

Private Ends in Maritime Piracy Legislation in Nigeria[†]

Abstract

A major maritime security problem in the Gulf of Guinea is the widespread proliferation of incidents of maritime piracy attacks off the coast of Nigeria. One reason cited is the lack of adequate domestic legislation including definitions of the elements of piracy. The drafters of the legislation recently passed by Nigerian government entitled: 'Suppression of Piracy and Other Maritime Offences Act, 2019' (SPOMO Act), copied verbatim the definition of piracy contained in the United Nations Convention on the Law of the Sea (UNCLOS). The legislation states that piracy consists of any 'illegal act of violence, detention or depredation committed for private ends'. It is notable that neither the legislation nor UNCLOS contains any provision defining or explaining the phrase 'private ends'. There is no Nigerian law or case law that defines the meaning or provides any explanation of that phrase which has led to various interpretations among scholars, stakeholders and judges. This paper attempts to explain acts that may be considered as amounting to private ends in the legislation. The explanations flow from the preparatory work of piracy legal framework of UNCLOS carried out in the 1920s, which the drafters of the legislation copied.

Keywords: Maritime Piracy, Private Ends, Suppression of Piracy and Other Maritime Offences Act 2019, SPOMO Act.

I. Introduction

The Nigerian territorial sea and the waters beyond serve not only as a means of transportation, but also as a source of food and employment. There are rich deposits of solid, liquid and gaseous mineral resources on the seabed and in the subsoil of those waters which attracts the attention of many actors including pirates.¹ The pirates are armed with sophisticated weapons such as general-purpose machine guns and sometimes use Rocket-propelled grenade (RPGs) to launched attack against ships.² These pirates regularly and indiscriminately attack crew, passengers and merchant ships of every nation without making any distinction.³ They mostly target oil drilling platforms and ships, with the intention of robbing the crew who are sometimes kidnapped for ransom, assaulted, injured, killed and in many cases go missing.⁴

More recently, specifically in January 2021 off the coast of Nigeria gunmen fired on a vessel and killed one Azerbaijan citizen, kidnapping 15 Turkish sailors. The spokesman of the ship owner confirmed that talks to free the sailors had been handled by a team based in Hamburg, Germany and two weeks later the sailors were all released.⁵ The International Maritime Bureau (IMB) reports that in the first six months of 2021 there were 61 vessels boarded, four attempted attacks, two vessels fired upon and one successful hijacked.⁶

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¹ OE Nkomadu and P Vrancken, *The Penalty for Piracy in Nigeria Law*, in *African perspectives on selected marine, maritime and international trade law topics* (2020) 94.

² International Maritime Bureau (IMB), *Piracy and Armed Robbery against Ships Annual Report* (2017) 23.

³ *Ibid*, 26.

⁴ *Ibid*, 29-30.

⁵ Daily Sabah, 'Pirates Free 15 Sailors Kidnapped off Nigeria' available on <https://www.dailysabah.com/politics/15-turkish-sailors-freed-after-kidnapping-by-pirates-off-nigeria/news> (accessed 23 May 2021).

⁶ IMB *Piracy and Armed Robbery against Ships Annual Report – Second quarter* (2021) 25.

One reason cited is lack of adequate domestic legislation as well as the meaning of elements of piracy.⁷ This has led to diverse interpretations among scholars including judges. Even a supreme court has demonstrated the disadvantages that may occur if specific interpretations are not given to the elements of piracy.⁸ The legislation recently passed by the Nigerian government entitled: ‘Suppression of Piracy and Other Maritime Offences Act, 2019’ (SPOMO Act), notes that piracy consist of any ‘illegal act of violence, detention or depredation committed for “private ends”’, but the SPOMO Act does not defined the phrase “private ends”. The question therefore is what ‘act’ amounts to private ends in the SPOMO Act? The purpose of this paper is to exemplify acts committed for “private ends” in the maritime piracy legislation of Nigeria, flowing from the 1920s’ preparatory work on this subject.

2. International Law Instruments on Suppression of Maritime Piracy

The 1958 Convention on the High Seas 1958 (HSC),⁹ and United Nations Convention on the Law of the Sea (UNCLOS),¹⁰ note that all States “shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”.¹¹ The term ‘piracy’ consists of any illegal act of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or an aircraft, and must be directed on the high seas against another ship or aircraft, or against persons or property on board such ship.¹² One huge limitation is that the global conventions do not defined the phrase ‘private ends’ and also do not indicate acts that amounts to the phrase.¹³

More recently, the United Nations Security Council (UNSC) has adopted, with the consent of the Government of Somalia, a number of binding piracy resolutions,¹⁴ with regards to the

⁷ UN Doc. S/2012/45, Report of the United Nations assessment mission on piracy in the Gulf of Guinea Jan, 19 2012 para 57. That most member States of ECCAS and ECOWAS including Nigeria “do not have adequate legal frameworks covering actions at sea and policies to address piracy”.

⁸ *Mohamed Hassan Ali and 3 others v Republic of Seychelles* (SCA 22/2012) [2014] SCCA 34 (12 December 2014) paragraph 19 available on <https://seylia.org/sc/judgment/court-appeal/2014/34> (accessed on 13 October, 2021).

⁹ 450 UNTS 82. Adopted: 29-04-1958; EIF: 30-09-1962.

¹⁰ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), 1833 U.N.T.S 379, 21 I.L.M. 1261 (1982) (*entered into force* Nov. 16, 1994).

¹¹ Articles 100 UNCLOS and 14 HSC.

¹² Art 101(a) UNCLOS and art 15(1) HSC.

¹³ Art 1 UNCLOS on interpretation section, and arts 100-110 UNCLOS, including arts 14-22 HSC, for the Legal Framework of International Law of Piracy.

¹⁴ UNSC Resolution 1816 (2008) (UN Doc. S/RES/1816 (2008) of 2 June 2008); UNSC Resolution 1838 (2008) (UN Doc. S/RES/1838 (2008) of 7 October 2008); UNSC Resolution 1844 (2008) (UN Doc. S/RES/1844 (2008) of 20 November 2008); UNSC Resolution 1846 (2008) (UN Doc. S/RES/1846 (2008) of 2 December 2008); UNSC Resolution 1851 (2008) (UN Doc. S/RES/1851 (2008) of 16 December 2008); UNSC Resolution 1897 (2009) (UN Doc. S/RES/1897 (2009) of 30 November 2009); UNSC Resolution 1918 (2010) (UN Doc. S/RES/1918 (2010) of 27 April 2010); UNSC Resolution 1950 (2010) (UN Doc. S/RES/1950 (2010) of 23 November 2010); UNSC Resolution 1976 (2011) (UN Doc. S/RES/1976 (2011) of 11 April 2011); UNSC Resolution 2015 (2011) (UN Doc. S/RES/2015 (2011) of 24 October 2011); UNSC Resolution 2020 (2011) (UN Doc. S/RES/2020 (2011) of 22 November 2011); UNSC Resolution 2077 (2012) (UN Doc. S/RES/2077 (2012) of 21 November 2012); UNSC Resolution 2125 (2013) (UN Doc. S/RES/2125 (2013) of 18 November 2013); UNSC Resolution 2184 (2014) (UN Doc. S/RES/2184 (2014) of 12 November 2014); UNSC Resolution 2246 (2015) UN Doc. S/RES/2246 (2015) of 10 November 2015); ; UNSC Resolution 2316 (2016) (UN Doc. S/RES/2316 (2016) of 9 November 2016); UNSC Resolution 2383 (2017) (UN Doc. S/RES/2383 (2017) of 7 November 2017); UNSC Resolution 2442 (2018) (UN Doc. S/RES/2442 (2018) of 6 November 2018) and UNSC Resolution 2500 (2019) (UN Doc. S/RES/2500 (2019) of 4 December 2019).

waters off Somalia under the Charter of the United Nations, in particular its Chapter VII.¹⁵ In addition, this Council has adopted two binding resolutions on piracy on the Gulf of Guinea, which includes off the coast of Nigeria.¹⁶ These resolutions do not defined private ends or even indicates acts which constitutes the phrase. The latter however, *inter alia* expressed concern over the “threat that piracy [...] pose[s] to the safety of seafarers and other persons, including through their being taken as hostages”.¹⁷ In this regard, it urges the States of the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS), and the Gulf of Guinea Commission (GGC) to further:

- (a) the development of domestic laws and regulations, where these are not in place, criminalizing piracy and armed robbery at sea;
- (b) the development of a regional framework to counter piracy and armed robbery at sea, including information-sharing and operational coordination mechanisms in the region;
- (c) the development and strengthening of domestic laws and regulations, to implement relevant international agreements addressing the safety and security of navigation, in accordance with international law.¹⁸

In addition, has urged States in the Gulf of Guinea including Nigeria to take prompt action at national and regional level to develop maritime security strategy, as well as to establish effective legal framework including the definition of elements of piracy.¹⁹

At continental level is the 2050 African Integrated Maritime Strategy (AIM Strategy),²⁰ whose objective includes taking maritime security measures against piracy.²¹ The Strategy neither defined piracy nor private ends, however, “encourage[s] Member States to develop legal frameworks for coordinated State intervention at sea” including to “harmonize national maritime laws and to enhance bi-lateral and regional strategic synergies, including signing and ratification and accession by Member States of the relevant international maritime instruments”.²² Two years after the AIM Strategy was adopted, the African Union adopted the African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter).²³ This constitutes a legal, binding instrument, unlike the AIM Strategy, though at the moment the Charter is yet to come into force. The Charter defined piracy in accordance with UNCLOS,²⁴ however, remained silent on the meaning of private ends, unlike the definition given for ‘pirate ship’.²⁵

On regional level, particularly the Gulf of Guinea region is the 2013 Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime

¹⁵For possible conflicts between the resolutions of the UNSC and UNCLOS, see Robin Churchill, ‘Conflicts between UN Security Council resolutions and the UN Convention on the Law of the Sea- And their possible resolution’ (2008) 38 *Israel Yearbook on Human Right* 185-198.

¹⁶ See UNSC Resolution 2018 (2011) (UN Doc. S/RES/2018 (2011) of 31 October 2011; and UNSC Resolution 2039, (2012) (UN Doc. S/RES/2039) of 29 February 2012.

¹⁷ UNSC Resolution 2018 (2011) of 31 October 2011 preamble 3.

¹⁸Ibid paragraph 2.

¹⁹Ibid paragraph 5.

²⁰Adopted on 27 January 2014.

²¹AIM Strategy, para 21(v) (vii) read with para 70.

²²Ibid, para 60.

²³ AU Doc. Ext/Assembly/AU/1(VI).

²⁴ Part III.

²⁵ Article 1 Lomé Charter.

activity in West and Central Africa (Yaoundé Code) of which Nigeria is a signatory.²⁶ The purpose of the Signatories is to “co-operate to the fullest possible extent in the repression of [piracy]” with a view towards:

- (a) sharing and reporting relevant information;
- (b) interdicting ships and/or aircraft suspected of engaging in in transnational organized crime in the maritime domain, [...];
- (c) ensuring that persons committing or attempting to commit in transnational organized crime in the maritime domain, [...] are apprehended and prosecuted; and
- (d) facilitating proper care, treatment, and repatriation of seafarers, fishermen, other shipboard personnel and passengers subjected to transnational organized crime in the maritime domain, [...], particularly those who have been subjected to violence.²⁷

The term piracy in the Yaoundé Code is

- (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).²⁸

The Yaoundé Code give no definition of private ends, nor does their preparatory work give any real guidance or act that constitute the phrase. However, each Signatory is required to co-operate in:

- (a) arresting, investigating, and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy;
- (b) seizing pirate ships and/or aircraft and the property on board such ships and/or aircraft; and
- (c) rescuing ships, persons, and property subject to piracy.

In view of the fact that the Yaoundé Code gives no definition of private ends, may make it difficult for the Signatories to co-operate to effect arrest. The Niger-Delta insurgents, for example, often claim that their activities advance societal interests, even though they sometimes engage in criminal conduct.²⁹ In that regard, it is difficult to establish a clear

²⁶ The States to the Yaoundé Code of Conduct are the Governments of Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, the Central African Republic, Chad, Congo, Côte d'Ivoire, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, the Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone, and Togo] (hereinafter referred to as “the Signatories”), Preamble 1 Yaoundé Code of Conduct.

²⁷ Art 2(1) Yaoundé Code of Conduct.

²⁸ Art 1(3) Yaoundé Code of Conduct.

²⁹ K Neethling, “Piracy around Africa’s West and East Coast: A Comparative Political Perspective” 2010 38 *Scientia Militaria, South African Journal of Military Studies* 89 100. See also International Crisis Group, *The Gulf of Guinea: The New Danger Zone* (Africa Report No 195- 12 December 2012) 9.

distinction between insurgents and criminals.³⁰ This would not have been the case if the Yaoundé Code give a definite meaning to the phrase.

In the other region, particularly, the Western Indian Ocean and the Gulf of Aden area, is the Jeddah Amendment to the Djibouti Code of Conduct 2017 (Djibouti Code). The Djibouti Code includes as piracy “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”.³¹ The phrase ‘private ends’ is not defined and the Code also does not indicate act that amounts to the term. The other similar instrument is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (RECAAP).³²The objective is to ensure a regional cooperation and coordination of States within Asia, to prevent and suppress piracy.³³ The term piracy includes “any illegal act of violence or detention, or any act of depredation, committed for private ends”.³⁴ The elements of piracy including private ends are not defined, however, the RECAAP compels each Contracting Party to take effective measures to prevent and suppress piracy including seizure of ships used for committing piracy.³⁵ These regional instruments and those continental treaties, including the global conventions and resolutions on piracy do not assist as far as a definition of the phrase is concern.

3. The Crime of Maritime Piracy in Nigerian Law

The SPOMO Act notes that piracy consists of any:

- (a) illegal act of violence, detention or depredation committed for private ends by the crew or any passenger of a private ship or aircraft and directed -
 - (i) in international waters against another ship or aircraft or against a person or property on board the ship or aircraft, or
 - (ii) against a ship, aircraft, person or property in a place outside the jurisdiction of any State;
- (b) 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; and
- (c) act of inciting or intentionally facilitating an act described in subparagraph (a) or (b).³⁶

The provision is, for all material purposes, identical to the definition of piracy contained in article 15 of the 1958 Convention on the High Seas 1958 (HSC),³⁷ and article 101 of the United Nations Convention on the Law of the Sea (UNCLOS),³⁸ except for certain textual differences. The latter state 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 private aircraft, and directed.
- (b) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
- (c) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

³⁰Ibid.

³¹ Djibouti Code, art 1(1).

³² Adopted on 11 November 2004 entered into force on 4 September 2006, with 16 State Parties. For those member States, RECAAP, art 18(1).

³³ Part III, RECAAP, art 7.

³⁴ RECAAP, art (1).

³⁵ RECAAP, art 3(1).

³⁶ SPOMO Act, s.3.

³⁷ 450 UNTS 82. Adopted: 29-04-1958; EIF: 30-09-1962.

³⁸ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc.

A/CONF.62/122

(1982), 1833 U.N.T.S 379, 21 I.L.M. 1261 (1982) (*entered into force* Nov. 16, 1994).

- (d) 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;
- (e) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).³⁹

Most importantly, neither the interpretation section nor any provision in the SPOMO Act defines the phrase “private ends” or indicates the criteria by which an act should amount to the phrase. Notably, there is no Nigerian law or case law that defines the meaning or provides any explanation of the phrase. In addition, the HSC and UNCLOS “give no definition of ‘private ends’, nor do their drafting histories give any real guidance as to the meaning of the phrase”.⁴⁰ The phrase private ends has led to various interpretations among contemporary scholars and stakeholders, including judges. Some argue that private ends must be for financial gain and that the private ends exclude acts that are wholly political or religious.⁴¹ Similarly, others argue that UNCLOS exclude acts that are purely politically motivated.⁴² They also claim that maritime terrorism, such as hijacking of ships with environmental attacks do not fall within the definition of piracy in UNCLOS or the HSC.⁴³ It is further asserted that the interpretation of the phrase will rely primarily on the subjective appreciation of the offender,⁴⁴ and that the phrase “should be examined by taking various factors into account, such as motives, ends, specific acts of offenders, the relationship between the offender and the victims, the relationship between the offenders and the legitimate government”.⁴⁵ Most authors challenging the above view contend that the phrase must be interpreted to encompass actions that lack State sanction.⁴⁶ This view further asserts that the essential requirement of piracy’s definition is not the actor’s intent, but whether any State can be held liable for the actor’s action.⁴⁷ Other author concur that it is difficult to see a warship, contemplating the arrest of a skiff that is attacking an oil tanker, could distinguish between whether those in the skiff were acting for purely mercenary ends or for a terrorist purpose.⁴⁸ The author further note, if:

terrorist acts are not to be regarded as being for ‘private ends’ would mean that the arrest would be unlawful and the flag State of the warship would be liable to the flag State of the skiff for any loss or damage caused by the arrest and seizure of the skiff, in accordance with Article 106 of UNCLOS. Such a result seems absurd, and contrary to the object and purpose of UNCLOS. It would therefore seem preferable to regard acts carried out by

³⁹ UNCLOS, art 101.

⁴⁰ R Churchill, *The Piracy Provisions of the UN Convention on the Law of the Sea- Fit for Purpose?* In the *Law and Practice of Piracy at Sea - European and International Perspectives* (2014) 16.

⁴¹ SP Menefee, ‘The Case of Castle John, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law’, 24 *Cal. W. Int’l L.J.* 4 (1993). See also ED Brown, *The International Law of the Sea*, vol 1 (Aldershot, Dartmouth, 1994) 301;

⁴² E Barrios, ‘Casting a Wider Net: Addressing the Maritime Problem in South East Asia’, 28 *B.C. Int’l & Comp. L.Rev.* 156 (2005). Also, G Tina, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11*, 27 *Tul. Mar. L.J.* 275 (2002) the author suggested that the piracy definition of UNCLOS could be reversed to include acts motivated by political ends.

⁴³ *Ibid.*

⁴⁴ Y Tanaka, *The International Law of the Sea*. 2ed (Cambridge University Press, 2015) 379.

⁴⁵ *Ibid.* 380.

⁴⁶ D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009) 36-40.

Also, R Geiss and A Petrig, *Piracy and Armed Robbery at Sea, The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*. (Oxford Scholarship online 2011).61-62.

⁴⁷ M Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations, 40 *Vand. J. Transnat’l L.*30 (2007). Also, D Guilfoyle, *Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts*, 57 *Int’l & Comp. L.Q.* 693-94 (2008).

⁴⁸ R Churchill, *The Piracy Provisions of the UN Convention on the Law of the Sea- Fit for Purpose?* In the *Law and Practice of Piracy at Sea - European and International Perspectives* (2014) 17.

terrorists as being for ‘private ends’ as far as the law of piracy is concerned.⁴⁹

Many others further take the view that the latter interpretation is more persuasive, the absence of State authority determines whether or not acts can be classed as piracy, not the actor’s motivation.⁵⁰ The diverse views on private ends indicate that the phrase is obscure and ambiguous. Even the courts have demonstrated the disadvantages and difficulties that may occur if meanings are not given to the elements of piracy. In a case, the court lamented that in the “circumstances we cannot and will not extend the meaning of [private ends] contained in section 65 of the Penal Code beyond international norms in cases where the offence of piracy was committed outside the jurisdiction of Seychelles”.⁵¹ The court further held that “we are therefore guided but also limited both by our domestic laws and international norms in construing the meaning of [private ends]”.⁵² Similarly, a United States District Court decision illustrates some difficulties that may arise if States including Nigeria do not specifically define the elements of piracy.⁵³ Furthermore, another inquired “[w]ho defines the ends– the judge, the victim, or the perpetrator? Can an end be both private and political in nature? There is a tremendous amount of ambiguity in the term”.⁵⁴

To this, the writer, in view of the confusion and the fact that neither the global conventions and those resolutions nor the continental treaties including the regional agreements define the expression *private ends* or indicate the criteria by which an act is to amount private ends. One must consider the preparatory work of the phrase in order to confirm the meaning. This position is supported by Article 32 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention),⁵⁵ which says 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.

In turn, Article 31 provides that:

1. 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 the objective and purpose.
2. 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 connection with the conclusion of the treaty;

⁴⁹Ibid.

⁵⁰ D Rothwell, *Geneva Academy, Counter Piracy under International Law* (Academy Briefing No. 1 2012) 12. Also, T Stephens, *The International Law of the Sea 210* (Hart Publishing: Oxford 2010); L Moir, *The Law of International Armed Conflict* (Cambridge University Press, 2002), 18; O’Connell, *The International Law of the Sea* 975-976 (Oxford, Clarendon Press, 1984); D Guilfoyle, n 27 at 37.

⁵¹ *Mohamed Hassan Ali and 3 others vs The Republic* Criminal Appeal SCA 22/2012 paragraph 19 available on <https://seylii.org/sc/judgment/court-appeal/2014/34> (accessed on December 13 2021).

⁵²Ibid.

⁵³ *United States v. Said* (E.D. Va. 2010) 757F. Supp. 2d 554, 566, available on <https://www.courtlistener.com/opinion/2472848/united-states-v-said/> (accessed on 13 August, 2021).

⁵⁴ SP Menefee, *Scourges of the Sea: Piracy and Violent Maritime Crime* 179-80 (1 Maritime Piracy Report 1989).

⁵⁵ Vienna Convention on the Law of Treaties, published 23 May 1969, entered into force on 27 January 1980, 1155 U.N.T.S. 331.

- (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. 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 relation between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

From the foregoing, the drafters of the SPOMO Act appeared to have copied verbatim the definition of piracy in UNCLOS, recourse can be had to the 1920s preparatory work on the modern international law of piracy in order to confirm the meaning of the phrase ‘private ends’.

4. Developments of Modern International Law of Piracy

4.1 League of Nations

On September 8 1924, at the Fifth Assembly of the League of Nations, Baron Marks Von Wurtemberg, the Delegate for Sweden recalled the decision of the First Assembly and referred to progress made by the League in promoting the development of international treaty law and to existing gaps in international law.⁵⁶ Von Wurtemberg outlined a procedure for such development by means of international conventions or international conferences held under the auspices of the League or other international instruments to be adopted by future Assemblies of the League.⁵⁷ As a first step he proposed that Members be invited by the Council of the League to indicate the items which in their opinion lend themselves to incorporation in international conventions or other instruments.⁵⁸ As a result of his proposal, on 22 September 1924 the Assembly of the League of Nations adopted a resolution on the development of international law.⁵⁹ The resolution as drafted laid down different methods from those contained in Von Wurtemberg’s proposal. The most notable one was that instead of calling for States to signify the items, this initiative was only entrusted to a Committee of Experts.⁶⁰ It was felt that the Members of the League might hesitate to make definite suggestions.⁶¹

The Assembly requested the Council to convene a Committee of Experts that would have the duty to “prepare a provisional list of the subjects of International Law, the regulation of which by international agreement would seem to be most desirable at the present moment”.⁶² In response the Committee of Experts, appointed eleven sub-committees and *rapporteurs* from among its members to report to the Committee on various subjects. These included “a Sub Committee to examine whether, and to what extent, it would be possible to establish, by an

⁵⁶ D Arthur, *The Fifth Assembly of the League of Nations*, 86 *Advocate of Peace through Justice* 604-5 (1924) available on <http://www.jstor.org/stable/20660742> (accessed on 12 December, 2021).

⁵⁷ “United Nations Documents on the Development and Codification of International Law”, 41 *Supplement to Am.J. Int’l L.* 67 (1947).

⁵⁸ *Ibid.*

⁵⁹ Resolution Adopted by the Assembly of the League of Nations, 22 September 1924. *Official Journal, Special Supplement*, No. 21, 1924, page 10. Also, S Rosenne, *League of Nations: Committee of Experts for the Progressive Codification of International Law, [1925-1928] 1-2* (Vol II Oceana Publications, Inc 1972).

⁶⁰ See the duty entrusted to the Committee of Experts in Resolution Adopted by the Assembly of the League of Nations, 22 September 1924 paragraph 3.

⁶¹ United Nations Documents on the Development and Codification of International Law at 67.

⁶² Resolution Adopted by the Assembly of the League of Nations, 22 September 1924 preamble 3.

international convention, appropriate provisions to secure the suppression of piracy”.⁶³ In response, the Sub-Committee prepared the following provisions for the suppression of piracy:

4.2 Draft Provisions for the Suppression of Piracy

Article 1. - 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. Article 2. - It is not involved in the notion of piracy that the ship should not have the right to fly a recognised flag, but in committing an act of piracy the pirate loses the protection of the State whose flag the ship flies. Article 3. - Only private ships can commit acts of piracy. Where a warship, after mutiny, cruises on its own account and commits acts of the kind mentioned in Article 1, it thereby loses its public character. Article 4. - Where, during a civil war, warships of insurgents who are not recognised as belligerents are regarded by the regular Government as pirates, third Powers are not thereby obliged to treat them as such.

Insurgents committing acts of the kind mentioned in Article 1 must be considered as pirates, unless such acts are inspired by purely political motives. Article 5. - If the crew of a warship has committed an act of piracy, every warship has the right to stop and capture the ship on the high sea. Article 6. - Where suspicion of piracy exist, every warship, on the responsibility of its commander, has authority to ascertain the real character of the ship in question. If after examination the suspicions are proved to be unfounded, the captain of the suspected ship will be entitled to reparation or to an indemnity, as the case may be. If, on the contrary, the suspicions of piracy are confirmed, the commander of the warship may either proceed to try the pirates, if the arrest took place on the high sea, or deliver the accused to the competent authorities. Article 7. - Jurisdiction in piracy belongs to the State of the ship making the capture, except: (a) in the case of pursuit mentioned in Article 5, paragraph 2; (b) in the case where the domestic legislation or an international convention otherwise decides. Article 8.- The consequences of capture, such as the validity of the prize, the right of recovery of the lawful owners, the reward of the captors, are governed by the law of the State to which jurisdiction belongs.

This was forwarded to the Governments of States for comments, thereafter the Committee realized that piracy was not of equal importance to States⁶⁴ and “proposed that of the five subjects for which the Committee envisaged a general conference the subjects of piracy and possibly of diplomatic privileges be excluded”.⁶⁵ For that reason, the Assembly decided to submit three subjects for examination at the first Conference and eliminated piracy.⁶⁶

4.3. The Harvard Research in International Law

The initiative of the League of Nations in proposing what was expected to be a major codification of international law and the exclusion of piracy from the conference, impelled the Harvard Law School in the 1930s to organize its own research in the international law of piracy.⁶⁷ This was unlike the Committee of Experts who were given the duty by the League to

⁶³Ibid at 15-16 the list includes a Sub-Committee charged with the suppression of piracy who are M Matsuda (Rapporteur) and M Wang-Chung-Hui.

⁶⁴S Rosenne, League of Nations at 299-305 Replies to the questionnaire on Piracy by the Governments of States rendered the preparation of an accurate analysis difficult to a certain.

⁶⁵ United Nations Documents on the Development and Codification of International Law at 75.

⁶⁶Ibid 77. See also League of Nations Official Journal, Special Supplement, No. 53, October 1927 page.

⁶⁷ J Bingham *et al*, ‘ Research in International Law,’ 26, No. 1, *The Am. J. Int. Law*, 739-85 (1932) (hereinafter Harvard Research) available on <http://www.jstor.org/stable/2213753> (accessed on 5 May, 2021 Also, P Birnie,

prepare a provisional list of the subjects of International Law.⁶⁸ The Harvard Law School set up a Committee to consider the international law of piracy. The result was a full Draft Convention on piracy,⁶⁹ which also included commentaries on the draft articles.⁷⁰ The most complicated and relevant to this work is Article 3 which reads as follows:

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. 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, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

This provision retained the phrase “private ends” found in the draft provision of the League. The Harvard Research consistently referred to that report but did not define the phrase.⁷¹ However in order to confirm or determine the meaning of the phrase, the Harvard Research clarified in its commentary that, an act committed by a revolutionary organization which has not been recognized as a belligerent amounts to piracy only in respect of *the offended State*.⁷² Others assert that such acts of violence or depredation on foreign commerce by unrecognized revolutionaries are pirates in the sense of international law and that at least there has been a judicial authority to that effect.⁷³ The Harvard Research disagrees with this view and further clarified the matter in the following terms:

[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. This is the view reflected [in the draft convention]. It leaves unaffected the right of an offended State to seize and punish the offenders in accordance with the precedents cited (and, of course, this may, at the option of the prosecuting State, include conviction and punishment for piracy under its municipal law); but it does not concede jurisdiction on the ground of piracy in the international sense to States not offended or threatened.⁷⁴

Piracy: Past, Present and Future, 11 Marine Policy 169 (1987) notes that the outcome of piracy in the League of Nations, was that the “Harvard Law School thereupon undertook to organize research into the international law of piracy and to prepare a draft convention for the International Law Commission”; Alfred Rubin, *The Law of Piracy* 308 (Naval War College Press: Newport, Rhode Island 1988) points out that the result of piracy in the League of Nations prompted the Harvard Law School “to organize its own research effort to contribute to the Codification Conference”.

⁶⁸ A Rubin, *Piracy*, (in John Grant and Craig Barker), *The Harvard Research in International Law: Contemporary Analysis and Appraisal*, 230 (William S. Hein & Company, Incorporated 2007) notes that the Committee acted “Independently of the efforts of the League and its Reporter M. Matsuda”.

⁶⁹ Harvard Research 735-885.

⁷⁰ *Ibid* at 767-872 containing art 1 to 19 with its commentaries.

⁷¹ Harvard Research, at 749, 775, 781, 782, 788, 792, 802, 808, 824, 833, 839, 847, 849, 853 and 857.

⁷² Harvard Research 857.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

However, an act by insurgents inspired by a motive of private plunder is piracy under the definition of the draft convention.⁷⁵ The Harvard Research further noted that act committed from purely political motives is not regarded as an act of piracy.⁷⁶ Brierly concurs with this view that a piratical act is an act committed by persons not acting under proper authority. Thus an act cannot be piratical if it is done under the authority of a state or even of an insurgent community whose belligerency has been recognized.⁷⁷ In the same way a “mere quarrel followed by acts of violence [...] occurring between fishermen on the high seas ought not to be regarded as an act of piracy, since such acts do not constitute a menace to the international maritime commerce”.⁷⁸ The Harvard Research explicitly pointed out that it is important to exclude thus specifically cases of violence committed in asserting a claim of right, which should not be assimilated to piracy, or at any rate, could not be assimilated by common consent of all States. Perhaps, quarrels of fishermen of different nationalities will cause most cases of this type.⁷⁹

4.4 The Law of the Sea Codification of 1958

In order to find a way forward in international law, in the 1950s, the United Nations General Assembly (UNGA), requested the International Law Commission (ILC) to prepare rules that could help with the law of the sea.⁸⁰ In response, the ILC produced the rules on the law of the sea which included articles on piracy.⁸¹ The most relevant to this work is Article 39 of the ILC Draft which provides that piracy consists of any of the following acts:

- 1 Any illegal act of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:
 - (f) On the high seas, against another ship or against persons or property on board such a ship;
 - (g) Against a ship, persons or property in a place outside the jurisdiction of any State;
- 2 Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- 3 Any act of incitement or of intentional facilitation of an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

The provision included the phrase “private ends” found in Article 3 of the Harvard Research definition of piracy.⁸² The ILC does not define the phrase but holds that an act prompted by feelings of hatred or revenge is piracy.⁸³ The ILC acknowledged:

[i]n its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared

⁷⁵Ibid. Also Harvard Research at 798.

⁷⁶ S Rosenne, League of Nations. 143. Also, Harvard Research 791.

⁷⁷ P Brierly, *The Law of Nations* (1928) 154 cited in Harvard Research 750; 771 and 798.

⁷⁸ S Rosenne, League of Nations. 143.

⁷⁹ Harvard Research at 809.

⁸⁰UNGA Resolution 899(IX) paragraph 1, available on <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/096/34/IMG/NR009634.pdf?OpenElement> (accessed on 7 August 2021).

⁸¹ Yearbook of the International Law Commission vol II (1956) at 282-285, (hereinafter ILC Commentary) available on http://legal.un.org/ilc/publications/yearbooks/english/ilc_1956_v2.pdf (accessed on 8 August 2021).

⁸²A Rubin, n47 at 319 who points out that art. 39 of ILC which is the definition of piracy is the same as art. 3 of the Harvard Draft Convention.

⁸³Art.39 ILC Commentary.

in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.⁸⁴

The ILC further points out that the articles on piracy prepared for the UNGA only deal with the protection against piracy, but that if an additional piracy provision is needed, the Harvard Research would suffice.⁸⁵ The ILC delivered its final draft to the UNGA which was adopted in the 1958 Convention on the High Seas.⁸⁶ In turn, Article 15 and other articles of the HSC became the legal framework for piracy in UNCLOS.⁸⁷

5. Conclusion

To this writer, the following are logical conclusions to the belief that the Harvard Research is the preparatory work: (1) the acknowledgement of ILC that the Commission was greatly assisted by the research carried out at Harvard Research; (2) the endorsement of the findings of that research; and (3) the final draft which was adopted in the 1958 Convention on the High Seas, (4) in turn that became the legal framework for piracy in UNCLOS.⁸⁸ These strongly confirm that the Harvard Research and the 1920s report on piracy in the League of Nations which Harvard Research heavily relied upon as seen above are the key preparatory work of the piracy legal framework of UNCLOS which the SPOMO Act followed. By this judgment one may conclude private ends as follow:

- (a) Act of violence, detention or depredation committed for gain amounts to piracy;
- (b) An act prompted by feelings of hatred or revenge is piracy;
- (c) An act committed by an insurgent is piracy, except the act is politically motivated;;
- (d) Act committed with a purely political object is not regarded as piracy;
- (e) act committed by a revolutionary organization not recognized as belligerent by the offended State amounts to piracy only to the offended State;
- (f) An act committed in asserting a claim of right is not piracy, as it does not constitute a menace to the international maritime commerce;
- (g) An act committed under the authority of a State is not piracy.

⁸⁴Art.38 (1) ILC Commentary.

⁸⁵Art. 24 Year Book of the International Law Commission vol II 1954, Document of the Sixth Session including the Report of the Commission to the General Assembly, available on http://legal.un.org/ilc/publications/yearbooks/english/ilc_1954_v2.pdf (accessed on 14 August).Also, A Rubin, *The Law of Piracy* 319 (1988).

⁸⁶ A Rubin, *The Law of Piracy* 319-337 (1988) demonstrated how the draft of ILC was acknowledged by the UNGA and was adopted as the HSC; Petrig, Piracy, in Rothwell, *et al* The Oxford Hand Book of the Law of the Sea 845 (2015) point out that the ILC draft is the foundation of the piracy provisions of the HSC; Michael Bahar, *supra* note 28 at 29-30 who notes that the drafters of the HSC relied heavily on the Harvard Draft Convention; Eugene Kontorovich, *International Decisions: United States v. Shi*, 103 Am. J. Int. Law 740 (2009) that the ILC relied heavily on the Harvard Draft which later became the preparatory note to UNCLOS.

⁸⁷ United Nations Conference on Trade and Development, Maritime Piracy: Part II An Overview of the International Legal Framework and of Multilateral Cooperation to Combat Piracy 4 (2014) that “most of the articles of the Convention on the High Seas are reproduced in UNCLOS, including the earlier definition of piracy, which is repeated almost verbatim in article 101” UNCLOS.

⁸⁸ Even the International Maritime Organization (IMO) has confirm that the “ILCs Articles concerning the law of the Sea formed the basis for the provisions of the 1958 Convention on the High Seas, which in turn formed the basis of the UNCLOS provisions on piracy. The drafting of the provisions of UNCLOS closely follows that of the original ILC Articles. The ILCs commentaries to its Articles may therefore be useful in understanding the meaning of these provisions”, see IMO, Piracy: Elements of National Legislation Pursuant to UNCLOS, 1982 LEG 98/8/1 (18 February 2011) paragraph 13, available on https://www.un.org/Depts/los/piracy/circular_letter_3180.pdf (accessed on 10 October 2021).