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What is the correct interpretation of the criterion “for private ends” in LOSC Art. 101?

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Foreword

This thesis is the result of a fair amount of fascination for pirates, fruitful discussions with friends and family and great guidance from my supervisor.

I would therefore like to thank the following people:
Kristine Moan, for many hours of interesting discussions about pirates and Spanish and Arabic linguistics. Professor Mohamed el Mouden for going out of your way to help me interpret and understand the Arabic text and its meaning. Jan Solski for help with the Russian interpretation. Ambassador Rolf Einar Fife for helping me, not only with the French text, but also for his feedback on the other texts and for providing interesting historical facts and curiosities.

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1 Introduction

Piracy is a current and vast problem. And for the shipping industry and the global community, combating this issue has proven to be a costly concern. Between the years 2010 and 2019, pirate attacks or attempted pirate attacks have occurred between 162 and 445 times annually.[1] This statistic does not, unfortunately, distinguish between attacks that occur on the high seas from those that occur in the territorial sea. The latter one is normally called armed robbery and does not constitute piracy under international law.

The most current data concerning armed robbery and piracy in Asia shows that such attacks have doubled during January- June 2020 compared to the same period in 2019.[2] And yet, the real numbers of attacks towards vessels are likely much higher than those found in the statistics. This is because reporting attacks entail increased insurance policy and loss of time, and therefore a lot of vessels and crews abstain from filing such reports. The number of unreported attacks has been estimated to cover as much as 50 % of all attacks.[3]

Furthermore, piracy acts can threaten the environment if the vessel attacked carries dangerous chemicals or radioactive material.[4] These acts also endanger life and health of the crews, as well as the pirates, and has also resulted in reluctance of vessels to carry aid to poor countries, such as Somalia.[5] Sometimes crews are taken in detention by the pirates, and on average hostages are being kept for five months, and some as long as almost three years.[6] The hostages are often treated poorly, and some are killed.[7] Only in 2011 as many as 35 suffered this faith.

With all these factors taken into consideration, Rothwell and Stephens have characterised the challenges regarding piracy as the biggest challenge to international shipping in peace time

[1] https://www.statista.com/statistics/266292/number-of-pirate-attacks-worldwide-since-2006/, extracted 15th July 2020.
[2] ReCAAP ISC Half Year Report 2020, p. 2, found at https://www.recaap.org/resources/ck/files/reports/half-year/ReCAAP%20ISC%20Half%20Yearly%20Report%202020.pdf, extracted September 14th 2020
[3] Frostad, M., 2016, *Voldelige hav, Pirateri og jus*, Oslo, Cappelen Damm akademisk, p. 16 referring to several authors including Birnie, P., 1987, Piracy: Past, present and future, 11, *Marine Policy,* 163, p. 173
[4] https://hal.archives-ouvertes.fr/hal-00470616/document, p. 22, table 1, extracted 15th July 2020
[5] Parliamentary Assembly Council of Europe, Rapporteur: Mr. Holovaty, S., 2010, Report, Doc.12194, The Necessity to take additional international legal steps to deal with sea piracy, B. Explanatory memorandum by Mr Holovaty, rapporteur, 1.2 Aim of this Report, point 10
[6] https://eunavfor.eu/mission/ extracted the 14th of August 2020
[7] Frostad, M., 2016, *Voldelige hav, Pirateri og jus*, Oslo, Cappelen Damm akademisk, p. 19

since the Suez channel was closed in 1956.[8] Because of uncertainties on several levels, the global costs of piracy are hard to estimate. However, when adding the price of naval forces, ransoms, prosecution, re-routing of vessels as well as other primary and also secondary costs, the numbers calculated by the Oceans Beyond Piracy in 2010, estimated the costs to lie between seven and 12 billion dollars every year.[9] Other sources have estimated the numbers to be as high as 18 billion dollars annually.[10] These numbers must be used with some caution as they are not totally up to date. Though updated statistics are hard to find, it appears clear that the topic of piracy is vastly relevant for many actors to this day.

Though piracy is a current issue, its roots are old. The act might even be the third oldest occupation in history, only surpassed by prostitution and medicine.[11] In fact, the issue of piracy has long been regarded as "*an outdated 'eighteenth-century concept' of chiefly historical interest*".[12] The problem was perceived as so old and obsolete, that during the drafting of the 1958 Convention on the High Seas (hereafter HSC), some delegations suggested to delete the provisions regarding piracy, stating that it *"no longer constituted a general problem"*.[13] Regardless, it was an inescapable fact that these acts, however often they occurred, could threaten the global economy. Also, their attacks had occasionally been so brutal and violent that the actors were regarded as *hostes humani generis,* that is enemies of the whole human race.[14]

While the issue of piracy was regarded as outdated, yet sufficiently serious that suggestions to omit provisions regarding piracy were not followed through, the rules regarding piracy in the HSC was not subject to thorough discussions and reflections.[15] These rules were later borrowed by the 1982 United Nations Convention on the Law of the Sea[16] (LOSC).

[8] Rothwell D. R. and Stephens, T., 2016, The International Law of the Sea, 2nd edition, Hart publishing, p. 173
[9] https://www.ics-shipping.org/docs/default-source/Piracy-Docs/the-economic-cost-of-piracy.pdf?sfvrsn=0, extracted 14th August 2020
[10] Frostad, M., 2016, *Voldelige hav, Pirateri og jus*, Oslo, Cappelen Damm akademisk p. 21
[11] Birnie, P., 1987, Piracy: Past, present and future. *Marine Policy, 11*(3), 163-183 p. 163
[12] Petrig, A., 2015, "Piracy", in Rothwell, D., et al. (eds), in *The Oxford Handbook of the Law of the Sea,* Oxford University Press, p. 843
[13] *Ibid*
[14] Birnie, P., 1987, Piracy: Past, present and future. *Marine Policy, 11*(3), 163-183 p. 164
[15] Frostad, M., 2016, *Voldelige hav, Pirateri og jus*, Oslo: Cappelen Damm akademisk, p. 63
[16] Petrig, A., 2015, "Piracy", in Rothwell, D., et al. (eds), in *The Oxford Handbook of the Law of the Sea,* Oxford University Press, p. 843

The LOSC, widely considered the constitution of the seas,[17] defines piracy in Art. 101. The provision states that:

> *"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;*
> *(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."*

According to (a) (i), the most used part of the definition, there are five cumulative criterions that must be met in order for an act to be defined as piracy. First, there has to be an illegal act of violence or detention or any act of depredation. Second, the act must be committed for "private ends". Third, the actors must be the crew or passengers of a private ship or aircraft. Forth, it must be directed at the high seas. Fifth and last, it must be directed against another ship or aircraft, or against persons or property onboard such ship or aircraft. Because of the ambiguous nature or vagueness of the text, the interpretation of several of the criterions may be subject to discussion.[18]

Specifically, the criterion "for private ends" has been subject to great debate. What does it mean? If interpreted widely it may encompass all acts that are not authorized by a state including insurgent and terrorist attacks, environmental activism, etc., thus enabling these motives to constitute piracy. But if interpreted narrowly, it may only cover acts that are for

[17] First mentioned by Koh, T. B., 1982, «A Constitution for the Oceans» remarks by the President of the Third United Nations Conference on the Law of the Sea, 6-11 December 1982, title of the remarks

[18] Assumed by Petrig, A., 2015, "Piracy", in Rothwell, D., et al. (eds), in *The Oxford Handbook of the Law of the Sea,* Oxford University Press, p. 846; Frostad, M., 2016, *Voldelige hav: Pirateri og jus*, Oslo: Cappelen Damm akademisk, p. 65, Birnie, P., 1987, Piracy: Past, present and future. *Marine Policy, 11*(3), 163-183 p. 171 etc.

personal benefit, like financial gain or revenge. One of the situations of greatest interests in recent years are acts of violence directed at vessels sailing on the outer side of the territorial sea of Somalia, as some of these attacks allegedly have been conducted to protect Somalian seas from illegal fishing and dumping of toxic wastes.[19] A narrow interpretation would exclude such acts from constituting piracy, but a wide interpretation could encompass such acts. It is also possible that the right interpretation lies somewhere between these two counterpoints. Nevertheless, there seems to be a common understanding in the international community that, at the very least, actions authorized by a state disqualifies the act from being piracy and rather places the responsibility on the state authorizing the violent actions.[20]

The importance of the definition of piracy is linked to the fact that piracy is the only transnational crime, meaning criminal acts that span national borders,[21] that is also subject to truly universal jurisdiction.[22] This means that closely related crimes that do not fit the definition of piracy, will not be subject to the wide enforcement or adjudicational jurisdiction that piracy is governed by. However, disagreement between states on how to interpret the provision leads to the undesirable result of divergent or potentially incorrect interpretation of the international definition.[23]

Though there are other criteria subject to debate, this thesis will only focus on the criterion "for private ends", as it would not be feasible to comprehensively cover additional criteria in depth within the time and page limit set for this task. This entails that the rest of the criteria, as well as other provisions in LOSC and other sources of law, will be covered only when they contribute to the interpretation of "private ends".

[19] Lennox, P., 2008, Contemporary Piracy off the Horn of Africa, Canadian Defence & Foreign Affairs Institute, Prepared for the Canadian Defence & Foreign Affairs Institute, p.8, found at https://d3n8a8pro7vhmx.cloudfront.net/cdfai/pages/96/attachments/original/1413689031/Contemporary_Piracy_off_the_Horn_of_Africa.pdf?1413689031, extracted 2nd September 2020; also suggested by United Nations Security Council, S/2017/859, Para 16-17 and 30; United Nations Security Council, S/2019/867 para 24-25

[20] Yearbook of the International Law Commission, 1955, Volume I, Summary records of the seventh session, 2 May – 8 July 1955, p. 44, para 80

[21] Natarajan, M., 2019, Part IA: Varieties of Transnational Crimes. in Nataranja, M., (ed), International and Transnational Crime and Justice (2nd ed.). Cambridge: Cambridge University Press, 3, p. 3

[22] Churchill, R., 2014, "The Piracy Provisions of the UN Convention on the Law of the Sea—Fit for Purpose?.", in Koutrakos, P. and Skordas, A., (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives*, Hart Publishing, 9–32, p. 10

[23] *Ibid,* p. 23.

In order to answer the question in this study, the thesis will be structured as follows: The upcoming chapter will be a presentation and reasoning for the use of methodology in this thesis. To avoid an overly theoretical touch, a thorough explanation of the chosen method will not be conducted in this chapter, but comments on methodology will be made continuously throughout the text.

The third chapter seeks to interpret the criterion "for private ends" in the LOSC Art 101. This is the main objective of the thesis and was chosen because the provision is regarded as international customary law and is therefore globally applicable.[24] For these reasons, the article does provide a natural starting point and other legal sources will be used as tools to interpret the relevant part of the article. The criterion will be interpreted in accordance with the rules of interpretation given by the *Vienna Convention on the Law of Treaties* (hereafter the VCLT)[25] and with the help of other relevant legal sources as listed in the Statute of the International Court of Justice (ICJ Statute)[26] Art. 38.

Lastly, a brief conclusion will be drawn in the fourth chapter based on the findings in the previous chapters.

2 Methodology

2.1 General methodology

International law can be analysed through different lenses. Some authors use the New Haven Approach. This approach does not clearly distinguish between values and legal norms but is valuable when analysing decision making and to formulate policy proposals.[27] Other authors interpret law with an international relation theory, placing the assumption that effectiveness is the main, if not the only criterion when interpreting and applying law.[28] Another methodology is strict positivism. These are just a few of the many methods used by jurists. The purpose of

[24] Petrig, A., 2015, "Piracy", in Rothwell, D., et al. (eds), in *The Oxford Handbook of the Law of the Sea,* Oxford University Press, p. 843
[25] 1969 United Nations, Vienna Convention on the Law of Treaties, 1155 UNTS 331
[26] 1945 Statute of the International Court of Justice, 33 UNTS 993
[27] Simma, B. and Paulus, A. L., 1999, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, in Ratner, S., & Slaughter, A., (eds), Appraising the Methods of International Law: A Prospectus for Readers. *The American Journal of International Law, 93*(2), 302-316, p. 305
[28] *Ibid*, p. 304

mentioning them is simply to show that different methods focuses on different elements of law or society. As the focus of these methods can be diverging, the choice of method might determine the result of an analysis. Consequently, it is important to be aware when choosing method.

The purpose of this thesis is to determine *de lege lata*. For this purpose, the method of revised positivism would seem most suited. Revised positivism is commented on by Simma and Paulus, whom describe it as the strict interpretation of the law in force.[29] This method delimits against the use of formal but nonlegal sources such as natural reason, moral principles and political ideologies.[30] Yet, the method acknowledges that the law is not independent of its context, as an extreme positivism might suggest.[31] Revised positivism also recognises the rules of interpretation in VCLT Art. 31, other relevant sources listen in the ICJ Statute, as well as the general shift of international norms. With the shift of international norms, focus has moved towards a larger use of the interpretive tools of law, rather than a sole focus on the strict will of the states as written in a treaty.[32]

2.2 Specific approach

Because LOSC is written and agreed to in six different and equally authentic languages, there might be a variety in the interpretation of the criterion in the different authentic languages. As English is the only authentical language of the LOSC that this author is intimate with, most attention will be given to this interpretation.

Yet after discussing the topic with a student of Spanish linguistics, I became aware of the possible nuances in the Spanish text, compared to the English version. Curious to find out more, I used my contacts and seeking help to interpret the different authentic versions. Thankfully, I got the help I wanted from these credible bi- and multilinguals; Kristine Moan, a student of Spanish linguistics, Mohamed el Mouden, Professor in Arabic linguistic at the Universidad de Cádiz, Spain, Jan Solski, postdoc at the Norwegian Centre for the Law of the Sea and Rolf Einar Fife, currently the Ambassador of Norway to the European Union and former

[29] *Ibid*
[30] *Ibid*
[31] *Ibid*, p. 306
[32] *Ibid*

Ambassador of Norway to France. The interpretations of the ordinary meanings of the non-English texts are heavily anchored in their contributions.

When entrusting the interpretation of the different languages to other people, I admittedly lose some control over the result. However, the people contributing are highly qualified individuals interpreting the ordinary meaning of a text in a language they are intimate with. As always when the information is second hand, there is a possibility of misunderstanding. These translations will therefore not be given determining weight by themselves, but will be viewed as a whole, in accordance with the VCLT Art. 33. Unfortunately, I have only managed to get help in interpreting five out of the six authentical languages, and the Chinese text is therefore lacking from this study. Though this version might have contained valuable information regarding its interpretation, the five other versions that have been studied represents a variety of language branches: Germanic, Roman, Slavic and Semitic. Because the languages studied stems from a variety of different language families and branches, there is reason to believe that the joint interpretation is both nuanced and representative.

A comment is also due in regard to the ICJ Statute. Art. 38 (1) makes a non-exhaustive list of authoritative legal sources to be used in international law.[33] This list includes judicial decisions and the teachings of the most highly qualified publicists as subsidiary means for the determination of the rule of law. To attain better flow in this paper, and because these sources are merely subsidiary means of interpretation, the views expressed through them will be used throughout the thesis as comments and contributions to the interpretation of the criterion instead of being sorted out in a separate chapter.

While the Harvard Draft Convention and Annexes (Harvard Draft) mentioned that there exists *"a few international cases, chiefly concerning the status of insurgents vessels or of irregular privateers"*,[34] I have only been able to access one case of relevance for the interpretation of the criterion "for private ends". And even this case, *The Lotus Case,*[35] only dealt with the issue of piracy indirectly.

[33] Pellet, A., 2012, Part Three Statute of the International Court of Justice, Ch.II Competence of the Court, Article 38, in *The statute of the international court of justice: A commentary* by A. Zimmermann, Oxford University Press, p. 700
[34] Harvard Draft Convention and Annexes, 1932, Supplement to the American Journal of International Law, 26, 739-886, p. 764
[35] SS Lotus (Fr. v. Turk), 1927, P.C.I.J. (ser A) No 10

Luckily there are several national cases and other state practices that contribute, both in number and in depth, to the interpretation. Because both sources display the intention of the parties through various practices, the sources will be studied and compared together and in the same subchapter.

Finally, a short comment is due on delimitation. Because of the page limit for this task, I have chosen to largely delimitate against the legal sources of customary international law and general principles of law. The process of identifying customary international law is a lengthy one, and some of the sources used for this exercise can and will be used in a more precise and shorter way when identifying practices of states. In regard to the source of general principles of law, the International Court of Justice (hereafter the ICJ), have shown extreme parsimony in its use. In fact, after studying the source, Pellet has found general principles of law to be mentioned expressly only four times in the entire case law of the ICJ since 1922.[36] And every time it was ruled out. Still, the content of general principles is used shortly to interpret the treaty.

3 What is the correct interpretation of "for private ends"?

It's no secret that a lot has been written about piracy and its definition. This is also true for the criterion "for private ends" which has been subject to thorough scrutiny. Though no one seems to conclude authoritatively,[37] theorists are generally divided into two schools of thought:

On the one hand there is the private/political standpoint, excluding any act that are politically or ideologically motivated, such as terrorism and environmental activism, from being piracy.[38] This view is supported by, amongst others, the Harvard Draft Convention and Commentary (Harvard Draft)[39] and Crockett[40] as well as Rothwell and Stephens.[41]

[36] Pellet, A., 2012, Part Three Statute of the International Court of Justice, Ch.II Competence of the Court, Article 38, in *The statute of the international court of justice: A commentary* by A. Zimmermann, Oxford University Press, para. 248
[37] E.g. Honniball, A. N., 2015, Private Political Activists and the International Law Definition of Piracy: Acting for Private Ends, 36, Adelaide Law Review, 279-328, p. 327.
[38] Petrig, A., 2015, "Piracy", in Rothwell, D., et al. (eds), in *The Oxford Handbook of the Law of the Sea,* Oxford University Press, p. 847
[39] Harvard Draft Convention and Annexes, 1932, Supplement to the American Journal of International Law, 26, 739-886, p. 786
[40] Crockett, C. H., 1976, Toward a Revision of the International Law of Piracy, 26, DePaul L. Rev. 78, p. 79
[41] Rothwell D. R. and Stephens, T., 2016, The International Law of the Sea, 2nd edition, Hart publishing, p. 162

Crawford is amongst the scholars calling for such a narrow interpretation, and rejects that insurgents, with few exceptions, can perform piracy. He has stated that:
"Ships controlled by insurgents may not, unless recognized as belligerents, exercise belligerent rights against the shipping of other states. (...) Opinions which favour the treatment of insurgents as 'pirates' are surely incorrect, save perhaps in circumstances where insurgents attack foreign-flagged private vessels in international waters (...)".[42]

He continues to remark that politically motivated acts by organized groups should not be regarded as pirates, testifying that:
"Harassing operations by organized groups deploying forces on the high seas may have political objectives, and yet be neither connected with insurgency against a particular government nor performed by agents of a lawful government. Ships threatened by such activities may be protected, and yet the aggressors not be regarded as pirates".[43]

On the other hand, there is the private/public standpoint. Here, private means the opposite of public, making the perpetrators' motives irrelevant.[44] According to this view, all acts of violence that are not authorized by a state are regarded as private and may constitute piracy, if the other requirements are met. This view is suggested by Halberstam,[45] Bahar[46] as well as Guilfoyle.[47]

The latter view gains some support by the only international case law identified in this paper, the previously mentioned *Lotus case*. The case was brought before the Permanent Court of International Justice and concerned the aftermath of the collision between S.S. Lotus and S.S. Bozkour where eight Turkish nationals drowned after Bozkour was torn apart by Lotus. The main question for the court was whether or not Turkey had breached the international legal principle of jurisdiction, by instituting criminal proceedings against the crew of the French vessel Lotus when the accident occurred outside the territorial sea of Turkey. The vote of the judgement stood six to six, and the dissenting judge Moore elaborates in a separate opinion.

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[42] *Ibid*
[43] *Ibid*
[44] Petrig, A., 2015, "Piracy", in Rothwell, D., et al. (eds), in *The Oxford Handbook of the Law of the Sea,* Oxford University Press, p. 847
[45] Halberstam, M., 1988, Terrorism on the high seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, 82, American Journal of International Law, 269-310, p. 290.
[46] Bahar, M., 2007, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti- Piracy Operations', 40, Vanderbilt Journal of Transnational Law 1, 30-34, p. 32.
[47] Guilfoyle, D., 2014, "Piracy and Terrorism.", *The Law and Practice of Piracy at Sea: European and International Perspectives*, Ed. Panos Koutrakos and Achilles Skordas, Hart Publishing, 33–52, p. 52.

In his statement Moore referred to a declaration by Hall and agreed that all acts of piracy has one thing in common, namely that *"they are done under conditions which, render it impossible or unfair to hold any State responsible for their commission".*[48] Moore further agreed with Hall in that piratical acts are not confined to *"depredations or acts of violence done animo furandi', but that a satisfactory definition 'must expressly exclude all acts by which the authority of the State or other political society is not openly or by implication repudiated'".*[49]

Lying somewhere between these two counterpoints, Tanaka argues from a different perspective, proposing an overall assessment. He states that:
"[i]t seems that illicit acts by organized groups for the sole purpose of achieving some political end cannot be automatically characterised as piracy. The private ends requirement should be examined by taking various factors into account, such as motives, ends, specific acts of offenders, the relationship between offenders and victims, the relationship between the offenders and the legitimate government, and reactions of third States".[50]

3.1 The Vienna Convention of the Law of Treaties – means of interpretation

The VCLT was developed by the International Law Commission (ILC) in 1947 with the object of promoting the development of international law and its codification.[51] The ILC itself is a commission established by the United Nations General Assembly in 1947 in order to develop and codify international law.[52] Aust has described the ILC process as drawing up existing and well-developed customary international law regarding treaties before making a set of draft articles.[53] These draft articles were subsequently adopted in the VCLT in 1969.[54]

The VCLT has become the primary tool for the interpretation of treaties and is regarded as the "bible" for practitioners,[55] thus laying down the ground rules for the understanding of the

[48] Hall, W., 1924, International Law, in *International Law by* Shaw, M. N. (ed), 8, 233–34, paragraph 81
[49] Hall, W., 1924, International Law, in *International Law by* Shaw, M. N. (ed), 8, 233–34, paragraph 81
[50] Tanaka, Y., 2016, *The International Law of the Sea*, 2nd ed, Cambridge: Cambridge University Press, p. 380
[51] Aust, A. (2013), *Modern Traty Law and Practice.* Cambridge: Cambridge University Press. P. 5
[52] https://legal.un.org/ilc/ extracted September 12th, 2020
[53] Aust, A. (2013), *Modern Traty Law and Practice.* Cambridge: Cambridge University Press. P. 5
[54] *Ibid*
[55] *Ibid*, p. 6

criterion «for private ends». Therefore, when establishing the meaning of the provisions in the VCLT, the *ILC Commentary on its final draft articles and contained in its final rapport on the topic* (ILC Commentary), is the single most important source of material.[56]

The VCLT Art. 31 (1) states that *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."* The fact that a treaty shall be interpreted in "good faith", entails that the interpretation shall be conducted in a loyal manner and that the conclusion of the interpretation shall coincide with the common intentions of the parties.[57] This requires that every step of the interpretation; the ordinary meaning, context and object and purpose, shall be conducted in good faith with the parties intention. The intention of the parties is therefore a continuous element in the following interpretation.

Aware of the structure of the VCLT Art. 31, the ILC stated that one is not intended to give greater weigh to one particular factor, such as text or the intentions of the parties or the objective and purpose of the treaty.[58] On the contrary, the ILC suggested that Art. 31 paragraph 1 *"is the point of departure for any treaty interpretation*", however, "*[a]ll means of interpretation in article 31, (...) are part of a single integrated rule".*[59]

Moreover, the structure of the article is:
"intended to ensure the balance in the process of interpretation between an assessment of the terms of the treaty in their context and in the light of its object and purpose, on the one hand, and the considerations regarding subsequent agreements and subsequent practice in the present draft conclusions, on the other".[60]

The following part will therefore seek to discover the intention of the parties, first by examining the ordinary meaning of the provision, its context and its object and purpose and secondly by studying common subsequent practice and agreements. The findings in these sections will be interpreted in good faith, balanced against each other and finally be regarded as a whole.

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[56] *Ibid*, p. 12
[57] Ruud, M., and Ulfstein, G., 2011, *Innføring i folkerett*, 4th edition, Universitetsforlaget, p. 89
[58] Aust, A., 2013, *Modern Treaty Law and Practice,* Cambridge University Press, p. 206
[59] 2018 United Nations General Assembly Official Records Seventy-third Session Supplement No. 10 (A/73/10) Part II, Conclusion 2 (1) p. 20.
[60] United Nations General Assembly, 2018, Official Records Seventy-third Session Supplement No. 10 (A/73/10), Part II, Conclusion 2 (1) p. 20.

After this procedure is done, the VCLT Art. 32 states that:
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

The ILC report further states that supplementary means of interpretation in Article 32 is non-exhaustive,[61] and expressly mentions that subsequent practice which consists of conduct by one or more parties in the application of the treaty can be regarded as such.[62] The weight of this practice, depends, *inter alia*, on its clarity and specificity.[63]

The conduct of states, both in form of verdicts, but also other forms of official practice, will therefore be studied together in order to identify the practice itself, as well as its clarity and specificity. But first, the starting point for the interpretation is the treaty text itself.

3.1.1 The VCLT Art. 31 (1): The general rule of interpretation

3.1.1.1 Ordinary meaning

The ordinary meaning of the criterion "for private ends" indicates that the act must have a private motive. A natural interpretation of the word "private" is something limited to one or more specific persons, and something that is not shared or intended to be shared with a wider or general population. If viewed within a spectre, the ordinary meaning of "private ends" lies somewhere between personal and public. Even though it lies closer to personal motives than public motives, it does not require personal ends. Regardless, the ordinary meaning of the criterion excludes all motives that are public from constituting piracy.

According to the Oxford English Dictionary, which is widely regarded as an accepted authority

[61] United Nations General Assembly, 2018, Official Records Seventy-third Session Supplement No. 10 (A/73/10), p. 20
[62] *Ibid,* p. 13
[63] *Ibid*, p. 14

on the English language,[64] and therefore relevant when interpreting the ordinary meaning of a word in English, "private" can have a number of similar, but nuanced meanings. First, it is defined as something "restricted to one person or a few persons as opposed to the wider community; largely in opposition to public». A second definition is *"[r]estricted to or for the use or enjoyment of one particular person or group of people; not open to the public».* A third meaning of the word is *«[o]f or relating to a service provided on a paying basis, as opposed to through the State or another public body*."

When examining the ordinary meaning of the English term, there seems to be three common denominators across the different interpretations. First, "*for* private *ends*" would seem to require a motive. The wording would therefore seem to indicate that the assessment criterion is not whether or not the act is authorized by a state, but rather focusing on the motive for the act. Second, the meaning of "private" is focused on motives that are identifiable to one person or a smaller group of people. Third, and closely related to the second meaning, is that it clearly delimitates against actions committed by public authorization.[65] However, the ordinary meaning remains silent on the exact line of demarcation regarding what motives, if any, that are not purely public, can be regarded as private.

The interpretation above is solely derived from the English text, which is one of six authentic versions of the LOSC. As stated in the VCLT Art. 33, the texts are equally authoritative in each language and are presumed to have the same meaning. However, if a comparison of the authentic texts discloses a difference of meaning after interpreting through the lenses of Art. 31 and 32, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

LOSC Art. 320 (1) explicitly states that all six languages (Arabic, Chinese, English, French, Russian and Spanish) are equally authentic, initiating the above-mentioned approach. As showed below, there may be some divergencies between the different authentic texts. After these are displayed and analysed, the question will be if an interpretation of Articles 31 and 32 remove these differences, and if not, which meaning reconciles best after regarding its context

[64] https://public.oed.com/about/ extracted May 31st 2020
[65] NB. The LOSC contains a special provision, Art. 102, stating that if the crew of a warship, government ship or government aircraft have mutinied and commits acts of piracy, their acts are assimilated to acts committed by a private ship or aircraft in Art. 101, potentially fulfilling the cumulative criterions of piracy.

and object and purpose. However, this analysis is hard to divide into subsequent and separate steps, and its process will therefore be intertwined and commented later on in this chapter.

But first, an interpretation of some of the authentic languages. The French version of Art. 101 (1) (a) states that:
"On entend par piraterie l'un quelconque des actes suivants,
al tout acte illicite de violence ou de détention ou toute déprédation commis par l'équipage ou des passagers d'un navire ou d'un aéronef privé, agissant à des fins privées, et dirigé"

The term "des fins privées", translates to "for private purposes", which has almost the exact same meaning as the English term "for private ends". Churchill have compared the two texts, stating that the French text is *"is identical to the English*".[66] The French version therefore appears to support the interpretation of the English criterion.

The Arabic text states:

المادة 101
تعريف القرصنة
أي عمل من الأعمال التالية يشكل قرصنة:
(أ) أي عمل غير قانوني من أعمال العنف أو
الاحتجاز أو أي عمل سلب يرتكب لأغراض
خاصة من قبل طاقم أو ركاب سفينة خاصة أو
طائرة خاصة، ويكون موج:

Translated to English, and depending on the context, the criterion means a private or personal goal or motive, which stands in clear opposition to a motive that is public, official or collective. This interpretation seems to promote the private/public standpoint, but the interpretation still appears to add some nuances to the interpretation. Namely that both private and personal, public and collective acts can be covered. For example, acts of terrorism conducted on behalf of a larger group (collective) is not counted as terrorism, whilst malicious acts which are personal but not necessarily private motives, can be included.

[66] Churchill, R., 2014, "The Piracy Provisions of the UN Convention on the Law of the Sea—Fit for Purpose?.", in Koutrakos, P. and Skordas, A., (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives*, Hart Publishing, 9–32, p. 16

Furthermore, Arabic is a rich language,[67] and the writers of this version had multiple ways of writing both "private" and "ends". For instance, there are several ways of writing "ends" or "motives". The word chosen is "لأغراض» (li'aghrad) which has a very close meaning to the English version. The writers could instead have chosen the word "الغايات" (alghayat), also meaning motive, but with quite different nuances. The latter term would describe an objective that stretches over a period of time, an object which is deeply rooted in the individual or a highly strategic motive. Though there are many possibilities when defining the criterion in Arabic, the writers nevertheless went with a text that means the same as the English version. The Arabic text therefore seems to confirm the English and French text in the necessity of a motive and not only the lack of sanction by a state.

The fact that the Arabic criterion corresponding to the English word "private" can mean both a personal purpose and a private purpose is interesting. A personal purpose is something subjective and closely connected to the person, like love or hate, or possibly a personal conviction of moral or politics. A private purpose, on the other hand, is something that is not shared with a state, organization or a wide group of people, perhaps something kept for oneself. A prime example is robbery for private gain. By covering both motives, the Arabic text does not prefer one or the other motive but seems to widen the scope of the criterion to cover both private and personal motives.

Further, when interpreting the criterion in the context of the whole provision, a peculiar discovery is made. The Arabic word for piracy which is used in different forms in the text, "Qursanah", could indicate a much wider interpretation than the English text and also a much wider interpretation than the meaning of the Arabic criterion. The word "Qursanah", stems from the French term «lettres de course», originally referring to the letters given from the ottoman sultan authorising attacks on French vessels. Bearing in mind the Arabic tradition of giving great respect to the origins of languages,[68] and the fact that this word was not created, but adopted to mean pirates, it might suggest that the criterion read in its context could indicate that a much wider interpretation should be taken into account, namely that privateers also could conduct piracy. As this interpretation cannot be supported in good faith, by the other languages and not by practice nor theory, such an understanding must be discarded, cf. the VCLT Art. 31 and 32.

[67] https://snl.no/arabisk, extracted 14th August 2020
[68] https://snl.no/arabisk, extracted 9th August 2020

A similar interpretation to the Arabic version is found in the Russian text. Art. 101 starts:
"Пиратством является любое из перечисленных ниже действий:

1. *а) любой неправомерный акт насилия, задержания или любой грабеж, совершаемый с личными целями экипажем или пассажирами какого-либо частновладельческого судна или частновладельческого летательного аппарата и направленный"*

The Russian version of the criterion is «совершаемый с личными целями» (sovershayemyy s lichnymi tselyami). Translated to English it can mean both «for personal purposes» or «for private purposes». This discovery clearly supports the interpretation of the Arabic version, where both private and personal motives are embraced.

The Spanish text stands in more contrast to the English version. Art. 101 (1) states that:
"Constituye piratería cualquiera de los actos siguientes:
a) Todo acto ilegal de violencia o de detención o todo acto de depredación cometidos con un propósito personal por la tripulación o los pasajeros de un buque privado o de una aeronave privada y dirigidos"

Here the criterion is "con un propósito personal". Churchill also comments on this text, stating that "*the Spanish 'propósito personal' translates as 'personal purpose', which probably means almost the same as the English and French texts*".[69] This assumption is, however, not entirely correct. The term "con un propósito personal" translated to English means a personal purpose in life, a personal goal or something that one wants to achieve in life. The word "personal" is in both Spanish and English something closely connected to or identified with the person in question. Further, the word "con", meaning "and" clearly highlights the significance of the personal purpose or goal. This version would therefore seem to correspond poorly with the private/political theory, where the motive is irrelevant if the act is not authorised by a state.

A narrow interpretation of the Spanish text could in fact indicate that robbery, whilst clearly being a private motive, might not fulfil the Spanish criterion of a personal motive in life. An

[69] Churchill, R., 2014, "The Piracy Provisions of the UN Convention on the Law of the Sea—Fit for Purpose?.", in Koutrakos, P. and Skordas, A., (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives*, Hart Publishing, 9–32, p. 16

act of robbery could thus fall outside of the scope of Art. 101. However, such an outcome is not a result of the ordinary meaning when interpreted in good faith. The obvious fact that robbery could constitute piracy is confirmed by several authors,[70] including Lauterpacht which wrote that:

"Piracy, in its original and strict meaning, is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (animo furandi). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy".[71]

Such a narrow interpretation would also correspond poorly with the rules of treaty interpretation set forth in the VCLT Art. 31 and 32.

Nevertheless, some conclusions may be drawn from the ordinary meaning of the texts studied. First, the different texts correspond well when they are interpreted together as a whole.

As the Spanish text indicates a personal motive while the French and English texts suggest a private motive, the nuances discovered might lead to a conflict between the two motives as to which would prevail. However, since the Arabic and Russian texts highlights that the criterion equally can mean both personal and private motives, this view seems to gain support from all the different texts studied. As the treaty and criterion shall be interpreted in good faith and be regarded as a whole, the first conclusion to be drawn is that both motives, that is private and personal, seems to be covered by the criterion.

A second conclusion to be drawn from the ordinary meaning of the different texts, is that the act should have a motive before it is proper to consider it as piracy. This conclusion stems from the fact that the Spanish text clearly suggests a motive, "*con un* propósito personal" (my emphasis) and further gains support from the other studied texts as well.

A third conclusion is that acts conducted with state authorization cannot be regarded as piracy. This appears clear from the Arabic criterion, where the words used to describe the motive is an

[70] Guilfoyle, D., 2017, Art. 101, in Proelss, A., (ed.), *United Nations Convention on the Law of the Sea: A commentary,* p. 740; implied by Honniball, A. N., 2015, Private Political Activists and the International Law Definition of Piracy: Acting for Private Ends, 36, Adelaide Law Review, 279-328, p. 287; etc.
[71] Jennings, R., 2008, Part 2 The Objects of International Law, Ch. 6 The high seas, Piracy and Related Offences, in Oppenheim's International Law: Volume 1 Peace (9th Edition), ed. By Lauterpacht, H., 746-755, p. 747

antonym to a motive that is public, official or collective, and is further supported by the English and French version and corresponds well with the ordinary meaning of the Spanish and Russian texts as well.

The ordinary meaning of the texts does not, however, identify in detail what motives can be regarded as private or public, or what motives fall outside of the criterion.

3.1.1.2 Context

The VCLT Art. 31 (1) further guides the course of interpretation to an examination of the context of the criterion "for private ends". This includes the grammatical construction of the provision,[72] its location in the Convention as well as other articles that might shed a light on the interpretation of the treaty. Besides, Gardiner argues in relation to the context, that it would be difficult to accept that the same wording used several places in the same agreement, could have completely different meanings.[73]

But first, it is important to study the textual context in order to find the intention of the parties. This was highlighted in the ICJ judgement *Land, Island and Maritime Frontier Dispute*[74]. One of the issues for the court was whether the ICJ had authority to delimit disputed maritime boundaries, an authorisation which had to be given either expressly in words or through the correct interpretation of the agreement between the parties. The court did not find support for its decision in the ordinary meaning of the treaty but deviated from the ordinary meaning and based its interpretation of the word on a wider analysis. The court stated that:
"(…) the word must be read in its context; the object of the verb 'determine' is not the maritime spaces themselves but the legal situation of these spaces. No indication of a common intention to obtain a delimitation by the Chamber can therefore be derived from this text as it stands".

Not only did the textual context itself, but also the wider context when examining the agreement as a whole, advocate for this solution. This example shows that the context of the provision can be given determining weight when it establishes the true intention of the parties. Accordingly, a study of the context of the criterion in question follows below.

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[72] Gardiner, R. K., 2017, Part II Interpretation Applying the Vienna Convention on the Law of Treaties, A The General Rule, 5 The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning, in *Treaty interpretation*, 2nd ed., Oxford University Press, 161-222, p. 199
[73] *Ibid*
[74] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*

The term "for private ends" is only found once in the LOSC, in Art. 101 (1) (a). However, the highly debated word "private" is used four times in only two provisions, including the aforementioned one. In LOSC. Art. 101 (1) the word is used as follows:
"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".

Here, the word «private» is used three times. The first time is the criterion subject to this study, whilst the second and third time the word is used, it seems to be used as a contrast to a warship or other state owned or operated ship which are given immunity in Art. 95 and 96. The use of "private" thus highlights the delimitation between state owned or operated vessels and non-state vessels.

The last use of the word "private" in the LOSC is found in Art. 102:
"The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft."

This is the clearest use of the word "private", where acts committed by government vessels or warships may also be regarded as piracy if the crew has mutinied. A natural understanding of the provision entails that the vessels are no longer "governmental", but rather "private". The sharp distinction may indicate that the term "private" is meant as the opposite of public. So, the study of context may indicate that the word "private" is meant to describe "non-governmental" continuously throughout the convention, including the criterion "for private ends".

However, as Honniball has written, this argument is unconvincing.[75] This is due to the fact that LOSC Art. 102 is a special provision, only applicable in very unique circumstances, which severely limits its transfer value. Honniball further argues that the parties to the LOSC have accurately used the terms "non-governmental" and "natural or juridical persons" when referring

[75] Honniball, A. N., 2015, Private Political Activists and the International Law Definition of Piracy: Acting for Private Ends, 36, Adelaide Law Review, 279-328, p. 289

to a situation that is non-governmental, cf. Art. 169 (1) and 139 (1).[76] This is an indication that the word "private" is not necessarily intended to mean non-governmental.

The fact that LOSC uses the word "private" several times in a similar manner, does not automatically mean that it was the party's intention to interpret the word equally in the criterion "for private ends". Unlike the *Land, Island and Maritime Frontier Dispute,* where the words objectives were not disputed[77] and the meaning of the words first changed when interpreted within a greater context, the meaning of the term "private ends" in Art. 101 is heavily disputed. Though it can be possible to alter the meaning of a clear text, as shown in the abovementioned case, it might be even harder to alter the meaning of a text subject to great dispute, as one lacks even a basis from where to draw such an altering conclusion.

Furthermore, the other uses of the word "private" in LOSC are used to describe the status of a vessel, not to describe a motive. It is not given that the word used to describe both vessels and motives, are to be understood equally in the different situations, specifically since the Oxford English Dictionary gives several different meanings to the word when it's used in different settings. Furthermore, as noted by Honniball, the criterion found in the LOSC "is 'private ends', not 'private'. He argues that *"By removing the word from its context and surrounding text one risks differing interpretations from the term itself".*[78] The argument behind this statement is that a word can alter its meaning by the context in which it is found. When using the word "private" alone, it can mean several things, including an antonym to the word "public". Still, when the word is used in a term, such as "for private ends", the meaning might alter. As stated previously in the paper, the term covers something that is individual or shared with only a smaller group of people. The meaning of "for private ends" does therefore not seem to have an equivalent meaning to "non-public" or the lack of state authorization. This is particularly apparent when considering that the Spanish versions of the LOSC means "personal motive in life", an interpretation supported by the Russian and Arabic text. Since the criterion "for private ends" also encompasses the meaning of "personal motive in life", it seems unlikely that the term is to be understood as "non-public".

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[76] *Ibid*

[77] The ICJ stated: *"the word must be read in its context; the object of the verb 'determine' is not the maritime spaces themselves but the legal situation of these spaces" (para. 373)* without further discussion. It seems therefore that the meaning of the word in fact was undisputed.

[78] Honniball, A. N., 2015, Private Political Activists and the International Law Definition of Piracy: Acting for Private Ends, 36, Adelaide Law Review, 279-328, p. 288

Another interesting observation is the fact that some of the other criteria have been interpreted expandingly, but not dynamically, to fit the wishes of the international community. An example is the criterion that the attack must be "*directed: (i) on the high seas, against another ship*", a criterion which is often referred to as the «two ship»-requirement. The ordinary meaning of "ship" is a large boat. However, the provision is interpreted expansively to not only mean larger boats, but also skiffs.[79] This entails that at least parts of the provision have been interpreted expansively, indicating that the context might allow for a wider interpretation in regard to the other criterions as well. Still, in spite of the current expressed intention of some parties to the convention, the criterion has not been interpreted dynamically to apply to violent acts committed by the crew or passengers of the same ship.

Quite the contrary, the adoption of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention)[80] was a direct response to the *Achille Lauro* incident and the fact that the case did not constitute piracy under the LOSC.[81] The sponsoring states behind this new convention, Austria, Egypt and Italy, explicitly named the two-ship requirement and the private ends criterion as some of the reasons for why a new convention was needed.[82] Furthermore, the Special Representative of the LOSC, Satya Nandan, and the Italian Minister of Justice, Guiliano Vassalli, stated that the "private end" criterion would not be met by maritime terrorism; thereby making the provisions on piracy in the LOSC inapplicable.[83]

With this backdrop, the SUA Convention was concluded successfully in 2005 and has been ratified by a total of 156 states. In its preamble the parties are:
"BEING CONVINCED of the urgent need to develop international co-operation between States in devising and adopting effective and practical measures for the prevention of all unlawful

[79] E.g. The Republic v. Mohamed Ahmed Dahir and 10 Others, The Supreme Court of the Seychelles, case no. 51/2009, verdict, 26.07.2010
[80] International Maritime Organization (IMO), *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005
[81] Honniball, A., 2015, Private Political Activists and the International Law Definition of Piracy: Acting for Private Ends, Adelaide Law Review, 36(2), 279-328, p. 305
[82] IMO Doc PCUA 1/3, 3rd February 1987, Annex 2
[83] Natalino Ronzitti, 1990, 'The Law of the Sea and the Use of Force Against Terrorist Activities' in Natalino Ronzitti (ed.), *Maritime Terrorism and International Law,* Martinus Nijhoff Publishers, 1, p. 7 citing International Maritime Organisation, *Record of Decisions of the Sixth Meeting Held at 11 am on 10 March 1988* (International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 1-10 March 1988), IMO Doc SUA/CONF/RD 13 (20 February 1989),

acts against the safety of maritime navigation, and the prosecution and punishment of their perpetrators".

These statements prove that most parties to the LOSC, even though being convinced that there is a need for a wider regulation of unlawful acts at sea, still regards themselves as bound by the restrictions set forth in the LOSC, both in regards to the two ship-requirement and the criterion of "for private ends". When looking at the context and the practice of the state parties combined, there is reason to show moderation in the interpretation of the criterions of the LOSC Art 101.

A similar conclusion, that the criterion should be interpreted literally, or at least moderately, can be drawn when studying Art. 101 and 102 in conjunction. This is because Art. 102 expressly mentions one exception where the criterion "private ship" in Art. 101 should not be interpreted moderately or literally, but that the criterion also can encompass warships or government vessels in case the crew has mutinied and conducted otherwise piratical acts. The express mention of when the criterion has a substantially wider scope than the ordinary meaning indicates, can lead to the assumption that this is the only situation where the criterion correctly can be interpreted in a significantly broader or analogically way. If the criterion was not supposed to be interpreted moderately in all other situations, there would be no need for a specific provision to broaden its scope under certain circumstances.

These latter arguments support the presumption that if the parties intended to include several acts than simply those that were more motivated by «private» or «personal» ends, they should have specified it in the words used or at least in a special provision, similarly to the method chosen in regard to "private ship" and Art. 102. Such an approach has not only shown to be manageable (as it is already conducted) but would find support in the treaty as a complete framework for the law of the sea.

A recap of this subchapter shows arguments going in different directions. Whilst the ordinary meaning of the criterion "for private ends" does advocate for a literal interpretation by supporting the need of a motive, the assumptions drawn from the provision's context is more ambiguous. One can make the argument that the context does support a wider interpretation of the criterion to include all acts that lacks state authorisation, while the opposite assumption is equally as correct. The context viewed in the light of practice of the parties, advocates for a modest interpretation. A definite conclusion from the context is, unfortunately, hard to draw.

Further guidelines regarding the treaty's context is given in the VCLT. Art. 31 (2) reads: *"The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

> *(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*
>
> *(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."*

The preamble of the LOSC is of interest in this interpretation, however, it seems more fit to discuss this element under the next means of interpretation, the object and purpose of the treaty because of its entanglement. The preamble will therefore be addressed in the next sub-chapter.

Other key words in this paragraph are "made between all the parties" and "accepted by the other parties". There are no agreements relating to the treaty that is concluded by all the parties. Furthermore, there are no instruments made in connection with the treaty and accepted by the other parties. Hence, reference to the context in VCLT Art. 31 (2) will only be made in regard to the preamble and be conducted below.

3.1.1.3 Object and purpose

The next means of interpretation in order to discover the correct meaning if the criterion "for private ends", is the "object and purpose" of the treaty and provision. One of the ordinary meanings of the word "object" is, according to the Oxford Learners Dictionary, "purpose".[84] The word "purpose", however, is a synonym for "object". The term thus seems to be a circular definition. Unfortunately, the term is not given a workable definition, and its meaning does vary in the VCLT.[85] Fitzmaurice has described the term *"in the light of its object and purpose*" as being vague and ill-defined, thus being an unreliable tool for interpretation.[86] Also practice from courts and tribunals vary, but tends to treat the term "object and purpose" as a single but broad remit.[87]

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[84] https://www.oxfordlearnersdictionaries.com/definition/english/purpose?q=purpose, extracted 16th august 2020
[85] Jonas, D. S., & Saunders, T. N., 2010, The object and purpose of treaty: Three interpretive methods, 43, Vanderbilt Journal of Transnational Law, 565-610, p. 567
[86] Fitzmaurice, M., 2003, «The Practical Working of the Law of Treaties», in Evans, M. D. (Ed), *International law*, Oxford University Press, p. 182
[87] Gardiner, R., 2008, *Treaty Interpretation,* Oxford University Press, p. 193

However, Jonas and Saunders have thoroughly studied the term and stated that *"[b]roadly speaking, it refers to a treaty's essential goals, as if a treaty's text could be boiled down to a concentrated broth - the essence of a treaty"*.[88] The authors concluded their study on the meaning of «object and purpose» of Art. 31 with stating that "*object and purpose refers to the goals that motivated the drafting and ratification of a treaty. Therefore, it is natural to look to the motives of the people and institutions that held those goals*".[89]

Gardiner seems to agree and has stated that the purpose of the treaty is the general result which the parties want to achieve by the treaty.[90] He further identified a treaty's preamble as a source of guidance.[91] Another element of a treaty's object and purpose is the principle of effectiveness.[92] The meaning of this principle in relation to a treaty's object and purpose, is that the instrument as a whole and each of its provisions must be presumed intended to achieve some end, and further that an interpretation that would make the text ineffective to achieve that object must be incorrect.[93]

The LOSC's preamble sheds some light on the object and purpose of the criterion "for private ends". Two of the elements named in the preamble is the desire to have *"due regard for the sovereignty of all States*" and the promotion of "*peaceful uses of the seas and oceans*". This latter element includes freedom of the high seas. Both elements are addressed several times throughout the convention,[94] which strengthens the assumption that these components are pivotal to understand the correct interpretation of the provisions in the LOSC.

Because Art. 101 is such a special provision by being the only article to grant truly universal jurisdiction, it might suggest that, in the special case of piracy, protection of the peaceful uses of the seas should be given heavier weight than the principle of sovereignty. This assumption would indicate that, in order to achieve the objective of peaceful use of the seas and freedom of navigation, the criterion should be interpreted to effectively achieves this goal, namely

[88] Jonas, D. S., & Saunders, T. N., 2010, The object and purpose of treaty: Three interpretive methods, 43, Vanderbilt Journal of Transnational Law, 565-610, p. 567
[89] *Ibid*, p. 581
[90] Gardiner, R., 2008, *Treaty Interpretation,* Oxford University Press, p. 192
[91] *Ibid*
[92] Fitzmaurice, M., 2003, «The Practical Working of the Law of Treaties», in Evans, M. D. (Ed), *International law*, Oxford University Press, p. 182
[93] *Ibid*
[94] Sovereignty: LOSC Art. 2, 236 etc.; Peaceful use of the seas and freedom of navigation: LOSC Art. 87, 88, 301 etc.

interpreting the term "for private ends" expandingly to allow universal jurisdiction in cases that clearly threatens the peaceful use of the sea.

However, the principle of sovereignty is also found throughout the convention, is one of the objects and purposes of the treaty and is also a pivotal principle of modern international law.[95] Sovereignty should therefore not be taken lightly, and the weight attributed to the principle of effectiveness ought to be modest.

3.1.2 VCLT Art. 31 (3): Subsequent practice

It is now time to consider what subsequent agreements and subsequent practice do contribute to in regard to the interpretation of the criterion "for private ends". The VCLT Art. 31 (3) demands that:

"There shall be taken into account, together with the context:

> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) any relevant rules of international law applicable in the relations between the parties".*

A side effect of the high number of state parties to LOSC is thus revealed: though several agreements, instruments and practices exist, not all of these are uniform or represent all the relevant parties. Especially the issue of piracy lacks uniform agreements, instruments and practices from all the participating states. Even though some agreements are highly endorsed, some states still remains outside their scope.[96] This lack of conformity cannot be interpreted into a common intention of *all* the parties as written in the LOSC, and diverging views may not be used as a primary means of interpretation in accordance with the VCLT Art. 31 (3).
Still, there are two common denominators that are accepted expressly or by tacit agreement that should be regarded as a relevant source of interpretation of LOSC. The first one is that the motive of robbery is included in the term "for private ends", even though this might not follow

[95] Besson, S., 2011, *Sovereignty*, Oxford Public International Law, Oxford University Press, para 1
[96] Eg. Somalia is a party to the LOSC but not to the SUA Convention

from the ordinary meaning of the Spanish text. The second one is that state authorized actions falls outside the definition, which is confirmed by the Arabic text and is further implied by the other texts. Since both of these lowest common denominators previously have been identified, little is to be gained by addressing them further.

3.1.3 VCLT Art. 32 Supplementary means of interpretation

The next means of interpretation in order to identify the correct meaning of "for private ends" are supplementary. When interpreting a treaty, VCLT Art. 32 states that:
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable."

The list of supplementary means of interpretation in the VCLT Art. 32 is non-exhaustive.[97] The ILC mentions in particular that subsequent practice in the application of the treaty, which does not establish the agreement of all parties to the treaty, but only of one or more parties, may be used as a supplementary means of interpretation.[98] As there is a lack of uniform practices and agreements following the LOSC on the issues of the definition of piracy, this source becomes ever more important.

In an official record of the International Law Commission from 2018,[99] the ILC confirms that subsequent agreements and subsequent practice can help identify the "ordinary meaning" of a particular term by endorsing a narrow interpretation among the different possible shades of meaning of the term.[100] This was the case in the ICJ *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*.[101] However, subsequent agreements and practices might also do the opposite, namely avoiding to limit the meaning of a general term to just one of the different possible meanings.[102] An example is the *Case concerning rights of nationals of the United*

[97] United Nations General Assembly, 2018, Official Records Seventy-third Session Supplement No. 10 (A/73/10), p. 20
[98] *Ibid*
[99] *Ibid*
[100] *Ibid*, p. 52
[101] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226
[102] United Nations General Assembly, 2018, Official Records Seventy-third Session Supplement No. 10 (A/73/10), p. 52

States of America in Morocco.[103] An expansive interpretation may also *"indicate a wider range of possible interpretations or a certain scope for the exercise of discretion that a treaty grants to States"*.[104] The purpose of these interpretations, whichever way it goes, is thoroughly addressed in the VCLT and the ILC Report to be the identification of the intention of the parties.[105]

However, the ILC Report does not consider whether subsequent practice which is not "in the application of the treaty" should be dealt with as a supplementary means of interpretation, and its status is therefore uncertain.[106] Practice of related treaties, such as the SUA Convention, will therefore not be addressed here.

3.1.3.1 Preparatory work

Now the time has come to examine what the preparatory works can reveal about the correct interpretation of the criterion. The preparatory work during the negotiations of the LOSC was not elaborate or subject to thorough debate, and the definition of piracy in LOSC Art. 101 is almost identical to the corresponding provision in the HSC.[107] In the book "The Law and Practice of Piracy at Sea", Churchill argues that the preparatory work to the HSC is relevant as the preparatory work for the provisions regarding piracy in the LOSC. He argues that because of the similarity between the provisions and the fact that there was a lack of independent debate before the provisions were "copied" from one convention and to the other, leads to the impression that the negotiators were satisfied with the previously agreed provisions.[108] Because of this, he claims that the preparatory work to the HSC by the ILC can be viewed as part of the preparatory work of LOSC within the meaning of VCLT Art. 32.[109] The same rationale can be argued in favour of viewing also the works from the Report from the League of Nations (League of Nations) and the Harvard Draft as preparatory works within the meaning of the VCLT Art. 32.

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[103] *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 176
[104] United Nations General Assembly, Report of the International Law Commission. A/73/10. New York: UN, 2018, p. 55
[105] I*bid*, p. 14, 24, 60 and more.
[106] *Ibid*, p. 21
[107] Hodgson-Johnston, Indi. (2014). The law and practice of piracy at sea: European and international perspectives. Australian Journal of Maritime & Ocean Affairs. 7. 1-2. 10.1080/18366503.2014.976164, p. 10
[108] Churchill, R., 2014, "The Piracy Provisions of the UN Convention on the Law of the Sea—Fit for Purpose?.", in Koutrakos, P. and Skordas, A., (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives*, Hart Publishing, 9–32, p. 10
[109] *Ibid*

Though preparatory works are not primary means of interpretation, Guilfoyle argues that the historical context is pivotal for the interpretation of the criterion: "*[i]ndeed, the very origins of the words 'for private ends' as a part of the definition of piracy can only be understood in this context"*.[110]

But first and in connection to the historical context of the criterion, the earliest use of the term "for private ends" was written by Bishop already in 1892, several decades before the works of the League of Nations. His book, *New Commentaries on the Criminal Law upon New System of Legal Exposition,* marked the beginning of the debate regarding the term. Bishop wrote that: "***Piracy*** *- is robbery or any other like forcible depredation on the high seas, committed for gain or other private ends, in a spirit of hostility to mankind"*.[111] Bishops listed two sources behind this definition: the *US v Palmer* 16 US (3 Wheaton) 610 (1818) and *US v Terrell*, Hemp 411. However, the exact location that formed the basis for the term remains uncertain, as the former case does not use the phrase, and since the latter case has not been found by Guilfoyle nor me.[112]

League of Nations

The earliest "preparatory works" studied is the League of Nations Report. In the report of the sub-committee to the League of Nations, M. Matsuda, Rapporteur, and M. Wang Chung-Hui, representative from China and former Deputy Judge of the Permanent Court of International Justice, declared the following:

"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".[113]

[110] *Ibid*, p. 35.
[111] Bishop, J., (8). *New Commentaries on the Criminal Law upon New System of Legal Exposition*. Chicago, T.H. Flood and Co., p. 339.
[112] Guilfoyle, D., 2014, "Piracy and Terrorism.", in *The Law and Practice of Piracy at Sea: European and International Perspectives*, ed. Panos Koutrakos and Achilles Skordas, Hart Publishing, 33–52, p. 34
[113] League of Nations, 1928, Committee of Experts for the Progressive Codification of International Law, Report, Supplement to the *American Journal of International Law*, 22, i-ii, p. 117

This view was maintained in their draft provision. Art. 1 states that:
"Piracy occurs only on the high sea and consists in the commission for private ends of depredations upon property or acts of violence against persons.

It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy".[114]

The statement and corresponding draft provision seem to support the private/political standpoint. Ambassador Matsuda made further remarks regarding what acts would be excluded from the definition, testifying that:
"[a]ccording to international law, piracy consists in sailing the seas for private ends without authorization from the Government of any state with the object of committing depredations upon property or acts of violence against persons".[115]

This statement does not only exclude all acts that falls under state authorization, it also demands that the sailing was conducted for private ends and that the object was committing depredations or acts of violence. The latter statement is not clear in distinguishing between motive, state authorization and the act of violence, but is presumably a hybrid between the private/political and private/public standpoint, in addressing both the need of a private end and the lack of authorization from any state.

Matsuda further elaborated his view, arguing that *"(...) when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy".*[116] This view gains support by the broader Committee stating that *"purely political motives' would exclude an act from being piracy".*[117]

On this basis it appears sound to conclude that the League of Nations were determined to exclude purely political acts from constituting piracy in their draft. This standpoint, that

[114] *Ibid*, p. 220
[115] *Ibid*, p. 116
[116] Harvard Draft Convention and Annexes, 1932, Supplement to the American Journal of International Law, 26, 739-886, p. 791
[117] Guilfoyle, D., 2014, "Piracy and Terrorism.", in *The Law and Practice of Piracy at Sea: European and International Perspectives*, ed. Panos Koutrakos and Achilles Skordas, Hart Publishing, 33–52, p. 38

political motives does exclude an act from constituting piracy has been supported in recent theory in the previously mentioned statement by Crawford in page 8-9.

Harvard Draft

The objective of the Harvard Draft was to gather the legal sources relevant to piracy and to formulate a draft convention on the subject.[118] It is important to specify that the drafters of the Harvard Research did not attempt to codify a rule that was reconciled with actual state practice and judicial pronouncements, rather their mission was to propose a rule based on analytical clarity.[119] They stated that:

"Finally, it may be useful to explain the paucity of pertinent cases and of evidence of modern state practice on most of the important moot points in the law of piracy. Except for a few international cases, chiefly concerning the status of insurgent vessels or of irregular privateers, and a few municipal law cases, there are no official determinations which will help an investigator to cut a way through the jungle of expert opinion. Indeed, the lack of adjudicated cases and of pertinent instances of state practice is the occasion for the chaos of expert opinion. Most of the municipal law cases on piracy are of little value in solving the international problems, because municipal law covers a different field, as a preceding part of this introduction explains, and the judicial opinions are colored by the national legislation".[120]

After examining the various sources, the drafters did not entirely adopt the approach proposed by Ambassador Matsuda.[121] And in draft Article 3, their definition of piracy encompassed *"Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right (...)".*[122] This indicates that the drafters wanted to include both "private" and "personal" motives, but not necessarily political motives.

The term "for private ends" in the Draft provision were mainly in line with Matsuda's proposal, but his supplementary sentence "*acts committed with a purely political object will not be*

[118] Guilfoyle, D., 2014, "Piracy and Terrorism.", in *The Law and Practice of Piracy at Sea: European and International Perspectives*, ed. Panos Koutrakos and Achilles Skordas, Hart Publishing, 33–52, p. 39
[119] *Ibid*, p. 43
[120] Harvard Draft Convention and Annexes, 1932, Supplement to the American Journal of International Law, 26, 739-886, p. 764
[121] Guilfoyle, D., 2014, "Piracy and Terrorism.", in *The Law and Practice of Piracy at Sea: European and International Perspectives*, ed. Panos Koutrakos and Achilles Skordas, Hart Publishing, 33–52, p. 40
[122] Harvard Draft Convention and Annexes, 1932, Supplement to the American Journal of International Law, 26, 739-886, p. 743

regarded as constituting piracy", was omitted.[123] The statement that purely political objects would not constitute piracy is mentioned four times in the Harvard Draft, as well as in 'Appendix 1, Matsuda's Draft Provisions'. The reason for the omission in the final Harvard Draft provision is not explained, but when mentioned in the report, the issue did not seem to generate much dispute and the drafters might therefore have meant that it was unnecessary to include it in the final draft.

Another interesting observation is that the choice of including the criterion "for private ends" in the Harvard Draft was somewhat in conflict with earlier practice. The inclusion was, nevertheless, deliberate. On page 798 the drafters discussed what acts would meet the criterion: *"Although states at times have claimed the right to treat [unrecognized insurgents pretending to exercise belligerent rights against neutral commerce and privateers violating the policy of the captor as pirates], and although there is authority for subjecting some cases of these types to the common jurisdiction of all states, it seems best to confine the common jurisdiction to offenders acting for private ends only. There is authority for the view that this accords with the law of nations. The cases of acts committed for political or other public ends are covered by Article 16. The explanation of this treatment is given under that article."*

This approach clearly delimitates between private ends on one side, and political and public ends on the other side, concluding that the former motive should be subject to the regime of universal jurisdiction, whilst the latter motives should not. The statement did not differentiate between recognized and un-recognized insurgents, as all insurgents were excluded from the special jurisdictional regime of piracy. Regarding political violence, insurgents and revolutionary organisations as something else than piracy, these acts were addressed in the abovementioned Art. 16. This draft provision stated that:
"The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy."

One of the reasons for omitting political acts, and specifically acts of insurgency from the definition of piracy was that *"[t]hese cases often involve serious political considerations which*

[123] Guilfoyle, D., 2014, "Piracy and Terrorism.", in *The Law and Practice of Piracy at Sea: European and International Perspectives*, ed. Panos Koutrakos and Achilles Skordas, Hart Publishing, 33–52, p. 40

may direct the course of action of the offended State».[124] Therefore, *"[i]t 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".*[125]

This statement leaves the question as to whether or not the drafters intended that only the affected state could exercise jurisdiction in the same way as they could with regard to piratical attacks. The answer to this question is, unfortunately, not provided by the draft. Regardless of this open-ended question, Guilfoyle reflects on the draft provision noticing that *"the authors of the Harvard Draft eventually favour a motives-based approach over the 'unauthorised violence' approach"*[126]*,* indicating that the drafters favoured the private/political standpoint over the private/public position.

International Law Commission

Because of the lack of explanation for the use of the term and its intended meaning, it appears that the ILC simply lifted the words «for private ends» from the Harvard Research Draft and into its own articles without much debate.[127] Guilfoyle therefore asks whether or not the ILC fully appreciated the progressive development of law that was conducted by the Harvard Research.[128] Despite the lack of direct comment by the commission, its rapporteur, Francois, made some remarks in his initial draft. He argued that a requirement of an intention to rob would limit the definition more than it should, and appeared to endorse the Harvard Research position that *'it seems best to confine the common jurisdiction [over piracy] to offenders acting for private ends only'*,[129] consequently excluding cases concerning government warships or civil war insurgencies.[130]

The potential reach of the criterion remained undetermined, and neither the ILC nor Francois discussed the grey areas where a clarification was desired the most. Yet, because the ILC did

[124] Harvard Draft Convention and Annexes, 1932, Supplement to the American Journal of International Law, 26, 739-886, p. 857
[125] *Ibid*
[126] Guilfoyle, D., 2014, "Piracy and Terrorism.", in *The Law and Practice of Piracy at Sea: European and International Perspectives*, ed. Panos Koutrakos and Achilles Skordas, Hart Publishing, 33–52, p 40-41
[127] Guilfoyle, D., 2014, "Piracy and Terrorism.", in *The Law and Practice of Piracy at Sea: European and International Perspectives*, ed. Panos Koutrakos and Achilles Skordas, Hart Publishing, 33–52, p. 43
[128] *Ibid*
[129] Yearbook of the International Law Commission, 1955, Volume I, Summary records of the seventh session, 2 May – 8 July 1955, p. 40
[130] Guilfoyle, D., 2017, Art. 101, in Proelss, A., (ed.), *United Nations Convention on the Law of the Sea: A commentary*, p. 741

not disagree with the remarks in the Harvard Drafts about civil war insurgencies, it can be assumed that insurgents, recognised or not, would not be able to conduct piracy if attacking a vessel from its own state. Such a remark would be called for and expected if the ILC drafters opposed the reasoning of the draft provision that they copied. Whether or not the same position can be assumed in regard to attacks by insurgents that are directed at a vessel flying the flag of another state, is more uncertain. The closely connected issue of terrorism was also not addressed and neither was the modern concern for environmental activism. All in all, the works of the ILC delivered few revelations.

The lack of thorough debate on piracy, which may be criticised, might also suggest that the Commission continuously agreed with the broad and transparent view of the Harvard drafters.

When remembering that the mandate of the Commission had:
"(...)the duty:
(...) to examine the replies received; and
(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution".[131]

it seems fair to assume that the Commission would speak up if they disagreed with the works they based their conclusion on, especially if the disagreement was strong.

Some conclusions can, however, be drawn from these three works, specifically that both the Harvard Draft and ILC have chosen a "motives" based approach, and not an approach making all illegal acts lacking state authorisation potential piracy actions. This view also seems to be supported implicitly in the work of the League of Nations. Another conclusion to be drawn is that the League of Nations, Harvard Draft and the ILC all seemed to omit purely political acts from the definition, such as attacks by civil war insurgents.

Unfortunately, these documents do not contribute much to the delimitation of the grey areas. Furthermore, the weight given to these works, must not be exaggerated. Honnibal summarizes Guilfoyes' arguments stating that such historical sources have been overrated in usefulness, as

[131] League of Nations Committee of Experts for the Progressive Codification of International Law, 1928, Supplement to the *American Journal of International Law*, 22, i-ii

they represent only the intentions of different codifiers and not LOSC drafters,[132] and are not actual preparatory works to the present convention. This argument is further supported in the case of *United States of America v Ali Mohamed Ali*.[133] Mr. Ali, who was charged with aiding and abetting piracy, attempted to rely on the Harvard Draft in order to evade prosecution.

The verdict commented his attempt by stating that:
"Ali's next effort to exclude his conduct from the international definition of piracy eschews UNCLOS's text in favor of its drafting history - or, rather, its drafting history's drafting history ... Ali would have us ignore UNCLOS's plain meaning in favor of eighty-year-old scholarship that may have influenced a treaty that includes language similar to UNCLOS article 101. This is a bridge too far".[134]

These arguments are rational and well-constructed, and advocates that these preparatory works should be given modest weight.

United Nations Conference on the Law of the Sea
Some discussion regarding the criterion also took place during the negotiations of LOSC. On March 17th, 1958, Mr. Zourek, the representative from Czechoslovakia, made some interesting remarks. He commented that the omission of acts of violence and depredation committed on the high seas for *other than private ends* meant that acts covered by the definition and committed at the order or at the initiative of a state organ, could not be regarded as piracy.[135] This again, he stated, would be equivalent to admitting the order of a superior officer as an excuse for the commission of a crime and so would be a blatant contradiction of the principles which had become an integral part of international law.[136] In this manner Mr. Zourek argued for a dramatical widening of the scope of the definition, possibly by regarding all acts of violence at sea as possible piracy acts, regardless of motive or authorization.

[132] Honniball, A. N., 2015, Private Political Activists and the International Law Definition of Piracy: Acting for Private Ends, 36, Adelaide Law Review, 279-328, p. 290
[133] (DC Cir, No 12-3056, 11 June 2013) *('US v Ali')*
[134] *Ibid*, p. 15
[135] United Nations Conference on the Law of the Sea, Official records, Volume IV: Second Committee *(High Seas: General Regime)*, Summary records of meetings and annexes, p. 25
[136] *Ibid*

Mr. Zoureks' opinion stands in great contrast to LOSC Art. 95 and 96, the majority view in the preparatory works described above and is also denied, nearly unanimously, by scholars.[137]

A different view was advocated during the same meeting by Mr. Campos Ortiz of Mexico. He addressed "private ends" as an essential factor in the definition of piracy, but noted that the stipulated article did not include a paragraph stating that *acts of violation or depredation committed by warships during a civil war were not acts of piracy*, a note which he meant should be included in the article.[138] Though his statement is somewhat ambiguous, it is likely that his announcement was meant to highlight the view that a warship should also be immune against universal jurisdiction granted in cases of piracy in every situation, also during a civil war. He also recommended that, as proposed by the League of Nations, that the relevant provision should mention that acts committed for purely political ends would not be regarded as acts of piracy.[139] Ortiz' view follows the conclusion of the Harvard Draft, namely that the correct interpretation of "for private ends" should delimitate against acts that have a purely political motive.

Following the short debate addressing the provisions regarding piracy, none of the remarks made by the two delegates were taken into account, as the relevant provision in the HSC was copied almost verbatim into the definition in the LOSC Art. 101.

These preparatory works (in the widest sense) seem to indicate that a motive is a prerequisite before an act can be considered piratical. This assumption is further in line with the interpretation of the ordinary meaning of the criterion in the different languages studied, specifically in regard to the Spanish version. Further assumptions to be drawn from these works is that the motive must be private. Also, this statement is confirmed by the ordinary meaning of several of the texts in this study. Additionally, even though these preparatory works do not expressly name what motives fall within or outside the criterion, several of them indicates that acts conducted for purely political motives would be excluded from potentially constituting piracy. However, if the acts mentioned were not purely motivated by politics, but also by, for

[137] See e.g. McGinley, G. P., 1985, The Achille Lauro Affair - Implications for International Law, Tennessee Law Review, 52, 691-738, p. 699, Yearbook of the International Law Commission, 1955, Volume I, Summary records of the seventh session, 2 May – 8 July 1955, p. 44, para 80
[138] United Nations Conference on the Law of the Sea, Official records, Volume IV: Second Committee *(High Seas: General Regime)*, Summary records of meetings and annexes, p. 29
[139] *Ibid*

instance revenge or financial gain the acts could possibly also be regarded as conducted for private or personal ends, thus fulfilling the criterion.

Neither the ordinary meaning of the treaty, its context, its object and purpose nor the preparatory works have provided clear instructions on how the criterion "for private ends" should be interpreted. Thus, one is forced to move along with the interpretation in line with the general rules stated in the VCLT Art. 31.

3.1.3.2 State practice

State practice is already mentioned as a supplementary means for the interpretation of the criterion «for private ends». The various practices are treated together and analysed against each other after a chronological presentation.

Malek Adhel

The brig Malek Adhel sailed from New York to California under the command of Joseph Nunez in 1840. The vessel was armed with a cannon, ammunition, pistols and daggers, as well as regular cargo. During its months at sea, the ship had committed piratical acts towards several vessels and the brig was later seized by a war ship belonging to the United States and sent to the port of Baltimore for adjudication. The claims regarding liability were founded upon an act of Congress to protect the commerce of the US, and to punish the crime of piracy. The case was processed by the supreme court in 1844.[140]

The verdict holds that:

"If he willfully sinks or destroys an innocent merchant ship without any other object than to gratify his lawless appetite for mischief, it is just as much piratical aggression, in the sense of the law of nations and of the act of congress, as if he did it solely and exclusively for the sake of plunder, lucri causa. The law looks at it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically hostis humani generis".[141]

This case shows that the US seemed to use "hostis humani generis" as a more influential element in the assessment of whether or not the act was piratical, and not deciding by the

[140] Peter Harmony and Others, Claimants of the Brig Malek Adhel v. The United States, The United States v. The Cargo of the Brig Malek Adhel, 1844, 43 US 210
[141] *Ibid,* p. 232

criterion "for private ends". This is not surprising given that the first use of the term is found almost five decades later in the aforementioned book of J. Bishop.[142] The description given in the textbook lies, however, very closely to the reasonings of the US Supreme Court this case and the books term can possibly be seen as a mere rewriting and a simplification of the description used in *Malek Adhel*. However, in later practice these elements have been omitted, possibly, with the exception of the *Achille Lauro* incident.

Ambrose Light

The issue for the court in case of the *Ambrose Light*[143] was whether it was piracy or unlawful warfare for Columbian rebels, who had not been recognized by any foreign power, to seize a registered Columbian registered vessel. After resolving the question, the judge stated that: *"The consideration that I have been able to give to the subject leads me to the conclusion that the liability of the vessel to seizure, as piratical, turns wholly upon the question whether the insurgents had or had not obtained any previous recognition of belligerent rights, either from their own government or from the political or executive department of any other nation; and that, in the absence of recognition* ***by*** *any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical".*[144]

The rationale behind this conclusion follows *"logically and necessarily, both from the definition of piracy in the view of international law, and from a few well-settled principles*".[145] A similar conclusion had also been made in an earlier English, the *Magellan Pirates*[146].

In the *Magellan Pirates case* the Admiralty court held that:
"[I]t does not follow that, because persons who are rebels or insurgents may commit against the ruling powers of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion".[147]

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[142] Bishop, J., 1892, 8, *New Commentaries on the Criminal Law upon New System of Legal Exposition*. Chicago, T.H. Flood and Co., p. 339.
[143] United States v. The Ambrose Light, etc., 1885, 25 F 408
[144] *Ibid,* p. 412
[145] *Ibid*
[146] The Magellan Pirates, 1853, 1 Spinks (Ecclesiastical and Admiralty), 81, 164 E.R 47
[147] *Ibid* at 48

After comparing the two cases, McGinley argues that they indicate that if the insurgents have international recognition of their status by states, acts performed by them in the furtherance of their rebellion will not be considered piratical.[148] He further argues that if the insurgents have no international status, their acts will be considered piratical no matter what their motive because of the absence of recognition.[149] Finally, he maintains that even though the insurgents have been recognized as such, depredations unconnected with the furtherance of their rebellion would still be considered piratical.[150] McGinley thus seems to support a version of the private/public standpoint where he excludes all acts conducted under the power of a recognized authority. This assumption is in accordance with the reasonings of the two cases he studied. Though his arguments for differentiating between insurgents that are recognised with international status or not appear reasonable, his assumption discarding any motive as irrelevant fits poorly with the ordinary meaning of the texts, where specifically the Spanish version advocates strongly in favour of a motive. In this conflict, the ordinary meaning, which the parties negotiated and accepted, should be attributed more weight than the two national case laws that were decided more than a century ago.

Bolivia Republic v. Indemnity Mutual Marine Assurance Co. Case

The definition of piracy was a concern in the *Bolivia Republic v. Indemnity Mutual Marine Assurance case*.[151] The facts of the case regarded insurance coverage for an act of robbery that occurred nearby the border between Bolivia and Brazil. In the case, the judges concluded that the act was not piratical for two reasons. Firstly, the act was conducted outside the geographical area where piracy could occur. Secondly, the act of robbery was motivated by political and social intentions and did therefore not meet the definition of piracy. A pirate, for the purposes of an insurance policy, was described by judge Vaughan Williams L.J, as:

"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,

[148] McGinley, G. P., 1985, The Achille Lauro Affair - Implications for International Law, Tennessee Law Review, 52, 691-738, p. 699
[149] *Ibid*
[150] *Ibid*
[151] *Republic of Bolivia v. Indemnity Mutual Marine Insurance Company Ltd.* 1909 1 K.B. 785; 1909 1 K.B. 792 (C.A.) at 802

politically organized. Such an act may be piracy by international law, but it is not, I think, piracy within the meaning of a policy of insurance (...)".[152]

It is important to underline that the direct relevance of this quote is limited to insurance policy and that Williams do not conclude whether or not the act is piratical under international law. Nevertheless, another component of the statement is of more interest in the assessment of whether or not an act is piratical under international law, namely the element of "indiscriminate" violence. Exactly one century after this case, a question of the classification of an indiscriminate act of violence at the high seas was brought before the Supreme Court in the Seychelles. An assessment of the case, *The Republic vs. Mohamed Ahmed Dahir & Ten others*, will follow later.

Santa Maria

Over a century later the incident of the *Santa Maria* took place. Santa Maria was a Portuguese luxury cruise liner that was overpowered at high seas by some of its passengers on January 10th, 1961. One of the passengers, Henrique Malta Galvão, a former Portuguese army captain and district governor in Angola, took over the command of the ship by violent means. While combating for control over the vessel, the third officer was killed, and an apprentice pilot was seriously wounded. The captain of Santa Maria was arrested by the rebels and the rest of the crew were forced to navigate at gun point. The hijacking was clearly motivated by political ends, as Captain Galvão announced that he had acted on behalf of the Portuguese "National Independence Movement", led by General Humberto da Silva Delgado, an opposition candidate for the presidency a few years earlier. The "National Independence Movement" was not in de facto control of any territory whereby it could claim the rights of a belligerent, but they were rather insurgents without recognition.

The Portuguese called the overtaking a "piratical act" and invited other governments to hunt down the "pirates".[153] Initially, United States', British and Dutch warships were sent out to chase the vessel.[154] A few days later, however, the United States and British governments expressed doubt as to the "piratical" character of the action and appeared to be mainly

[152] *Ibid*
[153] Vali, F. A., (1961-1962), Santa Maria Case, 56, Northwestern University Law Review, 168-175 p. 168 and Green, L. L., 1961, The Santa Maria: Rebels or Pirates, British YearBook of International Law, 37, 496-505, p. 496
[154] Vali, F. A., (1961-1962), Santa Maria Case, 56, Northwestern University Law Review, 168-175, p. 169

concerned with the passengers, many among them being their own nationals.[155] These governments denied any intention of capturing the vessel by force, and even the existence of a "search and visit" order was disclaimed.[156]

The overtaking of the Santa Maria could not be regarded as piracy by international law because it did not fulfil the cumulative criterions, including the lack of the two-ship requirement. However, Vali clearly indicates that the lack of "piratical" character of the act is not only due to the lack of the two-ship requirement, but equally as much due to the fact that the motive was public, not "private".[157] It is worth noticing that Brazil also reacted in a mild manner towards the rebels, granting them political asylum.[158] Though it is far from certain, the mild-mannered reactions from the US, Britain and Brazil could indicate that these states doubted whether or not the acts of the rebels resembled piratical acts. This becomes more likely when compared to the reactions to the later hijacking of *Achille Lauro*, which also failed to be piracy due to the two-ship requirement. Specifically, the distinction in the approach of the US is worth noticing, as they were involved and had conflicting reactions to the two incidents. However, this position should not be granted extensive weight, as the latter case affected the US directly with the killing of an American citizen. Further discussion is conducted after the presentation of the *Achille Lauro* case.

Castle John

The issue in *Castle John*[159] was whether or not an injunction could be granted to order Greenpeace from obstructing the dumping of waste on the high seas.[160] The backdrop of this case was that members of Greenpeace had boarded a chemical dumping vessel twice with the use of force, as well as using a vessel to blockade another dumping vessel from passing through Antwerp harbour. As a result of the actions, the owner of the dumping licence and the affected vessels claimed damages against Greenpeace and the latter's vessel was confiscated by Belgian authorities. The dispute was appealed twice and was brought before the Court of Cassation.

A question for the Court of Cassation was whether or not the acts committed by Greenpeace protestors could be regarded as piracy, specifically if the acts were considered conducted "for

[155] *Ibid*
[156] *Ibid*
[157] *Ibid*, p. 171-172
[158] *Ibid*, p. 169
[159] Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin, Belgian Court of Cassation, 1986
[160] Guilfoyle, D., 2014, "Piracy and Terrorism.", in *The Law and Practice of Piracy at Sea: European and International Perspectives*, ed. Panos Koutrakos and Achilles Skordas, Hart Publishing, 33–52, p. 15

private ends", under the definition of piracy in the High Seas Convention Art. 15. The defendant argued that the actions were taken "*with a view to alerting public opinion*" and did therefore not seek a private end regardless of the fact that the aim of protecting the environment also corresponded with objectives in the articles of its association.

The court rejected this position and stated that:
"The applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or 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. On the basis of these considerations the Court of Appeal was entitled to decide that the acts at issue were committed for personal ends within the meaning (...) of the Convention [on the High Seas]."

This statement indicates that the court laid weight on two elements when finding that environmental activism can be regarded as a private end. First, the fact that the act was not directed against or committed in the interest of a state. Second, that environmental activism, while being a political motive, supported a personal point of view, and could thus fall within the scope of the provision. Because both arguments were treated together it is impossible to conclude with certainty on whether the first, second or both elements in combination were the determining factor(s) in this case.

This verdict displays several limitations and has rightfully received criticism from renowned scholars. Churchill briefly states that the «decision has been strongly criticised, and should probably be regarded as incorrect».[161] Menefee elaborates his criticism, writing that the logic of the Court could implicate that *"formalized state or anti-state action is necessary to show that an incident does not merely result from"* a personal point of view reflecting a political perspective, and that this *"would tend to mean that almost every nongovernmental act of violence could arguably be classified as piracy".*[162]

Though this might be an accurate analysis of the ruling, Menefee wrote that the verdict would have been more helpful "*in defining what was a private end rather than doing this indirectly by saying what was not a "public" end".*[163] Since the Court did not define "private ends", but rather argued the other way around, trying to define what was not a public end, the scope of the

[161] *Ibid,* p. 18
[162] Menefee, S. P., 1993, 'The Case of the Castle John, or Greenbeard the Pirates?: Environmentalism, Piracy, and the Development of International Law', 24, California Western International Law Journal, 1-16, p. 15
[163] *Ibid*

term did not receive the awaited clarification one might have hoped for. Nevertheless, despite of the conflicting views regarding the verdict, one should be aware that also a US court of appeals took the same position as the Belgium Court of Cassation in the *Sea Shepherd case*.[164]

Achille Lauro

Achille Lauro was, in similarity to the Santa Maria, a cruise ship that was hijacked by passengers onboard. The hijackers were members of the Palestine Liberation Front, a division of the Palestine Liberation Organization (PLO), and their attack was accidental as they were discovered with weapons while planning another target in retaliation for the Israeli attack on the PLO headquarters.[165] The crew and the passengers were held hostages, while the hijackers threatened to kill them unless Israel released 50 Palestinian prisoners. The hijackers also threatened to blow up the ship if a rescue mission was attempted. To demonstrate the seriousness of the situation, they shot and threw an American Jew, Leon Klinghoffer, along with his wheelchair, overboard. The US, through its President, Legal Adviser, and Justice Department characterised the seizure as piracy. This characterisation gained support by some scholars,[166] but was opposed by others.[167] After a negotiation with Egyptian authorities, the hostages were released in return for safe passage for the terrorists out of Egypt. Yet, on October 10th, an Egyptian aircraft carrying the hijackers and Abbas, a co-conspirator, was intercepted by United States Navy planes and was forced to land at a NATO base in Sicily.[168] Thereafter the US requested the extradition of all the terrorists.[169] Sometime after the incident, the international community expressed a pressing need for extended jurisdiction in such cases, where the acts, though similar to piracy, would not meet the criteria of the LOSC, and started the negotiations on the SUA Convention.[170]

If studied under the prospects of piracy, the facts in *Achille Lauro* were in fact quite similar to the realities of the *Santa Maria* incident. Both hijackings were done through illegal acts of violence where innocent people were killed, and the acts were conducted outside the territorial

[164] Institute of Cetacean Research v. Sea Shepherd Conservation Society, United States Courts for the ninth circuit case no. 12-35266, 25th February 2013
[165] McGinley, G. P., 1985, The Achille Lauro Affair - Implications for International Law, 52, Tennessee Law Review, 691-738, p. 691-692.
[166] *Ibid*, p. 700; Gooding, G. V., 1987, Fighting terrorism in the 1980's: The Interception of the Achille Lauro Hijackers, *Yale Journal of International Law, 12(1),* 158-179, p. 159
[167] Constantinople, G. R., 1986, Towards New Definition of Piracy: The Achille Lauro Incident. *Virginia Journal of International Law, 26(3),* 723-754, p. 748
[168] McGinley, G. P., 1985, The Achille Lauro Affair - Implications for International Law, 52, Tennessee Law Review, 691-738, p. 692-693
[169] *Ibid* p. 693
[170] IMO Doc PCUA 1/3, 3rd February 1987, annex 2

sea of any nation. None of the hijackings constitutes piracy under international law because of the lack of the two-ships criterion and possibly also because the acts were not clearly committed "for private ends". Lastly, none of the hijackers were recognized by the international community at the time of the attacks. The different responses might have several explanations.

For the case of the US, probably the state with most conflicting responses, the issue can possibly be explained by the difference in the threats directed at American citizens and allies. The response of other states, however, might be explained by the fact that the *Santa Maria* incident was conducted and directed as a purely internal dispute, as opposed to the *Achille Lauro* incident. The reluctance to use force against the hijackers of *Santa Maria* could be influenced by the fear of touching to heavily on a politically delicate and entirely domestic situation, which, demonstrated by the Harvard Draft, is undesirable.[171] However, the harsher treatment of the hijackers in the *Achille Lauro* incident, might also be attributed to the excessive use of violence, as demonstrated by the international killing of a disabled person, whom was a citizen of another state than the state that the attack was directed towards. This might suggest that states are less incline to regard insurgents as pirates, if the sole focus of the attack is on internal affairs. Such a view gains some support from the *Magellan Pirates* case, where acts directed towards *"the ruling powers of their own country"* may not be piratical but acts that are directed at "other states" were more inclined to be viewed as such.

Another possible reason for the diverging reactions is that motives such as retaliation, hatred or similar are motives that presumably falls within the definition of piracy. This view finds support in the ordinary meaning of "for personal motives". Also, the extended view, that any illegal act of violence can constitute piracy regardless of the motive is suggested by several authors.

Blackstone, for instance, argued that the definition of a pirate did not stem from the motives of the act, but rather that he was an enemy against mankind because of the savage state of nature of the act:
"the crime of piracy, or robbery and depredation on the high seas, is an offence against the universal law of society; a pirate being (...) hostis humani generis. As therefor he has renounced all the benefits of society and government, and has reduced himself ... to the savage state of

[171] Harvard Draft Convention and Annexes, 1932, Supplement to the American Journal of International Law, 26, 739-886, p. 857

nature, by declaring war against all mankind, all mankind must declare war against him (…)".[172]

A broad and somewhat similar statement is made by Guilfoyle, declaring that:
"*International practice now supports the view that politically motivated violence against civilians is in all circumstances unacceptable, and in the event of ambiguity this should clearly be the preferred interpretation".*[173]

Here, Guilfoyle acknowledges that the term "for private ends" can be ambiguous, and that politically motivated violence against civilians in all circumstances should not be accepted. His conclusion is therefore that the preferred interpretation of the criterion should encompass such violent acts. His statement does therefore seem to be in line with the principle of effectiveness.

The Republic vs. Mohamed Ahmed Dahir

The Supreme Court of the Seychelles in the case of *Republic v Dahir and 10 others* was a criminal proceeding where eleven men were prosecuted for the attack of the coast guard patrol vessel "Topaz" in the exclusive economic zone of the Seychelles, in December 2009. The men were charged with seven different offences, where four offences regarded terrorism, whilst the remaining three offences were for piracy related crime. In the verdict, judge D. Gaswaga identified terrorism in accordance with national legislation to normally include "indiscriminate violence" with the objective of influencing governments of international organizations for political ends. Piracy, on the other hand, was defined to contain the motive of "private ends". The counts of terrorism were dismissed for all the accused, but the defendants were found guilty and convicted for acts of piracy.

Churchill criticises the reasoning of The Supreme Court of the Seychelles in this case as potentially inconsistent if transferred to international law,[174] arguing that if indiscriminate acts

[172] Blackstone, W., 1866, "Of Offences against the Law of Nations" *Commentaries on the Laws of England*, Book VI, Chap. 5, Philadelphia: George W. Childs, p. 71
[173] Guilfoyle, D., 2017, Art. 101, in Proelss, A., (ed.), *United Nations Convention on the Law of the Sea: A commentary*, p. 742
[174] Churchill, R., 2014, "The Piracy Provisions of the UN Convention on the Law of the Sea—Fit for Purpose?.", in Koutrakos, P. and Skordas, A., (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives*, Hart Publishing, 9–32, p. 17

of violence would preclude an act from being piracy, it could lead to an absurd result, necessitating a recourse of interpretation.[175]

His criticism focused on the fact that terrorism was described to normally constitute of *"indiscriminate acts of violence"* and that the judge stated that *"[s]uch acts could not be for 'private ends'"*,[176] seemingly differentiating between piracy and acts of indiscriminate violence. Churchill advocated that, if this argument was to be presumed, it could entail that a military vessel, contemplating the seizure of a skiff attacking an oil tanker, would not be able to distinguish between terrorism and mercenary (which is regarded as a private end and therefore piracy).[177] If interfering, the military vessel would risks liability to the flag state of the skiff in accordance with LOSC Art. 106 if the skiff was "simply" conducting terrorism instead of piracy. If not interfering, and the motive of the perpetrators was in fact private mercenary, the skiff could continue its attack without interference and escape enforcement. Churchill called this result absurd and argued for a recourse of interpretation in accordance with VCLT Art. 32 (b).[178]

According to Churchill, this distinction between discriminate and indiscriminate violence would probably not be applicable to environmental activism.[179] This is because the attacks from eco-activism are, by nature, easily identifiable, so a warship would unlikely mistake the motive as private and the risk liability for unlawful seizure is therefore lower.

I am inclined to follow Churchills reasoning to some degree. However, there are a couple of limitations to his arguments.

First, his reasoning seems to be based on the term "indiscriminate violence" as the main divergency between what acts are considered as piracy and terrorism, stating that acts of indiscriminate violence "cannot be piracy". The verdict, however, did not seem to rely heavily on this element when differentiating between the two types of crimes. The word "indiscriminate" was only used in one sentence. The word's counterpart "discriminate", was not used once. The reasoning of the court was elaborated in the verdict, where more weight seems to be given to the fact that piracy "*is more of an offence to do with stealing of property*

[175] *Ibid*
[176] *Ibid*
[177] *Ibid*
[178] *Ibid*
[179] *Ibid*

(vessel and cargo) for private ends at the high seas than assaulting or causing injuries to the crew, which is incidental to the main criminal act", as opposed to terrorism (the main criminal act), which "*usually involves indiscriminate violence with the objective of influencing governments or international organizations for political ends",* cf. paras 53 and 37. This verdict does not, at least explicitly, state that indiscriminate violence precludes an act from being piracy. It would therefore seem that Churchill has given determining weight to an element that was of minor significance to the court when distinguishing between the two crimes.

Secondly, Churchill argued that the preclusion of indiscriminate acts of violence from the definition of piracy, and hence universal jurisdiction, would entail an absurd result for a warship contemplating the arrest of a skiff attacking another vessel for unknown reasons because of the fear of incurring liability.[180] However, one can argue that the LOSC actually provides for the opposite solution.

The LOSC Art. 106 *only* establishes liability for the state undertaking the arrest for loss or damage to the seized vessel if the seizure "*had been effected without adequate grounds*". Guilfoyle writes that the rule "*can be justified to deter abuse and may be falling within the scope of Art. 300, on good faith and abuse of rights (...)"*.[181] This seems to indicate that the threshold of "adequate grounds" is quite low.

According to such a low threshold, in the example Churchill uses of a skiff attacking an oil tanker, the military vessel would not be in high risk of liability. A violent attack on an oil tanker would normally give a military vessel adequate grounds, within the meaning of Art. 106, for believing that the attack was motivated by private ends and therefore justifying seizure without risking liability. Consequently, the LOSC seems to protect warships against liability when encountering acts of indiscriminate violence.

Though our rationale might be different, I still agree with Churchills conclusion, namely that this case cannot be used as an argument for excluding indiscriminate acts of violence from constituting piracy under international law.

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[180] *Ibid*
[181] Guilfoyle, D., 2017, Art. 101, in Proelss, A., (ed.), *United Nations Convention on the Law of the Sea: A commentary*, p. 754

In fact, the principle of freedom of navigation supports the hypothesis that "indiscriminate acts" can be a relevant factor in the consideration of whether or not an act is piratical. The principle of freedom of navigation was introduced by Hugo Grotius in Mare Liberum.[182] Grotius believed that freedom of navigation and freedom of international trades were inviolable principles, a vision which is supported directly and indirectly several places in the Convention.[183]

From the standpoint of the principle of effectiveness, this view might suggest that "indiscriminate acts of violence" should be covered by the definition of piracy, as these acts severely hamper with such rights. While attacks for the purpose of personal motives, such as love or revenge, and acts of environmental activism are usually easier to identify and to defend against, acts that are indiscriminate might affect every vessel without warning, making attacks impossible to protect against. The latter acts are thus harder to shield from, advocating for broader jurisdiction.

Sea Shepherd

The *Sea Shepherd case*,[184] similarly to the case of *Castle John*, regarded environmental activism as piracy. One of the questions before the court was whether or not such motives were regarded as "private ends", and thereby fulfilling the cumulative criteria in the definition of piracy in the LOSC Art. 101. The Court of Appeals rejected the district court's interpretation as erroneous, when the district court limited "private ends" to acts pursued for financial enrichments.

After an interpretation of the ordinary meaning of "private", the Court of Appeals underlined that also the provision's context argued in favour of a wider interpretation of the term. The Court concluded its position on "private ends" stating that:

"(...) "private ends" include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public".[185]

As in the *Castle John* verdict, the court interpreted the criterion "for private ends" to include motives that are "personal". This is in line with the ordinary meaning of the provision, when the criterion is regarded as a whole after an interpretation of the different texts. Yet, the court

[182] Grotius, H., 1609, Mare Liberum, sive De Jure quod Batavis Competit ad Indicana commercio. Leiden, Edited and Translated by Aure, A. H., 2009, Mare Liberum. – Det Frie Hav, Vidarforlaget, p. 17
[183] LOSC Preamble, Art. 58 (2) 87 (1) (a), 87 (2), 100.
[184] Institute of Cetacean Research v. Sea Shepherd Conservation Society, United States Courts for the ninth circuit case no. 12-35266, 25th February 2013, p. 7
[185] *Ibid*

went further, stating that the criterion encompassed "moral or philosophical grounds" as well. The rationale behind this interpretation was found in the historical context of the criterion, where the word "private" was interpreted to be an antonym to "public". This conclusion is not, in my view, correct. Rather than focusing and assumingly concluding on the basis of the historical context, the court should have studied the textual context. Further, the assumption that the historical context reveals the criterion to be an antonym to public is, at best, oversimplified. Several of the historical works constituting the basis for the criterion do in fact rule out "purely political" motives from the criterion.

Honniball also criticised the verdict, sharply observing that:
"The US Appeals Court in Sea Shepherd began by looking into the ordinary meaning of 'private'. This approach was mistaken. Firstly, the term of UNCLOS is 'private ends', not 'private'. By removing the word from its context and surrounding text one risks differing interpretations from the term itself. More importantly, the 'ordinary meaning' of private does not provide a decisive interpretation that either excludes or includes politically motivated ends. If private 'is normally used as an antonym to public' and 'matters of a personal nature' as the Court suggested, then a working definition only exists if those terms (public and personal) are clear. But these terms are equally ambiguous".[186]

There are more recent cases before national courts regarding piracy.[187] However, the case of *Sea Shepherd,* is the latest case that I have found which truly studies the criterion "for private ends". Therefore, despite that the verdict is subject to heavy criticism, it still represents one of the most vocal and recent standpoints to the interpretation of "for private ends".

It appears obvious when comparing these verdicts against each other that they interpret the criterion "for private ends" in diverging ways. Even though these practices are conflicting, it is important not to discard the different verdicts, stating that they give no guidance as to the correct interpretation of the criterion. Quite the contrary, the vast and different practices observed, give reason for another analysis: they all support the fact that many different and authoritative interpretations can and have be drawn from the criterion. In conclusion, practice in the form of domestic case law complicates the possibility of drawing one fixed line of demarcation between private and public motives, but rather supports a more intricate interpretation.

[186] Honniball, A. N., 2015, Private Political Activists and the International Law Definition of Piracy: Acting for Private Ends, 36, Adelaide Law Review, 279-328, p. 288
[187] See e.g. the Seychellean case of Mohammed Ali Hussein & Ors v. R., 2016, SCA 05-09/2016, SCCA 33

Comparisons and conclusions from the supplementary means of interpretation

Two conclusions regarding the interpretation of "for private ends" can be drawn from the preparatory works of the LOSC. The first conclusion is the assumption that the drafters deliberately chose the motives-approach, as displayed by the Harvard Draft. The next assumption is that the term chosen was meant to exclude some motives from constituting piracy, namely motives that were purely political falls outside the scope of the criterion. This suggestion is expressly supported by the League of Nations and is further implied by the Harvard Draft and the ILC.

Unfortunately, there are no clear assumptions to be drawn from state practice, as the different states seemed to focus on various elements in their assessment of whether or not an act fulfilled the criterion "for private ends". Some reoccurring elements are nonetheless identified:

Older verdicts, such as *The Ambrose Light* and *Magellan Pirates* seemed to focus on the lack of authorisation as the only element of importance for the assessment. This view is nonetheless in conflict with the ordinary wording of the texts studied and the preparatory works that forcefully advocates for a motives-approach as well as some of the other legal sources.

Another reoccurring element found in state practice is the assumption that indiscriminate acts of violence not only could, but possibly should, be interpreted into the criterion "for private ends". The first time this element is displayed was in the *Bolivia Republic v. Indemnity Mutual Marine Assurance Co. Case.* Though this verdict was not based on international law of the sea, the element of "indiscriminate acts" have gained relevance and support from Churchill. Also, the object and purpose of the LOSC and Art. 101, specifically through the principle of freedom of navigation as well as the principle of effectiveness, indicates that this element can be of relevance. Additionally, the element of indiscriminate acts of violence was not rejected in the case of *Republic v Dahir and 10 others*.

Yet another element identified in state practice is that "personal motives" should be interpreted into the criterion. The view that such motives can be interpreted in the definition of piracy was first found in the *Malek Adhel* case and has later been explicitly supported in the cases of *Castle John* and *Sea Shepherd*. As the ordinary meaning of the English term "for private ends" is identified to mean personal purposes in the Spanish text, a view that has been supported also by the Arabic and Russian text, the element of "personal motives" have gained support by heavy

sources. Furthermore, none of the identified sources have clearly discarded this view. Because the ordinary meaning of the texts is quite clear on the matter, and because it has gained further support from repeated state practice, it seems sound to conclude that at least purely personal motives are to be included in the term "for private ends".

The last element identified through state practice has to do with the nature of the crime. Guilfoyle pointed out that all politically motivated violence against civilians is intolerable. Though this view stands in some contrast to the other legal sources identified, an extended argument may be recognised: the use of excessive violence might suggest that the act can be piratical, also if the motive of the violence was political. This view gains some support from the conflicting state practice in the incidents of *Achille Lauro* and *Santa Maria*. The reactions to the *Achille Lauro case*, though it was not rightfully viewed as piracy by some states, displayed that acts of excessive violence were frown upon and constituted a concern for the international community. As the violence conducted was unnecessary, one can argue that the hijackers fitted the description given in the *Malek Adhel* case as *one who is emphatically hostis humai generis*. Because excessive violence threatens the peaceful use of the seas and the freedom of navigation, it can be suggested that one should chose the interpretation of the criterion "for private ends" that best safeguards these rights, namely by expanding the scope of the criterion to include acts of excessive violence.

4 Conclusion

So, what is the correct interpretation of the criterion "for private ends"? Sadly, the interpretation of the treaty, through the rules of interpretation set in the VCLT Art. 31, 32 and 33 and the sources found in the ICJ Statute, did not provide a clear answer. Thus, the precise content of the criterion can only be argued, not identified, through the legal sources existing today. The intricacy of the vague wording, multiple and conflicting sources and practices, indicates that the answer cannot simply be measured as a concrete line drawn through the spectre of private and public ends, settling the definition, as I hoped going into this study. The complexity of the issue rather supports a broader approach, where several elements should be considered in each individual case to conclude whether or not the act can be regarded as piratical.

Still, one clear conclusion can be drawn: if the motive is clearly and solely "private" or "personal", the motive will meet the criterion "for private ends". This conclusion is based on

the ordinary meaning of the treaty itself and gains heavy support by the preparatory works and practice of states. Furthermore, also the context, the object and purpose of the provision and most scholarly opinions supports this conclusion.

However, if the purposes of the perpetrators are not clearly private or personal, Tanakas' position of identifying the criterion as an overall assessment, fits best with the explicit and implicit intention of all the parties to the LOSC. This assessment consists of several elements. Some of the elements are identified in this study, but there are likely several elements of relevance than the ones discovered here.

The first and most significant element identified, is the motives "private" or "personal" nature. The suggestion is that the more private or personal the motive is, the bigger the incentives are for the act to be classified as conducted «for private ends», thus fulfilling the criterion. And opposite, if the act seems publicly motivated, other compelling elements of weight are needed in order to shift the scale from a non-private or non-personal motive to fulfilling the criterion. Not only is this element rooted in the ordinary meaning of the criterion when viewing the different texts as one, but this reasoning follows logically from the preparatory works. These preparatory works confirm that private ends, such as financial gain is covered, but that at least purely political motives are excluded. Furthermore, this view is implicitly supported by all the remaining sources, that is the context, object and purpose, preparatory works, state practice and scholars. These sources all seem to support the fact that purely private or personal ends are included and appear proportionately less clear about the fulfilment of the criterion the closer one comes towards purely political motives.

The second element of interest is the level of indiscriminate and general acts of violence. This component could suggest that an act of indiscriminate or general violence could easier be identified as a "private end", than a discriminate attack. Not only would this element safeguard the interests of freedom of navigation, but it would also avoid interfering too fiercely with the principle of flag state jurisdiction, thus balancing the two opposing intentions of the states.

Moreover, this view seems to gain support by the fact that the LOSC presumably protects warships against liability when encountering acts of indiscriminate violence. As for vessels sailing under the threat of discriminate and targeted attacks, the imminent threat of attacks could possibly be averted by counter-piracy measures such as those proposed in the Best Management

Practice to Deter Piracy vol. 5[188] and private security, a cost or inconvenience that ideally would not be necessary for vessels subject to lesser threat. Such an element would therefore not lead to a manifestly absurd or unreasonable result, but rather support the interpretation of "for private ends". This element should not to be given determining weight but can provide guidance in the case that the other sources are indecisive.

The last, and possibly least important element identified in this assessment is comingled with the violent act itself. Some authors, for example Guilfoyle, seem to indicate that an act of illegal violence in itself is enough for an act to be considered piratical. Though this view is not supported in this thesis, an extended argument, that excessive use of violence can be a relevant element in the assessment, seems to be supported by some of the sources studied. With the use of excessive and unnecessary violence, it would be easier to consider a person to fulfil the old characterisation of a pirate as *hostis humanis generis*. The view that a pirate was in fact an enemy of mankind was supported in the abovementioned case of *Malek Adhel.* Furthermore, this view attains implicit support by the international reactions to the hijackings of *Santa Maria* and *Achille Lauro*, though the term *hostis humani generis* was not used in these incidents. As this last element is not derived directly from primary sources of law, but rather interpreted through the comparison of different supplementary and subsidiary means of interpretation, the weight given to this element ought to be light.

As this conclusion stands in contrast to the private/public standpoint, the latter position should arguably be discarded as incorrect. This claim is based on the fact that the ordinary meaning of the criterion in all the studied languages, and specifically in the Spanish text, argues with gravity that the lack of state authorisation is not sufficient to fulfil the criterion of "for private ends". The motives-approach is also supported by the preparatory works that was used as a basis for the final provision.

Furthermore, neither the context or the object and purpose of the treaty gave clear indications in any direction. However, it can be assumed that the context did not support the private/public standpoint, since most of the arguments drawn from this means of interpretation indicates that "private" is not meant as an antonym to public. At the same time fewer and less clear arguments

[188] BMP5, Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea, 2018,Version 5, Authors: BIMCO, ICS, IGP&I Clubs, INTERTANKO and OCIMF, Published by Witherby Publishing Group Ltd.

do seem to argue in favour of this approach, and the private/public view finds its clearest supporters in scholars such as Guilfoyle and the outdated cases of *Ambrose light* and *Magellan Pirates.* While it is true that some modern state practices do support a wide interpretation of the criterion, neither of the most vocal cases, *Castle John* and *Sea Shepherd*, found the acts to be piratical because the acts lacked state authorisation. Quite the contrary, the acts were adjudicated as piratical because the courts found that their *motives* were in fact personal, thus fulfilling the term "for private ends". The gravity of the legal sources demanding a motive and their clearness must be attributed decisive weight in this conflict.

Though this study only identified three elements, it is important to stress that other elements than the once revealed here might be relevant. For instance, the components recognized by Tanaka, which compliments the identified elements, might be relevant in the assessment.

Unfortunately, this conclusion is not the preferable *"clear definition of piracy applicable to all States in virtue of international law in general"* that the Harvard Draft desired over 80 years ago.[189] Yet, the mere wish for a clear definition cannot justify a such conclusion to be drawn within the time and page limit of this paper, however much it is wanted.

In spite of this anticlimactic conclusion, I still believe that it is possible to reach a more comprehensive conclusion with additional time and pages. Such a study would preferably include an interpretation of the Chinese text, a fuller representation of the scholarly opinions and identify a wider range of state practice, including domestic laws and official statements. Such a study might also include concrete examples of situations that would meet the criterion "for private ends".

While this study ends here, I hope that a fuller analysis can be conducted in the future.

[189] Harvard Draft Convention and Annexes, 1932, Supplement to the American Journal of International Law, 26, 739-886, p. 749

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