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Joseph Elliott Roeschke

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I. Introduction

"[F]rom hell's heart I stab at thee[,]" exclaimed Captain Ahab, as he cast his final harpoon at Moby Dick and subsequently plunged to the bottom of the sea with his whaling ship.\(^1\) Recently, it appears Paul Watson, founder of the Sea Shepherd Conservation Society (Sea Shepherd), would prefer to see the Japanese whaling fleet suffer a fate similar to Captain Ahab and his crew.\(^2\) Over the past thirty years, Watson has used his privately funded navy to enforce international conservation law by chasing, harassing, scuttling and in some cases ramming illegal whaling and fishing vessels on the high seas.\(^3\)

As of 2008, Watson has claimed responsibility for sinking ten "illegal" whaling ships.\(^4\) Watson asserts that the United Nations

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1. Herman Melville, Moby Dick; or, The Whale 468 (New York, Harper and Brothers 1851) (1851) (quoting portion of final dialogue from Captain Ahab).
3. See Khatchadourian, supra note 2, at 9 (explaining thirty-year history of Paul Watson and Sea Shepherd).

Since 1979, Sea Shepherd crew and agents have sent ten illegal whaling ships to the bottom:
- 1979 - The pirate whaler "Sierra" rammed and sunk in Portugal.
- 1980 - The outlaw whalers "Isba I" and "Isba II" sunk in Vigo, Spain.
- 1980 - The pirate whalers "Susan" and "Theresa" sunk in South Africa.
- 1981 - The illegal whaling ships "Hvalur 6" and "Hvalur 7" sunk in Iceland.
- 1998 - The pirate whaler "Morild" sunk in Norway.

Id.

(99)
World Charter for Nature (Charter for Nature) provides Sea Shepherd with the authority “to act on behalf of and enforce international conservation laws” in areas outside national jurisdiction. Sea Shepherd claims that the Japanese whaling fleet, like the ten sunken ships prior, engages in illegal whaling in violation of international conservation law. Sea Shepherd has made it clear that, if given the opportunity, it intends to stop the Japanese fleet from killing any additional whales; at what cost is yet to be seen.

Although whaling is generally prohibited today, Japan claims its annual whaling expedition is legal under a scientific research exception to the International Whaling Commission’s global moratorium on commercial whaling. Technically, Japan’s argument holds water; however, due to heightened exposure from environmental activist groups, Japan’s notorious annual trip to Antarctica has come under increased public scrutiny. During the 2007-08 Japanese whaling expeditions, Sea Shepherd and Greenpeace pursued the Japanese fleet, document and publicizing the fleet’s every move. This unwanted international attention for Japan climaxed when two Sea Shepherd volunteers boarded a Japanese whaling vessel and were detained for three days; the episode attracted the attention of media outlets worldwide.


10. See generally id. (documenting January 2008 incidents between Japanese whaling fleet and both Greenpeace and Sea Shepherd). See also Operation Migaloo, supra note 7 (discussing Sea Shepherd’s opposition to Japan’s whaling fleet); see also Scandalous Whale Hunt has Resumed, GREENPEACE, Feb. 6, 2008, http://www.greenpeace.org/usa/news/japan-resumes-scandalous-whale (discussing Greenpeace opposition to Japan’s whaling fleet).

Japan and other pro-whaling countries have strongly denounced the actions of Sea Shepard, labeling its coercive techniques as "acts of piracy" and "eco-terrorism" under the United Nations Convention on the Law of the Sea (UNCLOS) and the regulations of the International Whaling Commission (IWC). Sea Shepherd defends its actions under the United Nations World Charter for Nature, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and more recently, Federal Australian case law. Political compromise and a general lack of forethought, however, have resulted in an ambiguous amalgamation of international maritime law, which regulates whaling. This legal confusion is amplified by the fact that seven different countries claim ownership of Antarctica; consequently, with regards to whaling, governments and environmental activists alike seem to pick and choose which bodies of law to follow.

This Comment examines the various sources of international law on whaling, which attempt to wrestle with the convoluted area


Id.


14. See Khatchadourian, supra note 2, at 1-9 (discussing general confusion regarding relevant areas of law controlling International Whaling regulation).

of international environmental conservation law on the high seas. Specifically, this Comment analyzes whether, and to what extent, private groups like Sea Shepherd have legal authority to protect endangered whales in neutral waters outside the jurisdiction of any nation. Section II explains the history of whaling, including a synopsis of whaling in Japanese culture and a history of the Sea Shepherd Conservation Society. Section III outlines the relevant areas of international law that regulate whaling and environmental activism, which take place in the neutral coastal waters off of Antarctica. Section IV details the Japanese exploitation of the scientific research exception and provides a critical analysis of how the relevant regulations apply to individuals and private groups who enforce international conservation laws. Finally, Section V focuses on the effect Sea Shepherd has had on the Japanese scientific whaling program and suggests that Sea Shepherd should be allowed to continue enforcing international conservation law, but through less controversial means.

II. A HISTORY OF WHALING AND ITS GLOBAL OPPOSITION

The active hunting of whales has taken place for more than four hundred years. In the Eighteenth and Nineteenth centuries, the meat, baleen, bones, blubber and oil of a whale were all highly

16. For a further discussion of the underlying international legal principles that control the act of whaling on the open sea, see infra notes 68-141 and accompanying text.
17. For a critical analysis of how the relevant regulations apply to individuals or organizations that choose to enforce international conservation law, see infra notes 143-212 and accompanying text.
19. For a further discussion of the underlying international legal principles that control whaling on the open sea and environmental activism against whaling, see infra notes 68-141 and accompanying text.
20. For a critical analysis of how the relevant regulations apply to individuals or organizations that choose to enforce international conservation law, see infra notes 142-211 and accompanying text.
21. For a further discussion of the impact Sea Shepherd has had upon the international maritime legal community, and future environmental conservation, see infra notes 212-253 and accompanying text.
sought-after products in many civilizations. During the Nineteenth century, commercial whaling became a lucrative industry for many of the Scandinavian countries, Russia, Japan and certain areas of the United States. Public disgust with whaling began to develop and, consequently, since the 1970s, commercial whaling has faced a great deal of anti-whaling activism. Recently, however, the Sea Shepherd Conservation Society has faced increased criticism for its controversial high seas tactics taken against the Japanese whaling fleet in Antarctica in 2007 and 2008.

A. Prevalence of Whaling in Japanese Culture

According to the Institute of Cetacean Research, the Japanese "have been eating whale meat and utilizing whalebones, blubber and oil for more than two thousand years." Japan did not begin using organized offshore whaling, however, until 1868. In the 1950s Japan started using government funding to subsidize modern industrial whaling fleets, which grew extensively following the devastation of World War II. While Japan recovered economically from the war, whale meat provided a cheap but plentiful way to feed the large Japanese population. During 1947-49, two years


24. See Matera, supra note 23, at 26 (discussing U.S. commercial whaling history); see also Sarah Suhre, Note, Misguided Morality: The Repercussions of the International Whaling Commission’s Shift From a Policy of Regulation to One of Preservation, 12 GEO. INT’L ENVT'L. L. REV. 305, 307-08 (1999) (explaining eventual decline of U.S. commercial whaling industry). Because whale oil was considered the best machine lubricant and best smokeless burning oil, the U.S. industrial revolution and its high demand for oil, helped the U.S. to become a hotbed for whaling. Id. Later, due to the development of the U.S. petroleum industry, the U.S. whaling industry deteriorated. Id.

25. See Khatchadourian, supra note 2, at 9 (discussing thirty-year history of Paul Watson and Sea Shepherd).

26. See Fisher, supra note 2 (detailing events of January 2008 between Japanese whaling fleet and activist groups, Greenpeace and Sea Shepherd). See also Wakatsuki, supra note 12 (accusing Sea Shepherd of committing "act of terrorism").

27. Whales as Food & Japanese Culture, supra note 22 (discussing whaling history in Japan).

28. See id. (discussing development of modern commercial whaling in Japan).

29. See Khatchadourian, supra note 2, at 1 (discussing industrial history of Japanese whaling).

immediately following World War II, whale meat constituted 45% of the total meat consumption in Japan; consumption remained at 30% until the 1960s, but has subsequently decreased since. Industrial Japanese whaling fleets continued to harvest whales regularly for commercial purposes until 1986, the year the commercial whaling moratorium banned all whaling for commercial purposes.

Following the moratorium, Japan continued to practice whaling, claiming it was for scientific research, a legitimate purpose according to the International Whaling Commission (IWC). Between 2005 and 2006, the Japanese killed 2,113 whales in the name of scientific research. During the 2007-08 Japan Whale Research Program under Special Permit in the Antarctic (JARPA II), Japan planned to kill fifty Fin, fifty Humpback and 935 Minke whales. In response to immense public pressure, however, Japan later decided not to kill any Humpback whales. The Japanese government contends they are hunting whales off the coast of Antarctica in order to “ascertain when there will be enough to harvest for profit.” The whale meat, considered a “by-product” of the scientific research, is subsequently sold in markets, used for school lunches and placed in pet food. Each year, the Japanese Institute

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32. See Khatchadourian, supra note 2, at 1 (discussing industrial history of Japanese whaling).


34. See List of Special Permit Catches Since 1985, supra note 33 (listing numbers of whales killed by Japan under scientific research permits).

35. See Fisher, supra note 2 (detailing Japan’s JARPA II catch quotas for 2007-08 whaling season).

36. See id. (discussing public pressure upon Japan with regards to killing Humpback whales). Only after immense public pressure from numerous anti-whaling countries, did Japan decide to adjust its JARPA II catch quotas, so as not to kill the fifty humpback whales it originally planned to kill. Id.

37. Khatchadourian, supra note 2, at 1 (discussing Japan’s justification for scientific whaling program).

for Cetacean Research raises approximately 6.5 billion Yen, or 61 million dollars, from the sale of whale meat. The market for whale meat, however, seems to be weakening due to generational differences, health concerns and an awareness of the controversy surrounding whaling.

With regards to the consumption of whale meat, the Japanese government's advisory level for safe amounts of mercury found in food is 0.4 parts per million. Yet, one recent study found that the mercury content of whale meat ranged from ten to one-hundred parts per million, with one whale specimen found in a Japanese food market containing an alarming two thousand parts per million. Mercury consumption for long periods of time can cause birth defects, brain damage and even death.

Moreover, studies show, that while older Japanese generations continue to eat whale, younger generations rarely do so. In 2002, a Japanese newspaper found "4% of respondents ate whale meat 'sometimes', and 9% ate it 'infrequently' . . . 86% said they had never eaten it, or had stopped doing so in childhood." The younger Japanese generations eat less whale meat for two primary reasons: (1) knowledge of the global controversy surrounding Japanese

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40. See Martin Fackler, Mercury Taint Divides a Japanese Whaling Town, N.Y. Times, Feb. 21, 2008, at A10, available at 2008 WLNR 336455 (detailing history of whaling in Japan and study conducted on mercury levels within whale meat in Japan); see McMillian, supra note 39 (elaborating upon reasons for declining whale meat sales).

41. See Fackler, supra note 40, at A10 (detailing history of whaling in Japan and study conducted on mercury levels within whale meat in Japan).

42. See id. (explaining study conducted on mercury content within whale and dolphin meat in Japan).

43. See id. (stating long term effects of mercury consumption in food).

44. See id. (discussing lower rate of whale meat consumption amongst younger generations). See also McCurry, supra note 38 (detailing study conducted by Japanese newspaper showing how infrequently young people eat whale meat).

45. McCurry, supra note 38 (explaining study on frequency of young people's consumption of whale meat).
Japan’s whaling practice; and (2) education on the dangers associated with consuming the high levels of mercury found in whale meat.\textsuperscript{46}

Each year, despite the IWC’s rejection of the Japanese whale research program in Antarctica, Japan continues to issue itself scientific permits to kill endangered whales.\textsuperscript{47} IWC member countries have been extremely critical of the Japanese research program which, to date, has killed more than 11,000 whales,\textsuperscript{48} but failed to produce any substantial scientific data from twenty-two years of research.\textsuperscript{49}

B. Paul Watson & the Sea Shepherd Conservation Society

Paul Watson was an original cofounder of the environmental activist group Greenpeace in the early 1970s.\textsuperscript{50} After much disagreement over the appropriate level of aggression needed to protect the environment, Watson left Greenpeace in 1977 to form the Sea Shepherd Conservation Society.\textsuperscript{51} Watson took an increasingly aggressive approach to environmental activism, which differed drastically from Greenpeace’s conventional non-violent protest methods.\textsuperscript{52} Today, with Sea Shepherd “Paul Watson flies the Jolly Roger from his ship and boasts of ramming more boats than any living

\begin{itemize}
\item \textsuperscript{46} See Fackler, \textit{supra} note 40, at A10 (explaining educational efforts seeking to educate rural Japanese about rising mercury levels in dolphin and whale).
\item There was considerable disagreement within the Committee over most aspects of this research programme, including objectives, methodology, likelihood of success and effect on stocks . . . [i]n 2000, the Commission adopted a Resolution by majority strongly urging Japan to reconsider issuing the permit. It adopted a similar Resolution in 2001. A further Resolution was passed in 2003 (24 in favour, 21 against and 1 abstention). \textit{Id.}
\item \textsuperscript{48} See \textit{List of Special Permit Catches Since 1985, \textit{supra} note 33} (listing numbers of whales killed by Japan each year under scientific research permits).
\item \textsuperscript{49} See \textit{Scientific Permit Whaling, \textit{supra} note 47} (discussing persistent rejections of Japanese scientific research program by IWC member countries).
\item \textsuperscript{50} See \textit{Khatchadourian, \textit{supra} note 2, at 2} (explaining origin and Watson’s founding of Greenpeace).
\item \textsuperscript{51} See \textit{id.} at 6 (detailing origin of Greenpeace and Watson’s departure to form Sea Shepherd). Greenpeace members would protest by placing themselves between the whales and the harpooners in order to document the whole practice for public anti-whaling awareness. \textit{Id.}
\end{itemize}
seafarer, part of an anti-whaling crusade that even Greenpeace calls too radical.”53 Some of Sea Shepherd’s tactics include: firing smoke canisters onto decks, using nylon ropes to disable propellers, nailing shut drains that spill whale blood into the ocean and finally the antiquated "pirate-esque" ramming technique.54

Upon acquiring Sea Shepherd’s original ship in 1978, Watson filled its front hull with concrete in order to facilitate theramming of other ships.55 In 1979, off the coast of Portugal, Watson rammed a ship for the first time, a notorious illegal whaling vessel named the Sierra.56 Since sinking the Sierra, Watson and Sea Shepherd have gone on to ram or sink nine other “illegal” whaling vessels, and damage several others.57 According to Watson, Sea Shepherd has not purposely sunk a whaling vessel since 1998; other countries however, disagree.58

Officials in Iceland, Norway, Denmark, Japan, Canada and Costa Rica have publicly denounced Watson, comparing his actions to that of a common terrorist.59 Norway convicted Watson in the mid-1990s for attempting to scuttle, or sink, a Norwegian whaling vessel; Watson spent eighty-days in detention.60 Additionally, in 1986 the IWC banned Watson from its meetings after he “scuttled two . . . ships in Reykjavik’s harbor . . . an act of sabotage that many

54. See id. (discussing tactics used by Sea Shepherd against Japanese whaling fleet).
56. See id. (discussing events surrounding Sea Shepherd’s ramming of Sierra off coast of Portugal).
57. See Victory for the Whales in Berlin, supra note 4 (discussing self-proclaimed ship sinking history of Sea Shepherd).
58. See id. (detailing timeline for Sea Shepherds ship sinking history); See Khatchadourian, supra note 2, at 2 (discussing certain countries’ displeasure with Paul Watson and Sea Shepherd).
59. See Khatchadourian, supra note 2, at 2 (examining displeasure of countries with Paul Watson and Sea Shepherd).
60. See id. (convicting Watson under Norwegian law and detaining him for eighty days).
conservationists believe helped turn Icelandic public opinion against the cause of saving whales.”61

In 2007, when asked on a radio show about Sea Shepherd’s aggressive tactics, Watson stated:

[w]e intervene against illegal activities, and we are simply upholding international conservation law, and the United Nations World Charter for Nature allows for us to do that. It says that any nongovernmental organization, or individual, is empowered to uphold international conservation law. That’s why I’ve sunk ten whaling ships and destroyed tens of millions of dollars’ worth of illegal fishing gear, and I’m not in jail.62

Sea Shepherd conducts most of its environmental campaigns in international waters, “where the law is vague and enforcement is weak.”63 This controversial direct action has garnered a large number of supporters, “but also condemnation from governments and the label eco-terrorists.”64

In February 2007, Sea Shepherd used its high seas tactics to harass a Japanese whaling vessel, which eventually led to a controversial collision with the ship in Antarctica.65 Additionally, in January 2008, two Sea Shepherd volunteers managed to board a Japanese whaling vessel on the open sea, after which they were detained on a Japanese ship for three days in a highly publicized standoff; the volunteers were eventually released to Australian au-

61. Id. (explaining why IWC barred Paul Watson from further IWC meetings).
62. Id. at 8 (quoting Paul Watson on his asserted justification for Sea Shepherd’s actions).
63. Id. at 7 (explaining general vagueness and weak enforcement of law on open ocean and weak enforcement).
64. Katchadourian, supra note 2, at 2 (naming celebrity supporters of Sea Shepherd). Some of Sea Shepherd’s celebrity supporters include Mick Jagger, Sean Penn, Uma Thurman, William Shatner, Edward Norton, Pierce Brosnan, Aidan Quinn, and Orlando Bloom. Id. The Dalai Lama has even given Sea Shepherd a written endorsement supporting its actions. Id. See also Fisher, supra note 2 (discussing both public support and disdain for Paul Watson and Sea Shepherd).
65. See McGuirk, supra note 55 (detailing February 2007 events between Sea Shepherd and Japanese whaling fleet in Antarctic Ross Sea). In February 2007, Sea Shepherd used some of its high seas tactics to disable a Japanese whaling vessel, which eventually led to a highly controversial collision in the Antarctic Ross Sea with the Japanese ship. Id. Both ships suffered damages, and though there is no alleged connection, one day after Sea Shepherd’s Antarctic departure, the Japanese ship caught fire bringing an end to the 2007 Japanese whaling expedition. Id. Japan called Watson and Sea Shepherd “eco-terrorists”, and labeled their actions as acts of piracy, in violation of the U.N. Convention on the Law of the Seas. Id.
authorities and subsequently returned to Sea Shepard. Japan has threatened to bring suit for Sea Shepherd's alleged acts of eco-terrorism and piracy, but the jurisdiction under which they may be charged is yet to be determined.

III. LEGAL BACKGROUND

A. International Efforts to Regulate Whaling

The United States strictly prohibits commercial whaling. Additionally, most whale species are generally protected under the U.S. Endangered Species Act of 1973. Under international law, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) prohibits the commercial trade of any whale species, yet somehow international whaling continues. While the laws that regulate whaling in the U.S. are clear, the laws that regulate international whaling appear convoluted, outdated and often unenforceable.

66. See Fisher, supra note 2 (detailing January 2008 events between Japanese whaling fleet and activist groups Greenpeace and Sea Shepherd). The controversial events in 2007 failed to discourage a 2008 Japanese whaling expedition, and predictably, this past winter, Sea Shepherd again closely pursued the Japanese fleet through the Antarctic waters. On the run for the most part, the Japanese fleet kept its distance from the Sea Shepherd ship, the Steve Irwin, named after the late Australian conservationist. On January 15, 2008, however, two Sea Shepherd volunteers managed to board one of the Japanese ships, attempting to deliver a written document and the two men ended up being detained on the boat for three days under the laws of Japan, which preside over Japanese vessels at sea. After Japan's whaling received much unwanted public attention, the two men were released to Australian authorities and returned to Sea Shepherd.

67. See id. (detailing January 2008 events between Japanese whaling fleet and activist groups, Greenpeace and Sea Shepard). See also Wakatsuki, supra note 12 (accusing Sea Shepherd of committing "act of terrorism").


70. See Convention on International Trade in Endangered Species of Wild Fauna and Flora, Appendices I-III (July 1, 2008), http://www.cites.org/eng/app/E-Jul01.pdf (listing groups of cetaceans in Appendix I, which are most protected species in international trade).

71. See United Nations Environment Programme, Training Manual on International Environmental Law 283-91 (2001), available at http://www.unep.org/law/PDF/law_training_Manual.pdf (discussing confusion and subsequent non-binding nature of most international agreements regarding Antarctica). Although a number of countries have taken legislative actions for the protection and conservation of Polar Regions' ecosystems, not all these laws indicate clearly whether or not they were intended to implement the international instruments at domestic levels. In addition, given the non-
1. The IWC Commercial Whaling Moratorium of 1986

In 1946, the International Convention for the Regulation of Whaling (ICRW) created the International Whaling Commission (IWC), the administrative body responsible for the regulation of whaling on an international level.\(^7\) The purpose of the IWC is to “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”\(^7\) Currently, there are seventy-eight member nations in the IWC, including Japan, Australia and the United States.\(^7\)

Prior to the rise of environmental conservation in the 1960s, pro-whaling countries had little reason to appreciate the consequences of their whaling.\(^7\) Eventually, however, advancing science and environmental activism identified the near-extinction of many whale species, and a subsequent global moratorium was placed on commercial whaling in 1986.\(^7\) Today, most whale species are on the United States endangered species list, with a number of these whale species threatened by extinction.\(^7\) Since the moratorium, however, studies have shown that some previously endangered

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legally binding nature of most international arrangements regarding the Arctic, “implementing legislation” in the strict sense of the term is difficult to identify.

Id. at 90.

72. See generally International Convention for the Regulation of Whaling, supra note 33 (establishing International Whaling Commission as its regulatory body). The IWC is charged with the duty of being the sole regulatory body of the ICRW, and it is responsible for reviewing and revising necessary measures as they see fit. Id.


74. See id. (naming list of IWC member nations which are bound by IWC provisions).

75. See Japanese Institute for Cetacean Research, Jarpa II: The Second Phase of Japan’s Whale Research Program under Special Permit in the Antarctic, http://www.icwhale.org/FAQ.htm (last visited Oct. 19, 2008) (discussing devastation of blue whale species caused by humans). “The initial abundance (population before man started whaling) of blue whales has been estimated at about 200,000. The latest abundance estimate by the IWC Scientific Committee members is of only 1,700 . . . (less than 1% of the initial abundance)” Id.


whale populations have stabilized.78 For additional protection, the Southern Ocean Sanctuary was established in 1994 over Japan’s objection.79 The sanctuary prohibits all commercial whaling within its borders, consisting of nearly all of the Antarctic Southern Ocean.80

Despite the absolute ban on commercial whaling, some IWC member countries continue to engage in limited whaling due to a scientific “loophole” created in 1946.81 Article VIII of the ICRW provides a scientific research exception to the whaling moratorium.82 IWC member countries, under this provision, may issue special scientific permits to kill whales for research purposes.83 The scientific permit provision was originally created back in 1946 to allow proper supervision of the health of whale pods in order to promote and maintain their populations.84 Even though IWC member countries are required to submit scientific permit proposals for committee review, the member nation requesting the permit ultimately determines whether to issue itself the permit.85


80. See Whale Sanctuaries, supra note 79 (explaining purpose and goal of Southern Ocean Whale Sanctuary). “At the 46th (1994) Annual Meeting the IWC adopted the Southern Ocean Sanctuary as another area in which commercial whaling is prohibited.” Id. See also Antarctic Treaty, supra note 15 (listing Articles and subsequent text of Antarctic Treaty).

81. See International Convention for the Regulation of Whaling, supra note 33, at art. VIII, ¶ 1-3 (explaining IWC scientific research exception to commercial whaling moratorium).

82. See id. ¶ 1 (explaining IWC scientific research exception).

83. See id. (describing purpose for issuing scientific research permit).

84. See id. art. IV, ¶ 1-2 (establishing purpose and intent of scientific research on whales within IWC).

85. See id. art. VIII, ¶ 1 (explaining issuance of special scientific permits for whaling). According to the IWC, for countries holding a scientific whaling permit, “this [permit] overrides any other Commission regulations including the moratorium and sanctuaries.” Id.
Additionally, Article VIII of the ICRW “requires that the animals be utilised [sic] once the scientific data [has] been collected.”\textsuperscript{86} Accordingly, “utilised” means a whale killed for scientific research must be processed for meat or some other use, commercial or otherwise.\textsuperscript{87} Certain countries, primarily Japan, Norway and Iceland have continued to practice whaling, collectively killing more than 25,000 whales since 1986.\textsuperscript{88} Norway never agreed to the whaling moratorium, but instead decided to continue with its commercial whaling practice.\textsuperscript{89} Conversely, Japan and Iceland, bound by the moratorium, chose to conceal their whaling practices under the guise of scientific research.\textsuperscript{90}


\textsuperscript{87} \textit{See} International Convention for the Regulation of Whaling, supra note 33, at art. VIII, ¶ 2 (explaining what must be done with whales caught for scientific research).

"Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted." \textit{Id.}


\textsuperscript{89} \textit{See} International Whaling Commission, Catch Limits & Catches Taken: Information on Recent Catches Taken by Commercial, Aboriginal and Scientific Permit Whaling, http://www.iwcoffice.org/conservation/catches.htm (last visited Oct. 19, 2008) (explaining Norway’s objection to commercial whaling moratorium). “As Norway has lodged objections to the relevant items in the Schedule, it has exercised its right to set national catch limits for its coastal whaling operations for minke whales. The Commission passed a Resolution calling on Norway to halt all whaling activities under its jurisdiction.” \textit{Id.} \textit{See also} \textit{TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW}, supra note 71, at 229-30 (discussing ability to opt out of commercial whaling moratorium). Norway has opted out from the commercial whaling moratorium by using the “opting-out” procedure under Art. V(3) of the ICRW. \textit{See id.} at 230 (noting that Norway has opted out). This “opting-out” allows Norway to legally engage in commercial whaling despite the moratorium. \textit{Id.}

\textsuperscript{90} \textit{See} Ruth Davis, Commentary, \textit{Enforcing Australian law in Antarctica: the HSI litigation}, 8 MELB. J. OF INT’L L. 1, 7 (2007), \textit{available at} http://www.mjil.law.unimelb.edu.au/issues/archive/2007(1)/06Davis.pdf (discussing Japan’s agreement to sign IWC while continuing to whale under scientific research exception). Despite the IWC’s rejection of Japan’s scientific research plan for the 2007-08 whaling season, Japan issued a permit to itself. \textit{Id.} at 10.
2. The Antarctic Treaty System of 1959

Of the seven continents on Earth, Antarctica is the only continent containing no nation.91 Despite this fact, seven nations claim ownership to various sections of Antarctica.92 According to the Antarctic Treaty ratified in 1961, however, no single nation controls any part of Antarctica.93 The Antarctic Treaty controls all activity in Antarctica, and protects the Antarctic environment and its wildlife.94 The Antarctic Treaty also helps to avoid the legal and political confusion created when seven nations claim ownership to one piece of land.95

The Antarctic Treaty defers to the IWC regarding whaling regulations, but if a nation is not an IWC member nation, the provisions of the Antarctic Treaty govern any whaling that takes place within Antarctic waters.96 Unlike the easily acquired IWC scientific research permits, the Antarctic Treaty more strictly prohibits whaling within the Southern Ocean Whale Sanctuary,97 stating, "Antarctica shall be used for peaceful purposes only."98

3. Federal Australian Case Law

Recently, in Humane Society International, Inc. v. Kyodo Senpaku Kaisha, Ltd. (Humane Society),99 Australia became the first nation to

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92. See id. (listing countries claiming ownership to Antarctica: Argentina, Australia, Chile, France, Great Britain, New Zealand, and Norway).
93. See id. (explaining actual ownership status of Antarctica). See also Antarctic Treaty, supra note 15 (listing articles and subsequent text of Antarctic Treaty).
94. See Antarctic Treaty, supra note 15 (stating that Antarctica shall be used for peaceful purposes only with freedom of scientific investigation).
95. See The Antarctic Connection, supra note 91 (providing general information regarding Antarctica and Antarctic Treaty System). Forty-four nations representing two-thirds of the world’s population have signed and agreed to the privileges and responsibilities of the Antarctic Treaty. Id. Some of the original 1959 signees that agreed to be bound by the Antarctic Treaty include: Japan, Norway, Australia, and the United States of America. Id.
97. See id. (listing Articles and subsequent text of the Antarctic Treaty). See also id. (discussing strict legal repercussions under Antarctic Treaty for non-IWC member nations).
98. See Antarctic Treaty, supra note 15, at art. I ¶ 1 (listing text regarding proper usage of Antarctica).
hold Japan’s whaling in the Southern Ocean Sanctuary illegal. A Federal Australian court held that Japan’s Antarctic whaling was illegal under Australian law, and subsequently issued an injunction on the Japanese whaling within the Sanctuary, effective January 15, 2008. The court determined Japan had violated Australia’s Environment Protection and Biodiversity Conservation Act of 1999 (the EPBC Act), which makes it illegal to “kill, injure, or interfere with a cetacean [a whale]” within the Australian Whale Sanctuary.

The two main issues in Humane Society were: (1) whether Japan had violated the EPBC Act; and (2) whether Australia had power to impose legal authority over the Japanese whaling fleet. Although it was easy for the court to find Japan in violation of the EPBC, which prohibits killing whales within the Australian Whale Sanctuary for any reason, the difficult issue concerned Australia’s claim of sovereignty and subsequent authority over the Australian-Antarctic Territory. Australia argued that Antarctica’s coastal waters were part of Australia’s exclusive economic zone (EEZ), and thus any Japanese whaling within its borders fell under Australian authority.

According to the Australian court, Australia’s EEZ “extends to the waters adjacent to the baseline of Australia’s external territories, including, importantly for this matter, the Australian Antarctic Territory.” After analyzing both the United Nations Convention

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101. See id. (stating order of Australian court and subsequent injunction).


104. See id. (noting two main issues surrounding case).

105. See id. (noting primary difficulties that arose).

106. See id. (discussing Japan’s refusal to recognize Australia’s claim to Australian Antarctic Territory). Despite the fact that Australia is close in proximity to significant portions of Antarctica, only four nations recognize Australia’s claim to the Australian Antarctic Territory, Japan is not one of these nations. Id.

on the Law of the Sea (UNCLOS) and the EPBC Act’s provisions, the court determined Australia’s EEZ and subsequent Whale Sanctuary extended into the Antarctic territory. Therefore, the court concluded, because the Japanese killed whales within the Australian Antarctic Territory, they violated the Australian EPBC Act.

Experts throughout the anti-whaling community consider *Humane Society* to be a landmark decision for environmental conservation; skeptics, however, believe this decision to be futile because of the practical inabilities of Australia to adequately enforce the injunction. Perhaps most significantly, Japan has publicly expressed its intention to ignore the Australian Court’s ruling.

B. Legal Restrictions on Environmental Activism

In recent years, Japan has routinely accused Sea Shepherd of eco-terrorism and acts of piracy, often times threatening to bring suit in response to these acts. The following legal provisions establish coastal state “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.” *Id.* See also id. pt. V, art. 56 (stating language on Rights, jurisdiction and duties of coastal State in exclusive economic zone).

108. See *Humane Society*, http://www.iilj.org/courses/documents/Humane_Societyvs.Kyodo.pdf (quoting court’s discussion on Australia’s EEZ). “By virtue of the statutory definition in §225 of the EPBC Act, the waters within 200 nautical miles from the Australian Antarctic Territory land mass are within the Australian Whale Sanctuary.” *Id.*

109. See id. (discussing Federal Australian court’s holding).

110. See id. (concluding practical difficulties with enforcement are no reason to avoid issuing injunction upon Japanese whaling fleet). The judge considered the complexities of enforcing the injunction upon Japan, but nonetheless stated, “I cannot conclude that the practical difficulty of enforcement is a reason to withhold relief.” *Id.*


tablish the rights and boundaries involved with claims of eco-terrorism and piracy stemming from environmental activism at sea.113

1. United Nations World Charter for Nature

The United Nations World Charter for Nature (Charter for Nature) provides guidelines for the international protection of nature.114 Section 21 of the Charter states that “individuals, [and] groups [shall] . . . [s]afeguard and conserve nature in areas beyond national jurisdiction[.]”115 From a textual standpoint, section 21 includes the conservation of endangered species within Antarctic waters.116 Furthermore, section 24 states that “acting individually . . . each person shall strive to ensure that the objectives and requirements of the [Charter for Nature] are met.”117 The U.N. General Assembly adopted the Charter for Nature on November 9, 1982.118

Sea Shepherd maintains that the Charter for Nature provides authority for individuals and conservation groups to “act on behalf of and enforce international conservation laws.”119 Sea Shepherd cites the Charter for Nature as its principal authority to justify its law enforcement role on the high seas.120 Conversely, opponents of Sea Shepherd downplay the authority of the Charter for Nature, claiming it merely provides guidance from the United Nations and contains no real authority.121

2. Eco-terrorism Legislation

As recently as 2005, the FBI considered environmental and animal rights activists to be the number one domestic terrorism

113. For a discussion of the legal provisions regarding claims of eco-terrorism and piracy, see infra notes 123-142 and accompanying text.
115. Id. § 21(e) (discussing enforcement rights of individuals under World Charter for Nature).
117. See id. § 24 (discussing further general provisions of World Charter for Nature).
118. See id. (noting adoption by U.N. General Assembly).
119. International Laws & Charters, supra note 5 (stating Sea Shepherd’s guidance for its authority to enforce conservation law).
120. See id. (citing authority for Sea Shepherd’s actions).
121. See Khatchadourian, supra note 2, at 9 (discussing opposition to Sea Shepherd’s asserted legal authority).
threat.\textsuperscript{122} The FBI defines eco-terrorism as “the use or threatened use of violence of a criminal nature against innocent victims or property by an environmentally-oriented, subnational group for environmental-political reasons . . .”\textsuperscript{123} The spectrum of eco-terrorism ranges from non-violent sit-ins to serious crimes such as arson, burglary and death threats.\textsuperscript{124} John Lewis, an FBI director and top official in charge of domestic terrorism issues, claims that from 1990 to 2004 “animal and environmental rights extremists have claimed credit for more than 1,200 [attacks], resulting in millions of dollars of damages and monetary loss.”\textsuperscript{125}

In response to rising concerns over the behavior of extreme environmental activists, state and federal legislatures passed legislation to impose increased penalties upon the criminal activities of extremist environmental groups.\textsuperscript{126} The Animal Enterprise Protection Act of 1992 (AEPA)\textsuperscript{127} and the Animal Enterprise Terrorism Act of 2006 (AETA)\textsuperscript{128} were promulgated primarily to hold accountable the domestic criminal actions of the Animal Liberation


\textsuperscript{125} Schuster, supra note 122 (noting amount of damage caused domestically by eco-terrorism); see also Jeffrey Paul & Ellen Frankel Paul, \textit{Why Animal Experimentation Matters: The Use of Animals in Medical Research} 11 (2001) (noting damage caused by eco-terrorism in United States between 1980-1999). In the United States, damage created by environmentalist sabotage between 1980 and 1999 amounted to $42.8 million. \textit{Id.}


In response to this growing concern over the actions of animal rights activists there has been legislation passed on both the state and federal level that impose harsher penalties on those whose actions are motivated by a desire to save animals. Many of these laws have come under attack both for their constitutionality and their far reaching effects. \textit{Id.}


Front (ALF) and the Earth Liberation Front (ELF), two extremist environmental groups operating within the United States.\textsuperscript{129} The AEPA made it an offense, punishable by up to one year in prison, "to physically disrupt an animal enterprise and cause the owners to lose $10,000 or more."\textsuperscript{130}


Environmental activism that takes place at sea adopts a dimension that transcends the domestic laws of any country: the law of the open sea.\textsuperscript{131} The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is an international agreement concerning traditional aspects of ocean governance and uses.\textsuperscript{132} The provisions of UNCLOS "apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State . . . ."\textsuperscript{133} According to the language of UNCLOS, because Antarctica contains no state or nation, any activity within Antarctic waters is subject to the UNCLOS provisions.\textsuperscript{134}

For environmental confrontations at sea, Article 87 of UNCLOS provides that "[t]he high seas are open to all States,"\textsuperscript{135} and further, "[t]he high seas shall be reserved for peaceful purposes."\textsuperscript{136} With Article 87 in mind, UNCLOS defines acts of piracy as, "any illegal acts of violence or detention . . . committed for private ends

\textsuperscript{129} See Rutmanis, \textit{supra} note 126 (describing legislative response to increased ALF and ELF activity).

\textsuperscript{130} See Runyon, \textit{supra} note 124 (discussing punishment provisions of AEPA).


\textsuperscript{132} See id. (discussing international laws of sea); see also \textit{Training Manual on International Environmental Law}, \textit{supra} note 71, at 222 (detailing various UNCLOS provisions). "UNCLOS is a massive treaty. It consists of 320 articles in 17 separate parts and has 9 Annexes. As a 'Constitution for the Oceans,' the Convention deals with a much broader range of issues than those related to marine biodiversity and sustainable fisheries . . . ." \textit{Id.}


\textsuperscript{135} United Nations Convention on the Law of the Sea, \textit{supra} note 107, pt. VII, §1, art. 87 (quoting language of provision titled "Freedom of the high seas"). "The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law." \textit{Id.}

\textsuperscript{136} See id. pt. VII, §1, art. 88 (quoting language of provision titled "Reservation of the high seas for peaceful purposes"). "The high seas shall be reserved for peaceful purposes." \textit{Id.}
by the crew or the passengers of a private ship . . . on the high seas, against another ship . . . or against persons or property on board such ship . . . in a place outside the jurisdiction of any State[.]”

In addition to the general duty to repress piracy under UNCLOS, flag-states are responsible for controlling any sea vessels that register under the flag of that flag-state or nation. At sea, that registered ship is then considered a part of the flag-state itself, and legal jurisdiction under that country would apply accordingly. For disputes arising under UNCLOS, both the International Tribunal for the Law of the Sea (TLS) and the International Court of Justice (ICJ) provide suitable venues for relief.

IV. Analysis

If a law applies in theory, but a nation fails to enforce it, does anyone notice when it fails? It has been said, laws that lack enforcement power are often worth less than the paper on which they are printed. Nearly all of the international laws discussed thus far consist primarily of collections of agreements by certain nations, which member nations pick and choose to follow. This form of lawlessness stems from the fact that these laws are devoid of any adequate enforcement powers. Consequently, it is difficult to ascertain which laws actually control whaling in the Antarctic Austr-

137. See id. pt. VII, §1, art. 101 (quoting language of provision titled “Definition of piracy”).

138. See id. pt. VII, §1, art. 100 (quoting language of provision titled “Duty to cooperate in the repression of piracy”). Likewise, UNCLOS requires that “[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” Id.


140. See id. pt. VII, §1, art. 91 (discussing nationality status for ships). If a ship does not retain a flag, or its flag is taken away for some reason, the ship is fair game on the open sea, meaning if attacked, no country will be required to come to the ship’s aid. Id.

141. See id. pt. XI, §5, art. 186-191, pt. XV (discussing procedure for dispute resolution under UNCLOS). Japan has publicly stated it considers Australia to be in the wrong under their flag state responsibilities, for assisting Sea Shepherd in any fashion. Id.

142. See TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, supra note 71, at 39-47 (detailing practical difficulties associated with enforcing environmental agreements).

143. See id. (discussing inefficiency of laws that lack enforcement powers).

144. See id. at 290 (describing non-legally binding nature of most international agreements with Antarctica).
lian territory. One thing is clear, however: the IWC "scientific research" loophole mocks international conservation law. Without the security of the scientific research exception, Japan's whaling practice would be in violation of a number of conservation laws that private groups, such as Sea Shepherd, would be free to enforce.

Three questions concerning this dilemma deserve analysis: (1) whether the scientific research exception to the commercial whaling moratorium should be repealed; (2) whether Sea Shepherd and other privately funded groups, at their own risk, should be allowed to enforce international conservation laws that would otherwise not be enforced; and (3) whether Sea Shepherds high seas tactics should be considered appropriate means of enforcement, or merely acts of eco-terrorism and piracy.

A. Exploitation of the Scientific Research Exception

Japan is currently taking advantage of the scientific research exception to the IWC commercial whaling moratorium. The Japanese whaling program has taken place every year since the moratorium began in 1986, yet Japan has produced almost no peer-reviewed studies explaining their scientific findings. The Japan

145. See id. (discussing non-legally binding nature of most international agreements with Antarctic which makes it difficult to determine which laws are controlling).

146. See International Convention for the Regulation of Whaling, supra note 33, art. VIII, ¶ 1-3 (explaining issuance of special scientific permits for whaling under IWC).


148. For a discussion of the analysis of the scientific research exception to the commercial whaling moratorium and whether Sea Shepherd's enforcement of international conservation law is appropriate or an act of eco-terrorism, see supra notes 142-211 and accompanying text.

149. See generally International Convention for the Regulation of Whaling, supra note 33, art. VIII, ¶¶ 1-3 (explaining proper procedure and issuance of special scientific permits for whaling). Japan is not using the scientific research exception for the purpose it was originally intended. Id.

nese government "say[s] that they are hunting whales off Antarctica in order to ascertain when there will be enough to harvest for profit."\(^{151}\) Since killing whales for commercial purposes became illegal, however, more than 11,000 whales have been killed, processed and sold for consumption in Japan under the scientific research exception.\(^{152}\) Killing whales seems counterintuitive to a study meant to determine "when there will be enough to harvest for profit" in the future,\(^{153}\) as it only decreases the likelihood that whale populations will increase enough to justify lifting the moratorium.\(^{154}\)

Japan further defends commercial whaling by arguing that whales eat so much marine life that humans consequently suffer from depleted fisheries.\(^{155}\) Yet scientists have labeled this argument "simplistic and erroneous," finding that humans, not whales, are guilty of depleting the world's fisheries.\(^{156}\)

It is unnecessary for Japan to utilize lethal research methods to determine whale population numbers in Antarctica.\(^{157}\) Non-lethal methods of scientific research are equally successful in determining the growth of whale stocks.\(^{158}\) If Japan is truly eager to resume whaling for profit, it should support the growth of whale populations rather than contribute to their further demise, because with-

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151. Khatchadourian, supra note 2, at 2 (detailing ultimate goal of Japanese scientific research upon whales).

152. See List of Special Permit Catches Since 1985, supra note 33 (listing numbers of whales killed by Japan each year under scientific research permits).

153. Khatchadourian, supra note 2, at 2 (explaining that ultimate goal of Japanese scientific research on whales is to eventually harvest them for profit). For the IWC to potentially lift the commercial whaling moratorium, there would need to be enough whales on the planet to establish a sustainable stock of whales. Id.

154. See id. (discussing controversial reasoning behind Japanese scientific whaling). See also List of Special Permit Catches Since 1985, supra note 33 (listing numbers of whales killed each year by different countries under scientific research permits).

155. See Japan's Whale Research: What's it all about?, supra note 8 (explaining Japan's alternate argument for killing whales for commercial purposes).


157. See McCurry, supra note 38 (detailing study which revealed non-lethal methods of research could be just as effective to conduct Japan's study of whales).

158. See id. (discussing alternative non-lethal research methods for studying whales). "Australian experts recently completed a ten-year study of whales' place in the ecosystem without killing a single animal, and they insist that Japan could cease using their current methods and still be able to collect all the data they need." Id.
out population growth the whaling moratorium could never be lifted.\textsuperscript{159}

To avoid further exploitation, the IWC should either repeal the entire self-issuing scientific research exception, or prohibit all lethal methods of scientific research until whale populations are no longer endangered.\textsuperscript{160} If these changes were implemented, countries such as Japan could no longer disguise their commercial whaling practices as "scientific research."\textsuperscript{161}

B. Privately Enforcing International Conservation Law

Should an individual or non-governmental organization be allowed to enforce international conservation law with its own time and money?\textsuperscript{162} Sea Shepherd answers this question affirmatively, and has continued to answer this question through practice, not theory, over the course of the last thirty years.\textsuperscript{163} Sea Shepherd’s enforcement methods have been controversial and criticized, even illegal at times, yet praised and highly-respected as well.\textsuperscript{164}

Paul Watson and Sea Shepherd have limited legal authority to enforce international conservation law in neutral waters.\textsuperscript{165} Yet, the recent Australian decision in \textit{Humane Society} and the increased public ire of the global community over Japan’s whaling, together, lend

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\textsuperscript{159} See \textit{generally} International Convention for the Regulation of Whaling, supra note 33 (explaining purpose of IWC and subsequent commercial whaling moratorium). The IWC is charged with the duty of being the sole regulatory body of the ICRW, and it is responsible for reviewing and revising necessary measures as they see fit. \textit{Id.}


"Now therefore the commission calls upon ... the Government of Japan to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary." \textit{Id.}

\textsuperscript{161} See \textit{id.} (requesting Japan to cease using lethal methods of research on whales).

\textsuperscript{162} See \textit{Training Manual on International Environmental Law}, supra note 71, at 229 (discussing enforcement responsibilities of member nations to ICRW and IWC).

\textsuperscript{163} See \textit{generally} Khatchadourian, supra note 2 (detailing thirty-year history of Paul Watson and Sea Shepherd).

\textsuperscript{164} See \textit{id.} at 3 (discussing controversy and alternative praise surrounding Sea Shepherd’s choice of enforcement tactics used). "'I think he's a hero,' Peter Singer, the Princeton ethicist and the author of 'Animal Liberation,' [said]." \textit{Id.} at 2.

\textsuperscript{165} See United Nations World Charter for Nature, supra note 13 (providing legal authority for non-governmental groups to enforce conservation law).
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increased weight to Sea Shepherd’s authority.\textsuperscript{166} Accordingly, Sea Shepherd’s legal authority appears sufficient to justify reasonably interfering with the Japanese whaling fleet in the Australian Antarctic Territory.\textsuperscript{167}

After ramming the Sierra in 1979 on the basis of morality, Sea Shepherd in the early 1990s began to assert legal authority for its actions under the U.N. World Charter for Nature.\textsuperscript{168} The Charter for Nature states that individuals and groups may help “[s]afeguard and conserve nature in areas beyond national jurisdiction.”\textsuperscript{169} Critics, however, are quick to assert that the Charter for Nature “is not a license for vigilantism.”\textsuperscript{170} The Charter for Nature contains no enforcement provisions, and thus, like most international law, is effectively non-binding.\textsuperscript{171}

Additionally, the Charter for Nature states that individuals should take action “to the extent they are able,” a provision that one critic believes “Watson interprets to mean physical capability but . . . is obviously meant to encompass legal authority as well.”\textsuperscript{172} Sea Shepherd clearly has the physical capabilities to enforce international conservation law, because they have done so for thirty years.\textsuperscript{173} As for Sea Shepherd’s legal authority, however, most countries do not consider “ramming, disabling, or scuttling ships to


\textsuperscript{167} \textit{Training Manual on International Environmental Law}, \textit{supra} note 71, at 3 (detailing relevant strength of “charter” as compared to other forms of international law).

The term “charter” is used for particularly formal and solemn instruments, such as the constituent treaty of an international organisation. The term itself has an emotive content that goes back to the Magna Carta of 1215 . . . [t]he 1982 World Charter for Nature is a resolution adopted by the General Assembly of the United Nations and is not a treaty.

\textit{Id.}

\textsuperscript{168} See \textit{Khatchadourian, \textit{supra}} note 2, at 7 (asserting legal authority for Sea Shepherds actions). Paul Watson and Sea Shepherd cite the U.N. World Charter for Nature as justification for their enforcement role taken against Japanese whaling in Antarctica. \textit{Id.}


\textsuperscript{170} Khatchadourian, \textit{supra} note 2, at 7 (interpreting Charter for Nature’s authority).

\textsuperscript{171} \textit{Id.} (explaining non-binding nature of World Charter for Nature).

\textsuperscript{172} \textit{Id.} (quoting critic’s interpretation of Charter for Nature’s authority).

\textsuperscript{173} \textit{Id.} (detailing thirty year history of Paul Watson and Sea Shepherd).

be legal activities, and, except on rare occasions, even naval ships cannot lawfully interfere with foreign vessels on the high seas."\(^{174}\) David Caron, Director of the Law of the Sea Institute at the University of California at Berkeley believes Watson’s interpretation is "[c]learly wrong [and] . . . [t]here is no ambiguity."\(^{175}\)

While most countries will not support the tactics utilized by Sea Shepherd, at the same time, it appears no anti-whaling country wants to actually preclude Sea Shepherd from enforcing laws that protect endangered species.\(^{176}\) Further, now that Sea Shepherd appears to have won some support from the Australian government in *Humane Society*, it is likely Sea Shepherd will be able to continue enforcing the whaling ban within the Southern Ocean Sanctuary.\(^{177}\)

While Watson and Sea Shepherd have managed to elude significant punishment for the ten ships they have rammed or disabled, sailing forward they should refrain from intentionally ramming future ships in the name of international conservation law.\(^{178}\) Using other less volatile means, which are acceptable under the laws of the sea, would be more appropriate for enforcing international conservation laws under the Charter for Nature.\(^{179}\) Nonetheless, until a country or international body enforces international conservation law on the high seas, which is unlikely due to its cost, private groups and individuals should be allowed to enforce international conservation laws through private funding and at their own risk.\(^{180}\)

C. Appropriate Enforcement v. Eco-terrorism and Piracy

Over the past thirty years, Paul Watson and Sea Shepherd have committed acts that would be considered illegal in a number of

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175. *Id.* (quoting opinion of David Caron on Paul Watson’s interpretation of World Charter for Nature).
176. See generally *id.* (discussing general failure to punish Watson and Sea Shepherd for actions taken).
178. See Khatchadourian, *supra* note 2, at 7 (noting that countries do not consider actions taken by Sea Shepherd to be legal enforcement actions).
179. See *id.* (discussing legality under UNCLOS).
countries, such as ramming or scuttling ships. Still, Watson and Sea Shepherd have managed to avoid any major punishment.

Why do they get away with these actions? Some reasons include the difficult and costly nature of enforcing international laws, and the fact that Sea Shepherd directs its tactics at property, not people, which tends to be less controversial. Recently, however, Japan has questioned Sea Shepherd’s enforcement tactics. Following the January 2008 Japanese detention of two Sea Shepherd volunteers, Japan threatened to bring claims of eco-terrorism and piracy against Sea Shepherd. While these claims have legal standing, they appear to be geared more towards generating public sympathy for Japan than anything else.

1. Japanese Claims of Eco-terrorism

In response to Japanese claims of eco-terrorism, Paul Watson has stated, “it is now routine for every ecologically destructive industry in the world to label their critics as eco-terrorists so that comment is easily dismissed.” According to existing legislation on

181. See Khatchadourian, supra note 2, at 2 (discussing denouncement of Paul Watson’s tactics by other countries). In reference to Watson, Kristjan Loftsson, managing director of Hvalur, Iceland’s largest whaling company said “[h]e is persona non grata in Iceland,” meaning an unwelcome person. Id.
182. See id. at 7 (detailing lack of severe international punishment upon Paul Watson and Sea Shepherd).
183. See id. at 1 (explaining intent of Sea Shepherd’s actions which are directed at whaling vessels and illegal poaching equipment, not people). See also Training Manual on International Environmental Law, supra note 71, at 39-47 (detailing practical difficulties associated with enforcing environmental agreements).
184. See Australia Backs Eco-Terrorism: Whalers, supra note 112 (explaining Japanese displeasure with Australian government’s assistance of Sea Shepherd). Japan refuses to acknowledge that Sea Shepherd has any authority to enforce international conservation law and subsequently denounces all Sea Shepherd actions taken against Japan. Id.
185. See id. (explaining Japanese displeasure with Australian government’s assistance of Sea Shepherd). Japanese Fisheries Agency chief of whaling Hideki Moronuki said, “[t]he Australian government helped an eco-terrorist group by providing full support . . . [i]t was simply inappropriate.” Id. Japan has routinely accused Sea Shepherd of eco-terrorism, and publicly stated they believe the Australian government is wrong to support the “terrorist group” Sea Shepherd in any fashion. Id.
"eco-terrorism," Watson, to some extent, is correct in his assessment.\footnote{188}

Today, ostensible "eco-terrorism" legislation exists exclusively in the United States.\footnote{189} Some commentators actually believe anti-environmentalists created the term "eco-terrorism" as a "buzzword" to associate negativity with environmental activism in the United States.\footnote{190} Under international law, there is no common definition for the term "terrorism," let alone a definition for the term "eco-terrorism;" thus, there is little international focus placed upon the term "eco-terrorism."\footnote{191} According to Boaz Ganor, Director of the International Policy Institute for Counter-Terrorism, many definitions of terrorism proposed in international courts of law "state[ ] that terrorism is the intentional use of, or threat to use violence

piracy by Hiroshi Hatanaka Director General of Institute for Cetacean Research for Japanese government).


\footnote{189} For a discussion of international terrorism and eco-terrorism, see infra notes 190-200 and accompanying text (discussing lack of international attention on eco-terrorism). See also Michael Penders, President, Envl. Sec. Int’l, Paper on Eco-Terrorism, Environmental Crime, and International Environmental Security at NATO Round Table Speech (Mar. 20, 2003), available at http://www.nato.int/docu/speech/2003/s030320g.htm (calling upon other countries to develop eco-terrorism laws so United States can better control threat of domestic terrorism).

\footnote{190} See The Birth of a Buzz Word: Eco-Terrorism, supra note 188 (discussing possibility that eco-terrorism was term coined by Ron Arnold to create negative image for environmentalists).


[To date there has been no international consensus on a comprehensive international legal definition of terrorism ... [t]he absence of agreement on a comprehensive definition of terrorism under international law suggests in turn that the characterization of an act or situation as one of terrorism cannot in and of itself serve as a basis for defining the international legal obligations of states.

\textit{Id.}

against civilians or against civilian targets, in order to attain political aims."\textsuperscript{192} Thus, while the United States' definition for terrorism includes violence against people or property, the proposed international definitions often include only violence against people.\textsuperscript{193} Significantly, Sea Shepherd does not purposely commit violence against people.\textsuperscript{194}

Today, Americans tend to have a heightened, almost Pavlovian, sensitivity to any use of the word "terrorist."\textsuperscript{195} It is conceivable that Japan, hoping to acquire U.S. assistance, labeled Sea Shepherd "eco-terrorists" in order to raise the ire of the American public. A surge of "eco-terrorism" legislation was proposed to Congress following the attacks of September 11, 2001, though nearly all of it was rejected.\textsuperscript{196} The U.S. eco-terrorism legislation which passed is focused on reducing the problems presented by the ALF and ELF within the United States, such as tree spiking, setting fires to animal testing facilities and using explosives on sport utility vehicles.\textsuperscript{197}

In the United States, there are few enforceable eco-terrorism laws that exist, and the laws that do exist aim to control domestic crimes against legitimate animal enterprises; Japan's whaling is

\textsuperscript{192} Boaz Ganor, \textit{Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?}, 3 POLICE PRAC. & RES. 287 (2002), available at \url{http://www.ict.org.il/ResearchPublications/tabid/64/Articlsid/432/currentpage/1/Default.aspx} (suggesting proper international definition for terrorism). "Proposing a Definition of Terrorism - The question is whether it is at all possible to arrive at an exhaustive and objective definition of terrorism . . . ." \textit{Id}.

\textsuperscript{193} See \textit{id.} (comparing international definition of terrorism to U.S. definition of terrorism). According to Boaz Ganor, if international laws on eco-terrorism were to be created, they likely would only incorporate violence against people. \textit{Id}.


neither domestic nor legitimate. Sea Shepherd’s conservation activities against Japan took place outside the U.S., and the actions were aimed at preventing the killing of endangered species. Therefore, Sea Shepherd’s actions would not fall under the aim or jurisdiction of the American-made eco-terrorism laws. Although it may be appropriate to punish Watson and Sea Shepherd for their actions, U.S. eco-terrorism laws are inappropriate here and Japan would be best suited to pursue relief under a different body of law.

2. Japanese Claims of Piracy

Japan claims Watson and two Sea Shepherd volunteers committed acts of piracy in 2008, when Watson ordered two Sea Shepherd volunteers to board a Japanese whaling vessel without permission. Japan asserts that Sea Shepherd’s actions took place on the high seas and thus UNCLOS applies; conversely, according to Humane Society, Australia believes the activities took place in Australian waters, and thus Australian law applies. While Japan could potentially bring claims of piracy against Watson and the volunteers, they would likely fail.

Under UNCLOS, either the International Tribunal for the Law of the Sea (TLS) or the International Court of Justice (ICJ) are considered appropriate venues for any piracy claims. If Watson

198. For a discussion of the illegal nature of Japanese whaling under international law, see supra note 146 and accompanying text (discussing illegal nature of Japan’s whaling practice under numerous international laws).

199. See Animal Enterprise Protection Act, 18 U.S.C. §43(b) (establishing punishments for animal enterprise terrorism); see also H.R. 4239 (discussing main purpose of AETA geared towards ALF-type and ELF-type offenses).

200. For a discussion of the scope of U.S. eco-terrorism laws, see supra note 196 and accompanying text (defining scope of U.S. eco-terrorism legislation and how legislation does not apply to Sea Shepherd’s actions against Japan in Antarctica).

201. See Lah, supra note 11 (detailing public attention on Japanese detainment of two Sea Shepherd volunteers); see also Japanese Detain Whaling Activists, supra note 2 (discussing Japanese detainment of two Sea Shepherd protestors).


203. See United Nations Convention on the Law of the Sea, supra note 107, pt. XV, art. 279-99 (discussing provisions regarding settlement of disputes under UNCLOS). Sea Shepherd is careful to follow the U.N. Convention on the Laws of the Sea, and it is unlikely that Japan could mount a successful case. See id.

204. See id. (identifying proper venues for settlement of disputes under UNCLOS). It is unlikely that Watson and the two men would appear in a Japanese court, and Australia is unlikely to lay charges of piracy because they seem to support Sea Shepherd in some fashion. See generally id. Complexities with the jurisdic-
and the two volunteers actually appear in either the TLS or the ICJ, then Watson, not the volunteers, could potentially be charged with committing acts of piracy. Watson has publicly stated that Japanese claims of piracy fail to intimidate him. Watson has reason to be confident, due to the fact that acts of piracy under UNCLOS require "illegal acts of violence or detention, or any act of depredation, committed for private ends . . . . " Watson and the two men did not commit "illegal acts of violence" by boarding the Japanese vessel to deliver a written

Piracy consists of any of the following acts:

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

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

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

Id.
message, nor did Watson act for "private ends." Therefore, a Japanese claim of piracy is likely to fail. Finally, because Sea Shepherd's vessels are registered in the Netherlands, any Japanese claims against Australia under the UNCLOS flag-state responsibility provisions would also fail.

V. WHAT DOES THE FUTURE HOLD FOR JAPANESE WHALING?

The Australian Federal court order in Humane Society was clear: the Japanese whaling fleet should be restricted from killing whales within the Australian Antarctic Territorial waters. Sea Shepherd has called upon Australian Federal Police to uphold the federal court order against Japan. Nevertheless, neither Australia nor any other anti-whaling country has taken affirmative steps to physically restrain any illegal Japanese whaling.

It is one thing to enact legislation, but it is another to actually implement and enforce it. While many countries continue to create conservation laws prohibiting the killing of endangered species, these same countries fail to act while Japan, Norway and Iceland violate their laws. By enforcing conservation laws, Sea


210. See United Nations Convention on the Law of the Sea, supra note 107, pt. VII, §1, art. 101 (defining piracy under UNCLOS). Alternatively, Sea Shepherd could bring a claim for piracy against Japan for detaining the two Sea Shepherd volunteers onboard the Japanese boat for three days, however this claim is also likely to be unsubstantiated. Id.

211. See id. pt. VII, §1, art. 91-94 (defining and describing provisions that control responsibilities of flag states).


216. See Davis, supra note 90, at 7 (discussing Japan's agreement to sign IWC but continue whaling under scientific research exception).
Shepherd is simply doing the costly dirty work for these anti-whaling countries.\textsuperscript{217} By utilizing private funding to monitor and enforce conservation laws, private groups like Sea Shepherd save anti-whaling countries considerable amounts of tax money and government resources that would be spent attempting to properly enforce international conservation laws.\textsuperscript{218}

Although Japan tries to justify their whaling under the IWC scientific research exception, this exception is merely a technical anomaly that the IWC could soon revoke.\textsuperscript{219} From a public policy standpoint, most people would not want to see endangered animals killed under the guise of "scientific research" on mortality rates, only to see those same endangered animals end up on a dinner plate in Japan.\textsuperscript{220} The more negative attention Japanese whaling receives, the more public support Sea Shepherd and other related groups acquire.\textsuperscript{221}

A. Potential Policy Changes for Japanese Whaling

Without physically ramming the Japanese whaling fleet, Watson and Sea Shepherd may have sunk the Japanese fleet in a much more critical area: Japanese public opinion.\textsuperscript{222} It is possible that whaling will soon become banned in Japan, thanks in part to Sea Shepherd's constant harassment of the Japanese fleet, and the in-


\textsuperscript{218} See id. (discussing complexity of law enforcement on open seas). See also Khatchadourian, supra note 2, at 1-9 (addressing general confusion regarding relevant areas of law controlling International Whaling regulations).

\textsuperscript{219} See International Convention for the Regulation of Whaling, supra note 33, art. VIII, §§ 1-3 (explaining IWC scientific research exception to commercial whaling moratorium). See also Khatchadourian, supra note 2, at 1-9 (discussing general confusion relating to areas of law controlling International Whaling regulations).

\textsuperscript{220} See Fackler, supra note 40, at A10 (discussing lower rate of whale meat consumption amongst younger generations). See also McCurry, supra note 38 (detailing Japanese newspaper's study showing how infrequently young people eat whale meat).


\textsuperscript{222} See id. (discussing decreasing support for whaling within Japanese communities). See also Fackler, supra note 40, at A10 (explaining study showing mercury content within whale and dolphin meat in Japan may have decreased public support for Japanese whaling).
creased availability of scientific studies that reveal the alarmingly high levels of toxins contained within whale meat.223

The negative attention Sea Shepherd has generated for the Japanese whaling fleet has inspired Japanese citizens to become increasingly informed of their government-subsidized whaling program.224 Recent scientific studies that reveal the high toxin levels in whale meat have been widely distributed throughout Japan.225 Accordingly, a recent Japanese study found that “[m]ore than two thirds of Japanese people do not support their country’s whaling in the Southern Ocean[.]”226 Furthermore, the study found that “87 percent of the Japanese population were surprised to learn their tax money was being used to subsidize the increasingly-unpopular whaling operation.”227

Japan is figuratively walking the plank of international public opinion, and it may be too late to turn back without removing the Japanese whaling program altogether.228 Currently, the whaling industry “seems to enjoy a protected status, mainly as a tradition to be defended against foreign interference.”229 Yet, few young people eat whale meat in Japan, and soon, the older generation who traditionally continue to eat whale meat will pass away.230 With few consumers of whale meat remaining, Japan would have little reason to continue whaling.231 The global community has placed immense public pressure on Japan to cease any further “scientific” whaling, and consequently, it is possible that Japan could soon bend under

223. See Fackler, supra note 40, at A10 (discussing study conducted on high levels of mercury content within whale and dolphin meat in Japan).
224. See Japanese Frown on Whaling, supra note 221 (detailing decrease of public support in Japan for Japanese whaling). According to a number of studies, public support to continue whaling in Japan has recently dwindled. Id.
225. See Fackler, supra note 40, at A10 (detailing study conducted on mercury content within whale and dolphin meat in Japan and subsequent education in rural Japan on subject).
227. Id. (quoting portions of study that found Japanese people did not know tax money was spent on whaling).
228. See id. (citing portions of study that found most Japanese people do not support government whaling in Southern Ocean). See also Fackler, supra note 40, at A10 (discussing global attention placed on health risks associated with mercury consumption in whale and dolphin meat).
229. Fackler, supra note 40, at A10 (explaining national protection of Japan’s whaling practice).
230. See id. (analyzing possibility that demand for whale meat will die off as older generations disappear).
231. See id. (discussing that older generations of Japanese people keep whale meat industry slightly alive, but will eventually die off).
the pressure and decide to terminate its scientific whaling program.\textsuperscript{232}

Alternatively, if the Japanese government continues with the JARPA II program in 2008-09, deciding to stand by its ostracized whaling tradition, it is unlikely the whaling expeditions will cease any time soon.\textsuperscript{233} Eventually, Japan could decide to leave the IWC and start its own axis of pro-whaling countries along with Iceland and Norway.\textsuperscript{234} The commercial whaling moratorium would no longer restrict Japan, and the scientific research exception would no longer be necessary to conceal Japan's commercial whaling practice.\textsuperscript{235}

Leaving the IWC, however, would most likely backfire on Japan.\textsuperscript{236} Non-IWC member nations are subject to the Antarctic Treaty system, which would likely prohibit whaling within the fragile Southern Ocean Whale Sanctuary for \textit{any} reason, including scientific purposes.\textsuperscript{237} Therefore, leaving the IWC would remove the protections of the scientific research exception for Japan, and the Japanese whaling fleet would become exposed to increasingly restrictive legal authority.\textsuperscript{238} Furthermore, if Japan left the IWC, other IWC countries who oppose whaling could potentially place economic trade sanctions upon Japan; if this occurred, Sea Shepherd would be the least of Japan's worries.\textsuperscript{239}

\textsuperscript{232} See id. (emphasizing global displeasure with Japanese whaling). See also \textit{It's Ocean Warfare}, supra note 214 (identifying Australian and other governments' mounting pressure on Japan to cease whaling).


\textsuperscript{234} See Hogg, supra note 233 (examining Japanese threat to leave IWC and start new group for pro-whaling nations). "Japan is serious about its threat to leave the International Whaling Commission unless it is reformed." \textit{Id.}

\textsuperscript{235} See id. (discussing Japan's threat to leave IWC which would free Japan of IWC restrictions).

\textsuperscript{236} See Clarke, supra note 96 (discussing potential repercussions for Japan if Japan leaves IWC).

\textsuperscript{237} Agreed Measures for the Conservation of Antarctic Fauna and Flora, June 2, 1964, \textit{available at} \url{http://users.eroles.com/jackbobo/1964agreed.htm} (amending portions of Antarctic Treaty to further protect fauna and flora within Antarctica). Antarctic Treaty provisions would restrict Japanese whaling more than the IWC would, likely prohibiting Japanese whaling within Antarctic waters. See \textit{generally id.}

\textsuperscript{238} See id. (amending portions of Antarctic Treaty to provide protection of Antarctica's flora and fauna).

B. Potential Lawsuit Against Japan in the ICJ or TLS

If Japan decides to carry on with its scientific whaling program, JARPA II, in December 2008, Australia will most likely bring a lawsuit against the Japanese government in an international tribunal, where Japan could potentially be charged with violating a number of IWC whaling regulations. The Australian government is currently gathering evidence for a potential suit against Japan for its illegal whaling practice in the Southern Ocean Whale Sanctuary. In 2008, the Oceanic Viking, an Australian customs vessel, followed the Japanese whaling fleet and took graphic pictures and video of the Japanese killing whales in the Australian Antarctic Territory. Under the ruling in *Humane Society*, it is illegal for Japan to kill whales within this territory.

Australia would not likely pursue Japan in an Australian court under *Humane Society*, because this would "raise the sensitive question of Australian sovereignty over Antarctica which is only recognized by four other countries with Japan not one of these [countries]." Alternatively, pursuing Japan in an international
court would be much more appealing for Australia.\textsuperscript{246} Australia could present a very compelling argument that Japanese whaling activities have violated IWC whaling restrictions, UNCLOS, the Antarctic Treaty and CITES.\textsuperscript{247} If given the option to pursue Japan in either the ICJ or the TLS, Australia is likely to choose the TLS, where in 1999, Australia and New Zealand had some success forcing Japan to abandon an illegal fishing program.\textsuperscript{248}

Additionally, other anti-whaling countries may join Australia in a potential lawsuit against Japan.\textsuperscript{249} For example, the U.S. could pursue a Japanese violation of the U.S. Antarctic Conservation Act.\textsuperscript{250} Under the laws of the TLS, provisional measures could be ordered as late as November and still effectively shut down the JARPA II program for the 2008-09 whaling season.\textsuperscript{251} Japan's whaling practice is highly controversial, lacks public support and violates numerous international conservation laws.\textsuperscript{252} Consequently, Aus-

\textsuperscript{246} See id. (weighing potential for international case as opposed to Australian case).

\textsuperscript{247} See id. (explaining possibility for strong case against Japanese whaling in Australian Antarctic Whale Sanctuary). See also A Warrant to Intervene, supra note 240 (discussing various international laws Japan may have violated).


\textsuperscript{249} See It's Ocean Warfare, supra note 214 (discussing potential for other countries to be persuaded to join in lawsuit against Japan).


[The Antarctic Conservation Act] provides civil and criminal penalties for the... taking of native mammals or birds; the introduction of nonindigenous plants and animals; entry into specially protected or scientific areas; the discharge or disposal of pollutants; and the importation into the US of certain items from Antarctica. Violation of the Antarctic Conservation Act carries penalties of up to $10,000 in fines and 1 year in prison.

\textit{Id.}


\textsuperscript{251} See It's Ocean Warfare, supra note 214 (explaining potential time frame to prohibit Japanese whaling).

tralia would most likely succeed in an international lawsuit against Japan over its illegal whaling practices in the Southern Ocean.253

VI. CONCLUSION

Logistically, international conservation laws are tremendously costly and difficult to enforce on the open ocean.254 With this said, though controversial, I believe Sea Shepherd as a privately funded group, will continue to traverse the world protecting endangered species with little to no legal repercussions. This is due in part to Sea Shepherd’s ability to present enough relevant legal authority and public support to successfully continue with its enforcement activities.255 Additionally, Paul Watson’s recent declaration that he will no longer intentionally ram any Japanese whaling ships further anchors Sea Shepherd’s legal authority within international conservation law.256 Ultimately, given the fact that pro-whaling countries have failed to obtain significant legal relief against Sea Shepherd in the past, it is doubtful Sea Shepherd will face punishment anytime soon for its actions taken against Japan.257

Joseph Elliott Roeschke*

253. See Beeby, supra note 214 (discussing past success of Australia and New Zealand against Japan under Law of the Sea); see also It’s Ocean Warfare, supra note 214 (explaining possibility for strong case against Japanese whaling in Australian Antarctic Whale Sanctuary).

254. See TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, supra note 71, at 39-47 (detailing practical difficulties associated with enforcing environmental agreements).

255. See United Nations World Charter for Nature, supra note 13 (providing authority for non-governmental groups to enforce environmental conservation law).


257. See Khatchadourian, supra note 2, at 9 (discussing Paul Watson’s history and insubstantial punishment faced for his past actions).

* J.D. Candidate, 2009, Villanova University School of Law; B.A., 2004, University of Delaware.
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