] Subject matter jurisdiction was appropriate pursuant to the Alien Tort Statute[55] and admiralty law.[56]

Although jurisdiction was proper for the Washington District Court to hear the Whalers' claims, only the piracy and safe navigation claims were considered as bases for granting or denying the preliminary injunction.[57] First, the Whalers admitted the terrorism claim was not related to their plea for injunctive relief.[58] Second, although the Washington-based civil conspiracy claim potentially invoked diversity jurisdiction, it could not support the requested injunction sought because the injunction did not target activity in Washington and state law could not enjoin conduct on the high seas.[59]

To be actionable under the Alien Tort Statute, a tort must constitute a violation "of a norm that is specific, universal, and obligatory."[60] To qualify as "obligatory," an international norm must be a matter of "mutual, and not merely several, concern."[61] Nations recognize many norms of conduct, but

50 *Id.*

51 *Id.* at 1225.

52 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

53 *Sea Shepherd I*, 860 F. Supp. 2d at 1226.

54 *Id.*

55 The Alien Tort Statute grants district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). The Washington District Court has authority to determine whether a violation of the law of nations is cognizable under the Alien Tort Statute. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004).

56 Torts on the high seas have historically fallen within the realm of admiralty jurisdiction. Myhran v. Johns-Manville Corp., 741 F.2d 1119, 1120–21 (9th Cir. 1984). When exercising admiralty jurisdiction, all customary international law equates federal common law. *See* Lauritzen v. Larsen, 345 U.S. 571, 581–82 (1953).

57 *Sea Shepherd I*, 860 F. Supp. 2d at 1228.

58 *Id.*

59 *Id.*

60 Hilao v. Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994).

61 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980). Many norms of conduct are universally recognized, but not as a matter of mutual obligation. For example, the general prohibition against theft "does not incorporate the Eighth Commandment, Thou shalt not

not all are subject to mutual obligation.[62] A norm is "universal" when "virtually every nation recognizes it."[63] Lastly, sweeping prohibitions are insufficient; norms must be "specific," the particulars of which are agreed upon by the global community.[64] Establishing international norms is problematic as international law is composed of a multiplicity of agreements and treaties between various nations.[65]

C. Likelihood of Success on the Merits

The Whalers employed four international agreements to ascertain international norms pursuant to the Alien Tort Statute: the 1982 United Nations Convention on the Law of the Sea (UNCLOS);[66] the 1958 Convention on the High Seas (High Seas Convention);[67] the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA);[68] and the International Maritime Organization's International Regulations for Preventing Collisions at Sea (COLREGS).[69] This was a matter of first impression because a court had never considered piracy and marine navigation claims under the Alien Tort Statute.[70] All four agreements satisfied the universal and obligatory standards, exemplifying broad international consensus.[71] This was unsurprising as the court considered maritime traffic the "prototypical arena in which nations have universal, mutual concern."[72] However, a disagreement arose between the courts concerning the degree of specificity required under the Alien Tort Statute. According to the Washington District Court, these norms lacked the necessary specific prohibitions against Sea Shepherd's conduct, whereas the Ninth Circuit did not question the level of specificity.[73] Each claim's likelihood of success on the merits is examined in turn.

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steal . . . [into] the law of nations." *Id.* (quoting IIT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975)) (internal quotation marks omitted).

62 *Sea Shepherd I*, 860 F. Supp. 2d at 1229.

63 *Id.* As long as the civilized nations of the world accept a norm, it is considered "universal." Alvarez-Machain v. United States, 331 F.3d 604, 620 & n.15 (9th Cir. 2003).

64 *Sea Shepherd I*, 860 F. Supp. 2d at 1229; Alvarez-Machain, 331 F.3d at 618–19.

65 *Id.* at 1229–30.

66 UNCLOS, *supra* note 6.

67 Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter High Seas Convention].

68 Convention for the Suppression of Unlawful Acts Against the Safety of Marine Navigation, Mar. 10, 1988, 1678 U.N.T.S. 304 [hereinafter SUA].

69 Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16 [hereinafter COLREGS].

70 *Sea Shepherd I*, 860 F. Supp. 2d at 1231.

71 *Id.*

72 *Id.* at 1232.

73 *Sea Shepherd II*, 725 F.3d 940, 944–45 (9th Cir. 2013) (discussing the adequacy of Whalers' claims under SUA, UNCLOS, and COLREGS).

1. Piracy Claim

Both the Washington District Court and the Ninth Circuit assumed that the Whalers correctly identified UNCLOS and the High Seas Convention as representative of the modern well-established international norms proscribing piracy.[74] Both treaties defined the elements of modern piracy as "(1) acts of violence . . . (2) committed for private ends . . . (3) directed against a ship . . . (4) outside the jurisdiction of any state."[75] The Washington District Court considered the first two elements of this definition "fatal" to the Whalers' piracy claim, while the Ninth Circuit determined the Whalers had satisfied their burden.[76]

Concerning private ends, in the Washington District Court's estimation, Sea Shepherd was uninterested in pecuniary gain. Rather, the numbers of whales saved by the organization served as the benchmark of its success.[77] Traditionally, private ends signified financial enrichment, and the Whalers failed to cite any source defining the phrase otherwise.[78] The Washington District Court conceded that one may view Sea Shepherd's goal as a type of private ends, but declined to make such a presumption without any authority on point.[79] The Whalers offered no binding authority and the court was unaware of any international consensus on the matter: "The court [could not] say that there [was] a specific, obligatory, and universal international norm against violence in the pursuit of the protection of marine life."[80]

Even if such a norm were established, the Whalers were required to carry the burden of proof that Sea Shepherd's tactics constituted "violence" under UNCLOS, and it was not satisfactorily proven that the law of nations endorsed the categorization of Sea Shepherd's actions as violence.[81] After all, Sea Shepherd was targeting the whaling vessels, not the crew. The Washington District Court held that the Whalers did not have viable causes of action based on the identical piracy statutes of UNCLOS and the High Seas Convention.[82]

The Ninth Circuit reviewed de novo the Washington District Court's dismissal of the Whalers' piracy claim under UNCLOS.[83] The higher court deemed erroneous the Washington District Court's interpretation of the private ends and violence elements of piracy.[84] The Ninth Circuit stated that words were to be given their ordinary meanings unless context dictated

74 *See id.* at 943; *Sea Shepherd I*, 860 F. Supp. 2d at 1231–32.

75 UNCLOS, *supra* note 6, art. 101; High Seas Convention, *supra* note 67, art. 15.

76 *Sea Shepherd I*, 860 F. Supp. 2d at 1233; *Sea Shepherd II*, 725 F.3d at 944.

77 *Sea Shepherd I*, 860 F. Supp. 2d at 1233.

78 *Id.*

79 *Id.*

80 *Id.*

81 *See* UNCLOS, *supra* note 6, art. 101 (defining piracy to include "illegal acts of violence or detention, or any act of depredation").

82 *Sea Shepherd I*, 860 F. Supp. 2d at 1233.

83 *Sea Shepherd II*, 725 F.3d 940, 943 (9th Cir. 2013).

84 *Id.* at 943–44.

otherwise.[85] The Ninth Circuit determined that private ends was incorrectly limited to "financial enrichment" when, in fact, the common understanding of "private" was much more expansive.[86] "Private" was typically used as an antonym to "public" and referenced matters of a personal nature, e.g., private property, private entrance, and invasion of privacy.[87] The Ninth Circuit also identified the historical meaning of private ends, as those actions "not taken on behalf of a state."[88] Belgian courts—the only judicial forums to have considered the issue—concluded that environmental activism did qualify as a type of private end.[89] The Ninth Circuit gave this interpretation "considerable weight,"[90] and concluded that private ends included those "pursued on personal, moral, or philosophical grounds."[91] Although an organization subjectively may see itself as acting for the public good, as opposed to private ends, its goals are not inherently public.[92]

The Ninth Circuit concluded that the Washington District Court had similarly misinterpreted the "violence" element of piracy.[93] Because UNCLOS prohibited violence against "persons or property," there was no basis for the Washington District Court's assertion that Sea Shepherd was not committing violence because it was targeting ships rather than people.[94] Although Sea Shepherd did not target the crew, it endangered the personnel by throwing projectiles and attempting to damage the Whalers' vessels.[95]

Therefore, in consideration of the "private ends" and "violence" elements of UNCLOS, the Ninth Circuit held that the Washington District Court erred in dismissing the Whalers' piracy claims. The higher court determined that Sea Shepherd had committed piracy.[96]

2. Safe Navigation Claim

The Washington District Court concluded the Whalers' COLREGS safe navigation claim was the only claim likely to succeed.[97] COLREGS was

85 *Id.* at 943 (citing Leocal v. Ashcroft, 543 U.S. 1, 8–9 (2004)).

86 *Sea Shepherd II*, 725 F.3d at 943. *See also* WEBSTER'S NEW INTERNATIONAL DICTIONARY 1805 (3d ed. 2002) (defining "private" as "belonging to or concerning an individual person, company, or interest").

87 *Sea Shepherd II*, 725 F.3d at 943.

88 *Id.* at 943–44; *see also* Douglas Guilfoyle, *Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts*, 57 Int'l & Comp. L.Q. 690, 693 (2008) (discussing the "private ends" element).

89 Castle John v. NV Mabeco, 77 I.L.R. 537, 537 (1988) (Ct. of Cassation, Dec. 19, 1986) (Belg.) [hereinafter *Castle John*].

90 *Sea Shepherd II*, 725 F.3d at 944 (citing Abbott v. Abbott, 560 U.S. 1, 15 (2010)).

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*; UNCLOS, *supra* note 6, art. 101.

95 *Sea Shepherd II*, 725 F.3d at 944 ("Ramming ships, fouling propellers and hurling fiery and acid-filled projectiles easily qualifies as violent activities, even if they could somehow be directed only at inanimate objects.").

96 *Id.*

97 *Sea Shepherd I*, 860 F. Supp. 2d 1216, 1235 (W.D. Wash. 2012), *rev'd*, 725 F.3d 940 (9th Cir. 2013); *see also* COLREGS, *supra* note 69.

characterized as a "universal system of sea traffic rules," exemplifying universal, obligatory, and specific norms.[98] By navigating boats too close to the Whalers' vessels, Sea Shepherd was likely violating the provisions of COLREGS that were intended to prevent vessel collisions.[99] The Ninth Circuit agreed.[100] The record provided adequate support for the allegation that Sea Shepherd deliberately navigated its ships too close to the Whalers' vessels in violation of COLREGS.[101]

Although the Washington District Court acknowledged the SUA safe navigation claim, it determined that the Whalers were not likely to succeed on the merits because Sea Shepherd's tactics fell outside the scope of SUA, which specifically prohibits "act[s] of violence" that "endanger safe navigation" or "cause damage to a ship."[102] The Ninth Circuit, on the other hand, concluded the Whalers had presented clear evidence that Sea Shepherd had impaired navigation.[103] Therefore, the Washington District Court was wrong in positing SUA was inapplicable because Sea Shepherd had not yet disabled any of the Whalers ships. At the very least, Sea Shepherd had attempted to endanger the navigation of the Whalers. The Ninth Circuit rejected Sea Shepherd's defense that its mechanisms were merely symbolic and decided the claim was dismissed by the Washington District Court in clear error.[104] The higher court deemed evidence of the Whalers' SUA claim was satisfactory and determined the Whalers were likely to succeed on the merits of the safe navigation claim.[105]

D. Irreparable Harm

The second element of a preliminary injunction is irreparable harm.[106] The Whalers alleged irreparable harm in the form of threats to the health and safety of crewmembers.[107] While courts generally recognize physical injury as irreparable harm,[108] the Washington District Court had to reconcile the fact that no actual injury had resulted from Sea Shepherd's actions with the reality that future injury was possible.[109] Based on the record, the Washington District Court concluded that injury was not likely to occur in the absence of the injunction.[110] The Ninth Circuit disagreed, and proclaimed

98 *Sea Shepherd I*, 860 F. Supp. 2d at 1235.

99 *Id.*

100 *Sea Shepherd II*, 725 F.3d at 945.

101 *Id.*; *see* United States v. Hinkson, 585 F.3d 1247, 1251 (9th Cir. 2009) (describing the proper scope of the Ninth Circuit's review).

102 *Sea Shepherd I*, 860 F. Supp. 2d at 1235; SUA, *supra* note 68, art. 3.

103 *Sea Shepherd II*, 725 F.3d at 945.

104 *Id.*

105 *Id.*

106 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

107 *Sea Shepherd I*, 860 F. Supp. 2d at 1243.

108 *See* Harris v. Bd. of Supervisors, 366 F.3d 754, 766 (9th Cir. 2004).

109 *Winter*, 555 U.S. at 7, 22 (determining that the mere possibility of irreparable harm is inconsistent with the requirement that plaintiff make a "clear showing").

110 *Sea Shepherd I*, 860 F. Supp. 2d at 1243.

the fact that the Whalers had not yet suffered harm was irrelevant to the irreparable harm element.[111] "A dangerous act, if committed often enough, will inevitably lead to harm, which could easily be irreparable."[112] According to the Ninth Circuit, irreparable harm would not be an obstacle to the Whalers' injunction.

E. Balance of the Equities

The third element of a preliminary injunction involves balancing the equities.[113] This element focuses on comparing the parties' respective hardships, and according to both courts, weighed in favor of the Whalers. The Ninth Circuit agreed with the Washington District Court that "absent an injunction, the [W]halers will continue to be the victims of Sea Shepherd's harassment."[114] Furthermore, Sea Shepherd provided no evidence of any hardship imposed on it by the issuance of the injunction.[115] While Sea Shepherd pointed to the lives of whales that would be lost, this projection failed to constitute harm to the organization itself.[116] An injunction would not prevent Sea Shepherd from pursuing its mission; it would require merely that Sea Shepherd use different means.[117]

F. Public Interest

The fourth element consisted of determining whether the public interest weighed in favor of a preliminary injunction.[118] The Washington District Court believed the public interest favored Sea Shepherd.[119] While safe passage was obviously a public priority, so too was preservation of marine life and avoidance of adjudicatory interference in international disputes.[120] If the preliminary injunction were granted, more whales would die. Illegality of whaling was nearly universal, so this outcome would be contrary to the interests of the United States and the rest of the world.[121] Aside from the conservation aspect, it would not be in the public interest for the United States to utilize its adjudicatory authority to interfere in the controversy when every other nation had refused to do so.[122]

111 *Sea Shepherd II*, 725 F.3d at 945–46 (citing Helling v. McKinney, 509 U.S. 25, 33 (1993)).

112 *Id.* at 946; *see also Harris*, 366 F.3d at 766.

113 *Winter*, 555 U.S. at 7, 20.

114 *Sea Shepherd II*, 725 F.3d at 946 (internal quotation marks omitted).

115 *Sea Shepherd I*, 860 F. Supp. 2d at 1244.

116 *Id.*

117 *Id.*

118 Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) ("[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."); *Winter*, 555 U.S. at 20.

119 *Sea Shepherd I*, 860 F. Supp. 2d at 1244.

120 *Id.*

121 *See* Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423h (2006); *Sea Shepherd I*, 860 F. Supp. 2d at 1244.

122 *Sea Shepherd I*, 860 F. Supp. 2d at 1245.

The Ninth Circuit acknowledged the same competing public interests at stake—safe navigation and marine preservation—but decided the element weighed in favor of the Whalers because the Whalers' activities were espoused by the Marine Mammal Protection Act and the Whaling Convention Act.[123] Conversely, Sea Shepherd's conduct clearly hindered safe navigation in violation of international law.[124] The latter was illegal and thus outweighed the environmental impacts of lawful whale hunting.[125]

G. Sea Shepherd's Defenses

Sea Shepherd raised a number of defenses, nearly all of which were rejected by the Washington District Court and the Ninth Circuit.[126] International comity and the doctrine of "unclean hands" were the only two defenses that merited substantial disagreement.

1. International Comity Defense

International comity mandates deference to the sovereignty of other nations.[127] The fact no nation had yet intervened in this controversy mitigated international comity concerns.[128] The Washington District Court claimed Australia was the exception, since it had created a whale sanctuary within which the Whalers were enjoined from hunting,[129] and international comity required U.S. courts to respect the judgments of foreign courts.[130] For three reasons, the Ninth Circuit held the Washington District Court's deference to Australia's judgments was an abuse of discretion.[131] First, the Australian judgments concerned the Whalers' conduct, not Sea Shepherd's.[132] Second, U.S. courts were under no obligation to enforce the judgments of Australian courts.[133] Lastly, the United States Executive Branch did not recognize

123 *Sea Shepherd II*, 725 F.3d 940, 946 (9th Cir. 2013); 16 U.S.C. § 1372 (2006); 16 U.S.C § 916c (2006).

124 *See* SUA, *supra* note 68, 224–26; *see also* UNCLOS, *supra* note 6; COLREGS, *supra* note 69.

125 *Sea Shepherd II*, 725 F.3d at 946.

126 The Ninth Circuit addressed only those defenses the Washington District Court concluded would succeed, impliedly dismissing Sea Shepherd's other defenses. *See Sea Shepherd II*, 725 F.3d at 946–47 (discussing the Washington District Court's conclusions concerning international comity and unclean hands); *see also Sea Shepherd I*, 860 F. Supp. 2d at 1235–43 (analyzing Sea Shepherd's defenses).

127 Sarei v. Rio Tinto, 671 F.3d 736, 756–57 (9th Cir. 2011) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the law and interests of other sovereign states.") (quoting Societe Nationale Industrielle Aeropostale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 544 n.27 (1987)).

128 *Sea Shepherd I*, 860 F. Supp. 2d 1216, 1242 (W.D. Wash. 2012), *rev'd*, 725 F.3d 940 (9th Cir. 2013).

129 *Id.*

130 Asvesta v. Petroutsas, 580 F.3d 1000, 1010–11 (9th Cir. 2009).

131 *Sea Shepherd II*, 725 F.3d 940, 945 (9th Cir. 2013).

132 *See Kyodo*, [2008] FCA 3, ¶ 2 (Austl.), *available at* http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2008/2008fca0003.

133 *Sea Shepherd II*, 725 F.3d at 947.

Australia's jurisdiction in the AWS, so it would be improper for the judiciary to do so.[134]

2. Unclean Hands Defense

Sea Shepherd also offered the affirmative defense of unclean hands as to the Whalers. The Washington District Court concluded that outside of the AWS, this claim was invalid, as the Whalers' actions were otherwise technically legal.[135] The Washington District Court additionally identified a tangible irony in the Whalers seeking an injunction against Sea Shepherd from a U.S. domestic court while it continually violated the injunctions issued by Australian domestic courts.[136] The Washington District Court thus concluded that Sea Shepherd would likely succeed on its unclean hands defense, and that the equitable doctrine provided a reason to deny a preliminary injunction.[137]

The Ninth Circuit held the Washington District Court abused its discretion in denying the injunction on the basis of unclean hands.[138] Because neither the United States nor Japan recognized Australia's right to the AWS,[139] the Washington District Court's conclusion that the Whalers' indifference to the Australian courts justified denial of the requested injunction was flawed.[140] Moreover, the Whalers had not "dirtied" their hands. The right to safe navigation on the high seas was a right bestowed on all vessels by customary international law.[141] The Washington District Court was consequently reversed and the preliminary injunction was granted.[142]

H. The Significance of Sea Shepherd

Sea Shepherd sets the stage for a needed discussion about piracy and marine activism. The opinions of the case exemplify the contrasting perspectives from which perceived violence committed by environmental activists can be approached by courts, and the inherent confusion accompanying the application of "private ends." The Washington District

134 *Id.* Conducting foreign affairs falls within the exclusive realm of the Executive Branch. United States v. Hooker, 607 F.2d 286, 289 (9th Cir. 1979).

135 The IWC had not retracted Japan's authority to issue research permits, so the Whalers' actions were only illegal within the AWS due to the judgments of Australia's courts. *Sea Shepherd I*, 860 F. Supp. 2d 1216, 1245 (W.D. Wash. 2012), *rev'd*, 725 F.3d 940 (9th Cir. 2013).

136 *Sea Shepherd I*, 860 F. Supp. 2d at 1246.

137 *Id.* at 1245–46.

138 *Sea Shepherd II*, 725 F.3d at 947 (citing Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc., 621 F.3d 981, 986 (9th Cir. 2010)).

139 *Kyodo*, [2008] FCA 3, ¶ 13 (Austl.), *available at* http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2008/2008fca0003.

140 *Sea Shepherd II*, 725 F.3d at 947.

141 *See* Republic Molding Corp. v. B.W. Photo Utils., 319 F.2d 347, 349 (9th Cir. 1963) ("What is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts, or that the manner of dirtying renders inequitable the assertion of such rights against the defendant.").

142 *Sea Shepherd II*, 725 F.3d at 947.

Court erred on the side of caution, noting the unsettled nature of international law and emphasizing the strong foundation of a narrow interpretation of "private ends" and piracy.[143] In contrast, the Ninth Circuit looked to the ordinary meaning of "private" and gave "considerable weight" to international case law, eventually opting for a broad definition of piracy.[144] The *Sea Shepherd* opinions also demonstrate how the long and complicated history of piracy can be engineered to suit specific interpretations, a topic covered in the next Section.[145]

III. THE ELUSIVE DEFINITION OF PIRACY

Encapsulating the crime of piracy into a definition that is accurate both in terms of what is included and omitted has eluded the international community for centuries.[146] The lack of cohesion is arguably due to the fact that no single, comprehensive legal system for addressing piracy has ever existed.[147] The definitional issue has been dubbed the "single most controversial aspect of customary international law" on piracy.[148] This historical survey will focus primarily on the development of piracy law within the United States, and indirectly, England, wherein lie the roots of many American legal traditions.

First, an important distinction must be made between municipal piracy and general piracy. The former concerns exclusively violations of municipal law that occur within the jurisdiction of a particular state.[149] The latter is conduct that violates customary international law and can be prosecuted by any nation.[150] General piracy is the product of international consensus and is therefore guided by those acts the international community agrees constitute piracy.[151] The first half of this Section will address the evolution of international law as it pertains to general piracy, while the second half will focus on the development of piracy law in the United States.

143 *Sea Shepherd I*, 860 F. Supp. 2d 1216, 1233 (W.D. Wash. 2012), *rev'd*, 725 F.3d 940 (9th Cir. 2013).

144 *Sea Shepherd II*, 725 F.3d at 944.

145 *See infra* Part III.

146 *See* ALFRED P. RUBIN, THE LAW OF PIRACY 341 (2d ed. 1998) (noting that there is no authoritative definition of "piracy" and that most of its proposed definitions are inaccurate).

147 Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Enables Piracy to Flourish*, 29 BERKLEY J. INT'L L. 399, 401 (2011) (discussing the inconsistencies of international and domestic piracy law).

148 Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMP. L. 43, 46 (2009) (describing the lack of authoritative definition of "piracy").

149 Ashley Bane, *Pirates Without Treasure: The Fourth Circuit Declares that Robbery is Not an Essential Element of General Piracy*, 37 TUL. MAR. L.J. 615, 617 (2013).

150 *Id.*

151 *Id.*

A. Piracy in International Law

Piracy has not always been criminalized. In the 16th century, piracy was a tool of European governments, and its legal status was arguably manipulated in accordance with the capricious whims of the imperial powers.[152] During times of war, piracy was encouraged and even commissioned; by contrast, in times of peace, piracy was restricted and often outlawed.[153] This fluctuation frustrated the "decommissioned pirates," who became de facto rebels without a cause and began attacking ships indiscriminately.[154] Consequently, pirates once considered "weapon[s] in the arsenal of the states,"[155] became *hostis humani generis*—enemies of all mankind.[156] As a result, in the 19th century, the imperial nations of Europe signed the Declaration of Paris, which abolished all forms of piracy, including both state-sponsored piracy and privateering.[157]

Thus, piracy became the first crime subject to universal jurisdiction.[158] As recounted by the Privy Council of England in 1934, universal jurisdiction:

> [is] recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but a *hostis humani generis* and as such he is justiciable by any State anywhere.[159]

Universal jurisdiction is, therefore, an exception to traditional jurisdictional principles, and eventually gave rise to the distinction between general and municipal piracy.[160] Universal jurisdiction "applies only to those crimes the international community has universally condemned" and deemed worthy of universal recognition.[161] This also suggests that universal jurisdiction can be invoked only for conduct that falls squarely within the contours of the international definition of piracy.[162]

Despite clear evidence of universal condemnation as early as the mid-19th century, the elusive nature of piracy rendered enforcement problematic.[163] Considering that—as of yet—no international legislative body had been established, states were required to deal with the international

152 Bento, *supra* note 147, at 402.

153 Azubuike, *supra* note 148, at 46.

154 *Id.*

155 *Id.* at 45.

156 DANIEL HELLER-ROAZEN, THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS 91 (2009).

157 Declaration of Paris, April 16, 1856, *reprinted in* 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 561–62 (1906); Azubuike, *supra* note 148, at 46.

158 Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT'L L. 436, 437 (2010).

159 *In re* Piracy *jure gentium* [1934] A.C. 586; 3 BILC 836, 2.

160 *See* Bane, *supra* note 149, at 617.

161 United States v. Hasan, 747 F. Supp. 2d 599, 608 (E.D. Va. 2010).

162 *Id.* at 608–09.

163 Bento, *supra* note 147, at 403.

crime of piracy pursuant to their own legal systems.[164] The British Empire initially utilized a civil law process, requiring either two testimonial witnesses or a confession from the alleged pirate to obtain a conviction.[165] Despite the innately isolative nature of piracy, accomplices could not also be eyewitnesses.[166] The civil law process ultimately proved ineffective.[167] This inconsistency was resolved in 1536 by the Offenses at Sea Act,[168] through which British courts began trying pirates under common law.[169] Although allowing accomplice testimony, the law failed to consider the socio-political landscape of the British Empire.[170] As the British Empire expanded, the burden on the colonies to extradite pirates to the motherland grew unwieldy.[171] Colonies eventually began trying pirates themselves, inducing the British government to respond by passing An Act for the More Effectual Suppression of Piracy in 1700.[172] This act created a more effective system of courts within the colonies authorized to try pirates.[173]

England first formally defined "piracy" by statute in 1700.[174] However, the legal definition was limited to English subjects committing "any Act of Hostility, against others his Majesty's Subjects . . . under Colour of any Commission from any foreign Prince or State."[175] England treated piracy law as an extension of domestic law, which explains the limitation.[176] Piracy was viewed as the maritime counterpart to robbery, and as such, it fell within the proper jurisdiction of the English government.[177]

While countries independently adjudicated acts of piracy pursuant to their own municipal bodies of law as early as the 16th century, international codification of piracy law was not attempted until the early 20th century.[178] Records indicate that in 1926, the League of Nations initially included piracy

164 *See id.* (discussing England's various efforts to prosecute piracy using domestic legal and political processes).

165 Peter T. Leeson, *Rationality, Pirates, and the Law: A Retrospective*, 59 AM. U. L. REV. 1219, 1220 (2010).

166 Bento, *supra* note 147, at 403.

167 *Id.*

168 Offenses at Sea Act, 28 Hen. 8, c. 15 (1536).

169 Leeson, *supra* note 165, at 1220; Offenses at Sea Act, 1536, 28 Hen. 8, c. 15 (Eng.).

170 Bento, *supra* note 147, at 403.

171 *Id.*

172 An Act for the More Effectual Suppression of Piracy, 1700, 11 Will. 3, c. 7 *reprinted in* BRITISH PIRACY IN THE GOLDEN AGE: HISTORY AND INTERPRETATION, 1660–1730, 59 (Joel H. Baer ed. 2007) [hereinafter Effectual Suppression of Piracy Act]; *see* Alfred P. Rubin, *Piracy*, *in* The HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 229, 230 (John P. Grant & J. Craig Barker eds., 2007).

173 Max Boot, *Pirates, Then and Now: How Piracy was Defeated in the Past and Can Be Again*, FOREIGN AFF., Jan.–Feb. 2009, at 99.

174 Rubin, *supra* note 172, at 230 (quoting Effectual Suppression of Piracy Act, *supra* note 172).

175 *Id.*

176 Craig Thedwell, *Choosing the Right Yardarm: Establishing an International Court for Piracy*, 41 GEO. J. INT'L L. 501, 503 (2009).

177 *Id.*

178 Rubin, *supra* note 172, at 230.

on the agenda of an upcoming conference.[179] However, before the conference convened, the subject was deemed of insufficient "interest in the present state of the world to justify its inclusion," and it was dropped.[180] In lieu of consideration by the League of Nations, the Harvard research program assembled an independent committee charged with studying piracy in international law.[181] The resulting treatise, published in 1932, *The Harvard Research in International Law Draft Convention on Piracy*,[182] formed the basis for the 1958 High Seas Convention, which is one of two international agreements incorporating the current internationally accepted definition of piracy.[183] As of 2014, the High Seas Convention has sixty-three parties, including the United States.[184]

The second relevant international treaty is the United Nations Convention on the Law of the Sea (UNCLOS), which was adopted in 1982.[185] A total of 166 states are now parties to UNCLOS.[186] Notably, the United States has not ratified the treaty, though it has "accepted as customary international law treaty provisions dealing with 'traditional uses' of the sea," including those relevant to piracy.[187] The definition of piracy provided by the High Seas Convention was adopted verbatim by UNCLOS:

> Piracy consists of any of the following acts:
>
> > (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> >
> > > (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> > >
> > > (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> >
> > (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

179 *Id.*

180 *Id.*

181 *Id.* at 230–31.

182 Joseph W. Bingham et. al., *Codification of International Law, Part IV: Piracy*, 26 AM. J. INT'L L. SUPP. 739, 743–47 (1932) [hereinafter *Harvard Draft Convention*].

183 United States v. Hasan, 747 F. Supp. 2d 599, 618–19 (E.D. Va. 2010).

184 United Nations, *U.N. Treaty Collection, Chapter XXI: Law of the Sea, Convention on the High Seas*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21&lang=en (last visited July 26, 2014).

185 UNCLOS, *supra* note 6, art. 101; *Hasan*, 747 F. Supp. 2d at 619.

186 United Nations, *U.N. Treaty Collection, Chapter XXI: Law of the Sea, UNCLOS*, https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#1 (last visited July 26, 2014).

187 *Hasan*, 747 F. Supp. 2d at 619.

> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[188]

This definition is recognized as customary international law,[189] and is therefore binding and applicable to all states.[190]

Arguably, the nearly universal acceptance of this definition came at the price of vagueness. Legal scholars have identified three central gaps in the UNCLOS definition: the jurisdictional limitation of the high seas, the two-ship requirement, and the interpretational difficulties of private ends.[191]

International law, as it currently stands, restricts piracy to the "high seas," one of four jurisdictional zones created by UNCLOS.[192] In "territorial waters," a state exercises exclusive jurisdiction extending twelve nautical miles seaward from its coast.[193] The high seas technically originate at the twelve-mile mark; however, two intermediary zones exist in which states have the option of exercising restricted rights.[194] Directly beyond the territorial waters and extending twelve nautical miles into the sea lies the "contiguous zone," over which respective coastal states may exercise necessary control to prevent legal violations from occurring within its territory.[195] States can also claim "exclusive economic zones" within 200 nautical miles of their coastlines, thereby obtaining dominion over the resources within that area.[196] All remaining waters constitute the "high seas."[197]

The high seas requirement signifies that piratical acts occurring in territorial waters are not considered piracy under Article 101 of UNCLOS because the sovereign rights of states take precedence.[198] This policy has turned the territorial waters of weak and failed states into zones of piratical impunity with onlooking foreign states unable to respond to attacks launched from within, without infringing upon state sovereignty.[199] This incongruity has greatly attributed to the resurgence of piracy and continues to pose a challenge as most piracy attacks occur within territorial waters.[200]

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188 UNCLOS, *supra* note 6, art. 101.

189 UNCLOS is therefore "recognized as the most authoritative codification of piracy law." ANNEMARIE MIDDLEBURG, PIRACY IN A LEGAL CONTEXT: PROSECUTION OF PIRATES OPERATING OFF THE SOMALI COAST 6 (2011).

190 Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 17 (2007).

191 *Id.*

192 SOCIETY FOR UNDERWATER TECHNOLOGY, EXCLUSIVE ECONOMIC ZONES: RESOURCES, OPPORTUNITIES AND THE LEGAL REGIME 15 (1986).

193 UNCLOS, *supra* note 6, arts. 2–3.

194 Bahar, *supra* note 190, at 18.

195 UNCLOS, *supra* note 6, art. 33.

196 *Id.* art. 57.

197 *Id.* art. 86.

198 Bento, *supra* note 147, at 418.

199 *Id.* at 418–19.

200 Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT'L L. 197, 206 (2010).

UNCLOS also mandates that conduct be directed against another vessel to qualify as piracy under Article 101.[201] This element, known as the two-ship requirement, was originally intended to exclude conflicts between individual passengers or crewmembers.[202] However, a plain reading indicates that it also excludes internal seizures and all forms of violence by the crew on a ship, including mutiny.[203] Thus, potential pirates must merely pose as passengers or crewmembers and internally seize a vessel without involving a second vessel to avoid violating Article 101.[204]

Lastly, the act of violence or depredation must be committed for "private ends" to fall under UNCLOS.[205] The "private ends" element appears to have arisen as a means of identifying the difference between state-sponsored piracy and privateering, though this rationale is disputed.[206] Notably, UNCLOS does not define "private ends."[207] It is commonly assumed that because of the "private ends" element, piracy under Article 101 encompasses only those acts motivated by financial gain.[208] However, this assumption is accompanied by concern that perpetrators will use this language to potentially escape conviction on the basis of subjective intent.[209] Section IV explores the interpretational difficulties surrounding the "private ends" element.

B. Piracy Law in the United States

The United States first broached the subject of piracy at the time of its founding.[210] The Define and Punish Clause in Article I of the Constitution provides "Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations."[211] Because piracy technically qualified as a felony and an offense against the law of nations, the clause presents a "double redundancy."[212] However, the extraction of piracy from these categories indicates the Framers viewed the crime as unique. Most likely, it was an acknowledgment that piracy was the only existing universal jurisdiction crime.[213]

The United States currently has a dualist system, in that a crime is cognizable only if Congress forbids the act, even if it is well-established

201 UNCLOS, *supra* note 6, art. 101.

202 Bahar, *supra* note 190, at 38.

203 Bento, *supra* note 147, at 421.

204 Dutton, *supra* note 200, at 207.

205 UNCLOS, *supra* note 6, art. 101.

206 Bento, *supra* note 147, at 417.

207 Sandra L. Hodgkinson et al., *Piracy: New Efforts in Addressing This Enduring Problem*, 36 TUL. MAR. L.J. 65, 85 (2011).

208 *See* Doby, *supra* note 1, at 144.

209 Dutton, *supra* note 200, at 208.

210 *See* Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 160–62 (2009) (discussing the boundaries of the Define and Punish Clause).

211 U.S. CONST. art. I, § 8, cl. 10.

212 Kontorovich, *supra* note 210, at 163–65.

213 *Id.* at 160–61.

international law.[214] Hence, to charge a perpetrator with general piracy, the government cannot be solely dependent on the law of nations.[215] Rather, Congress must pass municipal laws to mirror their international counterparts.[216] This stems from the general rule that federal courts lack common law jurisdiction in criminal matters.[217]

In drafting legislation, Congress attempted to simultaneously use language broad enough to reflect the law of nations—thereby invoking universal jurisdiction—yet narrow enough to avoid ambiguity.[218] The Act of 1790 was the first substantive piracy legislation in the United States.[219] Despite Congress's attempt to invoke universal jurisdiction, in *United States v. Palmer*,[220] the Supreme Court rejected such a reading, pointing out the statute failed to include foreign attacks on foreign vessels.[221] Congress reacted to this decision by enacting a new statute, the Act to Protect the Commerce of the United States and to Punish the Crime of Piracy on March 3, 1819 (Piracy Act of 1819), to ensure that the incorporation of international principles was very clear, referring to "the crime of piracy, as defined by the law of nations."[222] The provisions of this law were codified into what remains municipal law, 18 U.S.C. § 1651.[223] In fact, the only notable policy difference between the Piracy Act of 1819 and § 1651 is the penalty, as § 1651 mandates life imprisonment, while the Piracy Act of 1819 required capital punishment.[224]

U.S. municipal piracy law, via Title 18, goes slightly beyond general international piracy law because acts not included within the law of nations definition are declared forms of piracy. Section 1652, for example, includes "act[s] of hostility" committed by U.S. citizens.[225] Section 1653 targets aliens "making war upon the United States, or cruising against the vessels and property thereof."[226] And attacks to "plunder" are specifically mentioned in § 1659.[227]

214 United States v. Hasan, 747 F. Supp. 2d 599, 610 (E.D. Va. 2010).

215 *See id.*

216 *Id.*

217 United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (holding federal court common law jurisdiction did not exist in criminal cases).

218 *Hasan*, 747 F. Supp. 2d at 610.

219 Samuel Pyeatt Menefee, *"Yo Heave Ho!": Updating America's Piracy Laws*, 21 CAL. W. INT'L L.J. 151, 153 (1991); *see* Crimes Act of Apr. 30, 1790, § 8, 1 Stat. 112 (1790); Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 19 (2006).

220 16 U.S. (3 Wheat.) 610 (1818).

221 *Id.* at 633–34.

222 Act to Protect the Commerce of the United States and to Punish the Crime of Piracy of Mar. 3, 1819, ch. 77, 3 Stat. 510 (1819) [hereinafter Piracy Act of 1819].

223 *Compare id. with* 18 U.S.C. § 1651 (2006).

224 *Compare* Piracy Act of 1819, *supra* note 222, at ch. 77, 3 Stat. 510 *with* 18 U.S.C. § 1651.

225 18 U.S.C. § 1652.

226 *Id.* § 1653.

227 *Id.* § 1659.

There is some debate as to Congress's intended interpretation of § 1651.[228] The current majority view contends that in defining piracy according to the law of nations, Congress chose to adhere to the international definition of piracy rather than creating particularized boundaries: "Congress made a conscious decision to adopt a flexible—but at all times sufficiently precise—definition of general piracy that would automatically incorporate developing international norms regarding piracy."[229] In contrast, adherents to the minority view have questioned whether or not the international definition is precise enough to enforce, and rely on the holding of *United States v. Smith*,[230] which defined piracy narrowly as "sea robbery."[231] Needless to say, the debate surrounding the proper definition of "private ends" and the proper scope of piracy is alive and well.

IV. IMPLICATIONS OF MOVING TOWARD A BROADER INTERPRETATION OF PRIVATE ENDS

The debate surrounding piracy—specifically in regard to encompassing actors with philosophical motivations such as environmental activism—centers on interpretation of the "private ends" element. Historical understandings of public and private motivations—including the removal of robbery as an element of piracy and the general acceptance of the political ends exception, along with current realities, such as modern counter-piracy efforts and the difficulty of discerning public and private ends—indicate the trend toward a broader interpretation as exemplified by *Sea Shepherd II* is misdirected. While the international community is divided on the appropriate actions to take in the whale wars, the implications of labeling Sea Shepherd as piratical reveal that "private ends" should not encompass marine conservation efforts.

A. Robbery as an Element of International Piracy

"Private ends" is not defined in the Harvard Draft Convention on Piracy, the High Seas Convention, or UNCLOS.[232] The most relevant theories of interpretation involve the breadth of the "private ends" element in terms of robbery and political ends. The removal of *animus furandi*—the intention to steal—as the definitive criterion of piracy was one of the first indications

228 *See, e.g.*, United States v. Hasan, 747 F. Supp. 2d 599, 623 (E.D. Va. 2010) (propounding the current majority view of § 1651).

229 *Id.*

230 18 U.S. (5 Wheat.) 153, 155 (1820).

231 *Id.* at 162.

232 *See* Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 278 (1988); Hodgkinson et al., *supra* note 207, at 86.

that private ends could mean more than "for profit."[233] As early as 1934, British courts determined robbery was not an essential element of piracy, signifying that frustrated piratical attempts were equally "piracy."[234] The United States Supreme Court last addressed the issue in the 1820 case *United States v. Smith*, coming to a contrary conclusion by defining piracy narrowly in accordance with the law of nations, as "depredation on the seas."[235]

This debate was recently rehashed in the Fourth Circuit.[236] Two judges in the Eastern District of Virginia (Virginia District Court) reached divergent conclusions on whether robbery was a requirement of international piracy.[237] In *United States v. Said*,[238] the Virginia District Court determined that *Smith* was the seminal case on the issue and rejected assertions that international agreements such as UNCLOS established the appropriate standards by which piracy should be defined.[239] The *Said* court pointed out that *Smith* was the only case to ever directly examine the definition of piracy under § 1651 and the only clear and authoritative source on the matter, thereby superseding all other relevant materials.[240] In contrast, *United States v. Hasan*,[241] adopted an evolving view of the definition of piracy, deeming its elements contingent upon international customary law as outlined in UNCLOS.[242] These two holdings illustrate different philosophical underpinnings of American courts: respectively, an originalist adherence to precedent, and a constructionist preference for malleability.

Upon review, the Fourth Circuit—in line with *Hasan*—held that piracy includes acts of violence on the seas even without robbery.[243] Although the Fourth and Ninth Circuits have adopted a broader interpretation of "private ends" than the district courts in *Said* and *Sea Shepherd I*, the policy implications of expanding the definition of piracy beyond robbery should not be dismissed lightly.

First, the district courts in both *Said* and *Sea Shepherd I* pointed out the perplexing, unsettled nature of international piracy law, the implementation

233 *See* RUBIN, *supra* note 146, at 91 n.49 (discussing the history of *animus furandi* and robbery as the terms pertain to piracy).

234 *In re* Piracy *jure gentium*, [1934] A.C. 58; 3 BILC 836, 2.

235 United States v. Smith, 18 U.S. at 155 (1820).

236 *See* United States v. Dire, 680 F.3d 446, 451 (4th Cir. 2012) (discussing the defendants' challenge based on a narrow definition of piracy).

237 *Id.* at 468–69 ("[W]e are constrained to agree with the district court that § 1651 incorporates a definition of piracy that changes with advancements in the law of nations."); United States v. Said, 757 F. Supp. 2d 554, 560 (E.D. Va. 2010) ("[T]he discernible definition of piracy . . . under § 1651 has remained consistent and has reached a level of concrete consensus in United States law since its pronouncement in 1820.").

238 757 F. Supp. 2d 554 (E.D. Va. 2010).

239 *Id.* at 559, 565.

240 *Id.* at 559.

241 747 F. Supp. 2d 599 (E.D. Va. 2010).

242 *Id.* at 623.

243 United States v. Dire, 680 F.3d 446, 468–69 (4th Cir. 2012).

and enforcement of which have been inconsistent.[244] Legal scholars continue to disagree about whether or not an authoritative definition of piracy even exists:[245] "[T]here is no single court that can bring order to [the] various interpretations of the UNCLOS. Rather, enforcement actions against pirates and criminal prosecutions of pirates are left to individual countries . . . ."[246] As discussed in *Sea Shepherd I* and *Said*, the lack of uniform application is problematic on a macro level because such inconsistency interferes with international comity,[247] and on a micro level, because it forces defendants into a state of unpredictability whereby they are unsure if their conduct is proscribed by § 1651, rendering the statute unconstitutionally vague.[248]

Second, the *Said* court noted that holding that § 1651 incorporated actions beyond sea robbery—such as attempts to commit sea robbery—would make § 1659 superfluous.[249] It is generally presumed by courts that Congress enacts new laws with sufficient knowledge of existing laws, and sections should be interpreted and applied with this principle in mind.[250] The *Said* court accordingly relied on the canon of statutory interpretation requiring that statutes covering similar topics "be construed harmoniously 'as to allow both to stand and give force and effect to each.'"[251] Section 1659 criminalizes those who "maliciously attack[] or [set] upon any vessels belonging to another, with an intent to unlawfully plunder the same," while § 1651 targets whoever "commits the crime of piracy as defined by the law of nations."[252] The inconsistent punishments prescribed also indicate intent of differing applications; the maximum ten-year sentence allotted by § 1659 is not nearly as harsh as the mandatory life sentence of § 1651.[253] Interpreting § 1651 broadly would render § 1659 meaningless. Thus, limiting the scope of piracy pursuant to *Smith* was arguably Congress's intent.[254]

Third, both the *Said* and *Sea Shepherd I* courts were wary of the real world consequences of expanding the definition of piracy. In *Sea Shepherd I*, the Washington District Court noted it was unlikely the international community would agree that the "malicious mischief" of Sea Shepherd amounted to piracy.[255] Similarly, the *Said* court feared that the consequences of defining piracy broadly would be far-reaching and "an act as minor as a

244 *See Said*, 757 F. Supp. 2d at 564–66; *Sea Shepherd I*, 860 F. Supp. 2d 1216, 1233 (W.D. Wash. 2012) *rev'd*, 725 F.3d 940 (9th Cir. 2013).

245 *Said*, 757 F. Supp. 2d at 563–66.

246 *Id.* at 565.

247 *Sea Shepherd I*, 860 F. Supp. 2d at 1242; *Said*, 757 F. Supp. 2d at 565–66.

248 *Said*, 757 F. Supp. 2d at 566.

249 *Id.* at 563.

250 United States v. Langley, 62 F.3d 602, 605 (4th Cir. 1995) ("It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute.").

251 *Said*, 757 F. Supp. 2d at 563 (quoting Orequera v. Ashcroft, 357 F.3d 413, 422 (4th Cir. 2003)).

252 18 U.S.C. §§ 1651, 1659 (2006).

253 *See id.*

254 *Said*, 757 F. Supp. 2d at 559–63.

255 *Sea Shepherd I*, 860 F. Supp. 2d 1216, 1233 (W.D. Wash. 2012) *rev'd*, 725 F.3d 940 (9th Cir. 2013).

sling-shot assault, a bow and arrow, or even throwing a rock at a vessel" would subject a person to a mandatory life sentence for piracy under § 1651.[256]

The district courts in *Said* and *Sea Shepherd I*—both reversed on appeal—represent the minority opinion. Many scholars and activists concur with the higher courts that piracy should not be limited to robbery. The most telling evidence is arguably the absence of "intent to plunder" or a comparable robbery-related element in UNCLOS.[257] While the legal community agrees that theft or acting with the intent to plunder is still enough to satisfy "private ends," generally, it is not considered a necessary element of piracy.[258]

B. The Political Ends Exception to International Piracy

Another theory concerning the breadth of piracy posits strong historical support for the exclusion of politically motivated acts from the "private ends" element.[259] Because pirates were once employees of the state, some commentators suggest "private ends" was meant to distinguish state-sponsored activity and privateering.[260] Thus, the distinction between private ends and non-private ends relies not on the actor's intent, but whether a state can be held responsible for the piratical conduct.[261] In the 1885 case *United States v. Ambrose Light*,[262] the Southern District Court of New York determined that an armed ship is a pirate, even if no act of robbery is committed, if it does not have the authority of a state behind it.[263] This is the contextual approach adopted by the Ninth Circuit in *Sea Shepherd II*.[264] However, despite drawing from the "rich history of piracy law," the Ninth Circuit failed to examine the nuances thereof, simply stating that, historically, acts taken for private ends are "those not taken on behalf of a state."[265]

The state sponsorship versus privateering rationale of private ends reveals a desire to protect commercial transportation and the "reluctance of other States to assert jurisdiction over politically motivated acts that do not have a commercial aspect."[266] From this rationale arose the notion that piratical acts committed for political reasons should be excluded from

256 *Said*, 757 F. Supp. 2d at 563.

257 Bahar, *supra* note 190, at 33.

258 RUBIN, *supra* note 146, at 91–92.

259 Kevin Jon Heller, *Judge Kozinski's "Rich History" of Piracy*, OPINIO JURIS, Feb. 27, 2013, http://opiniojuris.org/2013/02/27/judge-kozinskis-rich-history-of-piracy/ (last visited July 26, 2014).

260 Bahar, *supra* note 190, at 34.

261 Azubuike, *supra* note 148, at 52.

262 25 F. 408 (S.D.N.Y. 1885).

263 *Id.* at 412–13.

264 *Sea Shepherd II*, 725 F.3d 940, 943–44 (9th Cir. 2013).

265 *Id.*

266 Azubuike, *supra* note 148, at 52–53.

international piracy.[267] This assumption was reflected in *United States v. Achille Lauro*.[268] In October of 1985, four members of the Palestinian Liberation Organization hijacked a cruise ship, demanding that Israel release fifty Palestinian prisoners in return for liberation of the cruise ship.[269] When the terrorists' demands were refused, a Jewish-American passenger was murdered.[270] Because the hijacking was engineered to provoke the release of prisoners rather than for traditional "private ends" such as financial enrichment, the incident ostensibly fell outside of the scope of international piracy.[271] The *Achille Lauro* case brought to light the disjunction between modern maritime terrorism and the behavior proscribed by international piracy law. The interpretation of private ends in relation to politically motivated piratical acts has since been a focal point of academic debate.[272]

Sources used in drafting Article 15 of the High Seas Convention, artfully assembled by Professor Kevin Jon Heller in *Opinio Juris*,[273] support the premise that the "private ends" element endorses the political ends exception. First, in 1927, the League of Nations Committee of Experts for the Progressive Codification of International Law—created during an international law codification attempt in the 1920s—explained the meaning of "private ends":

> It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often delicate question of motives. *Nevertheless, when 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

267 John Peppetti, *Building the Global Maritime Security Network: A Multinational Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 92 (2008).

268 921 F.2d 21 (2d Cir. 1990).

269 John Tagliabue, *Ship Carrying 400 Seized; Hijackers Demand Release of 50 Palestinians in Israel*, N.Y. TIMES, Oct. 8, 1985, at A1.

270 *See Id.*

271 Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 26–27 (2006). The *Achille Lauro* incident provided the impetus for the creation of SUA, the heart of which is mutual obligatory apprehension, conviction, and punishment of those who commit illegal acts on the high seas. *See* Halberstam, *supra* note 232, at 292; *see also* SUA, *supra* note 68, at 224–26.

272 *See, e.g.*, H.E. José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 377–78 (2003) (stating that the "private ends requirement" excludes "sheer politically motivated acts directed at ships"); Milena Sterio, *The "Private Ends" Requirement of UNCLOS in the 9th Circuit: Are Sea Shepherds Pirates*, PIRACY-LAW.COM, Mar. 4, 2013, http://piracy-law.com/2013/03/04/the-private-ends-requirement-of-unclos-in-the-9th-circuit-are-sea-shepherds-pirates/ (last visited July 26, 2014) (comparing the different views of scholars about whether the private ends requirement includes politically motivated acts).

273 Heller, *supra* note 259.

> in question, since they remain subject to the ordinary rules of international law.[274]

Second, commentary accompanying Article 16 of the 1932 Harvard Draft Convention on Piracy reflects an assumption that political ends merit distinct treatment:

> Some writers assert that such illegal attacks on foreign commerce by unrecognized revolutionaries are piracies in the international law sense; and there is even judicial authority to this effect. *It is the better view, however, that these are not cases falling under the common jurisdiction of all states as piracy by the traditional law, but are special cases of offences for which the perpetrators may be punished by an offended state as it sees fit. This is the view reflected by this Article*. . . . The Article does not dictate any course of action; it merely preserves such criminal and police jurisdiction as is given by traditional law. *If an attack by a ship manned by insurgents is inspired by a motive of private plunder, it may be piracy under the definitions of the draft convention.*[275]

These commentaries indicate that the High Seas Convention was not meant to broaden the scope of piracy to include political acts.[276]

While Article 16 of the Harvard Draft Convention defines what piracy is *not*, Article 3, its counterpart, positively defines piracy law.[277] Commentary on Article 3 also supports the notion that private ends excludes political acts: "[T]he draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognized belligerent organizations, or of unrecognized revolutionary bands."[278] Notably, the International Law Commission (ILC), charged with drafting what became the piracy provision of both the High Seas Convention and UNCLOS, relied heavily on these commentaries.[279] These passages illustrate the private ends element was created with an implicit political ends exception in mind. In fact, the ILC rapporteur stated that "following the Harvard precedent, he had defined as piracy acts of violence or depredation committed for private ends, thus leaving outside the scope of the definition all wrongful acts perpetrated for a

274 *Rep. of the League of Nations Sub. Comm. of Experts for the Progressive Codification of Int'l Law*, League of Nations Doc. C.196.M.70.1927.V. 117 (1927), *reprinted in* Heller, *supra* note 259 (emphasis in original).

275 *Harvard Draft Convention*, *supra* note 182, at 857 (emphasis added).

276 *See supra* text accompanying notes 263–265.

277 *See* Halberstam, *supra* note 232, at 279 (describing Article 16 as the counterpart to Article 3); *Harvard Draft Convention*, *supra* note 182, at 743 (defining acts that constitute piracy).

278 *Harvard Draft Convention*, *supra* note 182, at 786.

279 *Rep. of the Int'l L. Comm. to the Gen. Assembly*, 2 Y.B. Int'l L. Comm'n 25, U.N. Doc. A/2934 ("The Commission was greatly assisted by the research carried out by the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary.").

political purpose."[280] Accordingly, the state sponsorship versus privateering rationale created a political-private end binary.

C. A Brief Textual Analysis

Despite the Ninth Circuit's contextual determination that "private ends" merely signified a lack of state liability, in its review of the Whalers' piracy claims, it also performed a brief textual analysis.[281] The Ninth Circuit stated that the common understanding of "private" is far broader than "financial enrichment."[282] Normally used as an antonym to "public," private "refers to matters of a personal nature that are not necessarily connected to finance."[283] The court cites *Webster's New International Dictionary*, which defined private as "[b]elonging to, or concerning, an individual person, company, or interest."[284] This definition obviously encapsulates the ordinary meaning of "private," but upon closer examination, its application to Sea Shepherd's philosophical motivations is tenuous.

The *Online Oxford English Dictionary* provides a total of twelve variations of the definition of "private" as an adjective, all of which reference the nature of separating a smaller group from a larger group: private versus public.[285] Generally, "private" is defined as "[r]estricted to one person or a few persons as opposed to the wider community; largely in opposition to *public*."[286] The distinction between a smaller private group and a larger public group is problematic for the Ninth Circuit's application of a "private" definition to Sea Shepherd's interests. While Sea Shepherd's actions are its alone—private in the truest sense of the word, in that it is acting on its own behalf apart from the rest of the world—its philosophical grounds for acting are shared by a large segment of the international community, and even Japan for that matter.[287] The dictionary definition of "private" illustrates the fundamental premise that a distinction based on the term must implicate the separation of a smaller sect from a larger group. While colloquially this technicality should not matter, in a legal sense it has immediate, serious consequences.[288]

D. Private and Non-Private Ends

Due to the demise of privateering, the distinction between private and non-private ends is all the more convoluted when employing a broad

280 Halberstam, *supra* note 232, at 279–80.

281 *See Sea Shepherd II*, 725 F.3d 940, 943 (9th Cir. 2013).

282 *Id.* (referencing the Washington District Court's narrow interpretation of "private ends").

283 *Id.*

284 *Id.* (citing WEBSTER'S INT'L DICTIONARY 1969 (2d ed. 1939)).

285 OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/151601?rskey=294iCN&result=1&isAdvanced=false#eid (last visited July 26, 2014).

286 *Id.* (emphasis in original).

287 Younger Japanese generations are eating less whale meat, largely because of the global controversy surrounding whaling practices. *See* Roeschke, *supra* note 23, at 104.

288 *See supra* text accompanying notes 271–274.

interpretation of "private ends."[289] The dilemma of parsing public from private ends is illuminated in the 1909 British case *Republic of Bolivia v. Indemnity Mutual Marine Assurance* Company,[290] in which defendants accused of piracy had mixed public-private motives.[291] Brazilian rebels seized a Bolivian ship due to political disagreements with the Bolivian government and stole goods consisting of provisions and stores.[292] The seized ship and the properties onboard were insured against "piracy," so the Bolivian government sued the insurer for recompense in an English court.[293] The court held that piracy should be construed according to its ordinary understanding, therefore "meaning the conduct of those who plunder indiscriminately for their own private ends, and not of those who operate against the property of a State for public ends."[294] Judge Pickford went on to explain:

> It is said that [the rebels'] motives were private and personal, but I cannot go into that. Probably in no revolution is it possible to say that all the revolutionaries acted from purely disinterested motives. The question is, Did the conduct [of the rebels] which I have stated amount to "piracy" and constitute these people "pirates" within the meaning of the policy? I do not think it did. [295]

It is interesting that in determining whether the rebels committed piracy, their political aims were given precedence over their acts of thievery and intent to plunder.[296] Thus, even in seemingly traditional piracy cases it can be difficult to ascertain where the boundary separating public and private lies.[297] From this perspective, the holding of the Ninth Circuit seems amiss because Sea Shepherd's actions do not approach what would otherwise be traditional piratical conduct, such as armed robbery. Sea Shepherd does not want to physically injure or steal from the Whalers, but rather, solely attempts to discourage whaling activities. Yet, the Ninth Circuit dismissed their undisputed political aims with little explanation.[298]

From a practical perspective, there is a relevant concern that a shift in focus from the actual harm committed to the intent of the actors could

289 Samuel Pyeatt Menefee, *The Case of Castle John, or Greenbeard the Pirate? Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT'L L.J. 1, 4–5 (1993).

290 [1909] 1 K.B. 596.

291 *Id.*; *see also* Bento, *supra* note 147, at 417 (discussing the Brazilian rebel attack on the Bolivian ship and the court's determination that a for-profit motive is essential to establishing an act of piracy under international law).

292 *Indemnity Mut. Assurance Co.*, 1 K.B. at 596.

293 *Id.*; Bento, *supra* note 147, at 417 (using *Republic of Bolivia v. Indemnity Mut. Marine Assurance Co.* to discuss the "mixed motives problems" behind an act of piracy).

294 *Indemnity Mut. Assurance Co.*, 1 K.B. at 596.

295 *Id.* at 599–600.

296 *Id.*

297 Bento, *supra* note 147, at 417.

298 *Sea Shepherd II*, 725 F.3d 940, 943–44 (9th Cir. 2013).

potentially provide a dangerous loophole for insurgents.[299] Yet, even if one assembles the historical evidence necessary to counter that presented above, it is arguably more effective to cope with such a concern through other means, such as the application and enforcement of a convention specific to maritime terrorism—i.e., SUA[300]—as opposed to manipulating elements of piracy to cater to whatever case is at hand. Additionally, as Judge Jesus from the International Tribunal for the Law of the Sea argues, many terrorist acts—such as those giving rise to *Achille Lauro*[301]—are mischaracterized as maritime piracy, inappropriately stretching the interpretation and application of piracy rules to cover, by default, all illegal politically motivated acts.[302] With the adoption of SUA, the persistence of this mischaracterization is a lost cause. As Judge Jesus concluded, the "private ends" element is inapplicable, and unnecessarily discounts environmental groups' acts of violence and depredation committed in pursuit of their quest for marine protection.[303]

Judge Jesus's opinion goes to the heart of the Ninth Circuit's analysis and the application of piracy to the Sea Shepherd controversy. Using piracy to combat Sea Shepherd's conduct is fundamentally awkward because "old world" ideas and distinctions of piracy law are the primary means of discerning the legality of modern political protest on the high seas.[304] International piracy law has not been updated or amended for nearly a century. From a historical perspective, no consideration was given to terrorists or protesters as we understand the concepts today.[305] The use of historical material to address cases like *Sea Shepherd II* inevitably requires "reasoning by analogy," which goes far beyond the intent of the drafters.[306] Consequently, many historical sources lending support to any of the various viewpoints on the topic are arguably overvalued because they were created in an era when environmental interests did not exist.[307]

The incompatibility of piracy law and marine conservation efforts is being perpetuated by current developments of counter-piracy measures, which are created specifically to combat the reemergence of traditional

299 *See* Debrah Osiro, *Somali Pirates Have Rights Too: Judicial Consequences and Human Rights Concerns*, ISS PAPER NO. 224, at 7, *available at* http://www.issafrica.org/uploads/Paper224SomaliPirates.pdf.

300 *See* Halberstam, *supra* note 232, at 291; SUA, *supra* note 68, at 222.

301 Klinghoffer v. Achille Lauro, 921 F.2d 21 (2d Cir. 1990).

302 Jesus, *supra* note 272, at 378–79.

303 *Id.*

304 *See id.* at 382 ("[S]ea piracy rules, in the main, are the reflection of the old-time piracy environment as experienced in the heydays of piracy in the 17th and 18th centuries. They reflect the views of the old world . . . .").

305 Douglas Guilfoyle, *Political Motivation and Piracy: What History Doesn't Teach Us About Law*, BLOG EUR. J. INT'L L. (June 17, 2013), http://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/.

306 *Id.*

307 *See id.* (discussing the historical context and intention of the codifiers in selecting the "private ends" language).

piracy off certain coasts of Africa and waterways in Southeast Asia.[308] Intergovernmental organizations, such as the United Nations Office on Drugs and Crime and the International Maritime Organization, have been actively spearheading such attempts.[309] A Counter Piracy Project has been created and is based in Nairobi.[310] Additionally, the International Maritime Bureau has been tracking and publishing incidents of piracy around the world.[311] The United Nations Security Council also has issued various resolutions, temporarily granting states slightly greater rights in repressing piracy in Somalian territorial waters and encouraging the protection of humanitarian convoys destined for failed states.[312] These developments represent the international community's reaction to a very different type of scourge than Sea Shepherd. Yet—pursuant to the Ninth Circuit's recent holding—there is a chance Sea Shepherd may become a collateral victim of harsh counter-piracy measures.

E. The Proper Characterization of Marine Conservation Efforts

The ultimate question is whether or not marine conservation should qualify as a type of private ends, rendering activists, such as Sea Shepherd, pirates. Taking into consideration the discussion above, the first issue is whether Sea Shepherd's ends qualify as non-private in any sense. According to Sea Shepherd's mission statement, the organization aims "to end the destruction of habitat and slaughter of wildlife in the world's oceans in order to conserve and protect ecosystems and species."[313] It further declares: "Our clients are whales, dolphins, seals, turtles, sea birds, fish, and other ocean life. We represent their interests."[314] It was accepted by both courts in the *Sea Shepherd* case that the organization was not pursuing compensation or gain, but rather, sought to minimize the number of whales killed in the Southern Ocean.[315]

Environmental issues including conservation efforts are well-recognized topics of domestic and international debate.[316] Though actions arising from the whaling controversy were held to be justiciable under the

308 Ivan Shearer, *Piracy*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 29 (2010).

309 *Id.* ¶ 30.

310 *Id.*

311 *Id.*

312 *Id.* ¶ 31.

313 Sea Shepherd Conservation Soc'y, *Who We Are*, http://www.seashepherd.org/who-we-are/ (last visited July 26, 2014).

314 Sea Shepherd Conservation Soc'y, *Namibia Seal Defense*, http://www.seashepherd.org/campaigns/namibia-seal-defense/namibia-seal-defense/sscs-equality-and-namibia-9 (last visited July 26, 2014).

315 *Sea Shepherd I*, 860 F. Supp. 2d 1216, 1233 (W.D. Wash. 2012) *rev'd*, 725 F.3d 940 (9th Cir. 2013); *see also Sea Shepherd II*, 725 F.3d 940, 943 (9th Cir. 2013).

316 *See, e.g.*, Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 224–29 (1986) (providing an example of a situation in which the U.S. government, its conservationist citizens, and a foreign government were embroiled in a debate on the international governance of whaling).

political question doctrine, the Supreme Court has acknowledged the controversy's "significant political overtones."[317] That Sea Shepherd is acting for political ends is undeniable, but the value of such a fact varies and depends on one's interpretation of private ends.

Taking a cue from the Ninth Circuit, it is important to view this problem contextually. Piracy has different meanings in different contexts: "Piracy has one meaning in the insurance industry, another in the international shipping industry, another in international law, another in criminal law, and yet another in 'common law.'"[318] Endeavors to apply international piracy to conduct outside of its traditional scope have generally failed. Examples include proposals to encompass the slave trade, submarine attacks, and air piracy.[319] Likewise, the continuity between piracy law and direct action marine conservation efforts employed by nongovernmental organizations is weak. As pointed out in the Ninth Circuit's *Sea Shepherd* opinion, the only courts to have previously addressed the issue are those of Belgium.[320]

The case of *Castle John v. NV Mabeco*[321] involved a campaign by Greenpeace against NL Chemicals of Ghent and Bayer of Antwerp (Bayer), a chemical company licensed to dump titanium oxide waste in the North Sea.[322] In protest of the dump, activists twice boarded one of Bayer's dump ships, the *Falco*. Greenpeace also utilized its own vessel, the *Sirius*, to create a blockade prohibiting passage of Bayer's second dump ship, the *Wadsy Tanker*, from the harbor in Antwerp.[323] Additionally, activists tied themselves to the dump ship and refused to comply with requests to detach themselves from the vessel.[324] Cumulatively, these efforts kept the two dump ships from exiting the harbor.[325] Subsequently, Bayer sued Greenpeace and the *Sirius* was impounded by the Belgian government.[326]

In the final appeal, the Court of Cassation held in favor of Bayer.[327] Regarding the application of the private ends element to Greenpeace, the court stated, "[t]he applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective."[328] Therefore, *Castle John* represents the notion that environmental activism can qualify as piracy

317 *Id.* at 230.

318 Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. & COM., 59, 61 (2009).

319 Menefee, *supra* note 289, at 3.

320 *Sea Shepherd II*, 725 F.3d 940, 944 (9th Cir. 2013) ("Belgian courts, perhaps the only ones to have previously considered the issue, have held that environmental activism qualifies as a private end.").

321 *Castle John*, 77 I.L.R. 537 (1988) (Ct. of Cassation, Dec. 19, 1986) (Belg.).

322 MICHAEL HAROLD BROWN & JOHN MAY, THE GREENPEACE STORY 120 (2d ed. 1991).

323 *Id.*

324 Menefee, *supra* note 289, at 11.

325 *Id.*

326 Brown, *supra* note 322, at 120.

327 *Castle John*, 77 I.L.R. 537, 538 (1988) (Ct. of Cassation, Dec. 19, 1986) (Belg.)

328 *Id.* at 540.

under UNCLOS.[329] This court adhered to the state-sponsorship rational in defining public ends as those "in the interest or to the detriment of a State or State system."[330] In focusing its attention on defining public ends, however, the court did little to clarify the meaning of private ends.[331]

The extension of the holding of *Castle John* is problematic if taken to its logical extreme. It implies official state action or anti-state action is necessary to prove an incident is not the result of "a personal point of view" reflecting a political perspective.[332] This suggests that nearly every nongovernmental act resembling violence could arguably be classified as piracy.[333]

The Australian case of *Humane Society International v. Kyodo Senpaku Kaisha*[334] serves as an ideological counterweight to the *Castle John* and *Sea Shepherd II* decisions. Humane Society International, an NGO, sued Kyodo, a Japanese whaling company, in 2004, and alleged illegal whaling under Australian federal law.[335] The sought-after declaration and injunction against Kyodo were eventually granted.[336] Upon first hearing the case, Judge Allsop was markedly attuned to the motivations of marine activists: "The whales being killed are seen by some as not merely a natural resource that is important to conserve, but as living creatures of intelligence and of great importance not only for the animal world, but for humankind and that to slaughter them . . . is deeply wrong."[337] Though Sea Shepherd was not a party to this case, this language implies empathy with the organization's goals. More significantly, this passage provides a new way of evaluating marine conservation efforts as to private ends, albeit unintentionally. Here, the court perceived the value of what was being protected in the minds of the conservationists, a perspective seemingly lost on the Ninth Circuit in its "private ends" analysis of Sea Shepherd. Whales are identified both as natural resources and intelligent creatures.[338] Perhaps, in cases of "environmental piracy," in addition to examining whether a defendant's actions invoke state liability or the fall under the dictionary definition of private, it would be prudent to look to the value of defendant's goals to the public. Though in *Sea Shepherd II* the Ninth Circuit acknowledged the public interest factor as part of its preliminary injunction balancing test, it was ironically not considered a part of the private-public ends analysis, wherein

329 *See* Menefee, *supra* note 289, at 14.

330 *Id.*

331 *Id.* at 15.

332 *Castle John*, 77 I.L.R. at 537.

333 Menefee, *supra* note 289, at 15.

334 *Humane Soc'y Int'l, Inc. v Kyodo Senpaku Kaisha Ltd.* [2008] FCA 3 (Austl.), *available at* http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2008/2008fca0003.

335 *Id.* at 1.

336 *Id.* ¶¶ 1–2.

337 *Humane Soc'y Int'l v. Kyodo Senpaku Kaisha Ltd.*, [2005] FCA 664, ¶ 29, *available at* http://www.austlii.edu.au/au/cases/cth/FCA/2005/664.html; DONALD K. ANTON, FALSE SANCTUARY: THE AUSTRALIAN ANTARCTIC WHALE SANCTUARY AND LONG-TERM STABILITY IN ANTARCTICA 12 (2008).

338 *Id.*

Sea Shepherd's motives were explicitly scrutinized.[339] In *Kyodo*, the Australian court plainly viewed the whalers as a public nuisance, thereby legally validating saving of the lives of whales as a type of public ends.[340]

Judge Allsop initially held that Australian domestic courts lacked jurisdiction to hear the matter, but his decision was reversed on appeal and he considered the merits of the case on remand.[341] The injunction against Kyodo was granted and whaling was officially prohibited in the waters of Australia's exclusive economic zone, also known as the AWS.[342]

Just as it is difficult to establish whose actions are more universally condemned—those of the Whalers or the conservationists—it is correspondingly impractical to predict which vein of reasoning will prove the pivotal legal navigational point of the whaling controversy. However, if Sea Shepherd is to be punished for its actions, piracy law is not the solid foundation upon which courts should dole out penalties. It would be far more sensible to employ SUA, which was created to specifically address the gaps in piracy law.[343]

After all, pirates are universally condemned, literally dubbed "enemies of all humankind."[344] Taking into account Sea Shepherd's general conduct on the high seas, it is conceptually uncomfortable to include Sea Shepherd in this group alongside weapon-wielding thieves and murderers. As articulately stated in *Marine Assurance Co.*, "[t]he man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular State."[345] While Sea Shepherd's inherent differences from traditional pirates do not excuse its illegal activity, the organization's adherence to laws that do not directly interfere with its goals sets it apart and merits attention. Sea Shepherd is a properly registered nongovernmental organization headquartered in the state of Washington and it flies under the flag of the Netherlands, a sovereign state.[346] The organization even postponed its 2011 whaling campaign to comply with a request to perform a search and rescue,

339 *See Sea Shepherd II*, 725 F.3d 940, at 1102 (9th Cir. 2013).

340 *See Kyodo*, [2008] FCA 3, ¶ 54 (Austl.), *available at* http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2008/2008fca0003.

341 *See* Donald K. Anton, *Antarctic Whaling: Australia's Attempts to Protect Whales in the Southern Ocean*, 36 B.C. ENVTL. AFF. L. REV. 319, 337–39 (2009) (discussing the procedural history of *Kyodo*).

342 *Kyodo*, [2008] FCA 3, ¶ 55 (Austl.), *available at* http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2008/2008fca0003.

343 *See* SUA, *supra* note 68, art. 3.

344 MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE 24 (Michael J. Struett, Jon D. Carlson, and Mark T. Nance, eds., 2013).

345 *Republic of Bolivia v. Indemnity Mut. Assurance Co.* [1909] 1 K.B. 566, 600.

346 Andrew Hoek, *Sea Shepherd Conservation Society v. Japanese Whalers, the Showdown: Who is the Real Villain?*, 3 STAN. J. ANIMAL L. & POL'Y 159, 183 (2010); Sea Shepherd Conservation Soc'y, *Sea Shepherd Contacts*, http://www.seashepherd.org/contact/general-public.html (last visited July 26, 2014).

which resulted in a commendation from the New Zealand government.[347] Sea Shepherd keeps its violent acts within "well-marked bounds" in that its direct-action tactics are solely targeted at the Whalers' vessels during whaling season. It is difficult to fathom condemnation of Sea Shepherd as an "enemy of all mankind."

V. CONCLUSION

Environmental ends are not private ends. The use of piracy law to combat violent marine conservation efforts goes far beyond the original intent of the "private ends" element of international piracy law. Moreover, labeling activities like those of Sea Shepherd as piratical could have far-reaching implications.[348] The two most immediate consequences justified by the Ninth Circuit's ruling are the right of any country anywhere to board the vessels of environmental protesters, and the possibility of additional prosecution in any jurisdiction. In other words, because of the universal jurisdiction evoked by piracy, apprehension and prosecution of Sea Shepherd could occur at any place or any time by any nation.[349] Employing the law in this manner inappropriately penalizes conservationists and forces international piracy law to accommodate criminal behavior beyond its purview.

Despite centuries of recognition, piracy remains a relatively mysterious doctrine, and the complexities of its usage in international and domestic law have only intensified with the advent of political protest on the high seas. The *Sea Shepherd* opinions highlight this dilemma, and exemplify the contrasting views of "private ends," along with the element's propensity for differing applications. Given that the international definition of piracy—particularly "private ends"—has been crystallized as customary international law in UNCLOS,[350] there is no realistic possibility of the international community redefining the term, but that does not prevent the United States and other nations from adopting a municipal interpretation that would exclude environmental protest from piracy. Such a shift would be more in line with the history of the "private ends" element, current developments in international law, and the policy interests of the United States.

347 Sea Shepherd Conservation Soc'y, *Sea Shepherd Receives Commendation from New Zealand*, http://www.seashepherd.org/news-and-media/2011/07/05/sea-shepherd-receives-commendation-from-new-zealand-2 (last visited July 26, 2014).

348 Adam Westlake, *New Zealand Law Expert Says Sea Shepherd Was Wrongly Labeled as Pirates by US*, JAPAN DAILY PRESS, Mar. 1, 2013, http://japandailypress.com/new-zealand-law-expert-says-sea-shepherd-was-wrongly-labeled-as-pirates-by-us-0124362/ (last visited July 26, 2014).

349 *Id.*

350 UNCLOS, *supra* note 6, art. 101.