

POLAR PIRATES: FRIEND OR FOE?

**SHOULD THE DEFINITION OF PIRACY BE ALTERED TO
EXCLUDE THE ACTIVITIES OF SEA SHEPHERD IN THE
SOUTHERN OCEAN?**

Nicole Millar

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours)

**Faculty of Law
The University of Otago**

October 2013

ACKNOWLEDGEMENTS

I would like to thank all those who provided me with advice, support and guidance throughout this year. With special mention to:

Nicola Wheen, my supervisor, who helped keep everything in perspective. Your insight, assistance and sense of humour were invaluable to the completion of this dissertation.

Professor Paul Roth for your knowledge and helpful observations.

My family, to whom I owe everything. Your overwhelming generosity has provided me with the experiences and opportunities that have shaped the person I am today. You have taught me to not take life too seriously and your boundless love and support has given me the strength to embrace new challenges and always dream big.

After all, I've got the sun in my pocket and the moon in my hands.

TABLE OF CONTENTS

List of Primary Sources	4
List of Abbreviations	6
INTRODUCTION	7
 CHAPTER 1: The Decision of the United States 9th Circuit Court of Appeals	
1.1	Institute of Cetacean Research v Sea Shepherd Conservation Society 11
1.2	Statutory Definition of Piracy 14
1.2.1	Must include illegal acts of violence, detention or depredation 16
1.2.2	Committed for private ends 16
1.2.3	With the exception of a crew that has mutinied on a warship, the illegal acts must be committed using a private ship 19
1.2.4	There is a “two ship requirement” 19
1.2.5	Must occur on the high seas 20
1.3	Implications of the Decision 20
 CHAPTER 2: The International Convention for the Regulation of Whaling and other Comparable Multilateral Environmental Agreements	
2.1	Review of the Current Compliance and Enforcement Regime of the International Convention for the Regulation of Whaling 23
2.2	Compliance and Enforcement Regimes within Comparable Multilateral Environmental Agreements 26
 CHAPTER 3: The Role of Non-Governmental Organisations and their Formal Incorporation into Multilateral Environmental Agreements	
3.1	Role of Non-Governmental Organisations in International Law 29

3.2	Non-Governmental Organisation's within Human Rights Law and the International Labour Organisation	30
3.3	Environmental Non-Governmental Organisations and the International Whaling Commission	34
3.4	What Role Should Environmental Non-Governmental Organisations Play in Monitoring Official Activities?	38
3.5	The Consequences of Formal Incorporation of Environmental Non-Governmental Organisations into the Enforcement And Compliance Regime	41
 CHAPTER 4: Possible Alternatives to the Current Definition Of Piracy		
4.1	How could we Define Piracy so as to Exclude Sea Shepherd?	44
4.2	What should be done?	48
 CONCLUSION		52
 BIBLIOGRAPHY		54

LIST OF PRIMARY SOURCES

Conventions/ International Agreements

Agreement on the International Dolphin Conservation Program 1998 (opened for signature 15 May 1998, entered into force 15 February 1999).

Convention for the Conservation of Antarctic Marine Living Resources 1982 (opened for signature 1 August 1980, entered into force 7 April 1982).

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (opened for signature 10 March 1988, entered into force 1 March 1992).

Convention of International Trade in Endangered Species of Wild Fauna and Flora (open for signature 3 March 1973, entered into force 1 July 1975).

International Convention on the Regulation of Whaling 1946 (opened for signature 2 December 1946, entered into force 10 November 1948).

International Convention Relating to the Arrest of Sea-Going Ships (opened for signature 10 May 1952, entered into force 24 February 1956).

International Labour Organisation Constitution (1919).

The Antarctic Treaty 1959 (opened for signature 1 December 1959, entered into force 23 June 1961).

The United Nations Convention on the Law of the Sea 1982 (opened for signature 10 December 1982, entered into force 16 November 1994).

United Nations Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (opened for signature 4 December 1995, entered into force 11 November 2001).

United Nations Charter 1945.

Vienna Document on Confidence and Security Building Measures FSC.DEC/14/11 (2011).

World Charter for Nature GA Res 37/7, A/RES/37/7 (1982).

Statutes

Alien Tort Claims Act 28 U.S.C § 1350.

Cases

Castle John v NV Mabecco (1986) 77 ILR 537.

Filartiga v. Pena-Irala 630 F.2D876 (2D Cir. 1980).

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd (2008) FCA 3.

Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659 (2013).

The Institute of Cetacean Research v Sea Shepherd Conservation Society C11-2043RAJ
(W.D. Wash. March 2012).

The Institute of Cetacean Research v Sea Shepherd Conservation Society 12-35266 (9th Cir.
2013).

LIST OF ABBREVIATIONS

This is not a comprehensive list of all the abbreviations in the dissertation; it includes only those that are most commonly used throughout the chapters.

ATCA	-	Alien Tort Claims Act
EEZ	-	Exclusive Economic Zone
ENGO	-	Environmental Non-Governmental Organisation
IMB	-	International Maritime Bureau
ICR	-	Institute for Cetacean Research
ICRW	-	International Convention for the Regulation of Whaling
IWC	-	International Whaling Commission
MEA	-	Multilateral Environmental Agreement
NGO	-	Non-Governmental Organisation
SUA	-	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
UN	-	United Nations
UNCLOS	-	United Nations Convention on the Law of the Sea

INTRODUCTION

“So utterly lost was he to all sense of reverence for the many marvels of their majestic bulk and mystic ways; and so dead to anything like an apprehension of any possible danger from encountering them; that in his poor opinion, the wondrous whale was but a species of magnified mouse, or at least water-rat, requiring only a little circumvention and some small application of time and trouble in order to kill and boil.”¹

Modern-day whaling is a loaded topic that generates a heated debate; on one side there are the traditional whaling nations asserting an entitlement to pursue this activity due to their ancient customs and on the other, the anti-whaling parties who feel that the activity is outdated and barbaric. Since the establishment of a zero catch limit (‘moratorium’) on commercial whaling in 1986 there has been a dramatic showdown between the two opposing interest-groups in the Southern Ocean. The source of most, if not all, controversy is the violent obstruction of Japanese whaling vessels by the non-governmental organisation (NGO), Sea Shepherd. The moratorium was established under the Schedule of the *International Convention for the Regulation of Whaling 1946* (ICRW),² which is a convention that was created to address concerns of overexploitation of whale stocks by the commercial whaling industry.³ Thereby the moratorium was created to “provide for the proper conservation of whaling stocks,”⁴ however its effectiveness is marred by the loopholes that the ICRW affords the whaling nations.⁵ The merits of these provisions are not important

¹ Herman Melville, “Moby Dick; or, The Whale” (Harper and Brothers, New York, 1851) (quoting from Chapter 27, paragraph 4).

² International Convention on the Regulation of Whaling 1946 (opened for signature 2 December 1946, entered into force 10 November 1948). An electronic version of the Convention can be accessed at <<http://iwc.int/convention>> last visited 04/10/2013.

³ The Convention and its corresponding International Whaling Commission (IWC) is now regarded as the leading authority on the regulation of whales and whaling: see Simpson, K. “The international convention for the regulation of whaling, 1946: A legal and ethical analysis” (Dissertation/Thesis, the University of Nottingham, United Kingdom, 2004).

⁴ ICRW, above n 2, at Preamble.

⁵ Norway lodged an official objection to the moratorium in 1982, and is not bound by it. It continues to hunt minke whales in the North Atlantic. Iceland left the IWC in 1992 but re-joined in 2003 with a reservation to the moratorium. It began commercial whaling in 2006. Japan conducts commercial whaling in the Antarctic and North Pacific under a loophole in the IWC convention that allows countries to kill whales for “scientific research”: See, Greenpeace “International Whaling

now; instead the focus is on the inability of the International Whaling Commission (IWC), the body set up to oversee the ICRW, to ensure state party compliance with the Convention, and whether NGOs have a role to play in its improvement.

The most recent development in the clash between Sea Shepherd and Japanese whaling vessels, and the subject of this dissertation, is the United States Court of Appeal decision, which has declared the NGOs to be pirates. Although Sea Shepherd had endangered the safety of the crew by allegedly throwing glass projectiles and physically ramming the Japanese vessel, the decision of the Court of Appeal to qualify these acts as piratical under international law appears contradictory to the traditional perception of piracy. Instead of looting for personal gain Sea Shepherd can best be compared to terrorists as they use violent means to coerce their target in furtherance of a political or social objective. Nevertheless it is the exceptional consequences associated with piracy, rather than the title itself, that is cause for the concern following the decision. An offending vessel is able to be seized indiscriminately by any state and then face a trial subject to the seizing state's national laws. This is a serious implication and one that would most likely result in the withdrawal of Sea Shepherd from the Southern Ocean, which would be undeniably detrimental for the whales. As the crime does not correspond with the punishment, one then has to question the court's interpretation of the crime and/or the appropriateness of its definition.

The definition of piracy looks at what acts are committed rather than who has committed them, therefore if Sea Shepherd were to stop their current activities and adopt a different approach to oppose Japanese whaling it is likely that they would no longer be classified as pirates. The international community cannot condone violence and regardless of being considered a pirate or not, Sea Shepherd should not be able to commit these acts to further its beliefs. It is with this assertion that the paper proceeds on the question whether NGOs can play a legitimate role in the policing and enforcement of Multilateral Environmental Agreements (MEAs). The current compliance and enforcement structure under the ICRW is deficient in providing an independent reporting mechanism that can accurately relay the parties' activities to the IWC and is thereby heavily underdeveloped in comparison to similar MEAs. Although fundamental changes are required to create effective penalties such as the creation of a "blacklist" or the enforcement of sanctions, the first step is to create a

Commission" (2013) Greenpeace USA <<http://www.greenpeace.org/usa/en/campaigns/oceans/whale-defenders/iwc/>> last visited 04/10/2013.

satisfactory reporting system that provides the IWC with adequate information to enable it to impose such penalties. As the IWC cannot supervise all the worlds' oceans, one solution would be to make use of the skills and resources offered by the NGOs and enlist them to coordinate a neutral observer/enforcer scheme.

Although it makes logical sense to capitalise on NGOs, it is important to first look at the role that they have already played in international law to determine whether it is in fact a viable option. NGOs have enjoyed an instrumental role in both human rights law as well as the International Labour Organisation. Nevertheless, despite being used in several ways, from the submission of shadow reports to monitoring state compliance with the Mine Ban Treaty,⁶ there appears to be no equivalence to enabling them to board another states vessel. As already insinuated, it is not the organisation Sea Shepherd that is being labelled pirates; rather it is the methods they have adopted that have made them outlaws. As it would be far easier to simply require the organisation to adopt peaceful methods, persuasive reasoning is needed to justify the more contentious option of formally integrating NGOs into the IWC.

Where the IWC is constrained by politics and defined legal boundaries, independent NGOs are flexible and adaptable, allowing them to adopt roles of neutral observers aboard the vessels or patrollers within the whale sanctuaries. As NGOs have no legal authority, they would merely be the equivalent of abatement officers, giving warnings for non-compliance, rather than actually making arrests and imposing penalties. Naturally there are fears of an NGO's lack of accountability and unpredictable agenda, however, these concerns can be mitigated through its formal incorporation into the legal framework with corresponding consequences for any violations.

Whilst the IWC itself has several flaws, the reclassification of the definition of piracy is the most pressing issue as the current situation has resulted in Sea Shepherd's members being branded pirates. The modifications would not only clarify the crime in a modern context, but also increase the likelihood of NGO incorporation into the IWC, as the Commission is more likely to engage in dialogue with an organisation that is not regarded as bandits. To simply exclude Sea Shepherd from the definition would be seen as international approval of violence and would fail to actually solve the problem. It is therefore suggested that a less technical

⁶ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (opened for signature 3 December 1997, entered into force 1 March 1999). An electronic version of the Convention can be accessed at <http://www.apminebanconvention.org/overview-and-convention-text/> last visited 04/10/2013.

definition be adopted in concert with a more refined definition of maritime terrorism. By tackling these two crimes separately and systematically it would ensure that traditional acts of piracy are still criminal but do not include unsuitable parties into its ambit. Simultaneously, the crime of maritime terrorism would ensure that bodies such as Sea Shepherd are unable to jeopardise the safe navigation of a vessel to further its beliefs.

There is a lacuna in the monitoring and enforcement of whaling activities in the Southern Ocean which explains why Sea Shepherd feels the need to interfere, however, the recent Court of Appeal case illustrates that they have gone too far in their attempt to protect the whales. The solution to the current situation is twofold; Sea Shepherd needs to cease its current dangerous activities in the Southern Ocean and the definition of piracy need be reevaluated to best represent the crime. The former limb can only be achieved with cooperation from the IWC as Sea Shepherd must feel that their views are being heard and properly considered. And before the IWC is likely to even think about an alliance with Sea Shepherd, the piracy definition would have to be changed so that their future partners are not regarded as outlaws from the onset. It is a circular set of requirements and the challenge is getting one of the two limbs underway, however the end result would benefit both man and whale.

CHAPTER 1:

THE DECISION OF THE UNITED STATES 9TH CIRCUIT COURT OF APPEALS

1.1 *Institute of Cetacean Research v Sea Shepherd Conservation Society*

The *Institute of Cetacean Research v Sea Shepherd Conservation*⁷ was initiated by a Japanese organisation, the Institute of Cetacean Research (ICR), authorised by the Ministry of Agriculture, Forestry and Fisheries and specialises in social and biological studies of the whale. It operates in accordance with the ICRW, which has adopted a zero catch-limit moratorium from the 1985/6 season following the decline of the whaling industry and an increase in environmentalist activism.⁸ The adoption of the moratorium was not without controversy from the whaling nations, who have found legal ways to circumvent the restriction.⁹ The research exception that Japan relies on is found under Article VIII of the ICRW which allows Contracting Governments to grant permits to their nationals, enabling them to “kill, take and treat whales for purposes of scientific research subject to such restrictions” the Contracting Government provides.¹⁰ Such restrictions would include the quantity of each whale species that can be caught and how the whale research by-products may be processed and utilised.¹¹ The current program that the ICR is working under is the JARPA II, which permits the catching of 850±10% Antarctic minke whales, 50 fin whales and 50 humpback whales annually.¹² The program was first established in the 2005/2006 season, however, its predecessor JARPA had been conducted since 1987/88 and both have

⁷ *The Institute of Cetacean Research v Sea Shepherd Conservation Society* C11-2043RAJ (W.D. Wash. March 2012).

⁸ Lisa Kobayashi “Lifting the International Whaling Commission’s Moratorium on Commercial Whaling as the most Effective Global Regulation of Whaling” 29 ENVIRONS 177 at 198.

⁹ For example, Norway objected it from the onset and continues to hunt minke whales and Japan withdrew their initial objection due to political pressure and continues to catch whales under the scientific research exception: *Ibid*, at 199.

¹⁰ Above n 2, at art VIII(1).

¹¹ Above n 2, at art VIII(2).

¹² The Institute of Cetacean Research “Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) -Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources”, SC/57/O1 at 1.

been considered a “valuable resource” in facilitating a better understanding of the role of whales within the marine ecosystem.¹³

Sea Shepherd Conservation Society is a non-profit organisation (NGO) established in 1977 with the mission to “end the destruction of habitat and slaughter of wildlife in the world's oceans in order to conserve and protect ecosystems and species.”¹⁴ In a bid to enforce the commercial whaling moratorium in the Southern Ocean, Sea Shepherd has made eight expeditions since 2002. Its methods have at times been controversial, from “delivering” non-toxic, but foul smelling, butyric acid on to the deck of the Japanese vessels to nailing metal plates to their drain outlets.¹⁵ Sea Shepherd engages in these radical protests as it believes that the Japanese are running a commercial whaling program under the guise of scientific research.

Despite the initial dismissal by the District Court, the Appeals Court in *The Institute of Cetacean Research v Sea Shepherd Conservation Society*¹⁶ has created a relatively novel situation; a court, in a jurisdiction where neither the plaintiff nor defendant is a national, has ruled that an environmental activist in the Southern Ocean has committed piratical acts against a research vessel. Furthermore, unlike the expected modus operandi of a pirate boarding unsuspecting vessels and committing armed robbery or hijacking the crew for ransom, Sea Shepherd acts to prevent the vessel from allegedly violating its international obligations. Instead of plunder and self-gain, a perceived greater good is being aspired to. It is due to these irregularities that I have decided to evaluate Kozinski J’s decision, as the acts committed seem to be incompatible with society’s preconceived idea of piracy.

In the case, the ICR asserted four claims against Sea Shepherd; freedom of safe navigation at sea, freedom from piracy, freedom from terrorism and civil conspiracy under Washington Law. The Court proceeded on the first two claims; however this dissertation will focus on the claims of piracy under Article 101 United Nations Convention on the Law of the Sea

¹³ The Institute of Cetacean Research “Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic” (JARPA Review Workshop of the International Whaling Commission, SC/59/Rep1, 4-8 December 2006) at 341.

¹⁴ Sea Shepherd “Who We Are” (2013) Sea Shepherd <<http://www.seashepherd.org/who-we-are/>> last visited 04/10/2013.

¹⁵ Sea Shepherd “Leviathan” (2013) Sea Shepherd http://www.seashepherd.org/leviathan/leviathan_campaign_report.html> last visited 04/10/2013.

¹⁶ *The Institute of Cetacean Research v Sea Shepherd Conservation Society* 12-35266 (9th Cir. 2013).

(UNCLOS)¹⁷ because it is the issue with the most serious implications for Sea Shepherd and its role in challenging Japanese whaling in the Southern Ocean.

At first instance it is confusing how a Japanese owned company complaining of activities in the Southern Ocean would have locus standi¹⁸ in a United States court. However a sufficient nexus was found as the court oversees the Western District of Washington and Sea Shepherd is registered in the State of Oregon, with its headquarters in Friday Harbor, Washington. The authority relied on to allow the court to rule on incidents occurring in the Antarctic waters is the Alien Tort Claims Act (ATCA).¹⁹ The Act allows for tortious civil action cases to be heard by the District Courts for any “violation of the law of nations or a treaty of the United States.” The court was able to proceed because, as recognised by Jones J, the admiralty jurisdiction of the District Court “has always extended to torts on the high seas.”²⁰

Established in 1789, this Statute was generally left untouched until a 1980 case²¹ that opened the “floodgates to ATCA litigation.”²² Subsequently however, the recent case of *Kiobel v. Royal Dutch Petroleum*²³ has somewhat curtailed the statute’s jurisdiction where it was decided that the presumption against extraterritoriality stands and that the court will only hear cases involving actions occurring on United States soil.²⁴ This would heavily restrict the scope of its enforceability, however, the opinion goes on to create a potential piracy caveat in recognition that pirates were historically viewed as “fair game, wherever found, by any nation.”²⁵ Although not binding, this obiter comment increases the likelihood that United States Courts would maintain jurisdiction over cases like the Sea Shepherd case.

The substantive claims of the ICR were that the Sea Shepherd vessels were endangering the lives and property of the crew with their actions by: attempting to jeopardise the Japanese propellers with rope, physically colliding with the vessels and throwing flares, smoke bombs

¹⁷ The United Nations Convention on the Law of the Sea 1982 UNTS 1833 (opened for signature 10 December 1982, entered into force 16 November 1994). An electronic version of the Convention can be accessed at <http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm> last visited 04/10/2013.

¹⁸ “The right to appear in court and argue a case”: see Peter E. Nygh and Peter Butt *Butterworth Australian Legal Dictionary* (Lexis Nexis, Sydney, 1997) at 704.

¹⁹ 28 U.S.C § 1350.

²⁰ *The Institute of Cetacean Research v Sea Shepherd Conservation Society*, above n 7, at 10.

²¹ *Filartiga v. Pena-Irala* 630 F.2D876 (2D Cir. 1980).

²² Michael C. Lynch and Lystra Batchoo, “What Are the Implications of *Kiobel v. Royal Dutch Petroleum*?” (January 2011) *The Practical Litigator* 57 at 58.

²³ *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013).

²⁴ At 1.

²⁵ At 10.

and glass bottles (filled with paint or, the foul-smelling but non-toxic, butyric acid) aboard the vessel.²⁶ The ICR has sought a preliminary injunction to prevent any similar actions. To win such an injunction, the applicant is required to establish four elements; likelihood of success, that irreparable harm would be inflicted without it, a balance of equities in their favour and proof that granting the injunction would be in the public's interest. Kozinski J in the Appeals Court overruled Jones J's dismissal of the case by finding that all of these factors were adequately met as his overriding persuasion was that violent acts were committed. In comparison, although Jones J recognised the potential danger inflicted, the prevailing point for him was the absurdity of the jurisdictional scope the court was being asked to cover.²⁷ Another major point of difference between the two decisions was the balancing of equities. Jones J used the "clean hands" doctrine²⁸ and thought the ICR "unclean" as it had previously ignored a similar injunction imposed against it in 2008 by the Federal Court of Australia.²⁹ In contrast, Kozinski J saw that the balance lay in ICR's favour as there would be no corresponding harm to Sea Shepherd if the injunction were imposed.³⁰

1.2 Statutory Definition of Piracy

Piracy is an ill-defined and little understood act, however it is the oldest crime of universal jurisdiction.³¹ Considered by Lord Coke as "*hostis humani generis*", an enemy to all mankind,³² pirates pose a threat to every seafarer without bias. This understanding provides the basis for the legal definition of piracy in UNCLOS, which is regarded as the most authoritative on the subject.³³ The Convention was established after nine years of deliberations between 160 nations. Japan and Australia are both signatories to the initial 1982

²⁶ The Institute of Cetacean Research v Sea Shepherd Conservation Society, above n 16, at 7.

²⁷ *The Institute of Cetacean Research v Sea Shepherd Conservation Society*, above n 7, at 24.

²⁸ "In other words, the plaintiff must not have acted inequitably in some way relating to the claim": see Stephen Todd, John Burrows, Bill Atkin, Cynthia Hawes and Ursula Cheer *The law of torts in New Zealand* (6th ed, Thomas Reuters, Wellington, 2013) at 1279.

²⁹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) FCA 3.

³⁰ Due to jurisdictional restrictions, the scope of the injunction would only affect Sea Shepherd USA: see, Sea Shepherd "Sea Shepherd USA Backs Australia in Landmark Legal Case to End 'Research Whaling'" (25 June 2013) Sea Shepherd <<http://www.seashepherd.org/news-and-media/2013/06/25/sea-shepherd-usa-backs-australia-in-landmark-legal-case-to-end-research-whaling-1510>> last visited 04/10/2013.

³¹ Twyman-Ghoshal, Anamika "Understanding Contemporary Maritime Piracy" (Dissertation/Theses, Northeastern University, Massachusetts, 2013) at 12.

³² Coke, Edward "*Systematic Arrangement of Lord Coke's First Institute of the Laws of England: on the plan of Sir Mathew Hales analysis*" (1st American from the last London ed, Vol. 3. Philadelphia, 1826-1827) at 421.

³³ Haywood, Robert and Spivak, Roberta *Maritime Piracy* (Taylor and Francis, Global Institutions, 2012) at 10.

UNCLOS,³⁴ the Agreement to the Implementation of Part XI of the Convention of 10 December 1982 and the Agreement for the Implementation of the Provisions of the Convention of 10 December 1982 (relating to the conservation and management of straddling fish stocks and highly migratory fish stocks). In contrast, the United States is only a signatory to the latter Agreement and has yet to sign the Convention itself.³⁵ Without ratification, it would not be a “treaty of the United States” as required by the ATCA, however due to piracy having its origins in customary international law, it is likely to qualify as part of the “law of nations” which would give the Court jurisdiction. Therefore I will proceed using the definition provided by UNCLOS in Article 101:³⁶

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).*

Taken verbatim from the 1958 Geneva Convention on the High Seas,³⁷ this section can be divided into five composite parts:

³⁴ Above n 17.

³⁵ According to the “Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 09 August 2013” see at, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm > last visited 04/10/2013.

³⁶ Above n 17.

³⁷ Convention on the High Seas 1958 UNTS 450 (opened for signature 29 April 1958, entered into force 30 September 1962), art 15. An electronic version of the Convention can be accessed at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/> > last visited 04/10/2013.

1.1.1 Must include **illegal** acts of **violence**, detention or depredation

The first issue is the definition of “illegal acts”, as there is ambiguity about whether this is governed by international law, which may restrict the scope of the article, or national law, which introduces the issue of *whose* law to use and the onus of enforcement.³⁸ The chosen national jurisdiction would influence the definition and penalty of the illegal act, however if the generalised authority were chosen, it is unlikely that throwing glass would be unlawful under international law as its primary concern is the conduct of States, not individuals. There appears to be no precedent on the correct definition so we are left with an ill-defined word that could prove problematic given less overt acts of violence.

The second issue is the intended target of the “violence”. The District Court was content to restrict the meaning to only include acts committed against people; therefore as the alleged actions of Sea Shepherd only targeted the ship and its equipment, they would fall outside this definition. Kozinski J took a far broader approach by adopting the “common sense understanding” of the term.³⁹ He ruled that the mere acts themselves constituted violent actions and the fact that lives were endangered in the process only strengthened his case.

It is likely that Kozinski CJ’s interpretation would be favoured as the Article specifically refers to such acts against “another ship... *or...* against persons or property” (italics added for emphasis). In addition, one could assume that the drafters of the Convention intended to include all acts of violence against another. This is further supported by the surrounding words, “detention, or any act of depredation”, which are open ended and connote intolerance of any pre-meditated damage inflicted. Therefore it is likely that the definition will include all acts of violence irrespective of the intended target.

1.1.2 Committed for **private ends**

This is probably the most contentious issue in this case as Sea Shepherd is an environmental non-profit organisation (ENGO). Jones J in the District Court favoured a limited interpretation of “private ends” to mean “financial enrichment” which coincides with the traditional view of pirates, as their purpose was to plunder the treasures on board and to make a pecuniary profit. This is quite obviously contrary to Sea Shepherd’s actions and motives.

³⁸ Amanda M. Caprari “Loveable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean” (2010) 42 Conn.L.Rev 1493 at 1512.

³⁹ *The Institute of Cetacean Research v Sea Shepherd Conservation Society*, above n 16, at 6.

Rather than physically acquiring something from the ICR, they simply want the vessels to cease their current activities.

The Appeals Court in contrast took the phrase at its literal meaning to include all acts that are not done on behalf of states. Kozinski CJ relied heavily on the 1986 case of *Castle John v NV Mabeco*⁴⁰ where a Greenpeace ship attacked an allegedly polluting Dutch vessel. The Belgian Court of Cassation decided that environmental activism can be regarded as piracy because serving the public good does not automatically qualify organisations' "ends" as public.⁴¹ Therefore the Court found Greenpeace's actions were for private ends as the motives of its members were to further the goals of the particular organisation, rather than "relat[ing] to the interests of, or impinge upon, the state or state system,"⁴² and should therefore be subject to UNCLOS like all other legal persons.

Although seemingly persuasive, *Castle John* has not been widely followed and no environmentalists have since been prosecuted under UNCLOS.⁴³ The principal issue that arises from the decision is one of universality.⁴⁴ Namely, will all environmental activism by NGOs at sea be deemed acts of piracy? It is unlikely that a blanket provision would be adopted as these bodies may in fact be furthering positive policies that would otherwise be restricted by monetary or political constraints. Furthermore, *Castle John* should not be considered a decisive precedent because instead of defining what "private ends" actually means, it rather focuses on what a "public end" is not.⁴⁵ This would create a broad definition that would be inadequate to deal with the unique factual matrix of each case, therefore it should be consulted in future decisions but not deemed determinative.

Another authority that ought to be considered when interpreting Article 101 is the *Comment to the Harvard Draft* prepared by Joseph Bingham. This document formed the basis of the High Seas Geneva Convention, which in turn was replicated in UNCLOS verbatim.⁴⁶ It is expressly stated in this Draft that the definition excludes "all cases of wrongful attacks on

⁴⁰ *Castle John v NV Mabeco* (1986) 77 ILR 537.

⁴¹ Samuel Pyeatt Menefee "The Case of *Castle John*, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of the International Law" (1993) 24 Cal. W. Int'l L.J. 1 at 14.

⁴² Saoirse de Bont "Prosecuting Pirates and Upholding Human Rights Law" (One Earth Future Foundation Working Paper, September 2010) at 8.

⁴³ Caprari, above n 38.

⁴⁴ *Castle John v NV Mabeco*, above n 40, at 14.

⁴⁵ Above n 40, at 15.

⁴⁶ Twyman-Ghoshal, above n 31, at 16.

persons or property for political ends, whether they are made on behalf of states or of recognized belligerent organizations, or of unorganized revolutionary bands.”⁴⁷ Again there is no concise definition as to what “private ends” means, however, the commentary provides insight as to what was *not* intended to be included in the definition. Although Sea Shepherd is not working on behalf of any state, it is certainly a recognised organisation with belligerent traits. The definition does not explicitly exclude NGOs but one could deduce that it was not the drafter’s intention to consider structured bodies working together for a unified purpose as pirates.

These excluded acts could be considered more akin to an act of terrorism as it is “the use of arbitrary violence against a defenceless person, office, ship, civilian aircraft, or any institution or installation, intended to intimidate or coerce a civilian population or government.”⁴⁸

Although there appears to be no consensual definition in international law as to what constitutes maritime terrorism, the Council for Security Cooperation in the Asia Pacific (CSAP) Working Group⁴⁹ provides some insight:

*...the undertaking of terrorist acts and activities within the maritime environment, using or against vessels or fixed platforms at sea or in port, or against any one of their passengers or personnel, against coastal facilities or settlements, including tourist resorts, port areas and port towns or cities.*⁵⁰

In looking at these definitions, it is clear that piracy and terrorism are two distinct concepts. The fundamental causes for their actions are completely different; economics instigates the one and political and social beliefs the other. The differences manifest themselves in the methods adopted and goals aspired to. A pirate’s only motive is financial gain therefore they adopt the easiest and quickest way to board the ship and have the takings. In contrast, terrorists wish to have their messages broadcast as loudly as possible and therefore have a

⁴⁷ *Ibid.*

⁴⁸ Peter E. Nygh and Peter Butt *Butterworth Australian Legal Dictionary* (Lexis Nexis, Sydney, 1997) at 1162.

⁴⁹ A non-governmental organisation with Member Committees from Australia, Brunei, Cambodia, Canada, China, Europe, India, Indonesia, Japan, DPR Korea, Korea, Malaysia, Mongolia, New Zealand, Papua New Guinea, Philippines, Russia, Singapore, Thailand, United States of America and Vietnam it has been described as ‘the most ambitious proposal to date for a regularised, focused and inclusive non-governmental process on Asia Pacific security matters’: see, CSAP “About Us” (2008) CSAP <<http://www.cscap.org/index.php?page=about-us>> last visited 04/10/2013.

⁵⁰ Yonah Alexander and Tyler B. Richardson “Terror on the High Seas from Piracy to Strategic Challenge” (Praeger Security International, United States of America, 2009) at 8.

tendency to seek attention by creating a scene. It can be said that they traditionally do not participate in looting and have no desire to *take* anything from their targets.

With the information at hand, it appears that Sea Shepherds' actions fit better within the category of terrorism, which is advantageous to the Organisation as the implications associated with piracy are both exceptional and severe (to be expanded on in the next section). Tellingly, Sea Shepherd has overtly broadcast its message by creating the internationally acclaimed television series, *Whale Wars*.⁵¹ This sensationalist program depicts all their protests against the ICR vessels and makes no attempt to hide or justify its violence. Throughout the series there is no footage to suggest that Sea Shepherd has taken anything from the ICR as would be expected from pirates. However, although it has not *physically* taken anything it could be argued that the *Whale Wars* documentary incurs profits and (unconventionally) generates financial gain. This may be true but Sea Shepherd has been fighting this cause officially since 1978⁵² whereas *Whale Wars* has only been on air since 2008. It can therefore be assumed that the overarching incentive for their protests, and *Whale Wars*, is to coerce the Japanese Government to stop its nationals from conducting whaling activities in the Southern Ocean. Commercial gain may be a favourable by-product, but it is not Sea Shepherd's *raison d'être*.

The third and fourth elements of the UNCLOS definition of 'piracy' are of no dispute in this situation:

- 1.1.3 With the exception of a crew that has mutinied on a warship, the illegal acts must be committed using a private ship
- 1.1.4 There is a "two ship requirement" (therefore cannot be a violent act by a crew member to his ship)

The fifth however is contentious:

⁵¹ Elizabeth Bronstein (Documentary, produced by TIVR Media, United States), first aired on 7 November 2008.

⁵² Sea Shepherd "History" (2013) Sea Shepherd <<http://www.seashepherd.org/whales/sea-shepherd-history.html>> last visited 04/10/2013.

1.1.5 Must occur on the high seas

The “High Seas” is defined in Article 86 of UNCLOS and excludes all seas within the territorial seas, internal waters, archipelagic waters and the exclusive economic zone.⁵³ As the incidents between Sea Shepherd and ICR occurred more than 200 nautical miles from Australia, the nearest continent,⁵⁴ it appears that the fifth element is satisfied.

However, the Antarctic region does not correspond well with the UNCLOS concepts due to the Antarctic Treaty System (a “regime of legal rules and guidelines for management of the Antarctic”) and the ice which obscures the concept of a traditional coastline.⁵⁵ In addition, the sovereignty status of Antarctica is a contentious issue in of itself, with Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom all asserting rights to it for different reasons. This on-going argument has led to the freezing of all claims by the Antarctic Treaty.⁵⁶ It therefore makes it hard to impose concepts like an EEZ within the Antarctic area and consequently the boundaries of the high seas.

The political and legal complexity of this region makes the issue problematic as no decisive decisions can be made. It is for this reason that the dissertation will proceed on the presumption that the incidents between Sea Shepherd and the Japanese whaling fleet occurred on the high seas.

1.3 *Implications of the Decision*

It is difficult to condone such violent acts by Sea Shepherd, however, the implications associated with piracy are arguably inappropriate for the organisation and disproportionate to its actions. Part VII of UNCLOS lays out the rules of the High Seas and provides that every state will assume jurisdiction over vessels flying its flag for administrative, technical and

⁵³ The exclusive economic zone is defined in UNCLOS Part V as extending “200 nautical miles from the baselines from which the territorial sea is measured”.

⁵⁴ The ships are located off Mackenzie bay near the Amery Ice Shelf, far south-west of Perth, a region of Antarctica rich in a wildlife, more than 400 miles south of 60 degrees: see, Takver, Japanese Whalers Escalate Dangerous Attacks on Sea Shepherd in Refuelling Attempt (26 February 2013) Independent Media Centre Australia <<http://indymedia.org.au/2013/02/26/japanese-whalers-escalate-dangerous-attacks-on-sea-shepherd-in-refueling-attempt>> last visited 04/10/2013.

⁵⁵ Julia Green “Antarctic EEZ Baselines: An Alternative Formula” (1996) 11 IJMCL 333 at 338.

⁵⁶ The Antarctic Treaty 1959 (opened for signature 1 December 1959, entered into force 23 June 1961), art IV. An electronic version of the Convention can be accessed at <<http://www.ats.aq/e/ats.htm>> last visited 04/10/2013.

social matters concerning the ship.⁵⁷ Furthermore, if an incident resulted in harm to life or vessel of another State it would be the duty of the perpetrator to hold an inquiry, which the other State is obliged to cooperate with.⁵⁸ This theme of self-governance extends to Article 4 of the *International Convention Relating to the Arrest of Sea-Going Ships 1952*,⁵⁹ which states that an arrest can only be made with authority from the relevant judicial body in the contracting state. Again, neither provision is applicable to Sea Shepherd, but both show that the expected norm is to uphold a nation's sovereignty and allow states to discipline their own nationals.

With these norms in mind, we now turn to the exceptional consequences of piracy. According to Article 105 of UNCLOS, any State regardless of nexus or motive may seize a pirate's vessel and try them in their own court of law. This remedy is reminiscent of the traditional concept of pirates being *hostis humani generis* and the idea that any and all States are potential victims of a pirate's barbarity. Sea Shepherd, however, is making targeted attacks on ICR vessels. There is no element of randomness or spontaneity that endangers other states as this is clearly an issue between two very specific parties.

It can be anticipated that (only) Japan would act upon this right of seizure and will consequently try Sea Shepherd under its national laws. This may be acceptable if the complained acts occurred within Japanese territory, however, they were committed in an area of international jurisdiction where no one state should be able to exert its law over another independent state. This is an issue between two parties on neutral ground, therefore it is appropriate that the international bodies established to deal with such conflict should be used.

Article 106 creates a caveat to Article 105 and requires "adequate grounds" before seizure. Nevertheless, it is unlikely to offer much protection to Sea Shepherd because once its vessels are specifically labelled as pirates one could assume that the grounds for seizure would be "adequate". No vessel would be expected to withhold seizure until the known "pirates" inflict actual damage or harm, therefore it would likely be able to adopt a pre-emptive stance.

Finally, Article 107 of UNCLOS requires that such seizures be carried out by warships or military aircraft. The recent deployment of a 12,500 tonne giant military icebreaker, operated

⁵⁷ Above n 17, at art 94.

⁵⁸ UNCLOS, above n 17, at art 94.

⁵⁹ International Convention Relating to the Arrest of Sea-Going Ships (opened for signature 10 May 1952, entered into force 24 February 1956). An electronic version of the Convention can be accessed at <<http://www.admiraltylawguide.com/conven/arrest1952.html>> last visited 04/10/2013.

by the Japanese Self-Defence Force to “bolster its whaling fleet,”⁶⁰ is indicative that the Japanese Government is not opposed to military involvement to further its whaling program. Therefore the issue that arises from Article 107 is the potential escalation of violence on the seas. The pristine waters and fragile ecosystem of the Antarctic area need not be exposed to unnecessary clashes and the heightened possibility of a disastrous oil leak. Although this argument can be made for any region that may be exposed to such harm when capturing pirates, Sea Shepherd is not an “enemy to all mankind” therefore the ends do not justify the means.

The preliminary injunction issued on the 17 December 2012 against Sea Shepherd Conservation Society remains in effect until further order of the court⁶¹ but unless the United States takes action under customary international law, it is only enforceable within United States jurisdiction or against a United States national.⁶² As the events occurred in the Antarctic region outside United States jurisdiction, and Sea Shepherd USA has completely withdrawn from the operation,⁶³ there is nothing more that Japan can legally do against Sea Shepherd with this decision. Thus it is not the preliminary injunction itself that is cause for concern, rather the possibility that the international community could endorse Kozinski J’s interpretation of Article 101. Should this happen, then it is likely that Sea Shepherd would have to withdraw from the Southern Ocean due to the far-reaching consequences of piracy. Consequently, a hypothetical situation needs to be considered, one where Sea Shepherd is no longer conducting its protests against the ICR and providing publicity of the activities occurring in the Antarctic. The legality of the ICR’s actions are not the issue here, instead the question is whether NGO bodies, such as Sea Shepherd, play an important role in international environmental law and, ultimately, whether its involvement should be encouraged or shunned.

⁶⁰ Ida Torres “Sea Shepherd releases new video of Southern Ocean collision, icebreaker arrives to defend whalers” (25 February 2013) Japan Daily Press <<http://japandailypress.com/sea-shepherd-releases-new-video-of-southern-ocean-collision-icebreaker-arrives-to-defend-whalers-2523983/>> last visited 04/10/2013.

⁶¹ *The Institute of Cetacean Research v Sea Shepherd Conservation Society*, above n 16, at 15.

⁶² Karen Scott “UC law expert disagrees with US court decision” (May, 2013) 19 Canterbury Tales at 6.

⁶³ Paul Watson, “Sea Shepherd: Defending the Integrity of the Southern Ocean Whale Sanctuary” (18 February 2013) The Guardian <<http://www.guardian.co.uk/environment/2013/feb/18/sea-shepherd-defend-southern-ocean-whale>> last visited 04/10/2013.

CHAPTER 2:

THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING AND OTHER COMPARABLE MULTILATERAL ENVIRONMENTAL AGREEMENTS

2.1 Review of the Current Compliance and Enforcement Regime of the International Convention for the Regulation of Whaling

To determine whether NGOs, like Sea Shepherd, do play a significant role in ensuring that contracting parties uphold their obligations, I will investigate the ICRW current tools available to ensure compliance. If there are no effective alternative mechanisms in place, then the withdrawal of Sea Shepherd from the Southern Ocean could undermine the entire multilateral environmental agreement (MEA) and the conservation of whales. If it were to be found that NGOs were invaluable to the compliance of the ICRW, then there is a greater incentive to exclude Sea Shepherd from the Article 101 definition of piracy and allow it to play a legitimate role within the IWC.

The United Nations Environmental Programme (UNEP) has described compliance as the “fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement.”⁶⁴ Although a seemingly straightforward definition, the unique nature of the worlds’ oceans makes monitoring compliance both difficult and expensive. Nonetheless, a satisfactory monitoring program is essential. This has been shown by the European Union’s Compliance with Fishery Regulations Project research which found that “the frequency of violations by individuals is negatively correlated with the risk of getting caught and being sentenced to severe fines.”⁶⁵ This chapter will highlight the ineffectiveness of the IWC’s compliance and enforcement

⁶⁴ United Nations Environmental Program, “Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements” (Nairobi, 2002) at 662.

⁶⁵ Dr. Sandra Altherr “Non-Compliance within the IWC, Requirements for an Effective IWC Compliance Review Committee” (An analysis with Pro Wildlife and Ocean Care, April 2006) at 3.

regime and the evident need for an independent body to deter violations by providing a real risk that offenders will get caught.

Article IX(1) of the ICRW provides that “Each Contracting Government shall take *appropriate* measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction.”⁶⁶ It is therefore the duty of state party governments to provide the Commission with infraction details along with the corresponding penalties that have been imposed.⁶⁷ Characteristic of most MEAs, the self-reporting mechanism was adopted to minimise any external intervention and allow a country to maintain its national sovereignty. This system might be suitable if it were individuals who were allegedly violating the ICRW provisions, however, it is different in a case that involves a national policy.⁶⁸ The Japanese Government is therefore unlikely to report or prosecute a body that it has itself validated through an Article VIII Scientific Permit. The merits of the Permits are not the immediate concern; instead it is whether the whales being caught under this provision are being used purely for the scientific reasons asserted. The meritorious issue is the basis for the current proceedings in the International Court of Justice (ICJ) brought by Australia. The application alleges that Japan is in violation of its international obligations⁶⁹ and that JARPA II is not a scientific research program within the meaning of Article VIII.⁷⁰ The case is not directly relevant to this dissertation as it focuses on the scope of Article VIII, whereas this paper investigates how the ICW can ensure compliance with Article VIII (/ICRW) and whether NGOs have a corresponding role to play. Nevertheless, the ICJ’s binding decision⁷¹ is likely to have an effect on the activities of the ICR, which in turn will impact Sea Shepherd’s presence in the Southern Ocean.

The IWC has often been referred to as a “toothless tiger”⁷² as it does not have any convincing or effective compliance measures. Its most persuasive feature, the Infractions Sub-Committee

⁶⁶ Italics added for emphasis.

⁶⁷ ICRW, above n 2, art IX(4).

⁶⁸ Recall that Article VIII of the ICRW allows whaling to occur under the domestic control of state party governments. Therefore whaling by the Japanese vessels in the Southern Ocean is sanctioned by the Japanese Government.

⁶⁹ Namely it would be a breach of 10(e), 7(b) and 10(d) of the ICRW Schedule.

⁷⁰ International Court of Justice “Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) Conclusion of the public hearings” (press release, 17 July 2013) at 2.

⁷¹ Article 94 of the United Nations Charter 1945 lays down that “each Member of the United Nations undertakes to comply with the decision of [the Court] in any case to which it is a party”.

⁷² UNEP Guidelines, above n 64, at 3.

established in the 1950's⁷³ to oversee Article IX,⁷⁴ has discussed 24 reported cases of illegal whaling and six of illegal trade since 1990. The individual discussions each lasted roughly 1.5 years before being discarded without any finite resolutions.⁷⁵ These statistics prove that minimal incidents are actually reported and that the Committee is an ineffective body. Correspondingly, without any definitive decisions being made and penalties enforced, there is little incentive for parties to fully obey the Convention.

These shortcomings have been attributed to the failure to define *infraction*, the non-binding nature of resolutions and the inability of the Committee to impose any sanctions or even make recommendations.⁷⁶ Ultimately the issue is one of accountability. With no compulsion for contracting parties to provide comprehensive information and the added ability for them to deny and undermine any accusations made,⁷⁷ the truth is unlikely to be found. With the sea being such an expansive area, there are currently no means to corroborate what any party asserts. Article 21 of the ICRW Schedule does require at least two inspectors aboard functioning factory ships but even if the Moratorium was to be lifted and factory ships were able to harvest, inspectors would be appointed by the vessel's own Government. Without a third party providing independent reports, any alleged infraction becomes a classic "he-said, she-said" debate. And as those accused are generally the only ones present at the time of the alleged infraction, their words tend to hold more persuasion.

Due to the obvious bias that consequently arises, the implementation of the proposed Compliance Review Committee (CRC)⁷⁸ is of great importance. The plan is that this Committee would source its authority from the Revised Management Scheme (RMS) which was established in 1994 to further the Revised Management Procedure (RMP). The RMP's aim is to provide a method of calculating sustainable catch-limits which would allow the lifting of the 1986 Moratorium on commercial whaling. To compliment this goal, the RMS seeks to establish a satisfactory monitoring mechanism to ensure compliance with the proposed catch limits. The 2003 Commission Meeting in Berlin proposed a RMS "package"

⁷³ At 4.

⁷⁴ ICRW, above n 2.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Following an examination of the Sub-Committee's reports from 1991 – 2004, only 10 out of the 24 infractions were recognised as such by the Parties concerned (14 of which were aimed at Japan): see *Ibid.*

⁷⁸ Revised management Scheme Working Group (Report at the 57th Annual Meeting, Annex E, 2005) at 16.

which included a “National Inspection and Observation Scheme”, as recommended by the Expert Drafting Group (EDG), and required observers and inspectors aboard all vessels.⁷⁹ Its implementation would minimise the issues associated with self-reporting and provide the Infractions Sub-Committee/CRC with more representative and comprehensive information.

Despite its potential, the progress of the RMS and therefore, the entire package has stalled. During the 2006 Intersessional Meeting of the RMS Working Group it was decided that individual (groups of) governments were free to work together, however, all collective endeavours would be postponed.⁸⁰ Despite being on almost all subsequent Commission Meeting agendas, no formal work has since been done on the RMS.⁸¹ In recognition that the current means of ensuring compliance of the ICRW are at best ineffective, Chapter 3 will consider if the participation of NGOs could improve the situation and how it could possibly be done.

2.2 *Compliance and Enforcement Regimes within Comparable Multilateral Environmental Agreements*

Before evaluating the potential role of NGOs within the IWC, it is relevant to compare the Convention with other similar MEAs. This comparison will provide insight into different compliance methods and alternatives that could be adopted in addition to, or instead of, formalising and expanding the role of NGOs.

The most noticeable difference with the ICRW and other MEAs is the authority given to the Commission. To compare, the *Convention of International Trade in Endangered Species of Wild Fauna and Flora 1975* (CITES) which requires party states to install domestic controls on exports and imports of listed endangered species, allows the Standing Committee to recommend to all Parties that they adopt stricter domestic measures and suspend trade with a persistent non-compliant Party.⁸² This method has been used in at least 40 cases and is

⁷⁹ Specifically; a Vessel Monitoring System (Which use satellite technology to ensure that only registered boats are catching fish within areas legally designated areas) on very small vessels with less than 24 hour trips and one observer per catcher attached to a factory ship: see Report of the Revised Management Scheme Working Group, IWC/57/Rep 6 (Agenda Item 6.21, Ulsan, 15 June 2005) at 21.

⁸⁰ Chair’s Report of the RMS Working Group Meeting, IWC/58/RMS 3 (Cambridge, 2 March 2006) at 15.

⁸¹ Chair’s Report of the 64th Annual Meeting (Panama City, 2 July 2012) at 5.

⁸² *Convention of International Trade in Endangered Species of Wild Fauna and Flora* (open for signature 3 March 1973, entered into force 1 July 1975), art XIV (1).

An electronic version of the Agreement can be accessed at <<http://www.cites.org/eng/disc/text.php>> last visited 04/10/2013.

regarded as generally successful in implementing effective trade bans.⁸³ Another example is the establishment by the Contracting Parties of the *Agreement on the International Dolphin Conservation Program 1998* (AIDCP)⁸⁴ of an Illegal, Unreported & Unregulated (IUU) fishing list. The penalty for any fishing vessel put onto that list is the prohibition of landing or transshipping at AIDCP Parties' ports.⁸⁵ Similarly, under the *Convention for the Conservation of Antarctic Marine Living Resources 1982* (CCMLR), inclusion onto the IUU Vessel List⁸⁶ could see the other Parties withdrawing the registration or fishing licence of the accused vessel.⁸⁷ These three Conventions provide examples of measures that the IWC could adopt and furthermore CITES and CCMLR illustrate that by approaching the words of the Treaty creatively, the Commission itself need not be the one that imposes the restrictions, instead the other contracting parties could do it. In fact, sanctions imposed by Governments may be more effective as they have real economic and political impact on the recipient and would incentivise compliance.

The aforementioned penalties are for the IWC to impose and Sea Shepherd would/should not play a role in their enforcement. However before a punishment for an infraction can be given, the IWC would need to be informed of the violation. Thus, other MEAs have adopted effective reporting mechanisms to ensure that their relevant Commission is aware of the treaty party's actions. CCMLR has created a more objective indication of the activities aboard vessels by requiring inspectors to observe fishing activities of the Contracting parties.⁸⁸ The *UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995* (UNFSA) takes it a step further by allowing state parties, through their own authorised inspectors, to board and inspect another state parties vessels for the purpose of ensuring compliance.⁸⁹ Although inspecting states

⁸³ Altherr, above n 65, at 5.

⁸⁴ *Agreement on the International Dolphin Conservation Program 1998* (opened for signature 15 May 1998, entered into force 15 February 1999). An electronic version of the Agreement can be accessed at <<http://www.iattc.org/IDCPDocumentsENG.htm>> last visited 04/10/2013.

⁸⁵ 12th Meeting of the Parties, *Resolution to Establish a List of Vessels Presumed to have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Agreement Area* (La Jolla, California, 20 October 2004) Resolution A-04-07.

⁸⁶ *Convention for the Conservation of Antarctic Marine Living Resources 1982* (opened for signature 1 August 1980, entered into force 7 April 1982), art 13. An electronic version of the Convention can be accessed at <<http://www.ccamlr.org/en/organisation/ccamlr-foundation-documents>> last visited 04/10/2013.

⁸⁷ At art XVII.

⁸⁸ At art XXIV.

⁸⁹ *UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995* (opened for signature 4 December 1995, entered into force 11 November

cannot bring proceedings against the non-compliant parties, they are able to remain on board to collect evidence and escort the vessel to the nearest port upon discovery of a serious violation.⁹⁰ This is an extreme example and its success is dubious due to a lack of State cooperation,⁹¹ however it does offer a precedent that could be adopted, in whole or in part, by the IWC.

It is recognised that inspection schemes are “intrusive in terms of sovereignty, and they require huge financial resources if they are to work effectively,”⁹² therefore, before states would allow for such an infringement on their sovereignty, they would need to believe that they were deriving some benefit from the arrangement. Within the IWC setting, an example that could satisfy both the commercial whaling and anti-whaling nations could be the lifting of the moratorium and the simultaneous enforcement of prescribed catch limits. To make this a viable option and prevent exploitation, it is essential that the catch-limits are adhered to, and as shown by the current compliance mechanism within the IWC, this cannot be guaranteed. Therefore in a circular way, neutral observers are required to legitimise a program to satisfy all parties and minimise the affront of intruding on state sovereignty. Furthermore, the second obstacle in implementing an effective inspection scheme of requiring “huge financial resources” could be mitigated with the delegation of duties. If NGOs, like Sea Shepherd, could assist in the inspection and observation schemes then the burden of finding apolitical resources would be lifted.

2001), art 21 (1) provided the flag state is notified, there is minimal interference with fishing operations and only proportionate action is taken (Article 21 (16)). An electronic version of the Convention can be accessed at

<http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm> last visited 04/10/2013.

⁹⁰ Andrew Phillips “A review on Innovation and Impotence in Fisheries Instruments: The Convention on the Conservation of Marine Living Resources 1980 and Fish Stocks Agreement 1995” (Graduate Certificate Report, University of Canterbury, 2007), at 13.

⁹¹ See generally, David A. Balton and Holly R. Koehler “Reviewing the United Nations Fish Stocks Treaty” (2006) 7 SDLP 5.

⁹² Stefan Oeter “Inspection in international law: Monitoring compliance and the problem of implementation in international law” (1997) 28 Netherlands Yearbook of International Law 101 at 69.

CHAPTER 3:

THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS AND THEIR FORMAL INCORPORATION INTO MULTILATERAL ENVIRONMENTAL AGREEMENTS

3.1 *Role of Non-Governmental Organisations in International Law*

The previous chapter outlined some deficiencies within the ICRW regime and came to the conclusion that the current compliance and enforcement provisions⁹³ are lacking any real strength. The result is that NGOs, namely Sea Shepherd, respond using violence to ensure that the terms of the Convention are upheld. If the Court of Appeals version of piracy stands and Sea Shepherd is no longer able to continue as it is, then the whales would be the ones to suffer, because as Chapter 2 illustrated, the IWC alone is ineffective to control the activities of the whaling nations. Therefore, the question is whether the gap could be filled by Sea Shepherd without the use of violence, and if so, how?

As a starting point it is helpful to first look generally at the roles that NGOs have played in international law and then determine how best to incorporate them into the IWC to effectively capitalise on their resources. The NGO Global Network, working in conjunction with EXECOM - The Executive Committee of Non-Governmental Organizations Associated with The United Nations Department of Public Information, defines NGOs as:

Any non-profit, voluntary citizens' group which is organized on a local, national or international level. Task-oriented and driven by people with a common interest, NGOs perform a variety of service and humanitarian functions, bring citizen concerns to Governments, advocate and monitor policies and encourage political participation through provision of information. Some are organized around specific issues, such as human rights, environment or health. They provide analysis and expertise, serve as

⁹³ Particularly Article IX of the ICRW 1946, which instead of creating binding legal obligations on the contracting parties, merely requires them to take “appropriate” measures to ensure compliance.

*early warning mechanisms and help monitor and implement international agreements.*⁹⁴

The definition illustrates some of the advantages that NGOs can provide. By relaying their concerns and reports to governments and relevant bodies, NGOs provide a rich source of expertise and resources that can be used in the development and application of international law. Governments may be restricted not only by their financial means, but also by political relationships and obligations. In contrast, NGOs have the advantage of working within a simple framework with comparatively minimal political and bureaucratic constraints. As Secretary General of the United Nations (UN), Ban Ki-Moon, said; "Our times demand a new definition of leadership - global leadership. They demand a new constellation of international cooperation - governments, civil society and the private sector, working together for a collective global good."⁹⁵

The benefits of following the advice of the Secretary General and incorporating NGOs into systems of "global leadership" are plentiful. NGOs are effective due to their flexibility, adaptability⁹⁶ and their apolitical nature, which enables them to provide a more representative voice for the wider public. The freedom means that NGOs are not constrained by borders and can pursue a cause without having to fit into the agendas of certain states, providing them with the ability to span nations, gather support from a range of sources and consequently pool resources. The very definition of NGOs is the coordination of private citizens to further a "common interest". Including these organisations into the system of international governance would not only increase the expertise available, but also ensure that politics do not hinder progress towards the "collective global good".

3.2 Non-Governmental Organisation's within Human Rights Law and the International Labour Organisation

Human Rights Law has unmistakably capitalised on NGO resources as "it is inconceivable that [the human rights] movement, whatever its weaknesses, could have achieved as much in

⁹⁴ Executive Committee of Non-Governmental Organizations Associated with The United Nations Department of Public Information "NGO Definition" NGO Global Network <<http://www.ngo.org/ngoinfo/define.html>> last visited 04/10/2013.

⁹⁵ Ban Ki-moon, UN Secretary-General "The Global Compact: Creating Sustainable Markets" (World Economic Forum, Davos (Switzerland), 29 January 2009).

⁹⁶ Sarah C. Schreck "The Role of Nongovernmental Organizations in International Environmental Law" (2006) 10 GONZ. J. INT'L.L 252 at 262.

its first half century without the spur and incentive of NGOs.”⁹⁷ Amnesty International provides an example of an independent and democratic organisation that has accumulated 3 million members since its inception in 1961.⁹⁸ The United Nations has acknowledged this following by adopting resolutions in direct response to Amnesty’s campaigns⁹⁹ and recognising its achievements through the presentation of multiple awards.¹⁰⁰ Amnesty International is influential in the public domain as its campaigns are generally highly regarded and play an important role in the implementation of new human rights policies.

In addition to independent campaigns, human rights NGOs are able to submit “shadow reports” to the legal bodies overseeing specific treaties. These reports either confirm or contradict a country’s own reports on the status of human rights within its jurisdiction. This process is considered a compliance mechanism that serves to induce dialogue between government and the international community, a “process to maximise the real enjoyment of rights within states.”¹⁰¹ Furthermore the UN has recently made some changes to its human rights monitoring system in an attempt to be more coordinated and user-friendly. An example is the new set of “Harmonized Guidelines” requiring State parties to provide the monitoring organisations with a “common core document”, a CCD, which is an overview of the state’s current situation with regard to its human rights obligations.¹⁰² Non-state actors are then able to respond with a CCD shadow report. Arguably a more efficient and inclusive system as the NGO does not need to comply with a particular treaty’s restrictive provisions to make a submission. Furthermore, the increased incorporation of NGOs helps to “increase knowledge of human rights and to prompt both the community and government to identify key issues as ‘human rights problems’ requiring urgent attention.”¹⁰³

⁹⁷ Kal Raustiala “The “Participatory Revolution” in International Environmental Law” (1997) 21 Harv. Envtl. L. Rev 537 at 555.

⁹⁸ Amnesty International “Who we are” (2013) Amnesty International <<http://www.amnesty.org/en/who-we-are>> last visited 04/10/2013.

⁹⁹ See generally, Amnesty International “The History of Amnesty International” (2013) Amnesty International <<http://www.amnesty.org/en/who-we-are/history>> last visited 04/10/2013.

¹⁰⁰ *Ibid* at “1978” (where the organisation was awarded the UN Human Rights prize for “outstanding contributions in the field of human rights”).

¹⁰¹ Annemarie Devereux and Catherine Anderson “Reporting under International Human Rights Treaties: Perspectives from Timor Leste’s Experience of the Reformed Process” (2008) 8 Hum. Rts. L. Rev. 69 at 70.

¹⁰² See generally, Report of the UN Secretariat “Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties” Third inter-committee meeting, Geneva (21-22 June 2004).

¹⁰³ Devereux and Anderson, above n 103 at 103.

The theme of trust and reliance on NGOs is further demonstrated in their role within various arms and weapons treaties. The Landmine and Cluster Munitions Monitor is a NGO body that monitors the progress of state compliance of the Mine Ban Treaty 1997 (The Ottawa Convention)¹⁰⁴ and the subsequent Convention on Cluster Munitions 2008.¹⁰⁵ The monitor's parent body, the International Campaign to Ban Landmines, enjoyed a pivotal role in the writing of the Treaty¹⁰⁶ and although the NGO has not formally been incorporated into it, the rudimentary verification system of the Convention has meant that the organisation has "assumed a quasi-formal role in monitoring the landmine ban."¹⁰⁷ Although similar to the ICRW in that the Treaties do not explicitly incorporate NGOs, the governing bodies have recognised the value of NGO contributions and encouraged their participation. However, this method of integration is negligible in comparison to that adopted in the 1990 Confidence and Security Building Measure Document of Stockholm. Instead of a compilation of annual reports, this document creates an unconditional obligation on the state parties to permit foreign inspectors to enter their territory to assess their efforts to comply with the Convention.¹⁰⁸ This is an onerous commitment as it is reported that participating States undertake 90 inspection and 45 evaluation visits each year.¹⁰⁹ Although the reports are sometimes weak due to a pressurised time schedule and some "sensitive areas" being off-limits,¹¹⁰ Article VIII illustrates how a seemingly intrusive provision can be modified so as to appease most actors. The challenge is finding a balance that is conducive to effective monitoring whilst not threatening state sovereignty.

A difficulty arises because to ensure the cooperation of nations, international law has to safeguard state sovereignty, however by doing so, the ability of the international community to monitor and enforce treaties is jeopardised. By relying solely on states' own reports there

¹⁰⁴ Above n 6.

¹⁰⁵ Convention on Cluster Munitions (opened for signature 3 December 2008 , entered into force 1 August 2010). An electronic version of the Convention can be accessed at <http://www.clusterconvention.org/the-convention/convention-text/> last visited 04/10/2013.

¹⁰⁶ The International Campaign to Ban Landmines (ICBL) "Treaty Basics" (2009) The International Campaign to Ban Landmines < <http://www.icbl.org/index.php/icbl/Treaty/MBT/Treaty-Basics#whatIsTheOttawaProcess> > at "What is the Ottawa Process" last visited 04/10/2013.

¹⁰⁷ Cameron S.G. Jefferies "Strange Bedfellows or Reluctant Allies?: Assessing Whether Environmental Non-Governmental Organizations (ENGOS) Should Serve as Official Monitors of Whaling for the International Whaling Commission (IWC)" (2009) 26 Windsor Rev. Legal & Soc. 75 at 90.

¹⁰⁸ Vienna Document 2011 on Confidence and Security Building Measures FSC.DEC/14/11 (30 November 2011) at IX (75) and (77).

¹⁰⁹ Forum for Security Co-operation "Confidence and Security Building" (2013) Organization for Security and Co-operation in Europe <<http://www.osce.org/fsc/44569>> last visited 04/10/2013.

¹¹⁰ Oeter, above n 92, at 122.

is a high possibility that their accounts of compliance would be biased, therefore to mitigate the problem the human rights field has engaged the help of objective third parties (NGOs). To look more specifically at the IWC, what is required is the observation of vessels, such as those associated with the ICR, to see whether the state parties stay within their prescribed catch limits. However, an argument arises that if Sea Shepherd was merely observing the vessels then there would be no issue, rather the problem is that they have taken to attacking the vessels too. This is true and the answer lies in the institutional structure of the ICW; if Sea Shepherd could submit shadow reports that the Commission valued, and/or had some enforcement powers to check non-compliance, it is arguably less likely that it would feel the need to adopt such a violent *modus operandi*. Conceptually, by giving the environmental NGOs (ENGOS) a voice on the Commission floor, they would not need to use force to be heard.

The human rights field is a relatively well-established area of international law that has developed a comprehensive judicial structure with reputable courts and commissions. In addition to the institutional framework, this field of law has the benefit of generating greater public support for its rights-based assertions instead of the complex technical regulations associated with environmental legislation.¹¹¹ The human rights model could never be replicated in full, however, its use of NGOs can provide a useful precedent that could help in the improved compliance of MEAs.

Perhaps the place that the role of non-state actors reaches its zenith is in the International Labour Organisation (ILO).¹¹² The Organisation has created a tripartite structure where each member state has a representative from their government as well as from the employers' and employees' workers organisations. They all work in concert to prevent labour conditions of "such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled."¹¹³ By being fully represented in the Governing Body, the NGOs are able to influence agenda items, supervise the implementation phase of recommendations and provide integral monitoring roles that vary

¹¹¹ United Nations Environment Programme "Training Manual on International Environmental Law" (Nairobi, Kenya, 2006) at 301.

¹¹² Raustiala, above n 97, at 553.

¹¹³ International Labour Organisation Constitution (1919) at the Preamble.

according to the needs of a particular issue.¹¹⁴ A recent example of the ILO's function would be its assigned role of monitoring a Compact between the European Union, Bangladesh Government and the ILO, following the collapse of the Rana Building in Bangladesh.¹¹⁵ The NGOs are therefore involved in ensuring that building structure integrity and occupational safety meet the prescribed standards. Any discrepancies in compliance by the relevant players would then be reported back to the Governing Body, who would deal with the violations accordingly. This is a comparable situation to the proposed process of Sea Shepherd reporting to the IWC about Japan's compliance with the IWRC, and then having the Commission decide on the appropriate punishment.¹¹⁶

This tripartite regime has existed since the ILO's inception therefore the likelihood that the IWC would ever reach its point of NGO integration is slim as its structure is already well established. Nonetheless, the ILO illustrates that States are able to preserve their sovereignty whilst engaging in positive relations with non-state actors. By devising formal pre-conditions for NGOs to meet before invitation to the Conferences,¹¹⁷ the Governments do not feel that their sovereignty is being threatened as they maintain a dominant role in the decision-making process. Consequent issues of only like-minded bodies being accepted into the organisation and of smaller NGOs prevented from being included could arise,¹¹⁸ however, a seat at the table for some is preferable to no seat at all. Again, it is unlikely that the IWC would incorporate NGOs so comprehensively into its structure, but the ILO does provide a workable model to use as a comparison.

3.3 *Environmental Non-Governmental Organisations (ENGOS) and the International Whaling Commission (IWC)*

Of course the ICRW does provide for the participation of NGOs in the regulation of whaling. At first glance Article IV is all-inclusive and provides for considerable participation of non-

¹¹⁴ Malva Driessen "Strength-Weakness Analyses on the ILO as a Model for NGO-Participation" in *The legitimacy of the United Nations: towards an enhanced legal status of non-state actors* (SIM Special 19, Univeriteit Utrecht, 1997) 73 at 73.

¹¹⁵ On 24 April 2013 structural defects led to the collapse of an eight story garment factory, which claimed the lives of 1, 127 people and injured many more. The compact was signed in July 2013: Communication and Public Information "The Rana Plaza building collapse... 100 days on" (5 August 2013) International Labour Organisation <http://www.ilo.org/global/about-the-ilo/activities/all/WCMS_218693/lang--en/index.htm> last visited 04/10/2013.

¹¹⁶ An example based on the current discussion; however it would be applicable to any NGO and any state party.

¹¹⁷ See generally, ILO Information Note "Representation of international non-governmental organizations at the International Labour Conference and other ILO meetings" (1 May 2005).

¹¹⁸ Driessen, above n 114, at 75.

state actors in the Convention,¹¹⁹ however, it is subsequently constrained by the IWC Rules of Procedure. The Rules require observers for NGOs to receive accreditation from the Commission following the review of contracting parties.¹²⁰ Approval is not guaranteed and as a result, the vision of “considerable participation” is greatly jeopardised. A prime example is the exclusion of Sea Shepherd from the Commission even though it should have met all the prescribed requirements.¹²¹ Although it is understandable that contracting parties should have the final say on matters relating to a signed international agreement, it does allow inconsistencies to arise. To rectify the problem a more standardised procedure should be followed where the meeting of certain prerequisites provides near assurance of admission to the Conference, such as the process within the ILO.

Another issue is that despite accreditation by the IWC being the only guaranteed method of ENGOs having their work accepted as official documents,¹²² the actual benefits that flow from it are negligible. Instead of having an active role on the floor, ENGOs contribution within the Commission is restricted to the submission of a heavily conditioned opening statement.¹²³ Therefore if a new monitoring system were to be introduced, a more inclusive reporting process within the Commission would need to be developed to provide ENGOs with an influential voice. Nevertheless, the IWC is not the only platform available to NGOs who have also coordinated influential campaigns and lobbies. According to an IWC observer and former aide to Sir Peter Scott,¹²⁴ ENGOs can be accredited with the adoption of the Moratorium, Indian and Southern whale sanctuaries and a precautionary RMP.¹²⁵ These are big accomplishments of which they can be proud, leaving one to question whether the formal incorporation of ENGOs into the IWC is necessary.

To evaluate that question one can divide NGO activism into two categories; “protest” and “interventionist”.¹²⁶ The former adopts legal techniques, such as demonstrations and campaigns, whereas interventionist activism involves the use of “borderline or blatantly

¹¹⁹ Above n 2, at art IV(1).

¹²⁰ See Generally, International Whaling Commission “Observers” (2013) International Whaling Commission <http://iwc.int/observers_ngo> at “Admission to Commission Meetings” last visited 04/10/2013.

¹²¹ Kieran Mulvany “The International Whaling Commission and the Role of Non-Governmental Organizations” (1997) 9 Geo. Int’l Env’tl. L. Rev 347 at 352.

¹²² *Ibid.*

¹²³ IWC, above n 120, at “Fees”.

¹²⁴ The founder of the World Wildlife Fund (WWF).

¹²⁵ Mulvany, above n 121.

¹²⁶ Anthony L.I. Moffa “Two Competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean” (2012) 37 Yale J. Int’l L. 201 at 203.

illegal tactics to confront violators directly.”¹²⁷ The greatest advantage of the former category is that protests and public demonstrations are generally regarded as legal in most modern democracies, as they relate to the freedoms of free speech and assembly.¹²⁸ Protests can prove successful, as with Greenpeace’s 2005 consumer boycott against the seafood giant, Gorton’s of Gloucester after it was discovered that Gorton’s parent company, Nippon Suisan Kaisha Ltd of Japan, held a 31.9% share in Kyodo Senpaku, one of the companies that operates under a Scientific Whaling Permit.¹²⁹ Within 6 months of the campaign the shares had been donated to “public interest corporations,”¹³⁰ however although this was considered a victory for Greenpeace, the actual effect on the whaling industry was negligible. Not only was the JARPA program renewed in 2005/2006,¹³¹ but as the Japanese Government purchased most of the shares,¹³² the JARPA II operations were heavily subsidised.¹³³ If the goal was to increase public awareness and corporate responsibility then the boycott was a success, however, if it was to curb whaling operations then it cannot so easily be regarded as a victory.

To compare, one can look at Sea Shepherd’s current interventionist tactics, in pursuit of its unmistakable goal of ending Japanese whaling in the Antarctic. The ICR has categorically blamed the “sabotage of the anti-whaling activists” (by Sea Shepherd) for the early end to their 2011/2012 season and by only meeting 30% of their quotas, over 630 whales were prevented from being killed.¹³⁴ An additional consequence of Sea Shepherd’s campaign has been the increased public awareness of Japanese whaling policies, mainly through the broadcasting of *Whales Wars*. This awareness has extended to the Japanese public who have become increasingly informed about their government’s subsidised whale program. With an unsold stockpile of over 5, 000 tonnes in 2010,¹³⁵ the general mood towards whale meat has waned, and even those 27 per cent who support whaling, only 1.8 per cent would support the

¹²⁷ *Ibid.*

¹²⁸ Relevant examples include Amendment 1 of the *Constitution of the United States 1787* and Article 21, paragraph 1 of *Nihonkoku Kenpo 1947* [the Japanese Constitution], which both protect the freedom of assembly.

¹²⁹ Danielle Fest Grabiell, Clare Perry, Claire Bass and Allan Thornton “The Gorton’s Family Whale Killing Business” (Environmental Investigation Agency Report, United Kingdom, 2005) at 1.

¹³⁰ Moffa, above n 126 at 208.

¹³¹ The Institute of Cetacean Research “JARPA II Research Fleet Departs for the Antarctic” (media release, 7 November 2005) at 1.

¹³² Moffa, above n 126, at 209.

¹³³ Subsidies of more than US\$9.78 million (for both Antarctic and North Pacific ventures in 2010) International Fund for Animal Welfare “*Economics of Japanese Whaling: A collapsing industry burdens taxpayers*” (International Fund for Animal Welfare Inc, Massachusetts, 2013) at 2.

¹³⁴ BBC News “Japan Ends Whaling Season Short of Quota” (9 March 2012) <<http://www.bbc.co.uk/news/world-asia-17312460>> last visited 04/10/2013.

¹³⁵ IFAW, above n 133, at 8.

use of tax payers' money to further it.¹³⁶ If economic logic holds, a decrease in demand should result in an equivalent decrease in supply, which directly corresponds to a decrease in Japanese whaling in the Antarctic, Sea Shepherd's goal.

To come back to the question about whether it is necessary to formally incorporate ENGOs into the IWC, it is appropriate to consider whether interventionist tactics are superior to protest activism. Therefore if it is decided that the latter plays a more effective role in furthering environmental concerns, then the current model is adequate and no official integration would be required. Therefore to determine which method is more effective, one can consider the definition of an NGOs effectiveness as being when "one actor intentionally communicates to another so as to alter the latter's behaviour from what would have occurred otherwise".¹³⁷ Evidently both Greenpeace and Sea Shepherd induced a course of action that neither Nippon Suisan Kaisha Ltd nor the ICR would have taken alone. The difference rather comes down to the consequences that the changes induced. As Sea Shepherd was the only one to actually curb whaling in the Southern Ocean, the interventionist approach appears to have been more influential. However a dangerous implication arises from this conclusion; that violent confrontations provide the best solution to any problem. Notwithstanding any professed good intentions, such behaviour should not be condoned, therefore the ethical fallacy that "two wrongs don't make a right" challenges interventionist activism and "its existence undercuts the international rule of law."¹³⁸ As the concept of the rule of law is embedded within the Charter of the United Nations 1945¹³⁹ one can look at the rule of law as providing the "architecture of the legal system rather than the content of its laws,"¹⁴⁰ thus the pursuit of non-violent mechanisms to resolve disputes should be preferred. This may be true and Sea Shepherd's sabotaging tactics should never be legalised, however, it would be counterproductive to classify the NGO as pirates. Instead, the passion of its members and its resources should be harnessed and used to provide legal restraint on state party whaling activities.

¹³⁶ *Ibid* at 13.

¹³⁷ Jefferies, above n 107, at 86.

¹³⁸ Moffa, above n 126, at 212.

¹³⁹ One of the Preamble's aims is to "*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*". And Article 1 of the Charter of the United Nations whose primary objectives is "*to maintain international peace and security... and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace*".

¹⁴⁰ Simon Chesterman "An International Rule of Law?" (2008) 56 Am.J.Comp.L. 331 at 341.

3.4 *What Role should Environmental Non-Governmental Organisations Play in Monitoring Official Activities?*

As already outlined, the underlying weakness of MEAs is that “most international agreements lack enforcement clauses” and the capacity to ‘police’ treaty law,¹⁴¹ therefore the proposition is that ENGOs should enjoy a formal role in overseeing State activities. With seven out of the 13 large species endangered¹⁴² it is evident that whales are vulnerable, and any method the IWC adopts to ensure the “*proper conservation of whale stocks and thus make possible the orderly development of the whaling industry*”¹⁴³ should be properly introduced and supervised. Along with genetic testing of whale meat, which is outside of the current scope of discussion, ENGOs like Sea Shepherd have the skills and resources to perform roles as official observers or patrollers of whale sanctuaries. It is the merits and feasibility of these two options that I will now examine.

As outlined in Chapter 2, Article 21 of the ICRW Schedule requires two inspectors aboard any factory ship, however their influence is minimal due to their appointment being the responsibility of the vessels own governments. Ultimately, the use of “politically independent observers” would put credibility back into this trust based system.¹⁴⁴ In addition to helping ensure that sustainable whale stocks are maintained, it would also comfort the general public to know that States are acting responsibly on the high seas. In democracies, government and citizenry relationships are important and “without transparency and accountability, trust will be lacking between a government and those whom it governs.”¹⁴⁵ Whaling activities in the Antarctic region may not be on the forefront of global concerns, but they do provide a precedent for the monitoring of other MEAs. The enhancement of accountability measures can only enhance international relations, which in turn would improve the efficiency of global governance.

¹⁴¹ Valerie Neale Spencer, “Domestic Enforcement of International Law: The International Convention for the Regulation of Whaling” (1991) 2 Colo. J. Int’l. Env’tl L. & Pol’y 109 at 115.

¹⁴² World Wildlife Fund “Why They Matter” (2013) World Wildlife Fund
<<http://worldwildlife.org/species/whale>> last visited 04/10/2013.

¹⁴³ ICRW, above n 2, at Preamble.

¹⁴⁴ Jefferies, above n 95, at 107.

¹⁴⁵ Augustin Carstens, Deputy Managing Director of the International Monetary Fund “The Role of Transparency and Accountability for Economic Development in Resource-rich Countries” (Regional Workshop on Transparency and Accountability in Resource Management in CEMAC Countries Malabo, Equatorial Guinea, 27 January 2005).

For a mandatory observer scheme to work, the observers would need to be approved of unanimously so as not to challenge a state's sovereignty. To achieve this, the ENGOs could pool their resources and establish an apolitical and independent training program. By doing so, any extremists, such as Sea Shepherd, would have to reconcile their tactics to conform. Some insight into how such a training program could be conducted is provided by the FAO Guidelines for Developing an At-Sea Fishery Observer Programme, created "to help those involved in managing fisheries to understand the range of objectives that an observer programme can meet and how these contribute towards the management of a fishery."¹⁴⁶ A situation that the Guidelines wish to promote is illustrated in Article 9 of the *Convention on Conduct of Fishing Operations in the North Atlantic* 1967¹⁴⁷ where observers are legally incorporated to facilitate the Convention. This article grants the observers considerable power; not only are they able to "enquire and report on infringements" but they can also "order the vessel to stop". Although such authority is necessary to ensure that the role is effective, adequate checks are required to safeguard against observers abusing their position.

It is emphasised in the Guidelines that observers need to be "fully trained for all aspects of their role, and [be] capable of acting with tact and with a full understanding of their position and the legal authority to undertake their work."¹⁴⁸ This is largely due to the unfavourable nature of their work where disagreements between the crew and the independent observer are inevitable. The Association for Professional Observers (APO) is an NGO that provides parties with comprehensive information to strengthen observer programs. Although the volume caught and methods used are substantially different between whales and fish, the similarities associated with acting on the high seas and within a fragile marine eco-system are persuasive in the establishment of a similar system. An observer program is by no means an absolute solution, but "observer enforcement may offer a unique and important tool to reduce noncompliance"¹⁴⁹ and provided adequate training is provided, there appears to be no justifiable reason to veto their presence. Observers provide the necessary impartial link

¹⁴⁶ S.L Davies and J.E Reynolds "Guidelines for Developing an at-Sea Fishery Observer Programme" (FAO Fisheries Technical Paper No. 414, Rome, 2002) at iv.

¹⁴⁷ Convention on Conduct of Fishing Operations in the North Atlantic (open for signature 1 June 1967, entered into force 26 September 1976). An electronic version of the Convention can be accessed at

<http://iea.uoregon.edu/page.php?query=coded_all_lines&where=start&FilenameEQ=1967-ConductFisheriesOperationsNorthAtlantic> last visited 04/10/2013.

¹⁴⁸ Above n 146, at 2.

¹⁴⁹ Read D. Porter "Fisheries Observers as Enforcement Assets: Lessons from the North Pacific" (2010) 34 Marine Pol'y 583 at 588.

between actor and supervisor; therefore by utilising the resources of the ENGOs the IWC is able to increase its presence on the oceans and consequently its control.

Another option available would be for the ENGOs to assume the role of patroller within the whale sanctuaries. Comparable to a neighbourhood watch, the NGO would police the waters to ensure that all states comply with the Convention. The ability for unobtrusive observation is relatively easy given the large size of whales and technological advancements that can show the real time GPS locations of a vessel. An example of such a program would be the protection of the Galápagos Marine Reserve through a five year partnership agreement in 2001 between the Galápagos Islands and Sea Shepherd, which has since been extended due to its success.¹⁵⁰ Sea Shepherd provided the park management with a small crew and loaned its best patrol vessel to transport two park rangers and an Ecuadorian naval officer.¹⁵¹ Therefore, as the naval officer is the only one with the power to arrest, Sea Shepherd merely provides the otherwise financially unobtainable means that allow the authority to act.¹⁵² Although apprehensive at first, the parks management is “pleased with the arrangement”¹⁵³ as the program has resulted in the ability to arrest multiple illegal fishing vessels and has also increased the local population’s awareness of the problem. Furthermore, a subsequent agreement has been made with the Cocos Islands, however, Sea Shepherd does not have a permanent presence in the area; instead it carries patrol personnel on board its vessel when making supply runs to its vessel in the Galápagos Islands.¹⁵⁴

Practically, it is unlikely that an exact replica of this system could be adopted within the IWC, because unlike the Galápagos’ and Cocos Islands Protected Areas, there is no single country that has exclusive jurisdiction over the waters concerned, therefore a simple contractual agreement between two parties is not possible. Instead, a contract between the ENGOs and IWC is needed, which would require the agreement of all ICRW state members. Despite this obstacle, the example shows that NGO participation can be beneficial to all and that, as the variations in the Cocos and Galápagos Islands contracts illustrate, creative

¹⁵⁰ “MPA Enforcement: How Practitioners are Developing New Tools, Strategies and Partnerships” (MPA News Vol. 11, NO. 5 March-April 2010) at Private Aid Enforcement <<http://depts.washington.edu/mpanews/MPA113.htm>> last visited 04/10/2013.

¹⁵¹ The vessel has since been donated: see *ibid*.

¹⁵² “Sea Shepherd, an International NGO, Participates in Enforcement at Two MPAs” (MPA News Vol. 3, No. 4 October 2001) < <http://depts.washington.edu/mpanews/MPA24.htm>> last visited 04/10/2013.

¹⁵³ *Ibid*, at “Management pleased”.

¹⁵⁴ MPA Enforcement, above n 150.

provisions can be made to best suit the situation at hand. Ultimately it proves that when ENGOs are formally involved in the compliance and enforcement of MEAs they help by providing the most appropriate skills and equipment, whether it is the loan of a vessel, providing an intermittent presence or enhancing public awareness. An NGOs most valuable characteristic is its adaptability of structure and resources, therefore variations can be made to satisfy all parties.

3.5 The Consequences of Formal Incorporation of Environmental Non-Governmental Organisations into the Enforcement and Compliance Regime

For all the aforementioned benefits of ENGO involvement, there are distinct downfalls too. Perhaps the greatest challenge posed is the threat to state sovereignty. The “borderless environmental agendas” of the ENGOs have the potential to “undermine the interests of some sovereign nations.”¹⁵⁵ When it is individual contracting parties that would incur the penalties of non-compliance, then it should (only) be them that oversee its governance. The question that arises is ultimately “what right do NGOs have to contribute to the shaping of global governance?”¹⁵⁶ The aforementioned flexibility and adaptability that is favourably associated with them have corresponding disadvantages too, namely a lack of accountability and unpredictable agendas. It would be inconceivable for a non-state party to be able to enforce an MEA without having any corresponding obligations to fulfil, therefore how can ENGOs automatically expect such privileges? If such preferences are given to uncommitted self-regulating bodies then there is a real risk that states’ involvement in MEAs would decrease.¹⁵⁷ Although the ICRW currently governs a faulty system, the IWC has 88 members and it is arguably more beneficial to have many members to an ineffective Commission than having no members to one with effective enforcement provisions that simultaneously infringe on state sovereignty. The argument is that once the parties have ratified a convention there is potential for favourable changes to be made at a later point, which creates a progressive system that works slowly but steadily towards a desired outcome. Hence, if the desired outcome of the IWC includes the help of ENGOs, the Commission would want assurances that their formal integration would not detrimentally affect the current status quo.

¹⁵⁵ Schreck, above n 96, at 264.

¹⁵⁶ Jefferies, above n 107, at 100.

¹⁵⁷ Schreck, above n 96, at 264.

A further risk of ENGO incorporation is the ability for them to nominate themselves the “spokesperson[s] of humanity and thus monopolise the debate and serve their own interests.”¹⁵⁸ The argument is that NGOs could be placed in a position that allows them to dictate the course of international law. As Greenpeace has a “supporter base of some 24 million”¹⁵⁹ whilst other countries have an entire population a mere fraction of that,¹⁶⁰ there is a legitimate concern that ENGOs would dominate proceedings, to the detriment of less influential Contracting Parties. Although a valid concern, it is important to remember the proposed role of ENGOs in the IWC; one of monitor and/or observer. Complaints about an ENGO intruding on state sovereignty through the “control [of] resources within countries and granting the right to vote on international laws,”¹⁶¹ are simply not applicable here. This argument of undermining a nations’ autonomy is significantly weakened when the ENGOs role would be merely to oversee that contracting parties are upholding the terms of the MEA they had independently ratified. The ENGOs would be comparable to a police force making sure that citizens comply with the laws created by their governmental representatives.

As a police force needs to prove legitimacy such that a “justification exists for the power they wield”¹⁶² before being able to enforce the laws, so too would the ENGOs. To prove legitimacy, Alan Hudson¹⁶³ has created the construct of “political responsibility,” a “pragmatic approach to understanding power relations as they arise in transnational advocacy networks and campaigns.”¹⁶⁴ His aim is to establish an objective standard that would span the diverse stakeholder’s interests and opinions and by meeting this threshold, NGOs would be able to enjoy a more active role in global governance. Hudson argues that for “political responsibility” to be achieved NGOs need to prove that they have: established clear roles as an organisation; “agenda-setting and strategy-building” capabilities; allocated monetary resources for international participation; an internal capability to produce information; set

¹⁵⁸ Marie Tornquist-Chesnier “NGOs and International Law” (2004) 3 Journal of Human Rights 253 at 261.

¹⁵⁹ Alexandra Dawe, Steve Erwood, Edwin Nichols and Janet Dalziell “Annual Report 2012” Greenpeace International (The Netherlands, 2012) at 4.

¹⁶⁰ For example, countries such as New Zealand have a population of just over 4 million and Saint Kitts and Nevis little over 50,000. See generally Google Public Data at http://www.google.co.nz/publicdata/explore?ds=d5bncppjof8f9_&met_y=sp_pop_totl&hl=en&dl=en&idim=country:KNA:ATG last visited 04/10/2013.

¹⁶¹ Schreck, above n 96, at 264.

¹⁶² Sophie Smyth “NGOs and Legitimacy in International Development” (2013) 61 U. Kan. L. Rev. 377 at 389.

¹⁶³ Alan Hudson (MA, MSc, MPhil, FRSA), and Academic and Research Staff at Oxford University.

¹⁶⁴ Alan Hudson “NGOs’ Transnational Advocacy Networks: from “Legitimacy” to “Political Responsibility”?” (2001) 1 Global Networks 331 at 331.

“frequency and format of information flows;” “useful and comprehensible information forms;” and the “formalisation of relationships to demonstrate democracy.”¹⁶⁵ These prerequisites are not onerous and provided Sea Shepherd and the IWC can work together cooperatively, “political responsibility” is realistically attainable for Sea Shepherd.

The role of NGOs in international law is varied and erratic however their unique characteristics, if used skilfully, can provide great advantages to individual treaty bodies. As an international environmental body, the IWC has weaknesses and if ENGOs were able to participate alongside the Contracting Parties then, at the very least, the failings of the current compliance and enforcement regime could be mitigated. Hudson’s “political responsibility” is one of many theories of proving legitimacy before formal incorporation is viable, however, it does illustrate that Sea Shepherd is not completely rogue and that incorporating it into the definition of piracy would be misrepresentative of the Organisation and potentially result in a disservice to the IWC, which could use its resources to further its own agenda.

¹⁶⁵ Jefferies, above n 107, at 101.

CHAPTER 4:

POSSIBLE ALTERNATIVES TO THE CURRENT DEFINITION OF PIRACY

4.1 How could we Better Define Piracy so as to Exclude Sea Shepherd?

If we are able to conclude that there is an opportunity for ENGOs to play a role within the IWC and that Kozinski CJ's reading of Article 101 UNCLOS is correct, then a new definition for piracy needs to be developed so as to exclude the actions of Sea Shepherd. In addition to the aforementioned issues specific to environmental activism, there have been concerns that the existing definition does not adequately address the problem of modern day piracy.¹⁶⁶ The main contention is that it is outdated as most incidents are no longer committed on the high seas nor do they meet the "two-ship requirement."¹⁶⁷ The resurgence of piracy off the Somali coast and elsewhere¹⁶⁸ demonstrate that this is a live issue and is likely to soon be addressed by the international community. The problem that has arisen is that slight technicalities prevent Article 101 from covering traditional acts of piracy, whilst managing to include acts that although deplorable, are not piratical. A single unified definition is required to suppress the new, more sophisticated, approach to piracy¹⁶⁹ and simultaneously exclude unwarranted parties, such as Sea Shepherd from its ambit. It is with this assertion that I explore possible modifications to Article 101.

The first alternative to consider is the definition provided by the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (SUA).¹⁷⁰ The

¹⁶⁶ Lucas Bento "Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish" (2011) Berkeley J. Int'l L. 399 at 452.

¹⁶⁷ At 441.

¹⁶⁸ The IMB live piracy map illustrates the widespread nature of modern day piracy. With particular concentration of the West Coast of Africa and within the Indonesian waters. See generally, The Piracy Reporting Centre at <<http://www.icc-ccs.org/piracy-reporting-centre/live-piracy-map>> last visited 04/10/2013.

¹⁶⁹ Bento, above n 166, at 406.

¹⁷⁰ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (opened for signature 10 March 1988, entered into force 1 March 1992). An electronic version of the Convention can be accessed at <<http://www1.umn.edu/humanrts/instree/maritime-navigation-safety.html>> last visited 04/10/2013.

Convention was adopted in response to the Achille Lauro incident in 1985¹⁷¹ where an Italian liner was hijacked by four Palestine Liberation Front (PLF) militants. The vessel was intercepted on its voyage from Alexandria to Port Said and held hostage in demand for the release of Palestinian prisoners from Israel. As the Legal Advisors of the Foreign Ministries of Austria, Egypt and Italy did not believe their acts constituted piracy,¹⁷² a new regime was implemented. The emphasis in the Preamble is on maritime terrorism and expresses the parties' distress over the "world-wide escalation of acts of terrorism in all its forms, the occurrence of which is considered a matter of grave concern to the international community as a whole." However the substantive section that is relevant to an alternate piracy definition is Article 3;

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

- a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or*
- 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 ship**; or*
- d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or*
- e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or*
- f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or*
- g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).*

¹⁷¹ Chris Trelawny, Senior Technical Officer "IMO Maritime Security Policy Background Paper" (2013) at 1.

¹⁷² Helmut Tuerk "Combatting Terrorism at Sea – The Suppression of Unlawful Acts Against the Safety of maritime Navigation" (2008) 15 U. Miami Int'l & Comp. L. Rev. 337 at 343.

Although this definition was considered by the District Court in the Sea Shepherd case it was discarded swiftly as Jones J ruled that there was no “impediment to the safe navigation of the ship.”¹⁷³ Although conceding that effort was made to incapacitate the ship, he ultimately decided that an attempt alone did not satisfy the Articles’ provisions. Kozinski J overruled that point and it is likely that his decision would be favoured due to Article 3 (2)(a) SUA stating that a person is liable if they “attempt to commit any of the offences set forth in paragraph 1.” In Kozinski CJ’s opinion, for Sea Shepherd to be liable it merely needed to “create dangerous conditions”, rather than incur dangerous consequences.¹⁷⁴ This interpretation is favourable as any acts that have the potential to injure others should be prevented before any harm is inflicted, so to include Sea Shepherd’s actions in its ambit would be reasonable.

As outlined in Chapter 1, maritime terrorism and piracy, although similar, are separate offences. Their different motives, methods and goals favour maintaining their distinction because the adoption of different definitions would enable specific and appropriate consequences to be imposed to each of the two crimes. An illustrative, fundamental difference is that maritime terrorism does not stem from the concept of “*hostis humani generis*” and without universal jurisdiction, the crime does not allow vessels to be seized unless there is consent of the flag State or a proper nexus.¹⁷⁵ Accordingly, Article 6 of the SUA provides an exhaustive list of situations where a state can establish jurisdiction over violations of Article 3¹⁷⁶ and if they are not met or the relevant state would prefer to transfer prosecution, the offences are extraditable.¹⁷⁷ These provisions accord with international law norms and unlike Article 105 of UNCLOS they do not impose any exceptional provisions associated with universal jurisdiction. Nevertheless piracy is still relevant in modern law,¹⁷⁸ and I am not suggesting the complete eradication of the crime. Therefore, as the SUA is only apt to cover incidents of maritime terrorism what is needed is the articulation of a separate definition that deals exclusively with piracy.

Such a definition is provided by the International Maritime Bureau (IMB) which considers piracy to be “*The act of boarding or attempting to **board any ship** with the intent to commit*

¹⁷³ *The Institute of Cetacean Research v Sea Shepherd Conservation Society*, above n 16, at 15.

¹⁷⁴ *The Institute of Cetacean Research v Sea Shepherd Conservation Society*, above n 16, at 8.

¹⁷⁵ SUA, above n 170, at art 8*bis*.

¹⁷⁶ Where the incident is committed against or on board a vessel of the flag State, within the territory of the State or by a national of the State.

¹⁷⁷ SUA, above n 170, at art 11.

¹⁷⁸ As illustrated by the Piracy Reporting Centre’s Piracy Map: see above n 168.

theft or any other crime and with the intent or capability to use force in furtherance of that act". The IMB is a specialised division of the International Chamber of Commerce (ICC) established in 1981 to combat all types of maritime crime.¹⁷⁹ One of its dedicated areas is the suppression of piracy and in 1992 it created the IMB Piracy Reporting Centre which has served as the first point of contact for crews following an attack. In addition, the centre raises awareness within the shipping industry of the real dangers of piracy. The IMB adopted this wider definition as the restrictions of Article 101 meant that the data did not best reflect the threat that piracy poses today.¹⁸⁰ It is only a non-legally binding guideline, however the fact that the IMB, a leading authority on piracy, has felt the need to alter its definition to rectify under-reporting is a further indication that change is needed.

The IMB's proposed broad definition is favourable as it circumvents the high seas requirement whilst maintaining, and arguably enhancing, the traditional understanding of piracy. The latter assertion is made as it requires the offender to *board* the ship before being classified as a pirate, which makes sense because traditionally, a pirates sole aim is to plunder the ships' treasures with any inflicted damage being merely incidental. Even with that caveat, an incident in 2012 indicates that Sea Shepherd may have engaged in acts that could still fall under the IMB version of piracy. In January 2012, three whale activists boarded a Japanese vessel in the dead of night with the help of Sea Shepherd.¹⁸¹ However, even though the accused *boarded* the vessel, it is unlikely that this borderline incident would actually be classified as piracy under this revised definition given that the activists had "no intent to commit theft or any other crime,"¹⁸² as the note they left behind merely demanded the removal of the Japanese vessel from Antarctic waters and that they be returned to Australia. Whilst boarding another vessel without permission is in itself likely to contravene maritime law, "any other crime" connotes something in addition to boarding. Without that extra element it is likely that the incident would not constitute piracy. This example shows that the

¹⁷⁹ "International Maritime Bureau" (Commercial Crime Services, A Division of the ICC) <<http://www.icc-ccs.org/icc/imb>> last visited 04/10/2013.

¹⁸⁰ By restricting the definition, majority of the piratical acts committed within Somali waters would not be classified as such due to not occurring on the high seas. The exclusion of these incidents would greatly distort the current situation and would undermine the threats posed by them: See, Sam Bateman "Piracy and Maritime Terrorism" (1997) *Maritime Studies* 21 at 23.

¹⁸¹ Ron Popeski "Activists Detained on Japan Whaling Vessel: Sea Shepherd" (8 January 2012) Reuters <<http://www.reuters.com/article/2012/01/08/us-australia-japan-whaling-idUSTRE80702G20120108>> last visited 04/10/2013.

¹⁸² "Other crime" implies committing another crime on top of the initial (illegal) boarding of the vessel.

seemingly simplistic definition manages to satisfactorily capture the essence of piracy by only outlawing true “*hostis humani generis*.”

Appropriate responses to each maritime crime require different approaches and resources. International law provides the basis from which to work and as the “current definitions of piracy are inadequate as a tool for policymakers” the wording of the definition needs to be changed before the crime of piracy can be properly addressed.¹⁸³ It is therefore my suggestion that the two aforementioned definitions be used in tandem. The use of both provisions would ensure that activists, such as Sea Shepherd, are not caught within the net of piracy whilst simultaneously preventing them from endangering the safe navigation of another vessel. This is a preferential framework to UNCLOS as it confronts the developments of piracy holistically and concisely whilst providing an alternative offence that can tackle other incidents of violence and/or terrorism.

4.2 What should be done?

To change the law of piracy purely because it outlaws environmental activism would be unfavourable as international lawmakers cannot be seen to condone violence. Although Sea Shepherd’s only motive is to protect the whales, good intentions are subjective and distinctions need to be drawn in deed, not merit. A further persuasive reason against a definition that simply excludes Sea Shepherd from its ambit would be the floodgates argument. How could the law distinguish one just cause from the next and discriminate against various ENGO beliefs? The undesirable result would be a multitude of (subjectively) well-intentioned organisations taking the law into their own hands. Nevertheless there are counterarguments and, in addition to those already outlined in Chapter 3 one must consider that the use of private funding means that Sea Shepherd saves “anti-whaling countries considerable amounts of tax money and government resources to properly enforce international conservation laws.”¹⁸⁴ By coordinating unlikely parties through a single common goal NGOs have a unique ability to generate large sums of money and resources. For example, where one might expect animal activist groups to provide the basis of Sea Shepherd’s funding, it is the unlikely alliance with the Dutch National Lottery that generates

¹⁸³ Dana Dillon “Maritime Piracy: Defining the Problem” (2005) XXV SAIS Rev. 155 at 155.

¹⁸⁴ Joseph Elliot Roeschke “Eco- Terrorism and Piracy on the High seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Laws in Neutral Waters” (2009) XX Vill.Envntl.L.J. 99 at 131.

a large bulk of the Organisation's funding.¹⁸⁵ Sea Shepherd has been active since 1979 and with a single campaign costing upwards of \$2 million in fuel alone¹⁸⁶ it has been able to survive on donations (and the recent proceeds of *Whale Wars*) alone. This is by no means an easy feat as its violent actions have given it a controversial image that not all philanthropists would wish to associate with. However, if Sea Shepherd was formally integrated into international law and consequently able to enjoy "political responsibility", it is highly likely that it would be able to raise an even greater amount of money to the benefit of the IWC and ultimately the whales.

Nevertheless for international law to enjoy any real authority it is imperative that all players respect and adhere to it, therefore ad hoc exceptions cannot be made for "good cause". It is therefore vital that a new system is developed rather than just excluding Sea Shepherd from a definition that would otherwise cover them. Ideally it would maintain a separate crime of piracy but also provide additional, well-defined restrictions on the actions of an ENGO like Sea Shepherd.

When deciding on an alternative system that NGOs could work within, it is important to recognise where Sea Shepherd currently finds its authority to act in such a violent matter. By understanding the perceived rights, insight can be gained on how best to control it. The document that Sea Shepherd relies on is the UN World Charter for Nature 1982:¹⁸⁷

Sections 21:

States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall:

(a) ...

(e) Safeguard and conserve nature in areas beyond national jurisdiction.

Section 24:

Each person has a duty to act in accordance with the provisions of the present Charter; acting individually, in association with others or through

¹⁸⁵ 500,000 euros/year and additional lump sums (It donated an additional 1 million euros (\$1.38 million) to fund establishment of an automatic identification system (AIS) for vessels in the Galápagos Marine Reserve in 2010): MPA News, above n 150.

¹⁸⁶ To send four ships south during a whaling season: "Funding now Dry for sea Shepherd" (7 April 2013) Radio New Zealand News <<http://www.radionz.co.nz/news/world/132185/funding-now-dry-for-sea-shepherd>> last visited 04/10/2013.

¹⁸⁷ *World Charter for Nature* GA Res 37/7, A/RES/37/7 (1982).

participation in the political process, each person shall strive to ensure that the objectives and requirements of the present Charter are met.

It is in Sea Shepherd's opinion that as the Japanese whaling fleet is violating international law, it is justified in stopping the activity by "colour of right."¹⁸⁸ The violent acts are thereby warranted because the phrase "to the extent that they are able" is interpreted by Sea Shepherd as "to the extent that they are *physically* able."¹⁸⁹ However a more plausible reading of "to the extent that they are *legally* able," means the authority that Sea Shepherd so heavily relies on is greatly undermined. Even if the former, more implausible version of the phrase were to be adopted and the Japanese fleet were to be whaling illegally, the resolution still does not provide a valid justification for Sea Shepherd's actions. The World Charter is merely a resolution that was intended to provide guidelines and set moral principles, it is not legally binding and therefore would not constitute a formal source of international law.¹⁹⁰

The fact that the World Charter evidently does not provide Sea Shepherd with legal legitimacy makes comments that "Sea Shepherd is not an environmental group. It is a terrorist vigilante group that operates outside the law,"¹⁹¹ persuasive, as a vigilante is someone who "seeks to avenge a crime by taking the law into his or her own hands."¹⁹² This definition seems to correspond well with Sea Shepherd and its actions as there is a genuine belief that its members are upholding international law; however they have no authority to do so. In fighting a cause without validation, Sea Shepherd has been viewed as an outlaw on the high seas which makes them vulnerable to claims such as the one brought by the ICR.

It is plausible to assume that this ENGO adopted a more robust version of protest because it believed that working within the system would prevent it from meeting its objectives.¹⁹³ The proposed changes to the law on piracy would only exclude Sea Shepherd from being titled a pirate, but it would not legalise its actions nor solve the compliance and enforcement

¹⁸⁸ "Mandate" (2013) Sea Shepherd <<http://www.seashepherd.org/who-we-are/mandate.html>> last visited 04/10/2013.

¹⁸⁹ Roeschke, above n 184, at 123.

¹⁹⁰ Caprari, above n 38, at 1510.

¹⁹¹ The Director General of the ICR made the statement in 2007 following the altercations with the Japanese factory and spotter ships: Gerry Nagtzaam & Pete Lentini (2007) "Vigilantes on the High Seas?: The Sea Shepherds and Political Violence, Terrorism and Political Violence" (2007) 20 Terrorism and Political Violence 110 at 114.

¹⁹² Bryan A. Garner *Black's Law Dictionary* (9th ed, Thomson Reuters, United States of America, 2009) at 1704

¹⁹³ Nagtzaam & Lentini, above n 191, at 126.

problems within the IWC. A defined regulatory framework needs to be adopted that draws on the values that the World Charter promotes, whilst enhancing the ICRW's purpose. It is true that the ICRW does not prioritise conservationist values; rather its intention is to maintain whaling stocks for future commercial use. Nevertheless the two are not mutually exclusive. Maintenance may not go as far as conservation, but both objectives seek to prevent the exploitation of whale stocks. Therefore if a middle-ground could be found that satisfies both the whalers and conservationists then perhaps all parties could be conciliated. As previously noted, an example of such a change would be the controlled reinstatement of commercial whaling that is monitored by regulated ENGO bodies. This could only be achieved if Sea Shepherd is not considered a pirate as it would undermine the entire ENGO movement and reduce the chance that the IWC would want to be associated with them as they would be considered "enemies of all mankind."¹⁹⁴ For the reasons already stated, the Article 101 definition of piracy should be replaced by the IMB definition and the SUAs prominence should be increased to ensure that the safe navigation of a ship is never jeopardised.

¹⁹⁴ From the original concept of pirates being "*hostis humani generis*."

CONCLUSION

“There’s very little question that unarmed Greenpeace activists are not pirates. Charges of piracy are manifestly unfounded in this case – having no basis in law or reality – and it’s profoundly damaging to level such serious charges so carelessly.”¹⁹⁵

This paper had no intention of trivialising or excusing Sea Shepherd’s actions, instead it has proposed two distinct but related issues; the current definition of piracy is outdated, and by including unsuitable parties into its ambit the IWC is losing potential allies to help revive the validity of the ICRW. The recent situation unfolding in the Arctic between the Russian officials and Greenpeace is further evidence that environmental activism is on the rise and a revised system is necessary to appropriately deal with it. Therefore to begin, a new definition needs to be established that clearly distinguishes piracy from maritime terrorism and the penalties associated with each. This solution would ensure the safe navigation of a ship at all times, whilst still maintaining a crime for traditional acts of piracy. Accordingly, although Sea Shepherd may be subject to international legal proceedings under the SUA, it would no longer be in danger of indiscriminate seizures by foreign vessels and subject to foreign domestic laws, as provided by Article 105 of UNCLOS. Most importantly however, Sea Shepherd would lose the incriminating label of “*hostis humani generis*” which would allow the public, along with the IWC, to impartially evaluate its ability to be legitimate enforcers of the ICRW.

Consequently, the second undertaking should be the formal incorporation of NGOs into the IWC compliance regime. Rather than actually giving them the ability to arrest or punish, the role would enable them to enforce the ICRW and/or any penalties that the IWC imposes. This system would benefit both the whales, as well as all invested parties. By guaranteeing that the ICRW provisions, specifically the catch limits, would be adhered to, the IWC would be more likely to lift the whaling moratorium as the possibility of over-whaling would be greatly diminished. Such a decision would satisfy the whaling nations as their traditional whaling

¹⁹⁵ A quote by John Dalhuisen (Europe and Central Asia Programme Director at Amnesty International) in reference to the Greenpeace vessel, the Arctic Sunrise, along with 30 activists being detained by Russian authorities after two campaigners attempted to board the Gazprom offshore platform. Russia’s Investigative Committee has opened a piracy investigation against the crew: Amnesty International “Russia must drop unfounded ‘piracy’ charges against Greenpeace activists” (24 September 2013) <<http://www.amnesty.org/en/news/russia-must-drop-unfounded-piracy-charges-against-greenpeace-activists-2013-09-24>> last visited 04/10/2013.

customs can be pursued, whilst the anti-whaling nations and NGOs can be assured that sustainable stocks would be maintained.

International law is a complicated construct that requires cooperation, concession and acceptance between parties that may have incompatible values; however its complexity is not an excuse to disregard it. Once the tedious process of drafting and ratification of an MEA is complete, it would seem logical that the next step would be the establishment of an effective enforcement system. Understandably this is likely to be done at a later stage through Commission Meetings,¹⁹⁶ but if it is not done in a timely fashion then the MEA is merely symbolic. The ICRW has been in force since 1948 and the recent escalation of violence on the Southern Ocean has merely highlighted the inadequacies of the IWC and ultimately, that a compliance regime is required if the state parties, and the international community, are to take it seriously.

No single party would ever be completely happy with its international obligations because invariably they would involve some form of compromise. Sea Shepherd's members are not pirates despite having acted unlawfully, and the IWC is a toothless tiger, despite having potential, therefore if the two join forces they could minimise concessions and maximise the chance to achieve their shared goal of ensuring the proper conservation of whale stocks.

¹⁹⁶ To mitigate the chances that states will refuse to ratify a treaty with onerous enforcement provisions.

BIBLIOGRAPHY

Journals

- David A. Balton and Holly R. Koehler “Reviewing the United Nations Fish Stocks Treaty” (2006) 7 SDLP 5.
- Sam Bateman “Piracy and Maritime Terrorism” (1997) Maritime Studies 21.
- Lucas Bento “Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish” (2011) Berkeley J. Int'l L. 399.
- Amanda M. Caprari “Loveable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean” (2010) 42 Conn.L.Rev 1493.
- Julia Green “Antarctic EEZ Baselines: An Alternative Formula” (1996) 11 IJMCL 333.
- Simon Chesterman “An International Rule of Law?” (2008) 56 Am.J.Comp.L. 331.
- Annemarie Devereux and Catherine Anderson “Reporting under International Human Rights Treaties: Perspectives from Timor Leste’s Experience of the Reformed Process” (2008) 8 Hum. Rts. L. Rev. 69.
- Dana Dillon “Maritime Piracy: Defining the Problem” (2005) XXV SAIS Rev. 155.
- Malva Driessen “Strength-Weakness Analyses on the ILO as a Model for NGO-Participation” in *The legitimacy of the United Nations: towards an enhanced legal status of non-state actors* (SIM Special 19, Univeriteit Utrecht, 1997) 73.
- Alan Hudson “NGOs’ Transnational Advocacy Networks: from “Legitimacy” to “Political Responsibility”?” (2001) 1 Global Networks 331.
- Cameron S.G. Jefferies “Strange Bedfellows or Reluctant Allies?: Assessing Whether Environmental Non-Governmental Organizations (ENGOS) Should Serve as Official Monitors of Whaling for the International Whaling Commission (IWC)” (2009) 26 Windsor Rev. Legal & Soc. 75.
- Lisa Kobayashi “Lifting the International Whaling Commission’s Moratorium on Commercial Whaling as the most Effective Global Regulation of Whaling” 29 ENVIRONS 177.

- Michael C. Lynch and Lystra Batchoo, “What Are the Implications of *Kiobel v. Royal Dutch Petroleum?*” (January 2011) *The Practical Litigator* 57.
- Samual Pyeatt Menefee “The Case of *Castle John*, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of the International Law” (1993) 24 *Cal. W. Int’l L.J.* 1.
- Anthony L.I. Moffa “Two Competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean” (2012) 37 *Yale J. Int’l L.* 201.
- Kieran Mulvany “The International Whaling Commission and the Role of Non-Governmental Organizations” (1997) 9 *Geo. Int’l Env’tl. L. Rev* 34.
- Gerry Nagtzaam & Pete Lentini (2007) “Vigilantes on the High Seas?: The Sea Shepherds and Political Violence, Terrorism and Political Violence” (2007) 20 *Terrorism and Political Violence* 110.
- Stefan Oeter “Inspection in international law: Monitoring compliance and the problem of implementation in international law” (1997) 28 *Netherlands Yearbook of International Law* 101.
- Read D. Porter “Fisheries Observers as Enforcement Assets: Lessons from the North Pacific” (2010) 34 *Marine Pol’y* 583.
- Kal Raustiala “The “Participatory Revolution” in International Environmental Law” (1997) 21 *Harv. Env’tl. L. Rev* 537.
- Joseph Elliot Roeschke “Eco- Terrorism and Piracy on the High seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Laws in Neutral Waters” (2009) XX *Vill.Env’tl.L.J.* 99.
- Sarah C. Schreck “The Role of Nongovernmental Organizations in International Environmental Law” (2006) 10 *GONZ. J. INT’L L* 252.
- Karen Scott “UC law expert disagrees with US court decision” (May, 2013) 19 *Canterbury Tales* 6.
- Sophie Smyth “NGOs and Legitimacy in International Development” (2013) 61 *U. Kan. L. Rev.* 377.

Valerie Neale Spencer, "Domestic Enforcement of International Law: The International Convention for the Regulation of Whaling" (1991) 2 Colo. J. Int'l. Envtl L. & Pol'y 109.

Helmut Tuerk "Combatting Terrorism at Sea – The Suppression of Unlawful Acts Against the Safety of maritime Navigation" (2008) 15 U. Miami Int'l & Comp. L. Rev. 337.

Dissertation/Theses

Twyman-Ghoshal, Anamika "Understanding Contemporary Maritime Piracy"
(Dissertation/Theses, Northeastern University, Massachusetts, 2013).

Andrew Phillips "A review on Innovation and Impotence in Fisheries Instruments: The Convention on the Conservation of Marine Living Resources 1980 and Fish Stocks Agreement 1995" (Graduate Certificate Report, University of Canterbury, 2007).

Books

Yonah Alexander and Tyler B. Richardson *Terror on the High Seas from Piracy to Strategic Challenge* (Praeger Security International, United States of America, 2009).

Edward Coke *Systematic Arrangement of Lord Coke's First Institute of the Laws of England: on the plan of Sir Mathew Hales analysis* (1st American from the last London ed, Vol. 3. Philadelphia, 1826-1827).

Bryan A. Garner *Black's Law Dictionary* (9th ed, Thomson Reuters, United States of America, 2009).

Haywood, Robert and Spivak, Roberta *Maritime Piracy* (Taylor and Francis, Global Institutions, 2012).

Peter E. Nygh and Peter Butt *Butterworth Australian Legal Dictionary* (Lexis Nexis, Sydney, 1997).

Stephen Todd, John Burrows, Bill Atkin, Cynthia Hawes and Ursula Cheer *The law of torts in New Zealand* (6th ed, Thomas Reuters, Wellington, 2013).

Press Releases

International Court of Justice "Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) Conclusion of the public hearings" (press release, 17 July 2013).

The Institute of Cetacean Research “JARPA II Research Fleet Departs for the Antarctic”
(media release, 7 November 2005).

Speeches

Augustin Carstens, Deputy Managing Director of the International Monetary Fund “The Role of Transparency and Accountability for Economic Development in Resource-rich Countries” (Regional Workshop on Transparency and Accountability in Resource Management in CEMAC Countries Malabo, Equatorial Guinea, 27 January 2005).

Ban Ki-moon, UN Secretary-General "The Global Compact: Creating Sustainable Markets" (World Economic Forum, Davos (Switzerland), 29 January 2009).

Reports

International Whaling Commission

Chair’s Report of the 64th Annual Meeting (Panama City, 2 July 2012).

Chair’s Report of the RMS Working Group Meeting, IWC/58/RMS 3 (Cambridge, 2 March 2006).

Report of the Revised Management Scheme Working Group, IWC/57/Rep 6 (Agenda Item 6.21, Ulsan, 15 June 2005).

Revised Management Scheme Working Group (Report at the 57th Annual Meeting, Annex E, 2005).

Institute of Cetacean Research

The Institute of Cetacean Research “Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) -Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources”, SC/57/O1.

The Institute of Cetacean Research “Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic” (JARPA Review Workshop of the International Whaling Commission, SC/59/Rep1, 4-8 December 2006).

United Nations

Report of the UN Secretariat “Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties” Third inter-committee meeting, Geneva (21-22 June 2004).

United Nations Environmental Program, “Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements” (Nairobi, 2002).

United Nations Environment Programme “Training Manual on International Environmental Law” (Nairobi, Kenya, 2006).

Other

AIDCP; 12th Meeting of the Parties, Resolution to Establish a List of Vessels Presumed to have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Agreement Area (La Jolla, California, 20 October 2004) Resolution A-04-07.

Alexandra Dawe, Steve Erwood, Edwin Nichols and Janet Dalziell “Annual Report 2012” Greenpeace International (The Netherlands, 2012).

ILO Information Note “Representation of international non-governmental organizations at the International Labour Conference and other ILO meetings” (1 May 2005).

Commentary

Dr. Sandra Altherr “Non-Compliance within the IWC, Requirements for an Effective IWC Compliance Review Committee” (An analysis with Pro Wildlife and Ocean Care, April 2006).

S.L Davies and J.E Reynolds “Guidelines for Developing an at-Sea Fishery Observer Programme” (FAO Fisheries Technical Paper No. 414, Rome, 2002).

Danielle Fest Grabel, Clare Perry, Claire Bass and Allan Thornton “The Gorton’s Family Whale Killing Business” (Environmental Investigation Agency Report, United Kingdom, 2005).

Chris Trelawny, Senior Technical Officer “IMO Maritime Security Policy Background Paper” (2013).

Internet sources

Websites

Amnesty International “Who we are” (2013) Amnesty International

<<http://www.amnesty.org/en/who-we-are>>.

CSAP “About Us” (2008) CSAP <<http://www.cscap.org/index.php?page=about-us>>.

Executive Committee of Non-Governmental Organizations Associated with The United Nations Department of Public Information “NGO Definition” NGO Global Network

<<http://www.ngo.org/ngoinfo/define.html>>.

Forum for Security Co-operation “Confidence and Security Building” (2013) Organization for Security and Co-operation in Europe <<http://www.osce.org/fsc/44569>>.

Greenpeace “International Whaling Commission” (2013) Greenpeace USA

<<http://www.greenpeace.org/usa/en/campaigns/oceans/whale-defenders/iwc/>>.

Google Public Data at

<http://www.google.co.nz/publicdata/explore?ds=d5bncppjof8f9_&met_y=sp_pop_to_tl&hl=en&dl=en&idim=country:KNA:ATG>.

“International Maritime Bureau” (Commercial Crime Services, A Division of the ICC)

<<http://www.icc-ccs.org/icc/imb>>.

International Whaling Commission “Observers” (2013) International Whaling Commission

<http://iwc.int/observers_ngo>.

Sea Shepherd “History” (2013) Sea Shepherd <<http://www.seashepherd.org/whales/sea-shepherd-history.html>>.

Sea Shepherd “Leviathan” (2013) Sea Shepherd

http://www.seashepherd.org/leviathan/leviathan_campaign_report.html>.

Sea Shepherd “Who We Are” (2013) Sea Shepherd <<http://www.seashepherd.org/who-we-are/>>.

The International Campaign to Ban Landmines (ICBL) “Treaty Basics” (2009)

<<http://www.icbl.org/index.php/icbl/Treaty/MBT/Treaty-Basics#whatIsTheOttawaProcess>>.

The United Nations Convention on the Law of the Sea 1982: Chronological List of Ratifications

<http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>.

World Wildlife Fund “Why They Matter” (2013) World Wildlife Fund

<<http://worldwildlife.org/species/whale>>.

Articles

Amnesty International “Russia must drop unfounded ‘pracy’ charges against Greenpeace

activists” (24 September 2013) <<http://www.amnesty.org/en/news/russia-must-drop-unfounded-piracy-charges-against-greenpeace-activists-2013-09-24>>.

BBC News “Japan Ends Whaling Season Short of Quota” (9 March 2012)

<<http://www.bbc.co.uk/news/world-asia-17312460>>.

Communication and Public Information “The Rana Plaza building collapse... 100 days on”

(5 August 2013) International Labour Organisation <http://www.ilo.org/global/about-the-ilo/activities/all/WCMS_218693/lang--en/index.htm>.

“Funding now Dry for Sea Shepherd” (7 April 2013) Radio New Zealand News

<<http://www.radionz.co.nz/news/world/132185/funding-now-dry-for-sea-shepherd>>.

“MPA Enforcement: How Practitioners are Developing New Tools, Strategies and

Partnerships” (MPA News Vol. 11, NO. 5 March-April 2010) at Private Aid Enforcement <<http://depts.washington.edu/mpanews/MPA113.htm>>.

Ron Popeski “Activists Detained on Japan Whaling Vessel: Sea Shepherd” (8 January 2012)

Reuters <<http://www.reuters.com/article/2012/01/08/us-australia-japan-whaling-idUSTRE80702G20120108>>.

“Sea Shepherd, an International NGO, Participates in Enforcement at Two MPAs” (MPA

News Vol. 3, No. 4 October 2001)

<<http://depts.washington.edu/mpanews/MPA24.htm>>.

Takver, “Japanese Whalers Escalate Dangerous Attacks on Sea Shepherd in Refuelling

Attempt” (26 February 2013) Independent Media Centre Australia

<http://indymedia.org.au/2013/02/26/japanese-whalers-escalate-dangerous-attacks-on-sea-shepherd-in-refueling-attempt>>.

Ida Torres “Sea Shepherd releases new video of Southern Ocean collision, icebreaker arrives to defend whalers” (25 February 2013) Japan Daily Press

<http://japandailynews.com/sea-shepherd-releases-new-video-of-southern-ocean-collision-icebreaker-arrives-to-defend-whalers-2523983/>>.

Paul Watson, “Sea Shepherd: Defending the Integrity of the Southern Ocean Whale Sanctuary” (18 February 2013) The Guardian

<http://www.guardian.co.uk/environment/2013/feb/18/sea-shepherd-defend-southern-ocean-whale>>.