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RETHINK OF THE DEFINITION AND FUNCTION OF MOTIVES, INTENTIONS AND CONSPIRACY IN PIRACY UNDER UNCLOS*

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ABSTRACT


I. INTRODUCTION.

This article discusses the legal position of Greenpeace and other environmental activists under international law. The recent arrest of Greenpeace’s icebreaker, the Artic Sunrise and her crew, on 19 September 2013 and threatened prosecution of Greenpeace activists for piracy in the Russian Federation raises fundamental issues of maritime security and maritime terrorism under international law problems. The incident also has ramifications on political, national security, international relations and energy policy and climatic change. For instance, it has affected diplomatic relationship between the Netherlands, the flag state, and the Russian Federation.

The Netherlands did not only protest diplomatically but also instituted arbitral proceedings against the Russian Federation under Annex VII UNCLOS III¹ at the International Tribunal for the Law of the Sea (ITLOS),

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Hamburg. The Netherland’s position being that the arrest and detention of *The Arctic Sunrise* and its crew was in violation of the provisions of the Convention\(^2\). The outcome of the case will also have implications on future exploration of the Arctic resources by Norway, the US, Canada and Iceland all of who border the oil and gas rich Arctic region. It will be interesting to discover how these other countries will react to Greenpeace’s similar activities against them if and when the time comes. The incident concerns a very sensitive matter of national energy policies and security interests and geopolitical issues. So what at first appeared to be a purely legal problem may have political and international diplomatic incidents. It brings vivid memories of the bombing and sinking of Greenpeace’s *Rainbow Warrior\(^3\)* and the death of its crew member by French forces in the South Pacific.

The focus of the article is whether the actions of the *Arctic Sunset* and its crew amounted to piracy under international law. If not piracy, what would be the alternative offence? In view of prevailing security concerns, the article more importantly asks why are many States increasingly resorting to piracy or terrorism charges even in inappropriate situations?

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\(^1\) ITLOS/Press 201 of 21 October 2013 21 October 2013: Request for provisional measures submitted to the Tribunal pending the constitution of an arbitral tribunal; for this and other press releases of the Tribunal, documents and other information are available on the Tribunal’s Websites ([http://www.itlos.org](http://www.itlos.org) and [http://www.tidm.org](http://www.tidm.org));

\(^2\) In the Request submitted to the Tribunal on 21 October 2013:

“...the Kingdom of the Netherlands requests that the Tribunal prescribe as provisional measures that the Russian Federation:

(i) Immediately enable the ‘Arctic Sunrise’ to be resupplied, to leave its place of detention and the maritime areas under the jurisdiction of the Russian Federation and to exercise the freedom of navigation;
(ii) Immediately release the crew members of the ‘Arctic Sunrise’, and allow them to leave the territory and maritime areas under the jurisdiction of the Russian Federation;
(iii) Suspend all judicial and administrative proceedings, and refrain from initiating any further proceedings, in connection with the incidents leading to the boarding and detention of the ‘Arctic Sunrise’, and refrain from taking or enforcing any judicial or administrative measures against the ‘Arctic Sunrise’, its crew members, its owners and its operators; and
(iv) Ensure that no other action is taken which might aggravate or extend the dispute”

\(^3\) For the *Rainbow Warrior* incident and case, see New Zealand v France (1990) 82 ILR 500
Against that background the article speculates whether preferred charges of maritime security\(^4\) offences, trespass, torts\(^5\) and other illegal entries wouldn’t have been more appropriate. Using the Incident, this article attempts to put things into perspective. Maritime security and terrorism\(^6\) have replaced piracy-related offences such as that recently in Tanzania\(^7\).

To answer these questions the article analyses what amounts to ‘illegal acts’, ‘violence’, ‘detention’, ‘depredation’, ‘private motive’, ‘public’ or ‘political motive’, ‘inciting and facilitating’ under Article 15 of UNCLOS I and Article 101 of UNCLOS III. To support the analysis the article compares the *Arctic Sunrise* predicament to the recent US federal court decision involving the *Sea Shepherd*, a vessel belonging to the anti-whaling group, an organisation with similar objectives and tactics to those of Greenpeace.

After the introductory opening (Part I), the article: reconstructs facts of the case (Part II); deals with piracy definitional problems (Part III); analyses piracy definition under UNCLOS I and UNCLOS III (Part IV); discusses possible Greenpeace defences (Part V); offers possible alternative charges (Part VI); puts matters in perspective (Part VII); and concludes (Part VIII).

**II. FACTS OF THE GREENPEACE-RUSSIAN INCIDENT**

The incidence leading to the case began on the 17 September 2013, when two Greenpeace International activists from their mothership, *The Arctic Sunrise* attempted to abseil on to the side of an oil rig platform *The Prirazlomnaya* operated by Gazprom Neft Shelf\(^8\), a subsidiary of Gazprom, the Russia’s State Oil and Gas Monopoly. At the time, *The Prirazlomnaya*, the first ice resistant oil platform (Russia’s first offshore oil rig in the Arctic) was operating in the Pechora Sea, Barents Sea. The activists wanted to hoist their banner on the platform as a protest against the potential oil pollution and consequent environmental damage of Russian exploration of the Artic. The *Arctic Sunrise* was a Dutch registered vessel captained by a British national with a

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\(^4\) E.g., under the *Convention For the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation* 1988 and its 1988 and 2005 Protocols (SUA CONVENTION) discussed *post*

\(^5\) E.g. under the *American Alien Torts (ATS)*

\(^6\) E.g. under the *International Convention for the Suppression of the Financing of Terrorism 1999*

\(^7\) A contrasting incidence discussed *post*

\(^8\) For details see their web page, [http://www.shelf-neft.gazprom.ru/en/](http://www.shelf-neft.gazprom.ru/en/); Gazprom Neft Shelf LLC, a wholly owned subsidiary of Gazprom OJSC, was set up to develop offshore oil and gas fields.
crew from 28 other countries including activists from the Russia Federation, the UK, Australia, Italy, Brazil, Finland, Denmark, Switzerland, Ukraine, Turkey, Sweden, Poland and France. Although disputed by the Russians, the Norwegians claimed they had checked the Arctic Sunrise at the Norwegian port of departure to ensure safety and absence of arms or any illegal cargo or substances. The Russians had warned and banned The Arctic Sunrise from sailing into the area and also claim to have found drugs and other illicit substances aboard the vessel.

The Prirazlomnaya crew used high jet water to try and stop the boarding. The activists were detained after a short skirmish in inflatable dinghies in which armed Federal Security Service of the Russian Federation (FSB) (US FBI equivalent) officers in balaclavas fired warning shots into the water. The Russian Crack Commando Unit then abseiled into the Greenpeace vessel from a naval helicopter and boarded it. The Arctic Sunrise, with all its crew was then toed to the nearby port of Murmansk. A week later on the Tuesday 2 October 2013, 13 of the activists, including a freelance video journalist, were informed of a likely formal charge of piracy under s 3 of Article 227 of the Russian Criminal Code⁹ (piracy committed by an organised group) which carries the maximum sentence of 15 years. A further 15 activists and a Russian freelance photo-journalist were due to appear before the Russian Investigative Committee. On Thursday Sep 26, in a court in Murmansk, the “Arctic 30”, as they became known, were seen by six judges. No charges were laid, but all 30 are still being detained; 22 are being held for two months as Russian authorities pursue an investigation around piracy charges while eight were to await a new hearing.

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1. Assault against a maritime or other vessel with intent to capture the property of others and with the use of force or the threat of force. Punishable by imprisonment from five to ten years.

2. The same act, but involving firearms or objects used in the capacity of firearms (Federal Act No. 162-FZ of 8 December 2003). Punishable by imprisonment from eight to twelve years, with or without a fine consisting of either 500,000 roubles or loss of salary or other income for a period of not more than three years (Federal Act No. 162-FZ of 8 December 2003).

3. The acts covered by parts 1 and 2 above, if they have been committed by an organized group and have resulted in either inadvertent death of a person or other serious consequences. Punishable by imprisonment from ten to 15 years, with or without a fine consisting of either 500,000 roubles or loss of salary or other income for a period of not more than three years (Federal Act No. 162-FZ of 8 December 2003).
They might be charged with piracy. However, piracy can only be committed in the high seas or in a place outside the national jurisdiction of any State. The exact location of the incident is disputed by both parties, making it difficult to determine whether it was within or without Russian waters. Much more importantly, to be properly charged with piracy, their offence must qualify as piracy under international law to which the Russian Federation is Party. There have been protests from several governments whose nationals are involved and other organizations. President Putin has himself cast doubt whether the charge of piracy against the activists is appropriate and would stick.

Did the Arctic Sunrise and its crew commit piracy under international customary law and/or international conventions? Were illegality, violence, detention, depredation, private motive, public or political motive, ship-to-ship attack and threats to persons or property involved? It is unclear because of President Putin’s doubts about the piracy charge sticking but indications are that they may be reduced to hooliganism; an offence under which the Pussy Riots were convicted.

III. PIRACY DEFINITION UNDER INTERNATIONAL CUSTOMARY LAW AND CONVENTIONS

(A) UNDER INTERNATIONAL CUSTOMARY LAW

To constitute piracy, actions of the Arctic Sunrise and her crew must fulfil the necessary conditions under international customary law and international conventions. With regard to the former, piracy has been a crime for centuries under customary law of nations, and a pirate has always been considered an outlaw and hostis humani generis, an “enemy of mankind”. Under customary law piracy was regarded as the first “international crime”, which means that a piratical act is a crime directly under international law and any state may bring a pirate to justice. Customary international rules were developed to protect international trade interest of especially maritime states. The dissenting opinion of Judge Moore in The Lotus 10 provides a useful starting point in customary international law, which should be helpful in current Arctic Sunrise’s dilemmas. He said,

“In the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say ‘piracy by law of nations ’, because the municipal laws of many States denominate and punish and punish as ‘piracy’, numerous acts which do not constitute

10 The Lotus case see France v Turkey (1927) P.C.I.J.Ser A No.10 p.70
piracy by law of nations, and which therefore are not universal cognizance, so as to be punishable by all nations”\(^{11}\).

Accordingly, the nature and characteristics of the *Arctic Sunrise* and her crew fit the above classical definition under international customary law. But does it fit under international conventions and international treaty law? If the early international rules on piracy are so clear, why is it hard for any state or international community to deal with the actions of activists?

(B) UNDER UNCLOS

(1) UNCLOS I

Would the *Arctic Sunrise* and her crew’s position be any different under international conventions? Probably not. After a long passage through the *Harvard Draft Report on International Law* (Harvard Reports)\(^{13}\), the *League of Nations*\(^{14}\) and the *International Law Commission (ILC)*\(^{15}\) phases, international customary law was further developed and eventually codified under UNCLOS I, which after defining piracy, provides that all states shall co-operate to the fullest extent in repression of piracy on the high seas or in any other place outside the jurisdiction of any state\(^{16}\).

Article 15 of UNCLOS I represents a wider customary international law view. Article 15 of UNCLOS I provides that:

“Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:

\(^{11}\) Ibid, at p.78!!

\(^{13}\) For the Harvard Reports see (1932) 26 AJIL Supp. 743-872 on piracy;


\(^{15}\) International Law Commission see Art 13(1) of the UN Charter;42 AJIL Supp.2 (1948)

\(^{16}\) For the definition of any place outside the jurisdiction of any state see Note (supra).
(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(b) Against a ship, or aircraft, persons, or property in a place outside the jurisdiction of any State;
(2) Any act of voluntary participation in the operation of a ship or of an aircraft with the knowledge of facts making it a
pirate ship or aircraft;
(3) Any act of inciting or of intentionally facilitating an act described in the sub-paragraph (1) or sub-paragraph
(2) of this article’;
(4) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew
or the passengers of a private ship or private aircraft, and directed:
(c) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(d) Against a ship, or aircraft, persons, or property in a place outside the jurisdiction of any State;
(5) Any act of voluntary participation in the operation of a ship or of an aircraft with the knowledge of facts
making it a pirate ship or aircraft;
Any act of inciting or of intentionally facilitating an act described in the sub-paragraph (1) or sub-paragraph (2) of this
article’ (emphasis added)”

Under the Convention, just as under the customary international law it codified, the act of piracy committed by a
warship, government ship or government aircraft whose crew have mutinied and taken control of the ship or
aircraft are assimilated to acts committed by a private ship17. Piracy under the Convention includes pirate
broadcasting; thus, a ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in
dominant control to be used for committing the acts referred in the definition article18. The same applies if the
ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons
guilty of that act19.
A ship or aircraft may retain its nationality although it has become a pirate ship or the law of the State from
which such nationality was derived determines aircraft. The Convention gives every state the right to arrest a
pirate ship in the high seas outside the jurisdiction of the flag or any state and to prosecute the captured pirates
with the proviso of a possible liability where the seizing state has not acted with adequate grounds20. A seizure
on account of piracy may only be carried out by warships or other ships or aircraft on government service

17 Private ship is not a warship or a government owned or operated ship or a ship belonging to an international organisation
18 UNCLOS I Article 15
19 Ibid
20 Ibid
authorized to that effect\textsuperscript{21}. Piracy is given as one of the four exceptions to the enjoyment of the high seas, the other three being slavery, illicit traffic in narcotics drugs or psychotropic substances and unauthorised broadcasting from the high seas\textsuperscript{22}.

(3) UNCLOS III

(a) General Context

UNCLOS III was a United Nations sponsored multilateral Convention supposed to have comprehensively codified and developed the contemporary law of the sea in peacetime, and has been widely regarded as the greatest codification in international law and the major milestone in the history of the law of the sea. Adopted in 1982 after 8 years of drafting and 10 years of negotiations by the Third United Nations Conference on the Law of the Sea 1973-1982 (hence UNCLOS III), it continued with the codification of international customary law started by the Harvard Report, League of Nations, International Law Commission, UNCLOS I and attempts by UNCLOS II.

More significant, UNCLOS I’s piracy definition was reproduced almost verbatim by the UNCLOS III in 1982. These, now contained in Articles 100-107 of the Convention, deal with: the duty to co-operate in the repression of piracy; definition of piracy; incidents of piracy by a warship, government ship or government aircraft whose crew has mutinied; definition of a pirate ship or aircraft; retention or loss of the nationality of a private ship or aircraft; seizure of a pirate ship or aircraft; liability for seizure without adequate grounds; ships and aircraft which are entitled to seize on account of piracy; pirate broadcasting from the high seas; and piracy being an exception to freedom of the high seas provided for elsewhere in the Convention. So in terms of piracy, apart from the UNSC/IMO initiatives we have not moved far from customary law as codified by UNCLOS I. Since UNCLOS III represented the latest stage of codification at the time, the rest of the article will analyse whether actions of the Arctic Sunrise and her crew committed piracy under its provisions. To achieve that objective the article will focus on Article 101 thereof.

\textsuperscript{21} Ibid at

\textsuperscript{22} Ibid at
Article 101 of UNCLOS III which reproduced Article 15 of UNCLOS I, with minor changes represents the current definitive definition by an international convention and has been universally adopted into national laws of many ratifications of the Convention. However, even within maritime piracy itself, the definition has probably created more problems that it tried to solve. To try to fit in those actions of environmental activists would amount to a double jeopardy. So do the actions of the Arctic Sunrise and her crew in this incident fit in with offence of piracy under Article 101?

Article 101 of UNCLOS III, excerpted above, repeats almost exactly the language of Article 15 of UNCLOS I, indicating that there has not been a significant change in the customary law established by UNCLOS I. All the ingredients of Article 15 of UNCLOS I are included save more efficiently.

**IV ELEMENTS AND PROBLEM OF THE DEFINITION**

(A) **JURIDICAL V POLITICAL AND COMMERCIAL DEFINITIONS**

Although now taken for granted, and even without Greenpeace’s involvements, the above definition of piracy has been a source of contention among both academics and policy makers. Piracy has been used loosely to refer to and include attacks on ships, robbery at sea, theft at sea, use of unauthorised radio broadcasting ships and unlawful reproduction, distribution and sale of music and works of art contrary to intellectual property laws. It has juridical, political and commercial connotations. And now, like terrorism, it is used to describe the actions of individuals, organizations or states that one does not approve or support, a more likely explanation of that used in the Arctic Sunrise incident. There is no single acceptable definition of the subject. Gentili, a 16th Century Italian jurist wrote

> “Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorers of the law of nation; hence, they find no protection in that law. They ought to be crushed by us and by all men. This is warfare shared by all nations”²⁵.

²⁵ Gentili, Alberico No
Hence the expression, “Pirata est hostis humani generis” (“A Pirate is an enemy of the human race”).

Brownlie, on the other hand, points out that,

“By way of caution, it may be pointed out that definitions by municipal courts are often out of date, and involve an amalgam of municipal rules and international law, or the narrow issue of the meaning of ‘piracy’ in an insurance policy”26.

However, it is generally agreed that the definition of maritime piracy contained in Article 15 of UNCLOS I and Article 101 UNCLOS of III, represent a wider customary international (and now a Convention) juridical view.

(B) Building blocks of piracy under the Convention

In addition to an illegal act, to constitute piracy the act must be violent or involve some form of violence. In the ordinary sense the term “violence” invokes degrees of violence and could be offensive as well as defensive violence31. For instance, one who resists arrest by the police could in return be committing violence. It is debatable whether there was certainly any violence used by the Arctic Sunrise and Greenpeace activists in attempting to board the drilling rig craft and attempting to raise their flag or banner on it. Neither was there an act of detention of the crew or workers on the platform nor depredation thereof. Greenpeace’s argument is that its foundation over 40 years ago is based on the Quaker principles of non-violence, bearing witness and peaceful protest, and disowns violence as its modest operandi. This does not of course mean that in the course of that protest they cannot and have not used violence.

26 Crawford, James, Brownlie’s, Principles of Public International Law, Oxford University Press, 8th Edn, 2008 at p.302 Note 35

Greenpeace’s position is “t no point during the protest against *The Prirazlomnaya* did Greenpeace International activists use or threaten to use violence in any form”\(^{32}\). Their interpretation of Article 15 of UNCLOS I and Article 101 of UNCLOS III is that piracy only applies when attempting to seize property with violence or threats of violence, not to a peaceful protest without those intentions. However, the term “violence” should be read against the background of the above historic insight. It is not clear whether violence means or includes force.

However, in an English case of Athens *Maritime Enterprise Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd*\(^{33}\) (*The Andreas Lemos*) Justice Staughton was of the view that piracy requires force\(^{34}\). Caution is necessary here. Related organizations with similar objectives and policies have and do use violence in their protests. However, in this incident, the video pictures posted on the Internet by the organization showed no violence on the part of Greenpeace activists.

(iii) *Was there an act of “detention” involved?: The Detention Test.*

A third jigsaw in the requirement for piracy under the Article is that the act should amount to or lead to or result in a detention of either persons or property\(^{35}\). To detain also involves capturing or seizing a person and/or, especially, a moveable property. Piracy can only be committed against a ship or aircraft. *The Prirazlomnaya* is a fixed platform, as the owner Gazprom itself acknowledged. At no point during the Greenpeace protest was there any attempt to capture *The Prirazlomnaya* let alone detain the platform or the persons therein. Two abseils, one a cameraman and the other banner bearer, attempted to abseil the side of the platform and plant a Greenpeace banner to bring media attention to environmental dangers from oil drilling and production in the Arctic. To bolster their case, Greenpeace International avers that the:

\(^{32}\) Greenpeace spokesman------

\(^{33}\) [1982] 2 Lloyds Rep 483

\(^{34}\) Ibid at 491

\(^{35}\) For what constitutes detention under English Law see *R v Brown* [1977] RTR 160. Detention is used in this content as an unlawful restraint rather arrest by the police or other lawful authorities for suspected offence
“Characterising peaceful protesters as ‘the enemy of mankind’, as pirates have traditionally been considered, is inappropriate and undermines the efforts of the international community to combat genuine piracy by diluting the international consensus on the definition of this offence”\textsuperscript{36}.

However, it is arguable that if the two abseils had succeeded, then they could have detained (restricted the movement of or frightened) the crew of the platform, however momentarily, during the course of their occupation of the rig. Nevertheless they were unsuccessful and the rest is now academic.

(iv) Was there an act of “depredation” involved?: The Depredation Test.

That leaves it open whether Greenpeace’s actions amounted to depredation of the \textit{Prirazlomnaya} or of its crew and/or affected any work on board the platform. In the ordinary language the term “depredation” denotes the act of preying upon or plundering, pillaging, robbery and ravage. These words accurately describe what the ancient pirates did-punitive: robbing and then killing and drunkenly burning any surviving property and persons to erase evidence or serve as a warning to others. An illegal and violent action is quite likely to lead to detention or depredation. Against that background, it cannot be said that Greenpeace’s action in this incident amounted to either a detention or an act constituting depredation. Depredation might also involve or result from the use of force and violence, as in the \textit{Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd}\textsuperscript{37}. The case demonstrates that the time at which force depredation is used or displayed is crucial as force or violence after the crime might not. Thus, in \textit{Shell International Petroleum Co Ltd v Caryl Anthony Vaughan Gibson}\textsuperscript{38}, where a large oil tanker was scuttled after allegedly discharging her cargo in South Africa, Lord Denning on appeal thought that, ‘[t]here were no “pirates” here because there was no forcible robbery. There were no “thieves” here because there was no violent means’\textsuperscript{39}. Thus violence, detention and depredation go hand in hand. Kidnapping for ransom, a popular method with Somali pirates, would fall into this category. It

\textsuperscript{36} See Note 49 (post)

\textsuperscript{37} The Andreas Lemos [1982] 2 Lloyds Rep 483 where a gang armed only with knives entered and used force and violence to make good their escape.

\textsuperscript{38} \textit{The Salem} [1982] 1Lloyd’s Rep 369

\textsuperscript{39} Ibid at 373
also follows that there cannot be, as in the Arctic Sunrise incident, detention or depredation where there is no violence.

(b) Was the action committed for “private ends”? The Private End and Private Motive Tests.

The conventional view is that to constitute piracy, the act must be committed for private not political ends. The term means and includes greed, hatred, lust, revenge, etc. The Somali piracy and classical pirates before fit into this jacket since they primarily benefited as individual pirates rather than for a public political cause or for some national grievances. Arguments by Somali pirates that they were politically responding to the illegal fisheries and the dumping of toxic and harmful substances in and off Somali territorial waters, although admirable, has not gained grounds. However, this popular view should be treated with caution. Once more a brief examination of the history of what became the Article 15 of UNCLOS I and Article 101 of UNCLOS III might shade some light into the debate.

For instance, a rapporteur of the League of Nations Committee of Experts for the Progressive Codification of International Law gave an insight when commenting in 1927 about the meaning of “private ends” that:

“Certain authors take the view that desire for gain is necessarily one of the characteristics of piracy. But the motive of the acts of violence might be not the prospect of gain but hatred or a desire for vengeance. In my opinion it is preferable not to adopt the criterion of desire for gain, since it is both too restrictive and contained in the larger qualification "for 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 in question, since they remain subject to the ordinary rules of international law”

In the Sea Shepherd case, an American district court construed “private ends” as limited to those pursued for “financial enrichment”, admitting that the common understanding of “private” is far broader. According to the court, the term is normally used as an antonym to “public” (e.g., private attorney general) and often refers to matters of a personal nature that are not necessarily connected to finance (e.g., private property, private entrance, private understanding and invasion of privacy).

However, to the contrary, on the private ends requirement, the IMO Legal Committee has cast doubt on that interpretation. Corroborating the League of Nations commentary on hatred or revenge, the Committee has noted that:

> “Article 101(a) of UNCLOS, requires that, in order to constitute piracy "any illegal acts of violence or detention, or any act of depredation," be committed "for private ends". It is noteworthy that the International Law Commission (ILC), in its 1956 draft Articles concerning the Law of the Sea with commentaries (Commentary), 16 stated that "[t]he intention to rob (animus furandi) is not required. Acts of piracy may be prompted by feelings of hatred or revenge and not merely by the desire for gain". So contrary to a hitherto popular opinion, intention to rob or commercial gain is not essential but feelings of hatred or revenge may constitute private motives or private ends. Against this background, could it be argued that Greenpeace’s actions involved hatred and vengeful motives against either the Russian Government or oil platform The Prirazlomnaya?"

(c) “...by the crew or the passengers of a private ship or a private aircraft”: The Two Ships Test.

To fulfil piracy requirements the two ships test must be fulfilled. On this, the IMO Guidance provided that:

> In order to constitute an act of piracy under UNCLOS, an attack on a ship must originate from another private ship or aircraft. The ILC pointed out, in its Commentary that: "acts committed on board a ship by the crew or passengers and directed against the ship itself or against persons or property on the ship, cannot be regarded as acts of piracy."

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41 See Note 46 post

piracy".

To come within the ambiats of piracy in Article 15 of UNCLOS I and Article 101 of UNCLOS III, the Arctic Sunrise activists have to be a crew and The Sunrise itself a private ship. The Greenpeace activists are definitely a crew and The Arctic Sunrise is without doubt a private ship. Although not fee-paying the crew are nevertheless passengers. However, there is a further criterion to be met: whether The Arctic Sunrise can be described as a private ship. It is certainly not a government ship but neither is it a strictly private ship, being registered to an international charitable organization. This requirement is neither complicated nor technical. The intention and crucial distinction in the Article was to distinguish a merchant vessel from a warship or merchant vessel owned and operated by a government or an international organization. Although there has not yet been a reported case where pirates hijacked a warship and used it to hijack another ship.

(d) “by one ship or aircraft against another ship or aircraft”: The Two Ships Requirement.

The two ships’ piracy test means the action has to be by a ship or aircraft against another ship or aircraft. The question here hinges on the fact whether the Russian drilling platform, The Prirazlomnaya is a ship. The definition of “ship” in Article 22 of the Russian Maritime Code does not include an offshore fixed platform. By this definition, The Prirazlomnaya was not a ship and since piracy can only be against a ship or aircraft, there was no piracy. Moreover, acts committed on board a ship by the crew and directed against the ship itself or against persons or property on the ship are not piracy within the definition and the Convention. Equally, The Arctic Sunrise is and was capable of committing piracy. Nevertheless, the act must be by a ship against another ship or aircraft, a condition probably not fulfilled in this incident since the two ships’ test has not been met.

(e) In the high seas or in a “place outside the jurisdiction of any State”: The Geographic Area Test

(i) Did the incident take place in the “high seas”?: The High Seas Requirement.

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43 Ibid p.5

44 Cf. the definition of ship and vessel in s.2 (1) of the Tanzanian Merchant Shipping Act 2004 (post) which accords with most national legislation definition.
To constitute piracy the offence has to be committed either in the high seas or in a place outside the jurisdiction of any State. In attempting to distinguish the high seas from a place outside national jurisdiction of any State, the Convention has created problems for itself. However, that is no consolation either for the Russian Federation authorities or the accused Arctic Sunrise crew in this case. It is doubtful whether the incidence for which Greenpeace activists are accused took place in Russian Federation territorial waters or international waters. The Rechora Peninsula, the alleged scene of the crime, is 370 miles from the Russian coastline. It is not clear whether 370 miles out high sea is or is not Russian continental shelf. If it is, then the Russian Federation, like any other state, can arrest a suspected pirate ship and detain its occupants as suspected pirates. Secondly, if the area is EEZ, then the scenario would be different. In this region the coastal state has only rights to mineral explorations but limited criminal jurisdictions. The area where piracy occurs is important as determined by In Re Piracy Jure Gentium case an important case which also includes the authority of the definition of the crime of piracy under public international law. The IMO document suggests that piracy can be committed in the EEZ thus:

“As regards the geographic scope for the definition of piracy, article 101(a) (i) refers to acts committed "on the high seas" while article 101(a) (ii) refers to acts committed "in a place outside the jurisdiction of any State". Article 101 of UNCLOS should be read in conjunction with article 58(2), which provides that "articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." Thus, the geographic scope of article 101(a) should be read to include the exclusive economic zone of any State. Accordingly, when the acts set forth in Article 101(a) are committed beyond the territorial sea of any State, they are considered acts of piracy under the Convention” (emphasis added).

So it is immaterial that the incident took place in the Russian continental shelf or EEZ; piracy can be committed in either. The only place where piracy cannot be committed is the country’s territorial sea and the contiguous zone. The high seas test is not applicable in this incident.

(ii) What constitutes “a place outside the national jurisdiction of any state”?: The Beyond State Jurisdiction Test.

45 (1934) 49 AC 586

46 IMO Guidance at p.4.
Even if the alleged offence did not take place in the high seas could it have occurred in “a place outside the jurisdiction of any state”? Even by the use of that phrase by which the Convention muddled already troubled waters, it is necessary to know what constitutes “a place outside the jurisdiction of any state”. Since the coastal state has only limited jurisdiction in the EEZ and the continental shelf which forms part of it, then those two maritime zones are outside the criminal jurisdiction of any state and accordingly, an act of piracy may be committed there. In that case, The Arctic Sunrise and her crew could have technically committed piracy in the 370 miles of the Russian EEZ. Furthermore, in the continental shelf or EEZ the Russian state has a right to proclaim a security zone of 500m radius to protect the platforms and other economic installations; which they did as a SUA Protocol requirement47. This is important because of the early, but noteworthy, authority of Nesbit v Lushington48 which after long deliberation on what constitutes an act of piracy, concluded that people from ashore (this time rioters) might constitute pirates49. Can activists be assimilated to rioters? Is this what the Russian Criminal Code referred to as piracy by an organised group?

Once more corroborating and enlarging the ILC perspective, the IMO commentary on this point pointed out that:

“With regard to the meaning of the phrase "in a place outside the jurisdiction of any State", the International Law Commission (ILC), in its Commentary to article 39, which was the basis for article 101 of UNCLOS, stated “[i]n considering as "piracy" acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction”50 (emphasis foreign).

Thus this phrase was intended for piracy on the shores of unpopulated islands as well ownerless territories: a popular choice for especially ancient pirates. However, that definition does not include the maritime zone where Arctic Sunrise- The Prirazlomnaya confrontation occurred.

47 See Article 4.2 of the Summary of the Industry Safety Declaration of the offshore ice-resistant fixed platform Prirazlomnaya issued by Gazprom Neft Shelf LLC at http://www.shelf-neft.gazprom.ru/images/materials

48 (1792) 4TR 783

49 Ibid at 787 per Lord Kenyon CJ

(f) “---or against persons or property on board such ship or aircraft”: The Person and Property Requirement.

For there to be piracy, the act has to pass the person and/or property test. The alleged act should be aimed and be a threat to the life or safety of persons in the other ship or aircraft or property on board thereof. That would definitely be so in a conventional piracy incidence where intimidation and capture of persons to facilitate the taking over of the vessel and its property for ransom would apply. Regarding this incident, it is arguable from the Russian view point that Greenpeace’s actions, although not intended to harm The Prirazlomnaya or her crew, were nevertheless aimed at and could have had the unintended consequence of endangering the life of the crew on board The Prirazlomnaya.

In relation to property, it is also arguable that the action, although aimed at stopping the drilling rig from its work, could have nevertheless damaged or endangered the safety of both the platform and its operations by the law of unintended consequences. That could have, in turn, resulted into the pollution of the sea, the very thing that Greenpeace’s actions intended to stop. However, even if The Prirazlomnaya had qualified as a ship, which it doesn’t, the act has to be directly against persons or property on the ship/drilling rig The Prirazlomnaya.

The drilling platform in question was probably government-owned (at least by a subsidiary of a State entity). The criteria are any act of voluntary participation in the operation of a ship or of an aircraft with the knowledge of facts making it a pirate ship or aircraft”. The requirement of voluntary participation is probably the only satisfied criteria but is probably irrelevant in the context. With the exception of the law of unintended consequences, the person and/or property test has not been met.

(g) “Act of inciting or of intentionally facilitating an act described in the sub-paragraph (1) or sub-paragraph (2) of this article”: The Inciting and Facilitating Requirements.

(i) Did the actions of the Arctic Sunrise or her crew’s amount to an inciting?: The Inciting Requirement.

To constitute piracy, the alleged action(s) must pass the Inciting Test. First, did the actions of the Arctic Sunrise and her crew constitute incitement? Secondly, were they voluntary participation? Regarding the second, easier question, the actions seem to be intentional in that they were not acting under any duress and intended to do so
all along within Article 101(1). There is no indication that they were coerced into taking part. It is also immaterial that they were unsuccessful. This wording in the final paragraph 1 of Article 101 implies that an attempted act might not necessarily succeed but can still be caught by a charge of conspiracy to commit piracy. Regarding the first, more difficult question, incitement means and includes provocation, stirring, agitation, inflaming, enflaming, seditious, rabble-rousing, motivation and to encourage and/or motivate persons to perform an illegal act within Article 101(1). However, apart from probably inciting themselves, there was nobody else around for the *Arctic Sunrise* and her crew to incite. The reader is therefore left to draw his or her own conclusions.

On incitement and facilitation the IMO commentary provides that:

> “Article 101(c) includes in the definition of piracy "any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)." Thus, the inchoate offence of inciting any of the acts covered in subparagraph (a) or (b) or intentionally facilitating any of the acts covered in these paragraphs would also constitute piracy." 52.

It appears this phrase was intended to cover rioters from ashore and other conspirators such as the Somali warlords who guide and finance operations from a distance. It was never intended to cover untraditional actions such as this from environmental campaigners. The IMO documents provide in a footnote to the commentary that:

> “States may wish to consider including in their penal codes other offences related to piracy, such as attempt to commit piracy, conspiracy to commit piracy, and aiding and abetting piracy in their national legislation. However, to the extent that such crimes do not fall within the scope of the definition of piracy set forth in UNCLOS, they would have to be based on other traditional bases of jurisdiction under international law”53.

Accordingly, except for the conspiracy, the Inciting Test is probably not met in this incident

(ii) Did the actions of the *Arctic Sunrise* and her crew facilitate the alleged piracy?: The Facilitating Requirement.

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52IMO Guideline at p.5

53 Ibid, Note 19
The Inciting and Facilitating tests normally go together. The *Arctic Sunrise* and her crew needn’t have committed the alleged acts themselves; they could simply facilitate it to come under Article 101. In its ordinary meaning, facilitation means enabling, assisting, helping, simplifying, smoothing, easing, expediting or accelerating the performance of the illegal act and doing so voluntarily. From the foregone the *Arctic Sunrise’s* actions probably constituted the offence. That could also be true of the Captain and the other 28 crew members who remained aboard the *Arctic Sunrise* but cannot be said of the two crew who attempted to board. Their actions were for the purpose of achieving an objective. The mothership, *The Arctic Sunrise*, although outside the 500m security cordon at the time, could be charged with conspiracy in planning, supplying and launching the inflatable dinghies whose crew attempted to board the *The Prirazlomnaya*. That has been the case with Somali piracy where both the mothership and the skiffs are instrumental in the commission of the piracy. There is probably also conspiracy by the mothership. But the intention to facilitation was to stop or highlight the environmental danger of the drilling in the Arctic rather than facilitating the commission of piracy. Facilitation provides a technical rather than normal way of committing the piracy offence. In that case, the IMO’s advice to national legislative drafting above is relevant. Thus, it would appear the Facilitation Test is met and the Arctic Sunrise and her 28 crew that remained on board could be charged under this sub-paragraph.

V. POSSIBLE GREENPEACE DEFENCE AGAINST CHARGES OF PIRACY

(A) THE LACK OF PRIVATE MOTIVE

The role of private motive under the Convention has been discussed partly under private ends above. In this incident, this test has to be matched against the accused organization’s principal objectives. On its official Website, Greenpeace International describes itself as an independent global campaigning organization that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace by:

- Catalysing an energy revolution to address the number one threat facing our planet: climate change.
- Defending our oceans by challenging wasteful and destructive fishing, and creating a global network of marine reserves.
- Protecting the world’s remaining ancient forests which are depended on by many animals, plants and people.
- Working for disarmament and peace by reducing dependence on finite resources and calling for the elimination of all nuclear weapons.
- Creating a toxin free future with safer alternatives to hazardous chemicals in today's products and manufacturing.
Campaigning for sustainable agriculture by encouraging socially and ecologically responsible farming practices.

On their face value these are noble objectives that would not ordinarily imply private motive. It is not surprising that in its response to the detention of *The Arctic Sunrise* and its crew, the organization spokesman retorted that:

“A charge of piracy is being laid against men and women whose only crime is to be possessed of a conscience. This is an outrage and represents nothing less than an assault on the very principle of peaceful protest. Any claim that these activists are pirates are as absurd as it is abominable. It is utterly irrational, it is designed to intimidate and silence us, but we will not be cowed”54.

However, the ILC and IMO commentaries above and the Sea Shepherd case below give a different perspective where private motive or private end may consist of hatred and vengeful actions however noble the accused’s intentions are.

(B) DOES HATRED AND VENGEANCE CONSTITUTE PRIVATE MOTIVE AND PRIVATE END? US NINTH CIRCUIT IN THE SEA SHEPHERD CASE.

The necessity of motive has been raised recently in the American *Sea Shepherd* case55, involving identical organizational motives and principles to those of Greenpeace in the Russian incidence. Like the *Arctic Sunrise* and her predecessor the *Rainbow Warrior*, the *Sea Shepherd* is the flag ship of the environmental activist that attempted to prevent Japanese whaling ships from taking whales. Unlike the pending *Arctic Sunrise* case, the *Sea Shepherd* case was brought by a private institution made up of corporations and individuals56 and the whalers’ association under an *Alien Tort Statute* in a US court against the US-based organization that operates the *Sea Shepherd*. Also unlike the *Arctic Sunrise* incident, the *Sea Shepherd* incident involved ramming, throwing bottles and hurling other objectives at the Japanese vessels which amounted to violence under UNCLOS I Article 15 and UNCLOS III Article 101, although the US has not ratified the latter.

54 http://repubhub.icopyright.net/freePost.act?tag=3.5981%3Ficx_id%3D20131014-161004-9393

55 Institute of Cetacean Research v Sea Shepherd Conservation Society, United States Court of Appeals Ninth Circuit 725 F.3d 940

56 Institute of Cetacean Research, a Japanese research foundation; Kyofdo Senpak Kaisha, Ltd.; a Japanese corporation; Tomoyuki Ogawa, an individual; Toshiyuki Miura, an individuals as Plaintiffs-Appellants
The appellants (Cetacean) alleged that the Sea Shepherd groups had engaged in “piracy” within the meaning of customary international law, and the appeal court agreed, reversing the district decision and granting an interim injunction. The appeal court refused to take note of an Australian court ruling in another case against the appellants but chose to cite a 25-year-old insignificant Belgian case. Furthermore, the appeal court was not concerned with whether piracy is included in the Alien Tort Statute following the decision in the Sosa v. Alvarez Machain case, Cetacean’s basis for a preliminary injunction pursuant to violations of the SUA Convention, and the Convention on the International Regulations for Preventing Collision at Sea.

There are two principal issues here. One is whether the activities of the Sea Shepherd constitute “piracy”- in particular whether there was violence and private motive. The district court found in favour of the owners of the Sea Shepherd. However, the Chief Judge Kozinski, in the Ninth Circuit’s court agreed with the appellants and overturned the finding and granted an interim injunction pending a retrial. The other is whether Sea Shepherd constitutes a cause of action cognizable under the Alien Tort Statute. The Chief justified his decision with a remark which has since become quotable when he opened with the following sentence:

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

Justice Kozinski had no doubts in his mind that the Sea Shepherd groups had engaged in “piracy” within the meaning of customary international law. More significantly, on the important criterion of private motives, he opined that “private ends” needed to satisfy an element of piracy includes goals other than financial enrichment.

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57 Discussed post at p.

58 Sosa v Alvarez held that the ATS is solely a jurisdictional statute that does not provide a general cause of action for violations of international law; for details see; Eugene Kontorovich, “Implementing Sosa v. Alvarez-Machain: What Piracy Teaches About the Limits of the Alien Tort Statute” Working Paper No. 04-38: http://www.law.gmu.edu/pubs/papers/04-38

59 For discussions on SUA Convention, SUA PROT and SUA Amendments, see Part VI of this article (post)

60 For a text of the Convention and Protocols see http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf

61 Institute of Cetacean Research v Sea Shepherd Conservation Society, United States Court of Appeals Ninth Circuit 725 F.3d 940, at p.947
Thus, the Ninth Circuit decided that anti-whaling activism qualifies as piracy if it involves violence against a ship on the high seas. This is despite overwhelming and significant historical support in the *Santa Maria* and the *Republic of Bolivian* cases (below) for the preponderant supposition that piracy specifically excludes acts of violence that are politically motivated. Judgment in *Kiobel v Royal Petroleum Company*62, when released, will provide further insights in the connection between the *Alien Torts Act* and piracy.

Although he did not make references to them in his ruling, Justice Kozinski’s position on this is supported by the ILC and IMO commentaries above.

This is giving a new meaning to private motives and private ends in Article 15 of UNCLOS I and Article 101 of UNCLOS III. It adds hatred and vengeance to the meaning of private motive and private ends. That makes the outcome of the *Sea Shepherd’s* retrial important. So unless the finding is reversed, going by the *Sea Shepherd* case the Russians could mount an argument that Greenpeace’s apparently “public motive” to save the world from environmental disaster might be immaterial in constituting the offence piracy. Thus, the *Sea Shepherd* case may well be cited by the Russian prosecutor to support a case for piracy charge against Greenpeace activists.

(C) POLITICALLY MOTIVATED OPERATIONS BY ORGANISED GROUPS: THE SANTA MARIA CASE

The likely Russian charge against *The Arctic Sunrise* and her crew is “piracy by an organised group”. Harassing operations by organised groups deploying forces on the high seas may have politically motivated objectives, and yet may be neither connected with insurgency63 against a particular government nor performed by agents of a lawful government64. Ships threatened with such activities may be protected, and yet the aggressors may not be regarded as pirates65. Thus, the taking over by Captain Galvao 66 of the Portuguese vessel *The Santa Maria*67, in


63 Brownlie at p.305

64 Ibid

65 This happened to the hijacking of the Portuguese luxury cruiseliner in the Atlantic and diverted to Brazil. Thereafter, a fleet of United States naval vessels, including not less than four destroyers surrounded the vessel. There, Galvão and his 24 leftist terrorists surrendered the Santa Maria, 600 passengers and crew of 300 to Brazilian authorities in exchange for political asylum; see also Menefee, Samuel Pyeatt, “Terrorism at Sea: The Historical Development of an International Legal Response” in E. Ellen (ed.), *Violence at Sea*: An International Workshop in Maritime Terrorism (1987).
1961 to dramatize his opposition to the Portuguese dictator Antonio Salazar did not constitute piracy since the seizure was not carried out for private motives (apart from the fact only one ship was involved—whereas piracy needs at least two—the aggressor and victim ships—under the two ships test above) which alone excluded the act in question from the scope of piracy under international law.\(^68\)

The ruling in that case related to purely political motives without any private commercial gains.\(^69\) This is despite the use of violence and the killing by the rebels of a crew of the *Santa Maria*. Nevertheless, the Somali experience merits a review of this customary law position. The Somali organised groups are not the type foreseen under international law. Somali pirates might consist of organised groups even with valid grievances against dumping, illegal fishing, jihadism and purported neglect of their country by the international community, but they would not benefit from *The Santa Maria* ruling that actions by such groups do not constitute piracy.\(^70\)

Under the current state of maritime terrorism and heightened state of piracy, the *Santa Maria* case would have had a different result. A tiny minority of the Somali pirates might be politically motivated but the bulk, if not all,

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\(^68\)  Henrique Galvão, it was a rebel terrorist operation against the Government of Portugal. The action has also been referred to as "piracy", although it does not fit the international definition of piracy involving an attack of one vessel on another for private ends. Shapiro, Peter. Issue: A Journal of Opinion, Vol. 2, No. 3. (Autumn, 1972), pp. 37–40.; see also Green L.C. The *Santa Maria*: Rebels or Pirates 37 BYBIL (1961), p496

\(^67\)  On January 23, 1961, a group of Portuguese and Spanish opposition movement members seized control of the Santa Maria, a 609-foot-long (186 m), 20,900-ton Portuguese luxury cruise liner. the ship was the second largest ship in the Portuguese merchant navy at the time and along with her sister ship, the Vera Cruz was among the most luxurious Portuguese-flag liners of that time. On January 23, 1961, the ship had 600 passengers and 300 crew members. Among the passengers were men, women, children, and 24 Iberian leftists led by Portuguese military officer and politician Henrique Galvão.

\(^69\)  Henrique Galvão was a Portuguese military officer and political foe of Portuguese dictator António de Oliveira Salazar, the head of the Estado Novo regime. Galvão had carefully planned the hijacking with the intention of waging war until Salazar was overthrown in Portugal and the overseas territories were subsequently offered independence. He planned on using the hijacking as a way to bring attention to the Estado Novo in Portugal and the related fascist regime in Francoist Spain.; Henry A. Zeiger: The Seizing of the Santa Maria, New York (Popular Library) 1961.

\(^70\)  The rebels, along with Henrique Galvão, seized the ship, ceased all communication, and killed one officer (3rd Pilot Nascimento Costa) and wounded several others in the process of taking complete command over the ship. The rebels forced crew members, along with the captain of the ship, Mário Simões Maia, to take the ship on a different course. Henrique Galvão: Santa Maria. My crusade for Portugal, London, Weidenfeld & Nicolson, 1961.
are opportunists, terrorists if not outright criminals acting from purely private motives. There may be sympathy for Somalia for reasons outlined above but two wrongs do not make a right. What is undisputed is Somali piracy has its roots partly in terrorism. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a State.

(D) POLITICAL MOTIVES IN INSURANCE COMMERCIAL CASES: THE REPUBLIC OF BOLIVIA CASE

In the Republic of Bolivia Case, Lord Justice Kennedy said,

“The man who acts with a public object may do like acts to a certain extent, but his moral attitude are different and the acts themselves will be kept within well-marked bounds. He is not only the enemy of the human race, but he is the enemy solely of a particular State.’ That I think expresses what I have called the popular or business meaning of the word ‘pirate,’ and I find that several, though not all, of the definitions cited in the note on p. 260 of the same work bear out that idea. No doubt there are definitions which do not embody that idea, but that I think is the common and ordinary meaning; a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular State for a public end, the end of establishing a government, although that act may be illegal and even criminal, and although he may not be acting on behalf of a society which is, to use the expression in Hall on International Law, politically organized”71.

However, the legal, political and commercial definitions of piracy may vary. For instance, the UK Marine Insurance Act, 1906, “The term ‘pirates’ includes passenger who mutiny and rioters who attack the vessel from the shore”72. Could Greenpeace action amount to what the Russians described as “piracy by an organised group”? All considered, the Republic of Bolivian Case and the Santa Maria incident would not support piracy prosecution of Greenpeace activists.

Goods were shipped upon a vessel for carriage from a place at the mouth of the Amazon to a place far inland upon a tributary of a tributary of that river, situated in a remote Bolivia territory on the boundary with Brazil. These goods were insured by a marine policy against, among other risks, “pirates” and “all other perils”. The policy was “Warranted free of capture, seizure, and detention, piracy excepted”. The goods insured consisted of

71 At p 797; see below for facts of the case.

72 Rule 8 of the Rules for construction of the policy, Appendix 1 to the marine Insurance Act 1906
provisions and stores which belonged to the Bolivian Government, and were intended for Bolivian troops engaged in establishing the authority of that Government in a disputed territory. Certain, mostly Brazilian insurgents against establishment of Bolivian authority there set out on an armed expedition to resist Bolivian troops and establish an independent republic in the disputed area. They stopped the vessel on which the goods insured were shipped and seized those goods. In an action on the policy claiming a loss through pirates, affirming the decision of Pickford J., Lord Justice Kennedy held that, even assuming that:

“The acts of those who seized the goods came within the legal definition of piracy for some purposes, the word “pirates,” as used in the policy, must be construed in its popular sense, and in that sense it meant persons who plunder indiscriminately for their private gain, not persons who simply operate against the property of a particular State, however unlawful that might be, for a public political end, and, therefore, there had not been a loss through “pirates” within the meaning of the policy”73 (emphasis added).

Although dealing with an insurance policy and, therefore, commercial rather than an international law or political definition, the case would support the idea that Greenpeace did not commit piracy74. Thus, piracy is an indiscriminate act and not politically motivated. However, in Banque Monteca v Motor Union Insurance Co75, although in a different set of facts and circumstances, the capture of a small vessel was considered to be politically motivated, and not indiscriminate and was therefore, an act of seizure and not piracy.

(E) DIFFERENCES BETWEEN ARCTIC SUNRISE, SEA SHEPHERD AND REAL PIRACY

The actions of the Arctic Sunrise and her crew cannot be compared to Somalia piracy, where in the last 6-8 years over 500 merchant shipping vessels with over 250 crew men and an estimated US$ 10 billion worth of cargo have been hijacked through acts of piracy and armed robbery off the Somali coast operating sometimes from as far as 800-1000 nautical miles out to sea. More than 100 attacks were reported at the peak in 2009 alone, and

73 At p.786, see also his main ruling in Note, supra, 21

74 However, the mutinous acts of passengers may be considered to be acts of piracy, as well illustrated by the English case of Palmer and Another v Naylor and Others (1854) 10 Ex 382

75 (1923) 14LIL Rep 48, at p.51 per Roche J; see also Cameron v HM Advocate 1971 J.C. 50;56 ILR p.243
pirates have seized over 100 vessels and more than 800 seafarers have been kidnapped and held for ransom. As of December 2012 over 50 ships and an estimated 600 seafarers from 30 countries were being held hostage in Somalia. About 30 seafarers and 20 pirates have died. In the process, the pirates have netted over US$ 500 million in ransom money from ship owners, cargo owners or operators this year.

From mid 2009, all the world’s most powerful navies and governments had been paralysed and unable to deal with the phenomenon caused by a rag-tag army of Somali youths, some barely in their teens, sailing in rusty motherships, using skiffs (speed-boats) and armed with AK47 and shoulder-held rocket propelled grenades (rpg). These are the pirates who do not fit the classical image and definition of the term; they are modern pirates with new dimensions and posing challenges to international law and world order. Their private motives, violence, incitement, and facilitation are undoubted. Against this background, the actions and scale of operations of the Arctic Sunrise and her crew pale into insignificance. They might have committed some breach such as unlawful entry, trespass, torts and SUA offences but are certainly not pirates.

(F) COMPARISON OF THE ARCTIC SUNRISE AND THE TANZANIAN SAM ALL GOOD INCIDENT OCTOBER 2013

(a) The Indian Ocean Incidence

Coincidentally, at the same time as the Arctic Sunrise, an incident against an oil platform was taking place in the Indian Ocean. Probably also for the first time a court will have a chance to prosecute pirate suspects for attacking an oil platform. A pending trial of seven suspected Somali pirates is at the High Court in Dar es Salaam, Tanzania. The pirate suspects allegedly committed the offence on 3 October 2011 in the Indian Ocean and within Tanzania's EEZ. The night before, a Navy Unit of the Tanzania People's Defence Forces (TPDF) captured the Somali suspects a short distance away from Mafia Island, an island to the South West of the commercial capital of Dar es Salaam. An oil prospecting vessel, SAM ALL-GOOD, was attacked by a group of at least seven pirate suspects of Somali origin using firearms. It is not clear whether this was a revenge or hatred attack. It could also have been a mistaken identity (a common occurrence with Somali pirates) as an oil prospecting vessel is clearly distinct from an ordinary ship (mistaking a warship for merchant ship would be understandable at night).

But when the attack was radioed in, the Tanzanian navy units in the area immediately deployed to intercept the pirates suspects. A fire fight reportedly ensued before the pirate suspects were overpowered and taken into custody, interrogated and appeared at a district court for preliminary inquiry. Section 66(2) of the Tanzania Penal Code under which the seven men could be charged (participating in piracy) carries a life sentence. Although the prosecution is yet to provide memorandum of facts, giving details on how the accused persons
participated in committing the crime and which charge would be preferred against them, it is doubtful whether this a piracy offence. First, it does not fit in with the maritime zone where piracy is commitable. A state’s criminal jurisdiction in the EEZ is limited. Secondly, the SAM ALL-GOOD like the The Prirazlomnaya is not a ship and piracy can only be committed by a ship or aircraft against another ship or aircraft. Clearly, like the Arctic Sunrise incident, this is a SUA maritime security offence rather than piracy.

(b) SUA Offences

The definition of a ship, in the interpretation of s.2 (1), of the Tanzanian Merchant Shipping Act 2004 does not include oil rigs or platforms. A ship is defined as a floating vessel which is self-propelled and capable of carrying passengers and includes every description of vessel used in navigation. And vessel includes any ship, boat, sailing vessel, or other vessel of any description used in navigation, but does not include an oil rig or production platform.

Although there was clearly violence and all the other piracy requirements involved in this incidence, the suspects could be charged under more appropriate SUA offences than piracy. Even though the main purpose of the SUA is to ensure that appropriate action is taken against persons committing unlawful acts against ships which include:

- the seizure of ships by force;
- acts of violence against persons on board ships; and
- the placing of devices on board a ship which are likely to destroy or damage it;

the SUA Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 extends the requirements of the Convention to fixed platforms such as those engaged in the exploitation of offshore oil and gas. The Convention and Protocol oblige Contracting Governments either to extradite or prosecute alleged offenders. These offences are included in the Merchant Shipping Act 2004. First, s. 342 of the Act has the more appropriate offence of hijacking and destruction of ships, imprisonable for life. Secondly, s 343 contains offences involving endangering safe navigation, threats and ancillary offences. Finally, s. 344 of the legislation requires the master to deliver such a person and makes it an offence not to do so.

VI. OTHER POSSIBLE MARITIME OFFENCES BY GREENPEACE ACTIVISTS.
(A) UNDER THE SUA CONVENTION, SUA PROTS AND SUA AMENDMENTS.

Current Somali piracy was preceded by the SUA and SUA PROTS. Outside the conventional piracy, acts related thereto can be tried for a variety of maritime security offences under some of the many international instruments. One such instrument is SUA, which was in turn based on its civil aviation counterpart, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Although aimed at maritime terrorism and establishment of general maritime security rather than to piracy specifically, SUA Convention 1988, SUA Protocol 1988 and SUA Amendment, 2005 is now one of the major weaponry employed against piracy. The amended SUA provides for Parties to create criminal offences, establish jurisdiction and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation. The Convention is boosted by Security Council Resolution 1846, which urges State Parties to SUA to fully implement their obligations under the Convention and cooperate with the IMO Secretary General to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somali. This is the more appropriate forum for the charge against The Arctic Sunrise and her crew and the Somali pirates who attacked the Tanzania SAM ALL GOOD oil platform.

(B) TERRORISM AND GENERAL MARITIME SECURITY OFFENCES

The other alternative would be general maritime terrorism. The offence became fashionable after the Palestinian Liberation Front (PLF) attacked the cruise liner the Achilles Lauro off the Somali coast in the India Ocean in 1985, killing a disabled American passenger Klinghoffer. This gave rise to SUA Convention 1988. Threats of possible attacks against fixed platforms gave rise to SUA Protocol 1988, the International Convention for the


77 For a detailed discussion of the Achille Lauro see, Halberstam, (1988) 82 AJIL 269;

Suppression of the Financing of Terrorism 1999\textsuperscript{79} and the SUA amendment 2005. This was followed by the 9/11 incidence. Thus, the international community saw it coming. Just prior to the emergence of Somali piracy, there had been protracted activities in terrorism in Somalia and off the coast of Somalia. There is a general lawlessness, which has infiltrated legitimate maritime activities. At first, it was regarded as terrorist threats to maritime transport and therefore, a general threat to maritime security.

Under the guidance of the United Nations and championed by the US, efforts were concentrated at both the UN and IMO maritime security. The main cause of this was the 9/11 bombing of the twin towers and general hijackings in the country. All this meant was that we were oblivious as to what the terrorism was to crystallise into, Somali terrorism. Piracy should now be considered as part of the general maritime security. In fact, included in the UK definition of piracy is the language of Article 101 of UNCLOS III. This in fact emanates from aviation security, hence the borrowing of the term “highjack” from therein\textsuperscript{80}. When the hijacking of aircrafts became harder and out of fashion, attention switched to merchant shipping, equally high profile but a softer target with a larger and more difficult environment for the owners to police. It is unclear whether Arctic Sunrise and her crew or the Somali pirate attackers of the SAM ALL GOOD could be charged under this, but it is a possibility. Failing that, they could be charged under the general tort of trespass, illegal entry and related maritime offences.

(C) TRESPASS AND OTHER ILLEGAL MARITIME ACTS

Piracy should be differentiated from other illegal acts committed by or on board a vessel that do not constitute piracy. They would still constitute illegal acts even if violence were not involved. When apprehended, Somali pirates are sometimes charged with commission of illegal acts in the high seas. This is closer to the International maritime Bureau’s (IMB) definition of piracy which includes all related offences in the high seas. Other distinguishing factors of the Somali piracy and the Arctic Sunrise or the SAM ALL GOOD incidence are the former’s links to current insurgency in the country. Actions of Somali pirates are illegal under both municipal and international law. That might not be the case with regard to The Arctic Sunrise and Tanzanian incident.


\textsuperscript{80} See the Aviation and Maritime Security Act 1990 (Cap 31/1990) Part I Endangering safety at aerodromes
Trespass, as in the *Sea Shepherd*, is another possibility although both the Russians and Tanzanians probably do not have the equivalent of the US’ *Alien Torts Statute*.

However, *The Arctic Sunrise* was within Russia’s declared EEZ, which stretches 200 nautical miles (370 kilometres) from its northern coastline into the Arctic Ocean. Inside the EEZ, although it does not have full criminal jurisdiction, the Russian state has the right to exploit the natural resources and to protect those operations. It is possible the Russians would have created a security cordon of 500m around *The Prirazlomnaya* as required, in which case if the dinghy entered that zone without permission then she would have committed a security breach. Furthermore, *The Arctic Sunrise* itself, although remained out of that security zone, she was nevertheless perceived to be a threat to the operation of *The Prirazlomnaya* and the Russians would be entitled to protect it by arresting *The Arctic Sunrise* for conspiracy in launching the dinghy.

**VII. THE WIDER ENVIRONMENTAL AND GEOPOLITICAL ASPECTS OF THE INCIDENT**

So far this article has taken a purely juridical approach. However, this is a growing and potentially dangerous area of the interface between law, politics and geopolitics. There are a number of issues that need addressing. First, is that courts will not permit individuals or organizations, however noble their views are, to mess about with the established order of the oceans, the maritime space. Greenpeace itself should see the reading on the walls. They should not have lost sight of the fact that only 27 years ago in 1986 in the case of *Castle John & Another v Mabreco & Another*[^81], they had been found guilty not by a foreign hostile court but by a court in the West. In that case members of Greenpeace boarded, occupied and damaged two Dutch vessels on the high seas. They were found guilty of *piracy jure gentium* because their acts had been committed for private ends, “being in support of a personal point of view concerning a particular problem”[^82]. The rationale here seems to be whatever the motive, however public spirited the motive, none is permitted to disturb the public order of the maritime space. The fact that Greenpeace wants to save the world was not considered in that case. Public motive or public spirit is no excuse.

Secondly, the definition of piracy is such that it has political, juridical, international and commercial differences. It may refer to a variety of acts such as actions by insurgents at sea, acts committed with the authority of a lawful government, politically motivated acts by organised groups, terrorism, maritime security acts and other illegal

[^81]: (1986) European Transport Law, 1987, p.98;77ILR p537

[^82]: 77 ILR p. 537at p.540
acts on the high seas or in places beyond national jurisdiction of any state. What is piracy in international law might not be so in municipal law. Accordingly, it is almost left to each state to determine whether an offence is piracy or not. Piracy is now tied with international terrorism and maritime security such that other players and conventions such as SUA come into play. Thus UNCLOS, although the premier guideline, no longer has the monopoly of the definition of “piracy”.

Thirdly, there are national security and geopolitical issues for each nation to decide. In this case there is the omnipresent energy security and economic interests to consider. When dealing with sovereign nations great care must be taken. UNCLOS is only a guideline which leaves sovereign nations to determine issues according to their national interest and security. That was the prevailing spirit at the development of UNCLOS through the League of Nations, ILC, the Harvard Draft stages, and then through UNCLOS I- UNCLOS III. SUA and other international conventions have allowed for establishment of security zones around oil and gas installations in the continental shelves and EEZ. They may not be acceptable to environmentalist but, until the situation changes, they are lawful and breaching them is an offence. Fourth, there is a general abhorrence of pirates and what they stand for. It may well be that the Russian Federation may take a stand send a signal to Greenpeace that they should not make it a habit. They might just hold them for a very long time and give a stiff sentence to make the point. They claim that in the wake of the recent attack on a Nairobi Shopping Mall, they could not anything for granted. That until they had them safely under custody, interrogated and identified, it would be difficult to ascertain they were not terrorists. It remains to be seen.

Fifth, there is need to balance national and international interests and economic or commercial interests with the preservation of the marine environment. Global warming and its effect needs to be taken very seriously. What happens in the Arctic eventually affects each and one of us, be they Greenpeace, World Wide Fund for Nature, the anti-Whaling Campaigners or corporations, governments or just individual maritime lawyers like the this author. It was ironic that they incident occurred not only in the International Year of the Environment but also when an international conference on the Arctic was taking place or about to take place and in the region. Sixth, and finally, it is rather unfortunate that it is being viewed as an East-West issue and a replay of the ‘barbaric Russian Bear’ Cold War stereotype. The reality is much complicated than that. Western countries such as Canada, Iceland, Norway and the USA all have vast oil and gas deposits in their sectors of the Arctic. It would be interesting to see how they would react to a similar provocative Greenpeace action if and when they decide to exploit their sectors. Furthermore, a lot of Western oil and gas corporations have shares and interests in
Gazprom’s surveys and productions. A lot of that gas is also exported to Western European markets. It is unlikely they are all waving anti-Russian banners like their populace.

VIII. CONCLUDING REMARKS

This approach was probably legalistic in a situation which involves geopolitics and national security. However, this approach was necessary to lay out the law before delving into politics rather than using politics to trample on the law. From the narratives, amiable as their intentions and however holy it might be, by entering the launching the inflatable dinghies into a security cordon, the activists violated the law. However, this article has demonstrated that that violation was not piracy within the ordinary sense under customary and Convention international law. But it does not mean that it was not piracy. The American ruling, the Belgian case and the commentaries from the League of Nations, the international commission and the international maritime organization have reminded us what we had forgotten that there are different shades to private and public motives. Perhaps we have forgotten that vengeance and hatred, even though embodied in a public spirited and a noble cause, ranks equally as private motive. The League of Nations and the International law Commission had long ago indicated that that is so nearly 80 years ago in the 1930s.

They could be charged with one of the offences under maritime security and other illegal maritime acts. Unfortunately, it did not help demonising the Russian Federation (a Western Hobby) actions in detaining the activists. No country (East or West) would permit such actions either in its waters or around its platforms. Dealing with environmentalist in the West has not been any different from the Russian handling of the Incidence. After all didn’t the French bomb the Rainbow Warrior with the loss of one crew? Didn’t the Belgian court convict Greenpeace for piracy for almost similar case in the Castle Case above in 1986? And that was in the South Pacific several thousand miles away from France, not just 370 miles or less from Russian coastline as in this case. It should be borne in mind that gas and oil productions constitute more than 50% of Russian GDP and that Gazprom is a national gem and pride. It might be paranoid to respond as such to an action of especially Western based but its wider context must be understood.