

2010

Lovable Pirates - The Legal Implications of the Battle between Environmentalists and Whalers in the Southern Ocean Note

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https://opencommons.uconn.edu/law_review/81

CONNECTICUT LAW REVIEW

VOLUME 42

JULY 2010

NUMBER 5

Note

LOVABLE PIRATES? THE LEGAL IMPLICATIONS OF THE BATTLE BETWEEN ENVIRONMENTALISTS AND WHALERS IN THE SOUTHERN OCEAN

AMANDA M. CAPRARI

The International Whaling Commission has banned commercial whaling by member nations since 1986. Although a member of this Commission, Japan has continued its whaling practices under the guise of scientific research, hunting hundreds of whales every season in the Antarctic waters. The Sea Shepherd Conservation Society, a radical environmentalist group, has declared war on the Japanese whaling fleet and mounted a campaign to attack the Japanese whaling fleet using non-lethal tactics. The environmentalists and whalers are now locked in a bitter battle in the Southern Ocean, where there is little enforcement of domestic and international law. This Note examines the legal consequences of this controversy and suggests necessary action to resolve it peacefully, without loss of lives.

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LOVABLE PIRATES?
THE LEGAL IMPLICATIONS OF THE BATTLE BETWEEN
ENVIRONMENTALISTS AND WHALERS IN THE SOUTHERN OCEAN

AMANDA M. CAPRARI*

I. INTRODUCTION

The term “whaling” often conjures up images of sailors long ago departing sea-side New England towns on tall wooden ships powered by sail and wind in search of a single animal to sustain the town through the dark, cold winter. When considering modern-day whaling, images of sailors with harpoons in hand are replaced by images of eight thousand-ton diesel-powered steel ships with harpoon guns mounted on the deck, capable of killing, processing, and packaging several whales per day.

In response to modern-day whaling, environmentalist groups have protested the activity and demanded that it be stopped. The Sea Shepherd Conservation Society (“Sea Shepherd”), considered one of the most radical of such groups, has gone well beyond merely holding up protest signs and instead has engaged in dangerous tactics, such as ramming whaling vessels and disabling their propeller systems, all in an attempt to stop the killings. The group specifically targets Japanese whaling ships that operate in Antarctic waters. Sea Shepherd has created a battleground in the Southern Ocean as it pits itself, champion of the whales, against the Japanese whaling fleet and its multi-million dollar business of harvesting whale meat. Despite various international laws that are designed to stop such activity on the high seas, few countries have taken steps to interfere in this fierce battle that will ultimately cost human lives.

Both the hunters and the protectors claim to have the legal authority to operate as they do. Japan claims that it is not violating the International Whaling Commission’s (“IWC” or the “Commission”) ban on commercial whaling because it is operating under a research exception that allows member states to kill whales each year for scientific purposes.¹ Sea Shepherd claims that under the United Nations World Charter for Nature, the group has the authority to enforce international conservation laws by

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¹ Raffi Khatchadourian, *A Reporter at Large: Neptune’s Navy*, NEW YORKER, Nov. 5, 2007, at 56, 58.

any means necessary.² Specifically, Sea Shepherd claims that it is enforcing Australia's right under the United Nations Convention on the Law of the Sea to create a whale sanctuary within its maritime exclusive economic zone ("EEZ").³ This Note analyzes the history of this conflict and the legal arguments set forth by both Japan and Sea Shepherd, as well as the international laws that apply to the situation.

Part II discusses the history of commercial whaling and steps taken by nations to preserve the whale population. Part III analyzes Japan's legal claim that it is not violating international law by partaking in whaling, despite the IWC's ban on commercial whaling. Part IV examines Sea Shepherd as well as its legal claim under the U.N. World Charter for Nature. Part V details the various international laws that pertain to the whalers and the conservationists. Finally, Part VI provides commentary on what should be done to prevent the loss of human life in the Southern Ocean that will undoubtedly result if this battle is allowed to wage unchecked.

II. THE HISTORY OF COMMERCIAL WHALING AND CONSERVATION EFFORTS

Humans have been killing whales for commercial purposes for centuries.⁴ For hundreds of years, humans treated whales as a "free resource" that could be exploited as a gift from nature by anyone who was capable and willing to hunt them.⁵ Because humans lacked the technology to harvest the whales in large numbers, however, there was little threat of over-exploitation of the species until the advent of industrial whaling around the eleventh century.⁶ After human beings developed the technology to efficiently hunt whales farther off-shore, the market for whale meat became more lucrative and whalers aggressively pursued whales to all corners of the oceans.⁷ As a result, several whale species were threatened with extinction, prompting the hunting and fishing industries to realize that the survival of their business depended on managing the whale stocks rather than over-exploiting them.⁸ This

² *Id.* at 66.

³ See Natalie Klein & Nikolas Hughes, *National Litigation and International Law: Repercussions for Australia's Protection of Marine Resources*, 33 MELB. U. L. REV. 163, 168-72 (2009) (discussing Australia's claim of an EEZ in Antarctic waters and the rights and duties that are associated with such a claim).

⁴ Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 28 (1991).

⁵ *Id.*

⁶ Gerry J. Nagtzaam, *The International Whaling Commission and the Elusive Great White Whale of Preservationism*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 375, 389 (2009).

⁷ See *id.* at 389-90 ("From 1750 to 1870 whales were considered an economically valuable source of oil, bone, and other products . . .").

⁸ D'Amato & Chopra, *supra* note 4, at 30.

prompted several years of limited international regulation of the whaling industry to preserve the vitality of the species, but these measures proved to be largely unsuccessful.⁹

It was not until the International Convention for the Regulation of Whaling (“ICRW”), held in 1946, that whaling nations recognized the need for more effective measures to prevent over-exploitation of the whale stocks.¹⁰ Spearheaded by the efforts of the United States, the ICRW set maximum catch quotas of whales for each country and, more importantly, established the IWC.¹¹ Today, the IWC is the preeminent body tasked with regulating the global whaling industry,¹² designed to “provide for the conservation, development, and optimum utilization of the whale resources.”¹³ The IWC allows nations that permit their citizens to hunt whales, as well as non-whaling nations, to become members and partake in decisions through voting.¹⁴

In the early years of the IWC, “whilst the Preamble paid lip service to the norm of conservation, it was essentially an arrangement between states with an interest in commercially exploiting whales,” and member nations focused on ways to continue to exploit the whale stocks.¹⁵ Nations perceived the IWC as having a weak enforcement mechanism because member nations that objected to any amendment passed by the IWC were allowed to opt out of the decision and could disregard it.¹⁶ As a result, even when the IWC set or attempted to enforce quotas for certain endangered whale species, whaling nations disregarded the quotas, “render[ing the IWC] virtually impotent.”¹⁷ Even after the creation of the IWC, the whale population continued to decline at alarming rates as the member nations focused on passing amendments that protected whalers’ economic interests rather than resource management.¹⁸

By the 1970s, several factors contributed to a change in philosophy of the member nations of the IWC. Research conducted around that time indicated that the whale population had continued to drastically decline

⁹ See *id.* at 30–32 (discussing attempts to regulate whaling from 1918–45).

¹⁰ Nagtzaam, *supra* note 6, at 397–98.

¹¹ International Convention for the Regulation of Whaling art. III(1), V(1), Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. 1849 [hereinafter ICRW].

¹² Nagtzaam, *supra* note 6, at 398; see also Adrienne M. Ruffle, *Resurrecting the International Whaling Commission: Suggestions To Strengthen the Conservation Effort*, 27 BROOK. J. INT’L L. 639, 646–52 (2002) (outlining the history and evolution of the IWC).

¹³ ICRW, *supra* note 11, art. V(2).

¹⁴ *Id.* arts. II(4), III(1).

¹⁵ Nagtzaam, *supra* note 6, at 398.

¹⁶ *Id.* at 399–400; see also Ruffle, *supra* note 12, at 653–55 (discussing how allowing member nations to lodge objections “tak[es] the teeth” out of the IWC’s legitimacy).

¹⁷ Nagtzaam, *supra* note 6, at 400.

¹⁸ Cinnamon Pinon Carlarne, *Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies*, 24 VA. ENVTL. L.J. 1, 6 (2005).

despite the implementation of the IWC; in 1974, the United States cited a study that indicated that there were less than a few hundred thousand whales in existence, compared to the four or five million in existence before the advent of industrial whaling.¹⁹ In response to these alarming numbers, many non-governmental organizations began to protest commercial whaling, and the environmental groups that already were opposed to whale hunting increased the number and intensity of their existing protests.²⁰ At the same time, because of the serious decline in the whale populations, the whaling industry was no longer economically viable for many nations, and these countries stopped whaling and began to support preservation efforts instead.²¹ The United States began developing domestic mammal protection programs to protect whales in U.S. waters, objecting to whaling on moral grounds.²² Lastly, because the IWC allowed non-whaling nations to become members and partake in all voting, several nations that were against whaling joined the Commission, some at the behest of environmental groups, in an attempt to swing votes against commercial practices and in favor of preservation.²³

As a result of the changing philosophy of members of the IWC, nations began calling for a moratorium on commercial whaling as early as 1972.²⁴ These nations demanded that all whaling for profit be prohibited. Japan, a dominant voice for the pro-whaling nations, opposed any ban on commercial whaling, calling it “dramatic and emotional,” and arguing that the whale populations were plentiful enough to sustain further commercial whaling.²⁵ The IWC Scientific Committee backed the Japanese perspective, stating that “a blanket moratorium could not be justified scientifically” because some of the whale species that were in decline had rebounded due to the conservation efforts.²⁶ Despite increasing pressure from non-whaling member nations, the IWC refused to adopt any whaling

¹⁹ Nagtzaam, *supra* note 6, at 408.

²⁰ Carlarne, *supra* note 18, at 6.

²¹ *Id.*; see also Ruffle, *supra* note 12, at 648–49 (discussing how the United States, once a prominent whaling nation, voiced opposition to whaling, citing research that indicated whales have advanced intellectual capacity).

²² See Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 BROOK. J. INT'L. L. 303, 315–17 (1996) (discussing U.S. domestic acts aimed at the protection of marine wildlife). For commentary on why the United States chose to become such an “ardent protector of whales,” see Nagtzaam, *supra* note 6, at 412 (“It is arguable that the United States might have gained a ‘reputational advantage’ in being perceived as a good environmental citizen.”).

²³ Schiffman, *supra* note 22, at 317.

²⁴ See, e.g., Ruffle, *supra* note 12, at 649 (discussing the U.N. Conference on the Human Environment at Stockholm and its proposal for a ten-year moratorium on commercial whaling to allow the stocks to recover).

²⁵ PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING 365 (1985).

²⁶ *Id.* at 422.

moratorium in the 1970s. However, the moratorium remained a central issue within the IWC, “testing both its identity and future direction.”²⁷

The IWC finally yielded to the pressure from the preservationist nations in 1984 when it adopted an amendment to ban all commercial whaling amongst member states, beginning in 1986.²⁸ The IWC set the catch quota for commercial whaling to zero for all member nations. This left open the possibility that the quota could one day be adjusted, allowing commercial whaling to resume; however, the ban has been extended every year since it first came up for renewal in 1990.²⁹

Since 1986, Japan has emerged as the leader of a coalition to reverse the moratorium and resume commercial whaling throughout the world, urging the use of conservation methods rather than preservation methods.³⁰ Following a strategy similar to the one that the environmentalist groups followed in the 1970s, Japan is attempting to encourage pro-whaling nations in the South Pacific and Caribbean to join the IWC in order to gain the critical votes needed to reverse the moratorium; Japan has even been accused of attempting to buy votes from these nations.³¹

Japan’s ardent pro-whaling rhetoric is somewhat surprising, considering the number of nations that now oppose whaling on moral grounds. However, some Japanese citizens continue to view whale meat as a delicacy, especially members of the older generation, and many believe that whaling is an important part of their culture.³²

In order to more fully protect whale species in the Southern Ocean off Antarctica, the IWC adopted a whale sanctuary in the Southern Ocean in 1993, prohibiting any commercial whaling in this area.³³ Even if the IWC lifts the ban on commercial whaling at some point in the future, the Southern Ocean Sanctuary ensures that member nations will not be allowed to hunt commercially in that area.³⁴ Japan lodged an objection to the creation of the sanctuary, claiming that the IWC could not justify closing the area based on a conservationist argument.³⁵ Their efforts to have the sanctuary amendment repealed have thus far been unsuccessful.

²⁷ Nagtzaam, *supra* note 6, at 415.

²⁸ International Convention for the Regulation of Whaling, 1946 Schedule ¶ 10(e), *available at* http://www.iwcoffice.org/_documents/commission/schedule.pdf [hereinafter ICRW, 1946 Schedule].

²⁹ Carlarne, *supra* note 18, at 2–3.

³⁰ Nagtzaam, *supra* note 6, at 422.

³¹ *Id.*

³² See PETER HELLER, *THE WHALE WARRIORS* 101–03 (2007); Joseph Elliott Roeschke, Comment, *Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups To Enforce International Conservation Law in Neutral Waters*, 20 VILL. ENVTL. L.J. 99, 103–06 (2009) (discussing the prevalence of whaling in Japanese culture).

³³ ICRW, *supra* note 11, art. V(1)(c); ICRW, 1946 Schedule, *supra* note 28, ¶ 7(b).

³⁴ ICRW, 1946 Schedule, *supra* note 28, ¶ 7(b); Nagtzaam, *supra* note 6, at 442.

³⁵ Nagtzaam, *supra* note 6, at 442.

III. JAPAN'S LEGAL CLAIM THAT WHALING ACTIVITIES DO NOT VIOLATE THE IWC'S MORATORIUM ON COMMERCIAL WHALING

The IWC moratorium did not stop commercial whaling entirely throughout the world. Because the ban is not legally binding on non-member nations, Canada, an ardent supporter of whaling, chose to leave the IWC entirely, allowing Canadian ships to continue hunting whales commercially.³⁶ Immediately after the moratorium was passed, Japan, Norway, Peru, and the Soviet Union filed formal objections to the amendment,³⁷ which allowed them to continue commercial whaling legally.³⁸ Except for a brief period in which Norway chose to comply with the moratorium, that nation has continued to hunt whales while lodging formal objections to the ban.³⁹

Due to pressure from the United States and threats of embargo under the Pelly Amendment, Japan decided to stop commercial whaling activity in 1987 and to this day claims that it does not hunt whales for profit.⁴⁰ But despite the fact that Japan claims to have stopped commercial whaling, Japanese whaling vessels kill hundreds of whales each year under the research exception to the 1986 moratorium. Because of a loophole in the 1946 convention that has never been corrected, Japan can slaughter whales for "scientific purposes," including those in the Southern Ocean Sanctuary, without violating the IWC moratorium.⁴¹

Article VIII of the ICRW provides that "any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research subject to such restrictions as to number and subject to other conditions as the Contracting Government thinks fit."⁴² Japan, as a member nation, is allowed to set its own quotas for how many and what type of whales to be killed each year for scientific research.⁴³ Because the 1986 moratorium applies only to commercial whaling, Japan has the legal authority to take whales as long as it does so for "research."⁴⁴ The IWC states, "Whilst member nations must submit proposals for review, in accordance with the

³⁶ *Id.* at 400, 417.

³⁷ D'Amato & Chopra, *supra* note 4, at 46.

³⁸ ICRW, *supra* note 11, art. V(3)(c); *see also supra* notes 16–18 and accompanying text (discussing the opt-out provisions of the IWC that allow member nations to disregard amendments).

³⁹ Carlarne, *supra* note 18, at 9.

⁴⁰ Nagtzaam, *supra* note 6, at 421–22.

⁴¹ NAT'L TASK FORCE ON WHALING, A UNIVERSAL METAPHOR: AUSTRALIA'S OPPOSITION TO COMMERCIAL WHALING 26 (1997), *available at* <http://www.environment.gov.au/coasts/publications/whaling/pubs/whaling.pdf>; Carlarne, *supra* note 18, at 19.

⁴² ICRW, *supra* note 11, art. VIII(1).

⁴³ *See* International Whaling Commission, Scientific Permit Whaling, <http://www.iwcoffice.org/conservation/permits.htm> (last visited June 11, 2010) [hereinafter Scientific Permit Whaling] (providing a complete description of the IWC scientific permit program).

⁴⁴ *Id.*

Convention, it is the member nation that ultimately decides whether or not to issue a [research] permit, and this right overrides any other Commission regulations *including the moratorium and sanctuaries*.⁴⁵ The IWC Scientific Committee does review the research permits for validity, but it has no authority to stop the member nation from issuing the permits and cannot alter the quotas of whales to be killed set by the member nation.⁴⁶

Japan also does not have to provide scientific studies showing the results of its research in order to justify its continuation of its research programs. Japan claims that the research it conducts is a population study directed at determining when specific species will be viable enough for the IWC to lift the ban on commercial whaling.⁴⁷ In other words, Japan is killing whales to research when the whale population will be healthy enough to hunt whales commercially. Other member nations objected to this population research, arguing that it could be conducted using non-lethal methods, such as taking tissue samples from live whales or using photography to capture critical information.⁴⁸ The Japanese scientists counter that some of their research involves analyzing ear plugs and stomach contents, which can only be done after the whales have been killed.⁴⁹ Regardless of the objections raised by other member nations, they have no authority to restrict or prohibit Japan from continuing its research program.

According to the IWC Scientific Committee, the study conducted by Japanese whaling vessels in 2000 “did not address questions of high priority relevant to management, did not make full use of existing data, and revealed many methodological problems,”⁵⁰ indicating that the research was not producing valid results. Despite the lack of valid data, Japan continues to issue research permits. Under the 2007–08 Japan Whale Research Program under Special Permit in the Antarctic (“JARPA II”), Japan issued permits to government-licensed ships to kill fifty Fin, fifty Humpback, and 850 Minke whales, with a ten percent change in allowance for Minke whales.⁵¹

As a result of the wording of the ICRW, the Japanese vessels involved in the research hunting of whales are permitted to sell the whale meat for profit after the research has been conducted. In fact, the wording of Article

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.*

⁴⁷ Kazuo Sumi, *The “Whale War” Between Japan and the United States: Problems and Prospects*, 17 *DENV. J. INT’L L. & POL’Y* 317, 339 (1989) (“Japan emphasized that the results to be obtained by the implementation for this program will provide a scientific basis for resolving problems facing the IWC which have generated confrontation among the member nations due to divergent views on the moratorium.”).

⁴⁸ *Id.* at 339–40.

⁴⁹ *Id.*

⁵⁰ Ruffle, *supra* note 12, at 657.

⁵¹ Scientific Permit Whaling, *supra* note 43.

VIII of the ICRW mandates that the meat be processed, rather than be allowed to go to waste.⁵² The Japanese government has mandated that the whale meat be sold in markets, as well as used for school and hospital lunches, the sale of which generates approximately \$74 million a year.⁵³ While there is little doubt that Japan is complying with the letter of the law under the IWC research exception, there is also little doubt that Japan is only claiming to conduct research in order to circumvent the commercial moratorium, thus not following the spirit of the ban.⁵⁴

The United States, as well as other nations, has expressed its displeasure over Japan's scientific research program and more specifically that Japan uses lethal methods to gather evidence that most scientists agree could be gathered using non-lethal means.⁵⁵ In 2000, President William J. Clinton denied Japanese fishing vessels access to fishing allotments in U.S. waters in response to Japan's expansion of their scientific whaling program, stating that Japan was undermining international efforts to protect whales.⁵⁶ In 2007, eight U.S. senators called on Japan to scale back its research hunting and to abandon plans to kill one hundred whales on the endangered species list.⁵⁷ The senators, in a letter to the Japanese ambassador to the United States, wrote:

[A] Japanese whaling fleet is en route to the Antarctic Ocean to hunt these mammals . . . for what Japan has called research purposes. . . . We also ask that Japan . . . employ non-lethal techniques for studying these populations. By pursuing these actions, Japan can continue to make significant scientific contributions, while conserving and protecting these important species.⁵⁸

Because Japan conducts much of its hunting in the Southern Ocean

⁵² ICRW, *supra* note 11, art. VIII(2).

⁵³ See HELLER, *supra* note 32, at 100–03 (discussing the fact that the whaling fleet must receive government subsidies in order to continue operating and that the program has never generated enough revenue to cover its expenses); Justin McCurry, *Big Sushi: The World's Most Politically Sensitive Lunch*, MONTHLY, Aug. 2006, at 42, 45–47 (noting that because the demand for whale meat has decreased, especially amongst the younger generations, the government has sought ways to deplete its whale meat stock by using it for government purposes).

⁵⁴ See, e.g., William C. Burns, *The International Whaling Commission and the Future of Cetaceans: Problems and Prospects*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 31, 49 (1997) ("Japan, Norway, and Iceland have dutifully submitted scientific research proposals to the IWC and then blithely ignored its recommendations that such programs should not be pursued."); Roeschke, *supra* note 32, at 112 ("Japan . . . chose to conceal their whaling practices under the guise of scientific research."); Ruffle, *supra* note 12, at 656 ("[T]he research is only a thinly-veiled attempt to maintain the profitability of the commercial whaling industry.")

⁵⁵ See Sumi, *supra* note 47, at 339 ("The Committee members . . . emphasized that non-lethal methods were available for the estimation of recruitment and the study of stock identity.")

⁵⁶ David E. Sanger, *Japan: Clinton Orders Sanctions*, N.Y. TIMES, Sept. 14, 2000, at A6.

⁵⁷ Press Release, Sen. Barbara Boxer, Senators Call on Japan To Limit Whale Hunt and Spare Protected Whales (Nov. 29, 2007), available at <http://boxer.senate.gov/en/press/releases/112907.cfm#>.

⁵⁸ *Id.*

Sanctuary, which is near Australian territorial seas, Australia has become particularly vocal about its opposition to Japanese whaling. Although Australia was at one time a staunch pro-whaling nation, it has become one of the most prominent whaling opponents in recent years and has adopted measures to stop whaling both domestically and internationally.⁵⁹ Australia is a member of the IWC and therefore complies with the moratorium on commercial whaling. It also has voiced a great deal of opposition to Japanese research whaling, especially when it occurs near Australian waters.⁶⁰

The Southern Ocean Sanctuary, established by the IWC, is located in close proximity to Australian territorial seas. While no commercial whaling is permitted in the sanctuary, the Japanese research fleet often hunts for its quota of research kills in this area.⁶¹ In an attempt to stop whaling in Australian waters, the Australian government established an EEZ in the area in 1994 and claims that the waters are protected Australian territory.⁶²

Under the United Nations Convention on the Law of the Sea (“UNCLOS”), a nation has exclusive sovereignty over the waters of its territorial seas,⁶³ which typically consists of all waters up to twelve nautical miles from the country’s shoreline.⁶⁴ Any vessel passing through another nation’s territorial seas is subject to that nation’s criminal and civil laws but is also afforded the right of safe passage.⁶⁵ A nation may claim a contiguous zone up to twenty-four miles from its baseline, in which the nation can enforce violations of customs, immigration, and sanitary laws.⁶⁶ A nation may also claim an EEZ up to 200 miles from its baseline for the purpose of establishing exclusive rights to explore and exploit the natural resources found there.⁶⁷ Australia maintains that there is an EEZ extending 200 miles from all Australian sovereign territory.⁶⁸ It is not uncommon for a country to exercise its right to claim an EEZ in order to extensively regulate the resources in the area and prevent over-use.⁶⁹

⁵⁹ See Donald K. Anton, *Antarctic Whaling: Australia’s Attempt To Protect Whales in the Southern Ocean*, 36 B.C. ENVTL. AFF. L. REV. 319, 325–32 (2009).

⁶⁰ See, e.g., NAT’L TASK FORCE ON WHALING, *supra* note 41, at 7–8, 63–64.

⁶¹ *Id.* at 26.

⁶² Anton, *supra* note 59, at 328.

⁶³ United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁶⁴ *Id.* art. 3.

⁶⁵ *Id.* arts. 27–28.

⁶⁶ *Id.* art. 33.

⁶⁷ *Id.* arts. 56–57; see also Klein & Hughes, *supra* note 3, at 168–72 (further explaining maritime zones under UNCLOS).

⁶⁸ Anton, *supra* note 59, at 328.

⁶⁹ For example, the United States established an EEZ in 1982 through a presidential proclamation and claims sovereign control over fishing rights up to two hundred miles from all U.S. shorelines. 48 C.J.S. *International Law* § 15 (2004).

Australia's claimed EEZ includes not only the waters 200 nautical miles off the coast of Australia, but also the waters around Antarctica, where the Japanese whaling vessels often hunt.⁷⁰ Australia has claimed sovereignty over part of Antarctica, called the Australian Antarctic Territory, since 1933, asserting that it is Australian land.⁷¹ Accordingly, Australia asserts that the EEZ extends 200 nautical miles from this territory as well as from mainland Australia.⁷²

Under UNCLOS, a nation claiming an EEZ has the authority to protect and preserve the marine wildlife within the EEZ.⁷³ In accordance with this authority, after establishing its EEZ in Antarctic waters, Australia created a whale sanctuary in the area, called the Australian Whale Sanctuary, making it a violation of Australian law to kill a whale in these waters.⁷⁴

While its claim of an EEZ extending 200 miles off the coast of mainland Australia is widely recognized, Australia's claim of an EEZ in Antarctic waters is extremely controversial and recognized by only a handful of other nations.⁷⁵ Australia signed the Antarctic Treaty in 1959 and, in doing so, agreed not to pursue its sovereignty claims in Antarctic while the treaty was still in force.⁷⁶ Because the Antarctic Treaty has not been revoked, most nations do not recognize Australia's right to claim an EEZ off the Antarctic territory because, in doing so, they contradict the treaty to which their signature is affixed by claiming that the Antarctic land is part of Australia.⁷⁷ Additionally, Australia's EEZ is challenged under UNCLOS because it conflicts with other nations' sovereign claims in Antarctic waters.⁷⁸ Due to the questions of legality over Australia's claims, only France, New Zealand, Great Britain, and Norway recognize the Australian EEZ in Antarctica.⁷⁹ Thus far, Australia has not enforced its domestic law against Japanese whalers hunting in its EEZ, in part because of the controversy surrounding its claim and the fact that it is not well recognized.⁸⁰

Despite the fact that the Australian government has not sought to enforce its domestic laws against whaling ships in the EEZ, a private

⁷⁰ See Klein & Hughes, *supra* note 3, at 171.

⁷¹ Joanna Mossop, *When Is a Whale Sanctuary Not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones*, 36 VICTORIA U. WELLINGTON L. REV. 757, 763 (2005).

⁷² Klein & Hughes, *supra* note 3, at 172.

⁷³ UNCLOS, *supra* note 63, art. 56.

⁷⁴ Mossop, *supra* note 71, at 759.

⁷⁵ Klein & Hughes, *supra* note 3, at 171.

⁷⁶ The Antarctic Treaty was written to prevent disputes over sovereignty of the area from interfering with the governance of Antarctica. It encourages, but does not demand, cooperation between different nations who have a sovereign claim over the land. For further discussion of the legality of Australia's maritime Antarctic zones, see Mossop, *supra* note 71, at 763–66.

⁷⁷ Klein & Hughes, *supra* note 3, at 171–72.

⁷⁸ See *id.* at 170–71 (discussing the issues that arise when EEZs “overlap”).

⁷⁹ *Id.* at 171 n.53.

⁸⁰ See *id.* at 172.

citizen group filed suit in Australian federal court in 2008 seeking an injunction against the Japanese whaling company Kyodo Senpaku Kaisha Ltd. to stop the hunting of whales within the Australian Whale Sanctuary.⁸¹ Although the injunctions were ultimately granted by the Australian federal court, they have not been enforced against the Japanese vessels and are ostensibly without effect.⁸²

IV. ANALYSIS OF THE SEA SHEPHERD CONSERVATION SOCIETY AND LEGAL CLAIM UNDER THE U.N. WORLD CHARTER FOR NATURE

Japan has faced intense pressure from other nations, including the United States, to stop killing whales as part of its research program.⁸³ However, the IWC has not taken the steps necessary to close the research loophole to prevent the Japanese from exploiting it. Because of this lack of action by member nations of the IWC, environmental groups have taken it upon themselves to disrupt what they view as illegal Japanese whaling in the Southern Ocean.⁸⁴ Sea Shepherd has taken the lead in attacking the whaling fleet, in part because it takes chances that no other organization is willing to take in order to stop the killing of whales.⁸⁵

Sea Shepherd was founded in 1977 by Paul Watson, a well-known environmental activist, whose actions often puts the lives of whales above the lives of people.⁸⁶ Sea Shepherd, which is supported by private donations, claims that its mission is “to end the destruction of habitat and slaughter of wildlife in the world’s oceans in order to conserve and protect ecosystems and species.”⁸⁷ In order to fulfill its mission, the group “uses innovative direct-action tactics to investigate, document, and take action when necessary to expose and confront illegal activities on the high seas.”⁸⁸ These direct-action tactics include ramming whaling vessels, firing smoke canisters at their decks, and using ropes to entangle the vessels’ propellers.⁸⁹

Paul Watson is undoubtedly the face of Sea Shepherd, as he touts himself as the captain of the organization’s vessels and Master and

⁸¹ *Humane Soc’y Int’l Inc. v. Kyodo Senpaku Kaisha Ltd.* (2008) 165 F.C.R. 510 (Austl.).

⁸² See Anton, *supra* note 59, at 332–39 (providing a complete discussion of the case); Mossop, *supra* note 71, at 758–62 (discussing the early history of the case).

⁸³ See *supra* notes 55–58 and accompanying text (discussing the United States’ opposition to Japan’s whaling research program).

⁸⁴ See, e.g., Greenpeace, Full Proposal: Roadmap to Recovery, <http://www.greenpeace.org/international/campaigns/oceans/marine-reserves/roadmap-to-recovery> (last visited June 11, 2010) (asking individuals opposed to whaling to sign a petition to create marine reserves).

⁸⁵ See *Whaling: Salty Shepherds*, *ECONOMIST*, Jan. 26, 2008, at 43–44.

⁸⁶ See Khatchadourian, *supra* note 1, at 58.

⁸⁷ Sea Shepherd Conservation Society, Who We Are, <http://www.seashepherd.org/who-we-are/> (last visited June 11, 2010).

⁸⁸ *Id.*

⁸⁹ Khatchadourian, *supra* note 1, at 58, 60.

Commander of their voyages to the Southern Ocean.⁹⁰ A Canadian national, Watson, along with a group of like-minded activists, founded Greenpeace in the early seventies, but he was later voted out of the organization for violating their pacifist ethos and using violence to achieve results.⁹¹ After being expelled from Greenpeace, Watson turned his attention to stopping whaling. Using funds from an animal-welfare advocate, Watson purchased his first ship in 1978, filled its front hull with concrete in order to facilitate the ramming of other ships, and steered it into a whaling vessel off Portugal, causing severe damage.⁹² Since then, he claims responsibility for ramming numerous whaling ships and disrupting countless other whale and seal hunts.⁹³

Sea Shepherd currently has three vessels that it uses in its anti-whaling campaigns. The largest of the vessels, the *Farley Mowat*, has a reinforced steel hull so that it can push through ice fields in the Antarctic waters without sustaining damage.⁹⁴ The *Steve Irwin*, named in honor of the late Australian celebrity and conservationist, is the vessel currently being used in campaigns against the Japanese whaling fleet in the Southern Ocean.⁹⁵ The organization's newest vessel bears the name *Bob Barker*; it was originally commissioned as a Norwegian whaler but was later purchased by Sea Shepherd with five million dollars that was donated to the group by the American game show host.⁹⁶

The organization relies on private funds and a crew of volunteers to carry out its anti-whaling campaigns. Its donors include celebrities such as Mick Jagger and Steve Wynn, the Las Vegas casino owner.⁹⁷ The majority of the crew are volunteers from a host of different nations, including Australia, the United States, Japan, New Zealand, and the Netherlands,⁹⁸ and they receive only room and board in exchange for their work on the campaigns.⁹⁹ The majority of Sea Shepherd's campaigns to stop the

⁹⁰ Sea Shepherd Conservation Society, Master and Commander: Complete List of Sea Shepherd Voyages, 1979–2008, <http://www.seashepherd.org/who-we-are/master-and-commander.html> (last visited June 11, 2010).

⁹¹ See Khatchadourian, *supra* note 1, at 65 (“[H]e seemed possessed by *too* powerful a drive, too unrelenting a desire to push himself front and center, shouldering everyone else aside.”).

⁹² See Khatchadourian, *supra* note 1, at 65; *Environment: Victory at Sea*, TIME, July 30, 1979, at 69.

⁹³ See Roeschke, *supra* note 32, at 99.

⁹⁴ Sea Shepherd Conservation Society, Neptune's Navy, <http://www.seashepherd.org/who-we-are/the-fleet.html> (last visited June 11, 2010).

⁹⁵ *Id.*

⁹⁶ Mark McDonald, *Ships Collide in War of Nerves over Whaling*, N.Y. TIMES, Jan. 7, 2010, at A10. The group also owns a high-speed vessel called the *Ady Gil*, but it was badly damaged in a collision with a Japanese whaler in January 2010 and is no longer sea-worthy. See *id.*

⁹⁷ Khatchadourian, *supra* note 1, at 58–59.

⁹⁸ Sea Shepherd Conservation Society, Sea Shepherd Crew, <http://www.seashepherd.org/who-we-are/ships-crews.html> (last visited June 11, 2010).

⁹⁹ The volunteer information page of the Sea Shepherd website states that the organization is seeking “people who burn inside with a rage against the injustices perpetrated upon whales No

Japanese whaling fleet take place in the Southern Ocean, off the coast of Antarctica, where the Japanese whaling fleet conducts the majority of its hunting.¹⁰⁰

The tactics employed by Sea Shepherd against the Japanese whaling fleet are sensational, sometimes violent, and intended to be extremely destructive. Sea Shepherd's actions have prompted Japan and other nations to label the group "pirates" and "terrorists."¹⁰¹ Watson is no longer allowed to attend IWC meetings because many conservationists believe that his actions have actually turned sympathy away from anti-whaling nations.¹⁰²

Sea Shepherd vessels are equipped to damage whaling vessels. The *Farley Mowat* is fitted with a customized device called "the can opener," which consists of a sharpened steel I-beam that is affixed to the side of the ship and is designed to puncture the hull of whaling vessels.¹⁰³ Watson has also attempted to ram the *Farley Mowat* into the stern of a whaling vessel; Sea Shepherd boasts that the group is responsible for sinking ten whaling vessels since 1979 using these types of tactics.¹⁰⁴

Sea Shepherd was recently involved in a collision with a Japanese whaling vessel. On February 5, 2009, the *Steve Irwin* and the *Yushin Maru No. 2*, a whaling ship flying under the Japanese flag, collided while underway in the Southern Ocean.¹⁰⁵ Each group issued statements shortly after the incident blaming the other party and, even though neither vessel sustained severe damage, it was clear from statements from both sides that the *Steve Irwin* maneuvered too close to the Japanese whaler in an attempt to disrupt it from transferring a dead whale to a processing ship.¹⁰⁶

whiners, malcontents, mattress lovers, and wimps need apply." Sea Shepherd Conservation Society, A Call for Planetary Duty!, <http://www.seashepherd.org/get-involved/crewing-at-sea.html> (last visited June 11, 2010).

¹⁰⁰ See *supra* note 61 and accompanying text; see also Press Release, Sea Shepherd Conservation Soc'y, Sea Shepherd Announces New Antarctic Research Project (June 24, 2009), available at <http://www.seashepherd.org/news-and-media/news-090624-1.html>.

¹⁰¹ Meraiah Foley & Mark McDonald, *Japan Seeks Australia's Help To Thwart Whaling Opponents*, N.Y. TIMES, Jan. 7, 2009, at A10; see also Roeschke, *supra* note 32, at 107 ("Officials in Iceland, Norway, Denmark, Japan, Canada and Costa Rica have publicly denounced Watson, comparing his actions to that of a common terrorist.").

¹⁰² Roeschke, *supra* note 32, at 107-08.

¹⁰³ Khatchadourian, *supra* note 1, at 58.

¹⁰⁴ *Id.* at 66; see also Press Release, Sea Shepherd Conservation Soc'y, Victory for the Whales in Berlin (June 16, 2003), available at <http://www.seashepherd.org/news-and-media/news-030616-1.html> ("Kill a whale; prepare to go to the bottom. The only practical use of an outlaw whaling ship is for underwater habitat for fish.").

¹⁰⁵ Press Release, Inst. of Cetacean Research, Dutch Vessel Rams Japanese Research Ship (Feb. 6, 2009), available at <http://www.icrwale.org/pdf/090206-2Release.pdf>.

¹⁰⁶ See *id.*; Press Release, Sea Shepherd Conservation Soc'y, Whaling Opponents Collide at Sea (Feb. 5, 2009), available at <http://www.seashepherd.org/news-and-media/news-090205-2.html> ("We're shepherds and we will do what we can to protect our flock from these murderous poachers."). In January 2010, a Japanese whaling vessel collided with the Sea Shepherd's high-speed vessel, the *Ady Gil*, which was split into two pieces by the force of the blow. One person was injured in the accident. As with the February 2009 collision, each side blamed the other for the incident. McDonald, *supra*

Sea Shepherd has also used prop foulers to disable the propellers of the whaling vessels.¹⁰⁷ To deploy the device, the group maneuvers its vessel in front of the whaling ships while they are making way through the water and then cuts across the bow of the vessel, dropping the prop fouler made of rope, steel cables, and buoys into the wake of the whaling vessel.¹⁰⁸ A vessel that has a disabled propeller is at the mercy of the sea and is unable to steer into the waves to avoid capsizing.¹⁰⁹ The Sea Shepherd crew also attempts to disrupt the processing of whale meat on the vessels by throwing canisters of butyric acid on the deck of the ships, which spoils the whale meat because of its rancid smell.¹¹⁰ Some workers on the Japanese vessels have claimed that they sustained injuries after being hit with such canisters.¹¹¹

In perhaps their most daring move to date, two Sea Shepherd crewmembers boarded one of the Japanese whaling vessels at sea in January 2008.¹¹² One British and one Australian crewmember jumped from a Sea Shepherd vessel onto the deck of the *Yushin Maru No. 2* while it was underway in the Southern Ocean, claiming that they were not trying to harm the crew but were there only to deliver a letter asking the vessel to end the whale hunt.¹¹³ Sea Shepherd stated that after the activists jumped onto the deck of the whaling ship, crewmembers “roughed [them] up” and detained them against their will.¹¹⁴ The Japanese whalers claimed that the activists were pirates who boarded the vessel illegally and tied the men to the mast of their ship.¹¹⁵ The Japanese whalers detained the two crewmembers for three days before transferring them to Australian authorities, who returned the pair to the *Steve Irwin* without filing charges.¹¹⁶

note 96.

¹⁰⁷ See HELLER, *supra* note 32, at 110.

¹⁰⁸ See *id.* at 165, 203.

¹⁰⁹ *Id.*

¹¹⁰ Khatchadourian, *supra* note 1, at 60.

¹¹¹ Media Release, Inst. of Cetacean Research, Sea Shepherd Attacks Japan’s Research Vessels (Mar. 3, 2008), available at <http://www.icrwhale.org/eng/080303Release.pdf>.

¹¹² See *Japanese Offer Fails To End Whaling Standoff*, N.Y. TIMES, Jan. 6, 2008, <http://www.nytimes.com/> (search for “Japanese Offer Fails To End Whaling”; then follow hyperlink) (discussing the incident and the Japanese claims that “this can be seen as nothing more than an act of piracy by the Sea Shepherd group”).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Roeschke, *supra* note 32, at 108, 109 & n.66. In February 2010, a Sea Shepherd crewmember again boarded a Japanese vessel at sea by jumping onto the ship in an attempt to make a citizen’s arrest of the Japanese ship’s captain and to demand \$3 million as payment for the destruction of the *Ady Gil*. The Japanese have stated their intention to try the crewmember in Japanese criminal court on intrusion charges. Tomoko A. Hosaka, *Japan Indicts Activist Who Boarded Whaling Ship*, ASSOCIATED PRESS ASIA, Apr. 2, 2010.

Sea Shepherd's antics are so dramatic that they caught the eye of the U.S. cable network Discovery, which created a show called *Whale Wars* that documents the exploits of the group as they pursue the whaling fleet.¹¹⁷ The popularity of the show, which airs on the network's Animal Planet channel, prompted Discovery to agree to a contract extension with Sea Shepherd, and it is about to enter its third season on cable television. It is Animal Planet's second-best performing show in the network's history.¹¹⁸

The Japanese scientific body that funds the hunting trips to the Southern Ocean has accused the Discovery network of colluding with Sea Shepherd to carry out unlawful acts in order to produce better footage for the show, claiming that the group's propensity for violence increased after filming began.¹¹⁹ The first season of *Whale Wars* included footage of the two crewmembers boarding the *Yushin Maru No. 2*.¹²⁰

Despite the aggressive actions of Watson and his crew, few Sea Shepherd members have been charged with criminal activity in connection with their antics. Neither Watson nor the two crewmembers who boarded the Japanese whaling vessel in 2008 were charged with any crime, although Japan has threatened to bring suit against them.¹²¹ Watson has been charged with violating domestic laws in Canada but has spent little time in jail for these mostly minor offenses.¹²² Watson at times even demanded to be charged with ramming vessels in an attempt to publicize the plight of his group, but he conducts most of his activities in international waters where the laws and jurisdiction are unclear, thus allowing him to avoid serious consequences.¹²³

Watson claims that Sea Shepherd has legal justification for its actions against the Japanese whaling vessels under the United Nations World Charter for Nature ("World Charter").¹²⁴ The World Charter was adopted in 1982 to provide "appropriate measures at the national and international levels to protect nature and promote international co-operation in that

¹¹⁷ Press Release, Animal Planet, Animal Planet's "Whale Wars" Returns from High Seas with Record Viewership in Finale and in Second Season (Aug. 25, 2009), available at <http://press.discovery.com/us/apl/press-releases/2009/animal-planets-whale-wars-returns-high-seas-record/>.

¹¹⁸ *Id.*

¹¹⁹ See Press Release, Inst. of Cetacean Research, Animal Planet Collaborated with Ecoterrorists (Oct. 29, 2008), available at <http://www.icrwhale.org/pdf/081029Release.pdf> ("Mr. Minoru Morimoto, Director General of the Institute of Cetacean Research, said: 'It is difficult to understand why a mainstream network would stoop so low as to produce a series that glamorizes and thereby gives support to ecoterrorism.'").

¹²⁰ Animal Planet, *Whale Wars*, Episode Guide, <http://animal.discovery.com/tv/whale-wars/episode/> (last visited June 11, 2010).

¹²¹ Roeschke, *supra* note 32, at 128.

¹²² HELLER, *supra* note 32, at 98-99.

¹²³ See Khatchadourian, *supra* note 1, at 66.

¹²⁴ *Id.*

field.”¹²⁵ It was an attempt to set guidelines by which countries should guide their actions in regards to conserving nature and urges human beings to consider their responsibilities toward the environment.¹²⁶ The United States was the only nation to reject the proclamation.¹²⁷ The World Charter is a resolution and is therefore non-binding on any party to it because it does not constitute a formal source of international law.¹²⁸

Specifically, Sea Shepherd cites paragraph 21 of the World Charter, which states that individuals and groups “shall [s]afeguard and conserve nature in areas beyond national jurisdiction,” which includes the Antarctic territory.¹²⁹ Watson often invokes this section of the World Charter when asked to justify the ramming of vessels at sea.¹³⁰ Sea Shepherd claims that the Japanese whaling fleet is violating international laws by commercially hunting the whales, and therefore the group is justified in stopping the illegal activity by reason of “colour of right.”¹³¹

Sea Shepherd’s reliance on the World Charter as legal justification for its actions is clearly misplaced. Even if Japan were whaling illegally—which it is almost universally accepted that they are not¹³²—the resolution does not provide justification for Sea Shepherd to ram or otherwise attempt to disrupt the whaling vessels. The World Charter is non-binding legislation that was drafted to encourage nations to work together to protect the environment and intended only to set moral principles as to how nations should act.¹³³ The World Charter also has no enforcement provisions for nations or individuals.¹³⁴ Critics of Sea Shepherd’s use of the World Charter for justification of its actions state that its interpretation of its legal authority is “[c]learly wrong” and that “[t]here is no ambiguity”

¹²⁵ World Charter for Nature, G.A. Res. 37/7, ¶ 455, U.N. Doc. A/RES/37/7 (Oct. 28, 1982) [hereinafter World Charter for Nature].

¹²⁶ Susan Emmenegger & Axel Tschentscher, *Taking Nature’s Rights Seriously: The Long Way to Biocentrism in Environmental Law*, 6 GEO. INT’L ENVTL. L. REV. 545, 569 (1994).

¹²⁷ *Id.*

¹²⁸ *But see id.* at 570 (“It is also worth noting that the General Assembly adopted the World Charter for Nature in the form of a solemn declaration, the same as used for the Universal Declaration of Human Rights. This gives it a special standing on the platform of international law.”).

¹²⁹ World Charter for Nature, *supra* note 125, ¶ 21; *see also id.* ¶ 21(e) (“Each person has a duty to act in accordance with the provisions of the present Charter.”).

¹³⁰ *See, e.g.*, Khatchadourian, *supra* note 1, at 66 (discussing how Watson cited the World Charter as the reason why he has not been charged with a crime).

¹³¹ Sea Shepherd Conservation Society, Mandate, <http://www.seashepherd.org/who-we-are/mandate.html> (last visited June 11, 2010).

¹³² *See supra* notes 42–54 and accompanying text (discussing the legal research loophole that Japan exploits in order to continue whaling in the Southern Ocean).

¹³³ *See* LYNTON KEITH CALDWELL, INTERNATIONAL ENVIRONMENTAL POLICY: FROM THE TWENTIETH TO THE TWENTY-FIRST CENTURY 100 (3rd ed. 1996) (“[T]he charter [is] a significant symbolic expression of a hope among nations to achieve a more harmonious and sustainable relationship between humanity and the rest of the biosphere—between mankind and earth.” (emphasis added)); Roseann Eshbach, Comment, *A Global Approach to the Protection of the Environment: Balancing State Sovereignty and Global Interests*, 4 TEMP. INT’L & COMP. L.J. 271, 297–98 (1990) (discussing the intentions of the World Charter).

¹³⁴ Khatchadourian, *supra* note 1, at 66.

on the matter.¹³⁵ While Sea Shepherd boasts many supporters around the world,¹³⁶ several nations, including the United States, and environmental groups have denounced its aggressive tactics and its misuse of the World Charter as justification.¹³⁷

V. APPLICABLE INTERNATIONAL LAW

Despite strong rhetoric from the United States and other nations about their opposition to Sea Shepherd's tactics, no nation has yet taken action under international law to stop Sea Shepherd. The group operates on the high seas in part because international law is vague and difficult to enforce on the seas.¹³⁸ There are several international laws which may be applicable to the situation between Sea Shepherd and the Japanese whaling fleet in the Southern Ocean. Each international law that could be applied to the situation, however, has flaws that make it difficult to enforce.

A. Piracy Under UNCLOS

Piracy is currently one of the most pressing issues in international law because of the recent outbreak of attacks off the coast of Africa and the fact that much of the world's commerce is transported via the oceans.¹³⁹ The 1982 Convention on the Law of the Sea defines piracy as "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 . . . directed on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft."¹⁴⁰ All states share the obligation to suppress acts of piracy on the high seas or outside the jurisdiction of any state.¹⁴¹

¹³⁵ *Id.*

¹³⁶ See *supra* note 97 and accompanying text (discussing Sea Shepherd's celebrity supporters).

¹³⁷ See Int'l Whaling Commission, *Resolution on the Safety of Vessels Engaged in Whaling and Whale-Research Related Activities*, Resolution 2006-2 (2006), available at <http://www.iwcoffice.org/meetings/resolutions/resolution2006.htm#2> (stating that "the Commission and its Contracting Governments do not condone any actions that are a risk to human life and property in relation to these activities of vessels at sea, and urges persons and entities to refrain from such acts"); HELLER, *supra* note 32, at 29–30 (referring to the strained relationship between Sea Shepherd and Greenpeace and the fact that Greenpeace has referred to Watson as an "ecoterrorist"); Khatchadourian, *supra* note 1, at 59 (discussing how Greenpeace has distanced itself from Sea Shepherd); Press Release, Nat'l Oceanic and Atmospheric Admin., U.S. Whaling Commissioner Denounces Sea Shepherd's Clash with Japanese Whalers (Feb. 9, 2007), available at <http://www.publicaffairs.noaa.gov/releases2007/feb07/noaa07-r-iwc.html> ("The United States is extremely concerned that encounters like this could escalate into more violent interactions between the vessels. We still oppose Japan's research whale hunts, but the way to resolve this is through the IWC process.").

¹³⁸ Roeschke, *supra* note 32, at 108.

¹³⁹ See, e.g., James Kraska & Brian Wilson, *Repressing Piracy in the 21st Century: An International Maritime Threat Response Plan*, 40 J. MAR. L. & COM. 43, 43–45 (2009) (discussing recent high-profile piracy attacks and piracy's profitability).

¹⁴⁰ UNCLOS, *supra* note 63, art. 101.

¹⁴¹ *Id.*

There are several problems in applying this definition of piracy in international law, as UNCLOS “suffers from several defects which have hobbled the usefulness of these conventions in combating piracy and modern crime.”¹⁴² One particularly difficult problem with the definition of piracy under UNCLOS is determining what constitutes “private ends.” This term is nowhere defined in the text of UNCLOS, but it seems to exclude political activities, which would exclude maritime terrorism from the definition of piracy.¹⁴³ Traditionally, a pirate is considered “a private individual whose heinous acts are aimed towards achieving some personal economic benefit,” so the term “private ends” is typically understood as an act done for economic gain.¹⁴⁴

Another ambiguity of the definition of piracy under UNCLOS is the term “illegal acts.” If “illegal acts” is defined under international law, there is little ambiguity as to what constitutes an illegal act. If, however, the term is defined under national law, there could be discrepancies in how the piracy laws are enforced because the legality of certain acts differs depending on national law.¹⁴⁵

In accordance with UNCLOS, states have the sole obligation to repress piracy in international waters or in any place outside their respective jurisdictions, or, in other words, outside another nation’s twelve-mile territorial sea.¹⁴⁶ Therefore, any nation that is aware of acts of piracy being committed on the high seas has an obligation to help the victims and to bring the pirates to justice in municipal courts.¹⁴⁷ The municipal courts are tasked with working through the ambiguities in the definition of piracy and applying international law at a national level.¹⁴⁸

Enforcing piracy under UNCLOS, however, has proven extremely difficult. Nations are hesitant to prosecute pirates under international laws in their municipal courts because piracy has traditionally been viewed as a domestic problem.¹⁴⁹ Nations typically only intervene to stop piracy acts committed on the high seas if the state’s own interests are threatened by piracy. Indeed, states will even ignore pleas for assistance from distressed

¹⁴² Samuel Pyeatt Menefee, *The New “Jamaica Discipline”: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT’L L. 127, 141 (1990).

¹⁴³ See Samuel Pyeatt Menefee, *The Case of the Castle John, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT’L L.J. 1, 4 (1993) (discussing the shortcomings of the UNCLOS definition with respect to private ends).

¹⁴⁴ Monica Pathak, *Maritime Violence: Piracy at Sea & Marine Terrorism Today*, 20 WINDSOR REV. LEGAL & SOC. ISSUES 65, 73–74 (2005).

¹⁴⁵ Menefee, *The Case of the Castle John*, *supra* note 143, at 4.

¹⁴⁶ UNCLOS, *supra* note 63, arts. 3, 100.

¹⁴⁷ See *id.* arts. 279–99 (outlining the procedures for prosecuting violations of UNCLOS).

¹⁴⁸ Carlo Tiribelli, *Time To Update the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 8 OR. REV. INT’L L. 133, 140 (2006).

¹⁴⁹ See MARTIN N. MURPHY, *SMALL BOATS, WEAK STATES, DIRTY MONEY: THE CHALLENGE OF PIRACY* 19 (2009).

vessels off of their coasts,¹⁵⁰ even though they have an obligation to assist under UNCLOS. Thus, most nations do not want to burden themselves with apprehending and prosecuting pirates unless it affects their own vessels or their own state interests.

Adding to the enforcement problems, UNCLOS is further weakened by ambiguity with regard to enforcement within a nation's contiguous and exclusive economic zones.¹⁵¹ While it is clear that individual nations have the duty to enforce domestic piracy laws within their own territorial seas (within twelve nautical miles from shore), there is conflicting commentary over whether nations have an obligation under UNCLOS to repress piracy if it occurs in another nation's contiguous zone (extending twenty-four miles from a nation's shoreline)¹⁵² or EEZ (extending two hundred miles from a nation's shoreline).¹⁵³ Because there is legal ambiguity over whether UNCLOS was intended to extend to these waters, nations have argued that piracy is a domestic criminal problem that should be dealt with under domestic law.¹⁵⁴ Consequently, criminals can avoid prosecution as pirates by operating just inside the territorial sea line, thus falling outside UNCLOS jurisdiction in most commentators' view.¹⁵⁵

As a result of this legal wrangling and the unclear definition of piracy under UNCLOS, it is unlikely that Sea Shepherd members will be successfully prosecuted as pirates for acts that they commit outside the twelve-mile territorial sea limit of any nation. Most of Sea Shepherd's activities take place outside of Australia's territorial seas because that is where the Japanese whaling fleet conducts its research hunts.¹⁵⁶ By conducting its activities outside this territorial sea limit, Sea Shepherd takes advantage of the vagueness of the UNCLOS law.¹⁵⁷ Australia and other nations that operate vessels in the Southern Ocean could potentially bring charges against members of Sea Shepherd under the UNCLOS provisions if their vessels intervened in the action between Sea Shepherd and the Japanese whaling ships. These nations, however, are not eager to prosecute Sea Shepherd because they are opposed to what they view as Japan's use of the research loophole in the IWC to continue commercial

¹⁵⁰ *Id.* at 18.

¹⁵¹ *See supra* notes 63–69 and accompanying text (discussing the definition of an EEZ under UNCLOS).

¹⁵² *See* MURPHY, *supra* note 149, at 15 (analyzing the legal ambiguity over whether coastal states can exercise their right to control piracy in their contiguous zone).

¹⁵³ *See id.* at 15–16 (discussing the legal ambiguity of enforcing UNCLOS piracy laws in another nation's EEZ).

¹⁵⁴ *Id.* at 17.

¹⁵⁵ *See id.* at 9 (observing that, regarding this definition of piracy, “[t]he only people who are pleased are the pirates (one minute) or armed robbers (the next minute) as they skip from one side to the other of an invisible line that divides the high seas from territorial seas in order to evade capture”).

¹⁵⁶ *See supra* note 61 and accompanying text.

¹⁵⁷ Roeschke, *supra* note 32, at 108.

whaling.¹⁵⁸ There is no international maritime peacekeeping force on which to rely.¹⁵⁹ Additionally, even if the nations did apprehend the members of Sea Shepherd, there is no established international tribunal with jurisdiction to try and punish pirates, so any prosecution would have to take place in Australia's municipal courts.¹⁶⁰

Sea Shepherd members also likely cannot be prosecuted as pirates because their actions are not done for private ends. Under the UNCLOS definition, illegal acts of violence and degradation are considered acts of piracy if committed for private ends on the high seas.¹⁶¹ Sea Shepherd's actions of ramming whaling vessels and disabling their propellers would most likely be considered acts of violence and degradation. Although "private ends" is not clearly defined under UNCLOS, Sea Shepherd derives no financial profit from its harassment of the whaling fleet and it is unlikely that its actions would be considered done for private ends, thus excluding the group's activities from piracy under UNCLOS.¹⁶² For these reasons, it is unlikely that any nation would attempt to prosecute members of Sea Shepherd as pirates under UNCLOS, much less be successful in that prosecution.

There has been one successful prosecution of an environmental group under UNCLOS piracy laws. The Belgian Court of Cassation found that Greenpeace had committed acts of piracy when its members interfered with two commercial tankers who were attempting to legally dump waste into the ocean.¹⁶³ The court found that the members of Greenpeace had committed the acts for "private ends" because their motivation was the achievement of Greenpeace goals and were therefore subject to the UNCLOS piracy laws.¹⁶⁴ The case "stands for the proposition that maritime environmental violence may qualify as piracy under international law."¹⁶⁵ Despite the success of this case, it has not been widely followed, and there have been no subsequent prosecutions of environmentalists as pirates under UNCLOS in the twenty years since this case was decided.

B. *Terrorism Under International Law*

Because Sea Shepherd's actions are unlikely to be classified as piracy, many nations, including the United States, consider the group eco-

¹⁵⁸ See *supra* notes 55–60 and accompanying text.

¹⁵⁹ Tiribelli, *supra* note 148, at 141.

¹⁶⁰ *Id.*

¹⁶¹ UNCLOS, *supra* note 63, art. 100(a).

¹⁶² See Menefee, *The Case of the Castle John*, *supra* note 143, at 5 ("[T]he problem of demonstrating a non-private end is compounded . . . by environmentally-motivated actions which are not easily categorized.").

¹⁶³ *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, 77 I.L.R. 537, 537–41 (Belg. Ct. Cass. 1986).

¹⁶⁴ See Menefee, *The Case of the Castle John*, *supra* note 143, at 13–14.

¹⁶⁵ *Id.* at 14.

terrorists.¹⁶⁶ There is no universally accepted definition of terrorism,¹⁶⁷ but there are some generally accepted guidelines for how to classify acts of terrorism. The line between piracy and marine terrorism is often blurred,¹⁶⁸ but “piracy and terrorism are not interchangeable phenomena.”¹⁶⁹ Whereas pirates usually seek financial gain, marine terrorists are motivated by the opportunity to make a political or ideological statement.¹⁷⁰ Pirates often want to remain anonymous and have their attacks go largely unnoticed in the global community, but, on the contrary, marine terrorists are interested in publishing their actions so that all may hear their political message.¹⁷¹

Additionally, terrorism is described as “coercion” through “a use of force.”¹⁷² Terrorism is “the public and systematic use of . . . ‘extranormal’ . . . violence . . . through the loss of life, property or prestige, mainly and ostensibly for political purposes.”¹⁷³ In order to be effective, terrorists must “inflict or threaten to inflict intolerable damage.”¹⁷⁴ While the term “intolerable” is itself ambiguous, it is clear that the damage inflicted by a group must be significant in order to constitute terrorism under this definition.¹⁷⁵

¹⁶⁶ Federal Bureau of Investigation, Testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, FBI, The Threat of Eco-Terrorism (Feb. 12, 2002), available at www.fbi.gov/congress/congress02/jarboe021202.htm (describing how acts of “eco-terrorism” have occurred around the globe and identifying Sea Shepherd as one of the first organizations to partake in such acts); see also HELLER, *supra* note 32, at 147–48 (discussing how one of the eco-terrorists mentioned in the Jarboe statement helped Watson sink two whaling ships in Iceland in 1986).

¹⁶⁷ See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (“[T]he nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus.”); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 17 (D.D.C. 1998) (“Attempts to reach a fixed, universally accepted definition of international terrorism have been frustrated both by changes in terrorist methodology and the lack of any precise definition of the term ‘terrorism.’”); Sami Zeidan, *Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT’L L.J. 491, 492 (2004) (“[T]errorism easily falls prey to change that suits the interests of particular states at particular times.”).

¹⁶⁸ See Pathak, *supra* note 144, at 73–74.

¹⁶⁹ Tammy M. Sittnick, Comment, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia To Take Additional Steps To Secure the Strait*, 14 PAC. RIM L. & POL’Y J. 743, 751 (2005).

¹⁷⁰ Helmut Tuerk, *Combating Terrorism at Sea—The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. MIAMI INT’L & COMP. L. REV. 337, 343 (2008); see also Pathak, *supra* note 144, at 74 (“[I]n the case of a terrorist, he or she is typically viewed as being religiously or morally obligated to undertake a terrorist action which appears to be just.”).

¹⁷¹ Tuerk, *supra* note 170, at 343.

¹⁷² Richard K. Betts, *The Soft Underbelly of American Primacy: Tactical Advantages of Terror*, 117 POL. SCI. Q. 19, 20 (2002).

¹⁷³ MURPHY, *supra* note 149, at 184.

¹⁷⁴ *Id.*

¹⁷⁵ Incidents of maritime terrorism typically, but not always, involve loss of life. For example, in 2004, marine terrorists planted a bomb on a 10,000-ton ferry in Philippine waters, killing an estimated 116 people. The most notorious act of marine terrorism was the attack on the *Achille Lauro*, a cruise ship that was boarded by members of the Palestine Liberation Front in Israeli waters in 1985. One passenger was killed and several hundred others were held hostage. Also, eleven people were killed in

Prosecution of terrorists often takes place in national courts rather than international tribunals. The multilateral treaties and conventions that define terrorism generally lack international enforcement mechanisms to ensure the enforcement of their terms.¹⁷⁶ The biggest obstacle that international law makers face in creating enforcement mechanisms is determining who will bear the cost of enforcement and surveillance of the treaty. In order to get around this obstacle, international law makers typically devolve these activities to the states themselves, “piggy-backing” on domestic law and enforcement.¹⁷⁷ Several multilateral conventions that focus on the suppression of terrorism have imposed obligations on the states to implement the terms domestically without use of an international tribunal, including the 1997 Terrorist Bombings Convention and the 1971 Montreal Convention.¹⁷⁸

It is important to note that many nations, not only Australia, have an obligation to prosecute terrorists under multilateral conventions. These conventions adopt a “no safe haven” principle in that state parties to the convention either must prosecute or extradite those alleged to have been involved in terrorist activities to another country that is also a party to the treaty.¹⁷⁹ Therefore, any party to a convention that prohibits terrorism is obligated to either prosecute or extradite alleged terrorists that are found within their jurisdiction.

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“SUA”) was adopted in 1988 to specifically address acts of terrorism at sea that are not covered by the UNCLOS piracy laws.¹⁸⁰ It was an attempt to consolidate and apply previous “anti-terrorism conventions by adapting their provisions to the maritime field.”¹⁸¹ Australia,¹⁸² the Netherlands,¹⁸³ and the United States¹⁸⁴

an attack on the ship *City of Poros* in waters south of Athens in 1988. *Id.* at 187–90.

¹⁷⁶ C. L. Lim, *The Question of a Generic Definition of Terrorism Under General International Law*, in *GLOBAL ANTI-TERRORISM LAW AND POLICY* 37, 45 (Victor V. Ramraj et al. eds., 2005).

¹⁷⁷ *See id.* at 46 (“Where the conduct called into question is not the conduct of the party to a treaty . . . such an approach which piggy-backs on domestic law and enforcement tends to work relatively well.”).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201 [hereinafter SUA]. SUA was adopted as a response to the hijacking of the *Achille Lauro* in 1985. Pathak, *supra* note 144, at 75; *see also* MURPHY, *supra* note 149, at 187–88 (describing the attack on the *Achille Lauro* and the international response to it).

¹⁸¹ Tuerk, *supra* note 170, at 347.

¹⁸² United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: Ratification and Accessions by Various Countries, Feb. 19, 1993, 1777 U.N.T.S. 587, 588.

¹⁸³ United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: Acceptance by the Netherlands, Mar. 5, 1992, 1721 U.N.T.S. 493, 493.

have signed this treaty and are bound by its provisions. Currently, 156 states are parties to SUA, and these nations' vessels account for 94.73% of the world tonnage on the high seas,¹⁸⁵ numbers that indicate the seriousness in recent years with which the international community has treated the threat of terrorist acts at sea.

SUA purposely does not define acts of terrorism but instead refers only to "unlawful acts" because the drafters thought that defining terrorism would be too difficult.¹⁸⁶ It "established extraditable offenses of direct involvement . . . in the intentional and unlawful threatened, attempted or actual endangerment of the safe navigation of a ship."¹⁸⁷ Specifically, the Convention states:

(1) Any person commits an offence if that person unlawfully and intentionally:

. . .

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship¹⁸⁸

Despite the use of the term "suppression" in the title, SUA is primarily focused on the apprehension, conviction, and punishment of those who commit such acts, as opposed to the prevention of terrorist acts.¹⁸⁹ Also, SUA refers only to unlawful acts that are committed by "any person" and therefore excludes offenses committed by governments or state-sponsored terrorist organizations.¹⁹⁰

SUA applies to all vessels that are "navigating or [are] scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State."¹⁹¹ Therefore, only vessels that are not scheduled to leave a state's territorial seas are exempt from the provisions

¹⁸⁴ United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: Ratification by the United States of America, Dec. 6, 1994, 1891 U.N.T.S. 438, 438.

¹⁸⁵ International Maritime Organization, Summary of Status of Convention, http://www.imo.org/conventions/mainframe.asp?topic_id=247 (last visited June 11, 2010).

¹⁸⁶ See MURPHY, *supra* note 149, at 192 ("The drafters, quite sensibly, decided that defining terrorism was too sensitive, too political and too much of a waste of time to be attempted and therefore adopted the term 'unlawful acts' as an acceptable euphemism.")

¹⁸⁷ Tuerk, *supra* note 170, at 350.

¹⁸⁸ SUA, *supra* note 180, art. 3(a)-(c).

¹⁸⁹ See *id.* arts. 4-12.

¹⁹⁰ See *id.* art. 3 (referring only to individuals, not governments or state-sponsored terrorist groups).

¹⁹¹ *Id.* art. 4.

of SUA; an attack on these types of vessels would be covered by the domestic laws of the state in whose territorial seas the vessel was operating.¹⁹²

Similar to most anti-terrorism conventions, SUA contains a provision specifying that a member state which finds an alleged offender in its territory is obligated to either extradite or prosecute that person.¹⁹³ However, despite this language, SUA does not impose a strict obligation to extradite the alleged offender because “the possibility of non-extradition for political offences as well as the right to grant asylum are maintained.”¹⁹⁴ If no specific extradition treaty exists between the state that captured the alleged offender and the state which seeks that person’s extradition, the former state may, “*at its option*,” consider SUA a legal basis for the extradition.¹⁹⁵ As a result, SUA is weakened because states may choose not to extradite an alleged terrorist if the two nations do not already have an extradition treaty in place, rather than rely on the authority vested by SUA.

Despite the hope that SUA would be an effective solution to the ambiguity of the piracy laws under UNCLOS, it has largely been futile in apprehending and prosecuting alleged terrorists. In addition to the independent obligation to extradite offenders in the absence of a specific extradition treaty, SUA does not explicitly require a complete jurisdictional overview; it only requires that the state in whose territory the offender is found “submit the case . . . to its competent authorities for the purpose of prosecution.”¹⁹⁶ There is no requirement that the state complete prosecution and punish the individual appropriately. Additionally, SUA is only as strong as the states’ willingness to enforce it. SUA is intended to discourage piracy and maritime terrorism, but “it must be used—and be used properly—if that objective is to be served effectively.”¹⁹⁷ If member nations do not pressure each other to enforce the “extradite or prosecute” provision of SUA, it will be unsuccessful in combating terrorism.¹⁹⁸

Even without a binding treaty that requires member nations to prosecute terrorists, such as SUA, state action against terrorists can be justified under international custom.¹⁹⁹ Even though it is not often used as

¹⁹² Tuerk, *supra* note 170, at 348.

¹⁹³ SUA, *supra* note 180, art. 10.

¹⁹⁴ Tuerk, *supra* note 170, at 349.

¹⁹⁵ SUA, *supra* note 180, art. 11(2) (emphasis added).

¹⁹⁶ *Id.* art. 10(1).

¹⁹⁷ Tiribelli, *supra* note 148, at 153.

¹⁹⁸ In fact, SUA has only been used once to prosecute an alleged offender. In 2002, the United States government apprehended and charged a Chinese national with violating the provisions of SUA after he killed two crewmembers aboard a Taiwanese fishing vessel that was operating on the high seas. The defendant was later convicted on all counts and sentenced to thirty-six years in federal prison. *United States v. Shi*, 525 F.3d 709, 718–20 (9th Cir. 2008).

¹⁹⁹ Samuel P. Menefee, *Terrorism at Sea: The Historical Development of an International Legal Response*, in *VIOLENCE AT SEA: A REVIEW OF TERRORISM, ACTS OF WAR AND PIRACY, AND*

justification for the prosecution of terrorists, “protecting the lives and property of one’s nationals against maritime attacks has . . . been accepted as an international norm.”²⁰⁰ Therefore, no specific treaty need be cited in order to justify counter-terrorist activity, and a nation that is not a party to an anti-terrorism international convention is not prohibited from prosecuting terrorists based on international custom.

The members of Sea Shepherd who engage in destructive actions against the Japanese whaling vessels clearly fall within the recognized mentality of marine terrorists. One of Sea Shepherd’s stated goals is to “expose” what it views as illegal activity by the whaling vessels in the Southern Ocean.²⁰¹ The group is trying to garner attention for its cause, even allowing camera crews to film their exploits for production of a television show in the United States.²⁰² The group believes that whaling is morally reprehensible and is trying to pressure the Australian government, as well as other governments and citizens across the world, to change the laws and prevent Japanese research whaling.²⁰³ Their motivation is both political and moral.

Sea Shepherd’s activities can also be considered “unlawful acts” as defined by SUA. Specifically, members of Sea Shepherd have violated articles 3(1)(c) and (3)(2)(a) in that they have attempted to “cause[] damage to a ship . . . which is likely to endanger the safe navigation of that ship”²⁰⁴ by attempting to use prop foulers to damage the propellers of the Japanese whaling ships, which, if successful, would leave the whaling ships crippled and unable to maneuver, endangering their ability to safely navigate.²⁰⁵ Also, Sea Shepherd’s ramming of the Japanese whaler *Yushin Maru No. 2*²⁰⁶ would be classified as an unlawful act under SUA if there is evidence that Watson purposely rammed the vessel, thus causing damage that was likely to affect safe navigation.

Even if Sea Shepherd’s actions in the Southern Ocean were classified as terrorism or as unlawful acts under SUA, it is unlikely that Australia or any other nation that witnesses Sea Shepherd’s actions would prosecute

COUNTERMEASURES TO PREVENT TERRORISM 191, 203 (Brian A.H. Parritt ed., 1986).

²⁰⁰ *Id.*

²⁰¹ Sea Shepherd Conservation Society, *Who We Are*, *supra* note 87.

²⁰² *See supra* notes 117–20 and accompanying text.

²⁰³ Paul Watson stated in a Sea Shepherd press release:

I wish that the Australian government would apply the same “diplomatic” pressure on Japan to end their illegal whaling operations. . . . The Rudd government was elected on a promise to take the Japanese whaling industry to court for their illegal whaling activities. Now they seem to be more interested in taking Sea Shepherd to court for our efforts to intervene against illegal whaling operations.

Press Release, Sea Shepherd Conservation Soc’y, Australian Federal Police Seize Whale War Videos (Feb. 20, 2009), *available at* <http://www.seashepherd.org/news-and-media/news-090220-1.html>.

²⁰⁴ SUA, *supra* note 180, art. 3.

²⁰⁵ *See supra* notes 107–09 and accompanying text.

²⁰⁶ *See supra* notes 105–06 and accompanying text.

them under international law for the same reason that they chose not to prosecute Sea Shepherd as pirates: these nations do not support Japan's exploitation of the commercial whaling moratorium. Australia has consistently refused to bring charges of terrorism against Sea Shepherd, despite Japan's pleas that the country intervene.²⁰⁷ The enforcement of international law, and specifically SUA, relies on the good faith of domestic courts²⁰⁸ to enforce the laws, and without Australia's good faith, it is unlikely that Sea Shepherd will be prosecuted as terrorists by Australia if other nations do not pressure Australia to do so.

C. *International Regulations for Avoiding Collisions at Sea*

Australia has received a great deal of criticism from Japan for failing to take action against Sea Shepherd. However, the group's vessel, the *Steve Irwin*, does not fly the flag of Australia; rather, it is registered in the Netherlands.²⁰⁹ As the flag state in which the vessel is registered, the Netherlands has obligations under international law to ensure that the vessel is operated safely.²¹⁰ Article 94 of UNCLOS lists several obligations of the flag state, but the list is understood to be non-exhaustive.²¹¹ The Dutch government has an obligation to revoke or suspend the registration of the *Steve Irwin* if it finds that Watson and the officers are operating the vessel in an unsafe way, in violation of international law.

The International Maritime Organization ("IMO"), of which the Netherlands has been a member since 1949,²¹² established rules for the operation of vessels at sea, commonly referred to as "COLREGS," by which all vessels flagged under the member states must abide.²¹³ These

²⁰⁷ For example, Japan protested the Australian government's decision to return the two crewmembers who boarded the Japanese whaling vessel to the *Steve Irwin* rather than pressing charges of terrorism against them. "The Australian Government helped an eco-terrorist group by providing full support," Japan's Fisheries Agency chief stated. *Whalers Angry at 'Eco-Terror' on the High Seas*, HERALD SUN (Austl.), Jan. 22, 2008, at 12.

²⁰⁸ Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 71 (2006); see also *supra* notes 195–96 and accompanying text (discussing the ineffectiveness of SUA if member nations are unwilling to enforce its provisions).

²⁰⁹ Andrew Darby, *Japan to Smith: Act Against Sea Shepherd*, SYDNEY MORNING HERALD, Sept. 24, 2009, at 4.

²¹⁰ See UNCLOS, *supra* note 63, art. 94 (requiring that the flag state ensure that the master and officers of any vessel flagged in their state observe international regulations concerning safety at sea and prevention of collisions).

²¹¹ Craig H. Allen, *Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention*, 10 SAN DIEGO INT'L L.J. 265, 291 (2009).

²¹² International Maritime Organization, <http://www.imo.org/> (last visited June 11, 2009) (select "Member States").

²¹³ UNITED STATES COAST GUARD, NAVIGATION RULES: INTERNATIONAL—INLAND, at iv (1999). The United States adopted the regulations into public law in 1977. International Navigational Rules Act of 1977, Pub. L. No. 95-75, 91 Stat. 308 (1977).

rules were established as part of the Convention on the International Regulations for Preventing Collisions at Sea in 1972.²¹⁴ The main purpose of the rules, as suggested by the title of the convention, is to prevent collisions at sea, and the rules are intended to be vigorously enforced in order to maintain overall safety at sea.²¹⁵

One of the most important regulations established in COLREGS is the obligation of the ship's master under rule 2 to operate the vessel prudently and in observance of "good seamanship."²¹⁶ The rule not only reminds mariners that they have a legal duty to observe the rules and to apply the collision regulations, but "it [also] alerts the mariner that the collision regulations . . . require[] mariners to operate their vessels with the same care and vigilance that would be exercised by a reasonably prudent and professional seaman in the same conditions and circumstances."²¹⁷

While operating in the vicinity of the Japanese whaling vessels, Watson violated this regulation when he collided with the whaling vessel *Yushin Maru No. 2* in February 2009.²¹⁸ During the encounter, Watson claimed that he was only trying to get close enough to the Japanese vessel to disrupt the transfer of a dead whale from a harpoon ship to a processing ship.²¹⁹ However, even if Watson did not intend to ram the other vessel, which he has done in the past, in attempting to disrupt its activities, he maneuvered his own vessel so close to the whaling ship that the vessels collided. Footage of the collision was captured by cameramen working for the Discovery network while filming an episode of *Whale Wars* and clearly shows the *Steve Irwin* ramming the whaling vessel from behind, although it is not clear if it was intentional or accidental.²²⁰ Regardless of whether the collision was an accident, Watson violated rule 2 of COLREGS by not operating his vessel in a prudent manner because he maneuvered too close to another vessel to prevent a collision.

²¹⁴ International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16 [hereinafter COLREGS].

²¹⁵ Robert P. McCleskey, Jr. & Jeremy A. Herschaft, *Unique Features of Maritime Collision Law*, 79 TUL. L. REV. 1403, 1409–10 (2005).

²¹⁶ *Id.* at 1410. The rule specifically states: "Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen" COLREGS, *supra* note 214, 28 U.S.T. at 3468, 1050 U.N.T.S. at 22.

²¹⁷ CRAIG H. ALLEN, FARWELL'S RULES OF THE NAUTICAL ROAD 87 (8th ed. 2005).

²¹⁸ See *supra* notes 105–06 and accompanying text.

²¹⁹ Sea Shepherd Conservation Soc'y, Whaling Opponents Collide at Sea, *supra* note 106.

²²⁰ Animal Planet, Whale Wars: Close Quarters and Collisions, <http://animal.discovery.com/videos/whale-wars-close-quarters-and-collisions.html> (last visited June 11, 2010). The video shows the *Steve Irwin*, with Watson at the helm, attempting to catch the two Japanese ships in order to stop them from transferring a dead whale from one to another. At one point, Watson asks for more speed from his vessel, rather than reducing speed and backing out of the close-quarters situation. The *Yushin Maru No. 2* can be heard blowing the danger signal on the ship's whistle in an attempt to warn the *Steve Irwin* that it is too close.

Sea Shepherd has violated COLREGS and, in doing so, has violated international law. Because of its participation in UNCLOS, the Netherlands is obligated under article 94 to ensure that vessels flying the Dutch flag are abiding by international laws to ensure safety at sea and to enforce its jurisdiction over offending vessels. Japan has exerted pressure on the Netherlands to withdraw the *Steve Irwin*'s registration and deem it a flagless vessel.²²¹ Recently, some Dutch officials have begun to voice agreement with the Japanese government and are trying to amend Dutch law so that the *Steve Irwin*'s registration can be revoked.²²²

If the Netherlands revoked the *Steve Irwin*'s registration and no other nation issued the vessel a registration, it would be deemed a flagless vessel and would have little protection under international law. Stateless vessels operating on the high seas are "international pariahs" with no recognized right to operate freely on the high seas.²²³ All nations have the right to exercise jurisdiction over these flagless vessels and can board them at any time.²²⁴ "Jurisdiction exists *solely* as a consequence of the vessel's status as stateless. Such status makes the vessel subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those persons aboard to prosecution for violating the proscriptions."²²⁵ If the *Steve Irwin* were deemed stateless as a result of the Dutch government's revocation of its registration, the Japanese government could board the vessel in search of evidence of illegal activity any time the vessel operates on the high seas or in Japanese territorial water.

Australia has recently taken some action against Sea Shepherd, although it has not resulted in any criminal charges. The Australian Federal Police executed a search of Sea Shepherd's ship and seized documents, video footage, and more than 150 unedited videos as part of an investigation into the group's activities.²²⁶ The raid took place after Sea Shepherd returned from a trip to the Southern Ocean to engage the Japanese whaling fleet.²²⁷ The evidence seized, including footage shot by the Discovery network employees during production of their television show, could be used by Japan to bring charges against Sea Shepherd, although no charges have been forthcoming.²²⁸

²²¹ See *Gov't Wants Emergency Act Against 'Environmental Pirates,'* NIS NEWS BULL., June 27, 2009, http://www.nisnews.nl/public/270609_3.htm (reporting that Japan has repeatedly complained to the Dutch government about Sea Shepherd).

²²² *Id.*

²²³ Monroe Leigh, *Judicial Decisions*, 77 AM. J. INT'L L. 624, 631 (1983).

²²⁴ *Id.*

²²⁵ *United States v. Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir. 1982) (emphasis added).

²²⁶ David Barbeler & Andrew Darby, *Green Wants Answers on Anti-Whaling Vessel Raid*, SUN HERALD, Feb. 22, 2009, at 8.

²²⁷ *Id.*

²²⁸ *Id.*

VI. COMMENTARY

If Sea Shepherd is permitted to continue its actions against the Japanese whaling fleet without fear of prosecution from the international community, human lives will be lost in the Southern Ocean. Sea Shepherd's actions are extremely dangerous and could be deadly to the Japanese whalers as well as members of Sea Shepherd.

Sea temperatures in the Southern Ocean regularly fall below thirty-three degrees Fahrenheit.²²⁹ If a person were to fall overboard into water below thirty-three degrees without wearing survival equipment, he would lose function of his extremities within two minutes and lose the ability to keep himself afloat by kicking and paddling.²³⁰ Death from hypothermia can occur within fifteen minutes.²³¹ Survival times drop significantly if there is any kind of wind chill. The rugged environment in which whaling vessels and Sea Shepherd operate is unforgiving. For example, if Sea Shepherd successfully obstructed the propeller of one of the whaling ships and it drifted into an iceberg, puncturing a hole in the vessel's hull, any crewmember who abandoned the ship without proper equipment would almost assuredly perish from hypothermia before aid arrived. Similarly, if any Sea Shepherd crewmember were to fall overboard, perhaps after losing his balance while attempting to board a Japanese vessel, he would likely perish before the ship could execute a recovery maneuver. A Japanese crewmember was lost at sea and perished in 2009 after falling overboard, although Japan did not allege that it was the result of Sea Shepherd's antics.²³² If the international community at large does not act to stop the battle between Japanese whaling vessels and Sea Shepherd, it is likely that several lives will be lost in the cold waters of the Antarctic.

Australia and the Netherlands, as well as the United States, are opposed to the Japanese exploitation of the research loophole that is written into the IWC. They believe that Japan is carrying out commercial whaling under the guise of research. Because these countries believe Japan is violating the spirit of the law, Australia and the Netherlands have refused to take action against Sea Shepherd. Their refusal can be seen as a silent protest to the activities of Japan. By idly watching Sea Shepherd attack the Japanese whaling fleet and endanger the lives of the crew

²²⁹ See Matt Rosenberg, *The New Fifth Ocean*, ABOUT.COM, Aug. 20, 2009, <http://geography.about.com/od/learnabouttheearth/a/fifthocean.htm> (observing that the sea temperature of the Southern Ocean ranges from twenty-eight to fifty degrees Fahrenheit).

²³⁰ Whatcom Association of Kayak Enthusiasts, Hypothermia Rates, <http://www.wakekayak.org/content/safety/hypothermia.asp> (last visited June 11, 2010).

²³¹ *Id.*

²³² See Andrew Darby & AAP, *Japanese Whaler Lost at Sea*, SYDNEY MORNING HERALD, Jan. 6, 2009, at 7 (“Survival time in waters of zero degrees [Celsius] and a four metre swell is estimated at one hour.” (quoting Christ McMillan, spokeswoman for the Maritime New Zealand's Rescue Coordination Centre)).

onboard the whaling vessels, however, Australia and the Netherlands are violating international law and multilateral treaties that require they take action against unlawful acts at sea.

Japan's use of the research loophole in the IWC moratorium on commercial whaling may be disreputable, but it is not illegal. The research exception allows the member nations to set their own quotas for kills done for the sake of research and does not specify to what type of research the exception applies. Even though Japan is not following the spirit of the IWC's ban on commercial whaling, it is following the letter of the law and making use of an oversight in the drafting of the ban. If Australia and other member nations of the IWC strongly oppose Japan's research, as they clearly seem to, the appropriate action is not to ignore attacks made against these whaling vessels by Sea Shepherd that could potentially cost human life, but instead to petition the members of the IWC to change the provisions of the commercial ban and eliminate the research exception to the ban. Australia and other anti-whaling nations can change the provision by gaining the necessary votes to pass an amendment. Failing to take action against Sea Shepherd is not a reasonable response to Japan's activities.

There are several mechanisms available to prosecute members of Sea Shepherd for their actions against the Japanese whalers. The least viable option would be to prosecute Sea Shepherd crewmembers under UNCLOS for acts of piracy. Although Belgium successfully prosecuted Greenpeace for its antics,²³³ this is the only example of a court finding that an environmentalist group was acting for "private ends" during its protest of perceived harmful activities. The commonly recognized meaning of "private ends" is that the illegal act be done for financial gain, which is not one of Sea Shepherd's motivations. It would also be inappropriate to prosecute Sea Shepherd as pirates when SUA was enacted in part to prosecute environmental terrorists who are politically motivated and who traditionally fall outside of the definition of piracy under UNCLOS.²³⁴

Both Australia and the Netherlands, however, should take action against Sea Shepherd because they are obligated to under international law. Sea Shepherd flies the Dutch flag and, in doing so, is guaranteed certain protections from the Netherlands. As the flag state, the Netherlands is required under UNCLOS to ensure that the vessels registered with the Dutch government are operated safely. If it does not meet this requirement, the government is obligated to suspend or revoke that

²³³ See *supra* notes 163–65 and accompanying text.

²³⁴ See Menefee, *The Case of the Castle John*, *supra* note 143, at 16 ("The very absence of emotive terms, such as 'piracy' and 'maritime terrorism,' makes it more likely that [SUA] will be applied by ratifying or acceding States in appropriate environmental contexts, and thus less likely that an expanded definition of international piracy will come into use.").

registration. Paul Watson, as the captain of the *Steve Irwin*, has shown a disregard for his own vessel and the Japanese whaling vessels by operating the ship too close to the whaling vessels to be considered good seamanship. Watson claims that he no longer intentionally rams whaling vessels,²³⁵ but even if he can be believed, his tactics to place his vessel between the whales and the whaling ships is equally dangerous. A collision at sea could be disastrous, regardless of whether it was intentional or accidental, and if the collision damaged the structure of either vessel and caused it to take on water, crewmembers would perish if forced to abandon ship. By continuing to allow the *Steve Irwin* to fly the flag of the Netherlands, the Dutch government is affording Sea Shepherd protections under UNCLOS that it does not deserve because of the unsafe operation of its vessel. If the Dutch government were to revoke the *Steve Irwin*'s registration, the vessel could still operate, but under international law it would not be protected from searches and seizures by the law enforcement vessels of any nation when it operates on the high seas. This would effectively prohibit Sea Shepherd from continuing its antics.

In addition to losing its registration, the officers and crew of the *Steve Irwin* should be prosecuted under SUA for unlawful acts committed on the high seas. SUA was written precisely to deal with these types of activities. It was created with the intention that it be used by nations to prosecute or extradite individuals who commit criminal acts on the high seas without regard to their motivation. SUA specifically did not provide a definition of terrorism; instead, the drafters intended that acts that might not be traditionally considered terrorism or piracy would still fall within its umbrella of jurisdiction. Under the provisions of SUA, nations must either prosecute or extradite alleged offenders found within their jurisdiction. This provision was included to force nations to take action rather than be passive bystanders. Australia's obligations under SUA are not optional; the government cannot choose whether to abide by the provisions if Australia is a member nation to the treaty. If Australia is opposed to the Japanese whaling activities in the Southern Ocean, the appropriate venue for action is to petition the IWC to end the research program. Ignoring violations of international law by individuals who then seek safe harbor in Australian ports is a clear violation of the state's obligations under SUA.

Any nation that is a party to SUA may take action against members of Sea Shepherd that are found within that nation's jurisdictions. Australia is criticized by the Japanese government for failing to arrest Sea Shepherd crewmembers because Sea Shepherd's vessels frequently pull into Australian ports to refuel the vessels and take on supplies.²³⁶ Nevertheless,

²³⁵ Roeschke, *supra* note 32, at 107.

²³⁶ The Final Assault on the Cetacean Death Star (Feb. 1, 2010), www.seashepherd.org/news-and-media/editorial-100201-1.html.

the Sea Shepherd organization and its members frequent many other countries. In fact, Sea Shepherd's international headquarters is located in Friday Harbor, Washington, near the Canadian border.²³⁷ The U.S. government has the authority and the obligation under SUA to prosecute or extradite any crew member that travels to the United States after partaking in illegal activities as defined by SUA in support of the anti-whaling campaign.²³⁸

The endangerment of life at sea is unacceptable, regardless of the reasons cited for the violence. It is incumbent on Australia, the Netherlands, and the international community as a whole—including the United States—to use international mechanisms to stop Sea Shepherd's criminal activity in the Southern Ocean.

²³⁷ Sea Shepherd Conservation Society, Sea Shepherd Contacts, <http://www.seashepherd.org/contact/general-public.html> (last visited June 11, 2010).

²³⁸ See *supra* notes 180–95 and accompanying text (describing the provisions of SUA and its enforcement).