



Sea Shepherd Conservation Society v. Japanese Whalers, the Showdown: Who Is the Real Villain?

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This Article discusses the on-going battle between Sea Shepherd Conservation Society and Japanese whalers. An analysis of international law reveals that while the law is complicated and unclear, it is likely that both sides are violating international law.

I propose that over time Japanese whaling will cease on its own. The dwindling consumption of whale meat in Japan will force Japan to end their whaling activities on a commercial level. Research reveals that educating Japanese individuals about the effects of whale meat consumption on their health and on the environment leads to a decline in consumption. I assert that Sea Shepherd should scale back their aggressive tactics and concentrate their efforts on educating the public rather than resorting to violence on the high seas.

* © 2010 Andrew Hoek, J.D., Florida State University College of Law (2010). The author would like to thank Professor Donna Christie and Alfred Karl Yergey for reviewing early drafts. The author would also like to thank Professor Faye Jones for helping with publishing efforts.

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Introduction

They harpooned a female in the head. She screamed, and it’s a sound like a woman screaming, and then this huge male slapped his tail on the water and hurled himself at the Soviet ship. They harpooned him and he fell back and swam right at us and reared up out of the water. We thought, “This is it, he's going to slam down on us, it's all over.” But he didn't. He pulled back at the last moment and spared our lives, and as he slid back into the water we saw his eye, which was the size of a dinner plate, and in that whale's eye I saw recognition, compassion, empathy, an understanding.

Something passed between us and it changed my life for ever.¹

These are the words of Paul Watson, founder of Sea Shepherd Conservation Society. Watson's passion for whales drives him to fight every day to end Japanese whaling.

In 1986, the International Whaling Commission (IWC) passed a temporary moratorium banning commercial whaling.² However, Japan continues to whale on a commercial level thanks to a loophole in the IWC Convention that allows for the take of whales in the name of research.³ Japan's whaling activities have created conflicts between Japanese whalers and radical environmentalists on the high seas off Antarctica. Recently, these encounters have gained more attention as the television station Animal Planet has documented the Sea Shepherd's quest to end Japanese whaling in their hit show *Whale Wars*.

There is no doubt that these battles are life threatening; however, little has been done to regulate either party's actions. Sea Shepherd insists that Japan is in violation of international law and is whaling illegally. Conversely, Japan is adamant that their whaling campaigns are legal under the IWC Convention and that Sea Shepherd is an eco-terrorist organization that engages in pirate-like conduct. While both sides insist the law is on their side, little has been settled other than the fact that this fight will surely continue until one side is forced to cease their campaign.

While Japan's whaling activities are hotly contested by many, their actions are considered facially legal, at least under the IWC Convention. Sea Shepherd and others argue that Japan's whaling is economically driven rather than research driven and is therefore illegal. The international law surrounding whaling and the trade of whale meat is jumbled and in flux. Currently, Japan has found a loophole that allows them to continue to whale and sell whale meat on the domestic market without directly violating the IWC Convention. However, there is an argument to be made that Japan is violating the law under the

¹ *Paul Watson: Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, TELEGRAPH.CO.UK, Apr. 17, 2009, <http://www.telegraph.co.uk/earth/5166346/Paul-Watson-Sea-Shepherd-eco-warrior-fighting-to-stop-whaling-and-seal-hunts.html> (quoting Paul Watson).

² International Convention for the Regulation of Whaling, Schedule para. 10(e), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW].

³ *Id.* at Schedule para. 30.

“abuse of right” doctrine as well as the Convention on Biological Diversity.

On the other side of the fight, Sea Shepherd is arguably violating the law by engaging in eco-terrorism on the high seas. Japan condemns Sea Shepherd as a terrorist organization and has issued warrants for the arrest of Captain Paul Watson and others.⁴ On July 16, 1979, Captain Paul Watson transformed from conservationist to eco-terrorist by ramming and subsequently sinking the whaling ship *Sierra*.⁵ Since that time, Watson and Sea Shepherd have continued their controversial activities in an attempt to end whaling. Their motives may be honorable, but their techniques are life endangering and fall into a growing category of violence known as eco-terrorism.

To date, Sea Shepherd has escaped any significant punishment for their actions.⁶ Much like the international law surrounding scientific whaling, the current state of the law concerning eco-terrorism is vague as well. Furthermore, Sea Shepherd enjoys the sympathy of many who oppose Japanese whaling. So, while their tactics remain dangerous, life threatening, and most likely illegal, little has been done to prosecute Sea Shepherd. Only one thing remains certain in the battle between Sea Shepherd and Japanese whalers: political pressures are mounting against each side, and only time will tell who will be forced to cease their campaign first.

This Article will discuss the ongoing battle between Sea Shepherd Conservation Society and Japanese whalers and the legality of the practices on both sides. Part I offers a brief history of international whaling. Part II discusses whaling in today’s world, including the legality of Japan’s present research permit program. Part III discusses Sea Shepherd and their campaigns to end whaling. Finally, Part IV offers alternative measures to end whaling besides violence and life threatening tactics.

⁴ *Japan Issues Arrest Warrants for Sea Shepherd ‘Eco-Terrorists’*, CYBER DIVER NEWS NETWORK, Aug. 18, 2008, <http://www.cdnn.info/news/eco/e080818.html>.

⁵ *Sea Shepherd Conservation Society: Sea Shepherd History*, <http://www.seashepherd.org/whales/sea-shepherd-history.html#1979> (last visited June 6, 2010).

⁶ *See Paul Watson: Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1.

I. History of Whaling

Whaling has been around since the ninth century when Norway, France, and Spain began engaging in the practice.⁷ Soon after, whaling became popular in other parts of the world. As whaling progressed through the centuries, more countries began to whale, including the United States in 1712.⁸ Over the years, whalers have adapted their means of whaling and have embraced technology to improve their kill rates.⁹ It was not until the 1900s, when harpoons and commercial whaling ships were introduced, that whaling really took off.¹⁰ Soon after, whale populations began to dwindle.¹¹

Traditionally, whales were used for multiple purposes. The blubber of the whales was boiled down and used as oil for use in burning lamps, in making soaps and cosmetics, and in lubricating machinery.¹² Additional oils from whales were particularly useful in making candles,¹³ cleaning wool, making medicines, and manufacturing paints.¹⁴ The whalebone was used for stiffening dresses and corsets, as well as being used in carriages, umbrellas, knife handles, and other products.¹⁵ Finally, the meat was used as a food source for many.¹⁶

⁷ Japanese Whaling Association, History of Whaling, <http://www.whaling.jp/english/history.html> (last visited June 6, 2010).

⁸ *Id.*

⁹ See, e.g., Alyson Decker, Note, *Save the Whales – Save the Whalers – Wait, Just Save the International Whaling Commission: A Fresh Look at the Controversy Surrounding Cultural Claims to Whale*, 16 S. CAL. INTERDISC. L.J. 253, 264-65 (2006).

¹⁰ Japanese Whaling Association, *supra* note 7.

¹¹ See Anthony Matera, Note, *Whale Quotas: A Market-Based Solution to the Whaling Controversy*, 13 GEO. INT'L ENVTL. L. REV. 23, 26-27 (2000).

¹² ENCYCLOPEDIA OF MARINE MAMMALS 1245 (William F. Perrin et al. eds., 2d ed. 2009).

¹³ *Id.* at 1245-46.

¹⁴ Michael Pearson, *The Technology of Whaling in Australian Waters in the 19th Century*, 1 AUSTRALIAN HISTORICAL ARCHAEOLOGY 40, 40 (1983), available at http://www.ashadocs.org/aha/01/01_04_Pearson.pdf.

¹⁵ *Id.*

¹⁶ See Anne M. Creason, Comment, *Culture Clash: The Influence of Indigenous Cultures on the International Whaling Regime*, 35 CAL. W. INT'L L.J. 83, 98-99 (2004).

A. *Japanese Whaling*

Whaling has been part of Japanese culture since the twelfth century.¹⁷ Whaling has played a large role in Japanese history and continues to play an important role in Japanese culture.¹⁸ Whaling became increasingly important to Japan after World War II when the Japanese turned to whale meat as their primary source of protein during severe food shortages.¹⁹ Whale meat made up almost fifty percent of the animal protein in Japanese diets in 1947.²⁰ Whale meat is traditionally considered a delicacy in Japan and continues to be today. Whaling is also associated with religious practices in Japan. During the whaling season Japanese women attend shrines to pray for the whalers and for the souls of the whales.²¹ Whaling is so deeply woven into Japanese society that whale meat is given as gifts and even used as currency in some circumstances.²²

1. *Creation of the International Whaling Commission*

As whaling technology improved, the take of whales became easier, and by the early 1900s the numbers of whales began to sharply decline.²³ On the other hand, as other technologies advanced and newer, cheaper, and more efficient materials were used to provide for oil and fashion products, countries like the United States that did not rely on whale meat for food ceased commercial whaling.²⁴ The first attempt to regulate whaling arose in 1927 when the League of Nations proposed an international whaling conference.²⁵ However, because of a desire to have whale regulation occur “through bilateral and multilateral agreements,” the League-sponsored conference never

¹⁷ Japanese Whaling Association, *supra* note 7.

¹⁸ See Decker, *supra* note 9, at 265-66.

¹⁹ *Id.* at 265.

²⁰ *Id.*

²¹ Creason, *supra* note 16, at 100.

²² See Decker, *supra* note 9, at 266.

²³ Matera, *supra* note 11, at 26-27.

²⁴ See *id.* at 26; Pearson, *supra* note 14, at 40.

²⁵ Gare Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 NAT. RESOURCES LAW. 543, 545 (1984).

occurred.²⁶ In 1931, twenty-one nations signed a whaling agreement called the “Convention for the Regulation of Whaling.”²⁷ This convention was weak, however, because it did not set whale quotas or shorten the whaling season.²⁸ In 1937, the United States and several other nations again attempted to regulate whaling by entering into a more substantive agreement that imposed a whaling season, size limits, and the take of only certain whale species.²⁹

As pressures to control whaling continued to mount, the International Whaling Commission (IWC) was founded in 1946 by the International Convention for the Regulation of Whaling (ICRW).³⁰ The Convention was signed on December 2, 1946 by fifteen nations.³¹ Its purpose was “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”³² The Convention sought to stabilize whale populations throughout the world “as rapidly as possible without causing widespread economical and nutritional distress.”³³ The Commission committed itself to study and collect information on whale populations.³⁴

The IWC gets its powers from the ICRW.³⁵ The IWC consists of one commissioner from each member nation.³⁶ The responsibility of these commissioners is to “review the previous year’s catch and determine whether new regulations are necessary.”³⁷ Notably, the Commission reserves the right to amend the provisions of the Convention’s Schedule as needed to preserve whale populations.³⁸ However, any nation that does not agree with an amendment can “opt

²⁶ *Id.*

²⁷ *Id.* at 546.

²⁸ *Id.*

²⁹ *Id.*

³⁰ International Whaling Commission: History and Purpose, <http://www.iwcoffice.org/commission/iwcmain.htm#history> (last visited June 6, 2010).

³¹ International Whaling Commission: Convention Signatories, <http://www.iwcoffice.org/commission/convention.htm#convsigns> (last visited June 6, 2010).

³² ICRW, *supra* note 2, at Preamble.

³³ *Id.*

³⁴ *Id.* at art. IV.

³⁵ Smith, *supra* note 25, at 547.

³⁶ *Id.*

³⁷ *Id.*

³⁸ ICRW, *supra* note 2, at art. V, paras. 1-2.

out” of the new regulation by simply objecting to the proposed change.³⁹

II. Whaling Today

A. *International Whaling Commission Today*

The ICW continues to promote the protection of whale populations. While the Commission’s stated purpose remains the same, it has recently adopted a more conservationist approach rather than concentrating on quotas and the stabilization of whales.⁴⁰ In other words, “the objective of the [IWC] has shifted [from sustainability] toward the protection and conservation of whales.”⁴¹ As this shift occurs, some believe the legitimacy of the IWC is called into question. Dr. Christopher Clark, a member of the Scientific Committee of the IWC and director of the Bioacoustics Research Program at Cornell University, has said that “[i]t’s getting harder . . . to say [the resumption of whaling] is scientifically invalid.”⁴² Dr. Clark’s reasoning is based upon blossoming numbers of minke whales.⁴³ The numbers have stabilized so much that IWC Scientific Committee members have estimated that as many as 2,000 minke whales per year could be taken without jeopardizing the population.⁴⁴

To date, the Commission has made several attempts to severely limit commercial whaling. In 1986, the IWC established a whaling moratorium to cease all commercial whaling.⁴⁵ Japan and several other

³⁹ *Id.* at art. V, para. 3.

⁴⁰ See generally Judith Berger-Eforo, Note, *Sanctuary for the Whales: Will This Be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?*, 8 PACE INT’L L. REV. 439 (1996).

⁴¹ Creason, *supra* note 16, at 85-86; see also Berger-Eforo, *supra* note 40, at 474 (“[T]he IWC has essentially changed gears, transforming itself from a union of commercial whaling nations to an international watchdog group.”).

⁴² David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT’L L. 154, 160 (1995) (quoting Dr. Christopher Clark).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ ICRW, *supra* note 2, at Schedule para. 10(e). (“[C]atch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero.”). “Pelagic” means of or pertaining to the ocean.

countries objected to the moratorium when it was first presented.⁴⁶ International pressures, particularly from the United States, took their toll on Japan, which eventually withdrew its objection to the whaling moratorium.⁴⁷ The moratorium was to be kept under review, but remains in effect today.⁴⁸

However, because the moratorium applies only to commercial whaling, there are two loopholes under which countries may continue to whale. First, there is the “aboriginal subsistence” exception.⁴⁹ The IWC recognizes that aboriginal whaling is “of a different nature” than commercial whaling and allows for whaling at designated levels.⁵⁰ Currently, the IWC allows aboriginal subsistence whaling for Denmark, the Russian Federation, St. Vincent and the Grenadines, and the United States.⁵¹ Each individual nation must provide evidence of their desired catch limits to the IWC, and the IWC issues advice on limits for each whale species allowed.⁵²

More controversially, there is also a research exception to the moratorium⁵³ and to the Convention more generally.⁵⁴ While research permits are granted by individual nations, a proposed research permit must be submitted to the Scientific Committee of the IWC for review and comment.⁵⁵ Each individual nation is responsible for specifying the “objectives of the research; number, sex, size and stock of the animals to be taken; opportunities for participation in the research by scientists of other nations; and possible effect on conservation of stock.”⁵⁶ In reviewing a proposed permit, the Scientific Committee weighs the following factors:

⁴⁶ Berger-Eforo, *supra* note 40, at 461-62.

⁴⁷ *Id.* at 470-71.

⁴⁸ ICRW, *supra* note 2, at Schedule para. 10(e).

⁴⁹ See International Whaling Commission: Aboriginal Subsistence Whaling, <http://www.iwcoffice.org/conservation/aboriginal.htm> (last visited June 6, 2010).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* For take limits, see the ICRW, *supra* note 2, at Schedule para. 13.

⁵³ See ICRW, *supra* note 2, at Schedule para. 30.

⁵⁴ *Id.* at art. VIII (“Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research . . . and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention.”).

⁵⁵ *Id.* at Schedule para. 30.

⁵⁶ *Id.*

whether the permit adequately specifies its aims, methodology and the samples to be taken; whether the research is essential for rational management, the work of the Scientific Committee or other critically important research needs; whether the methodology and sample size are likely to provide reliable answers to the questions being asked; whether the questions can be answered using non-lethal research methods; whether the catches will have an adverse effect on the stock; whether there is the potential for scientists from other nations to join the research programme.⁵⁷

In addition, Article VIII provides that “[a]ny whales taken under these special permits shall so far as practicable be processed.”⁵⁸ Again, however, the government granting the permit is in charge of how this is done and where the proceeds are directed.⁵⁹ Furthermore, the country conducting such research must make its research available to the Commission on an annual basis.⁶⁰ Since the moratorium took effect in 1986, only Japan, Norway, and Iceland have issued such permits.⁶¹

Subsequently, in 1994, the IWC attempted to further ensure the continued restriction of whaling by creating the Southern Ocean Sanctuary, a specific region in which commercial whaling is prohibited.⁶² The Commission explicitly states that the Sanctuary shall be reviewed every ten years.⁶³ The Sanctuary remains in existence today.

The success of the Southern Ocean Sanctuary has fallen short because, much like the 1986 moratorium, the Sanctuary limits only commercial whaling.⁶⁴ Therefore, countries can still whale with research permits in the area. Another sanctuary is currently in effect in

⁵⁷ International Whaling Commission: Scientific Permits, <http://www.iwcoffice.org/conservation/permits.htm> (last visited June 6, 2010).

⁵⁸ ICRW, *supra* note 2, at art. VIII.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Korea issued one permit for 1986, but no more since then. International Whaling Commission: Catches Under Permit, http://www.iwcoffice.org/conservation/table_permit.htm (last visited June 6, 2010).

⁶² ICRW, *supra* note 2, at Schedule para. 7(b).

⁶³ *Id.*

⁶⁴ *Id.*

the Indian Ocean, but other proposed sanctuaries in the South Pacific and southern Atlantic have failed to be adopted.⁶⁵

Presently, the IWC is working on a proposed “10-year peace plan” that would legalize some commercial whaling.⁶⁶ The proposal would remove the whaling nations’ power to set their own quotas and place that power in the hands of the IWC.⁶⁷ Reportedly, the quotas set by the IWC would be stricter than the allotments set by whaling nations today.⁶⁸ The proposal stirred outrage among many anti-whaling activists. Critics of the proposal assert that it encourages non-compliance with the moratorium and the Southern Ocean Sanctuary and reinforces the idea that if you refuse to cooperate for long enough you can escape liability.⁶⁹ Others assert that it will revive a perishing whale meat market.⁷⁰

B. *Present Day Japanese Whaling*

Today, Japan continues to whale thanks to research permits that the Japanese government issues each year.⁷¹ Currently, Japan issues permits that allow for the take of over 1,400 total whales of different species, including fin whales, humpback whales, Sei whales, and sperm whales,⁷² all of which are listed as endangered by the U.S. Fish and Wildlife Service.⁷³

⁶⁵ Cinnamon Piñon Carlarne, *Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies*, 24 VA. ENVTL. L.J. 1, 16-17 (2005).

⁶⁶ Helen McArdle, *Green Groups’ Anger at New Plan to Make Whaling Legal*, HERALD SCOT., Apr. 24, 2010, <http://www.heraldsotland.com/news/transport-environment/green-groups-anger-at-new-plan-to-make-whaling-legal-1.1022727>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*; *Cutting Rogue Nations a 10-Year Break Won’t Save the Whales*, L.A. TIMES, May 12, 2010, available at http://www.sltrib.com/D=g/ci_15071067.

⁷⁰ *Latin America Anti-Whaling Countries Meet Ahead of IWC Event*, AFP, May 18, 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5jtyWHTZwGCjUcvf3ihi2C4dbEk8g>.

⁷¹ See Matthew O. Berger, *Fighting off Criticism, IWC Looks to Rein in Whaling*, IPS, May 28, 2010, <http://www.ipsnews.net/news.asp?idnews=51620>.

⁷² International Whaling Commission: Scientific Permits, <http://www.iwcoffice.org/conservation/permits.htm#recent> (last visited June 6, 2010).

⁷³ U.S. Fish & Wildlife Service: Species Reports, http://www.fws.gov/ecos/ajax/tess_public/SpeciesReport.do (last visited June 6, 2010).

Japan defends its actions on the grounds that the research “is to examine the impact of whales on the fisheries resources of the north Pacific.”⁷⁴ Japan contends that whales consume the same fish that humans do and that research must be done to stabilize those fish populations.⁷⁵ Japan believes that it requires more than photography and non-lethal testing to adequately study whales and their habits.⁷⁶

Because the ICRW mandates that any whale taken in the name of research must be fully processed,⁷⁷ Japan must process the whale meat. Therefore, the meat makes its way into fish markets and restaurants throughout Japan. Because the United Nations Convention on International Trade in Endangered Species (CITES) forbids the trade of endangered species⁷⁸ or those that may become endangered,⁷⁹ the whale meat can only be bought and sold on the Japanese domestic market. In 2002, CITES “rejected Japanese proposals to legalize trade in the meat of minke and Bryde’s whales.”⁸⁰

Typically, Japan makes around 61 million dollars a year from the sale of whale meat.⁸¹ However, research shows that there is a declining demand for whale meat in Japan.⁸² While whale meat was common in Japan in the years following World War II, it has now been largely

⁷⁴ Reuben B. Ackerman, *Japanese Whaling in the Pacific Ocean: Defiance of International Whaling Norms in the Name of “Scientific Research,” Culture, and Tradition*, 25 B.C. INT’L & COMP. L. REV. 323, 330 (2002). For a discussion on the research findings of Japanese whaling see Media Release, Institute of Cetacean Research, JARPA II Research Fleet Departs for the Antarctic (Nov. 7, 2005), available at <http://www.icrwhale.org/eng/JARPAII.pdf> [hereinafter JARPA II Media Release].

⁷⁵ Ackerman, *supra* note 74, at 330.

⁷⁶ *Id.*

⁷⁷ ICRW, *supra* note 2, at art. VIII; *id.* at Schedule para. 19(b).

⁷⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora art. III, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

⁷⁹ *Id.* at art. IV.

⁸⁰ CRS Issue Brief for Congress IB97004, Japan-U.S. Relations: Issues for Congress 8 (May 21, 2003), available at http://assets.opencrs.com/rpts/IB97004_20030521.pdf.

⁸¹ Joseph Elliott Roeschke, *Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters*, 20 VILL. ENVTL. L.J. 99, 104-05 (2009).

⁸² See Anthony Faiola, *Reviving a Taste for Whale*, WASH. POST, June 19, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/18/AR2005061800890.html> (discussing how the price per pound of whale meat is declining due to “anemic” demand).

replaced by other sources of protein like beef and fish.⁸³ Today, younger generations of Japanese citizens do not consume whale meat like past generations have. One study from 2002 showed that “4% of respondents ate whale meat ‘sometimes’, and 9% ate it ‘infrequently’ . . . [while] 86% said they had never eaten it, or had stopped doing so in childhood.”⁸⁴

In an attempt to revitalize interest in whale meat, Japan has turned to government-sponsored programs to increase consumption of whale meat in young children.⁸⁵ These programs educate children on the history of whaling in Japanese culture and offer students the opportunity to taste whale meat.⁸⁶ Japan is pumping five million dollars per year into these programs in hopes of regenerating interest in whale meat consumption.⁸⁷

C. *Legality of Japan’s Whaling*⁸⁸

Under the present system, Japan is not directly violating the literal text of the IWC. However, their whaling campaigns are certainly controversial, and there is an argument to be made that Japanese whaling is illegal under the “abuse of rights” doctrine as well as under the Convention on Biological Diversity.

1. *Legality Under the ICRW*

Japan’s research permits are reviewed each year by the IWC.⁸⁹ Japan issues their own research permits, and while the IWC can object to a research permit after review, it cannot necessarily stop Japan from

⁸³ Jonathan Head, *Japan Pushes Whale Meat Revival*, BBC NEWS, June 19, 2005, <http://news.bbc.co.uk/2/hi/asia-pacific/4106688.stm>.

⁸⁴ Roeschke, *supra* note 81, at 105 (citing Justin McCurry, *Big Sushi: The World’s Most Politically Sensitive Lunch*, THE MONTHLY, Aug. 2006).

⁸⁵ Faiola, *supra* note 82; Head, *supra* note 83.

⁸⁶ Faiola, *supra* note 82. The children also receive “official books on whales that include[] . . . recipes for whale burgers and whale soup.” *Id.*

⁸⁷ *Id.*

⁸⁸ For a detailed discussion of the legality of Japan’s research whaling under a multitude of treaties and international law, see Peter H. Sand, *Japan’s ‘Research Whaling’ in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)*, 17 REV. EUR. COMMUNITY & INT’L ENVTL L. 56 (2008), available at http://www.ssn.org/Documents/Share/Res_whaling.pdf.

⁸⁹ International Whaling Commission: Scientific Permits, *supra* note 57.

operating a research program.⁹⁰ The objections are meant to encourage whaling nations to adjust their quotas, but ultimately, the IWC cannot force such adjustments. In years past, the IWC has passed resolutions urging Japan to abandon their lethal research methods, but thus far no action has been taken against Japan for their scientific whaling because ultimately it is within the law of the ICRW.⁹¹

2. *Legality Under the "Abuse of Rights" Doctrine*

It is arguable that Japan's whaling activities violate the "abuse of rights" doctrine. An "abuse of rights" can be described as "the fictitious exercise of a right for the purpose of evading a rule of law or a contractual obligation."⁹² In 2001, the IWC embraced the idea that an abuse of rights should not be tolerated when they adopted a resolution "stress[ing] in particular the importance of adherence to the requirements of good faith and transparency in all activities undertaken by the IWC and in all activities by Contracting Governments in respect of their involvement with the IWC."⁹³

At the fifty-fifth meeting of the IWC, the Humane Society of the United States (HSUS) took a strong stance against Japanese research whaling by appealing to the "abuse of rights" view:

The obligation of States to act in good faith and the doctrine of abuse of rights are closely related. Some jurists have argued that a party is not acting in good faith when it abuses a right allowed by the Convention. . . .

. . . Therefore, if a Party currently bound by the moratorium issues a special permit under Article VIII for a

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *The Humane Society of the United States (HSUS) Position Statement for the 55th Meeting of the IWC*, http://files.hsus.org/web-files/PDF/IWC_55_statement_2.pdf [hereinafter *HSUS Position Statement*]. Other definitions include "the exploitation of an individual right [that] injuriously affects the interests of the community." Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 389 (2002).

⁹³ IWC, *Resolution on Transparency Within the International Whaling Commission*, Res. 2001-1 (2001), available at <http://iwcoffice.org/meetings/resolutions/resolution2001.htm#1>.

purpose other than scientific whaling, then the exercising of that right is an abuse contrary to international law.⁹⁴

It is arguable that Japan engages in their scientific whaling to reap the benefits of processing and selling the whale meat rather than for *actual* scientific research. If this is in fact the case, then Japan is violating the “abuse of rights” doctrine by continuing to kill whales as a participating member of the IWC.

Strengthening the argument that the Japanese are in breach of international law is the “good faith” requirement of the Vienna Convention on the Law of Treaties,⁹⁵ which states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁹⁶ If it can be proven that Japan is killing whales under the guise of research for commercial profits and thus not acting in good faith, they could be found to be in violation of the Vienna Convention. However, it appears to the author that adequately proving bad faith may require as much as indisputable confirmation from the mouths of Japanese officials that Japan is engaging in commercial whaling.

3. *Legality Under the Convention on Biological Diversity*

There is another argument that Japanese whaling violates the Convention on Biological Diversity.⁹⁷ The Convention notes that “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.”⁹⁸ The Convention on Biological Diversity is broad in nature; its objectives include “the conservation of biological diversity [and] the sustainable use of its components.”⁹⁹

Some environmentalists argue that the Convention on Biological Diversity mandates that the international community eliminate even a

⁹⁴ HSUS Position Statement, *supra* note 92.

⁹⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁹⁶ *Id.* at art. 26.

⁹⁷ Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79. The Convention is sometimes referred to as the “Biodiversity Convention” or the “Convention on Biodiversity.”

⁹⁸ *Id.* at Preamble.

⁹⁹ *Id.* at art. 1.

very small risk of the extinction of whale species.¹⁰⁰ These anti-whaling advocates argue against those who claim that the IWC can adequately “avoid or minimize” risk under the Convention while still allowing certain whaling practices.¹⁰¹

Recently, an article by Rachele Adam examined the legality of Japanese dolphin hunting under the Convention on Biological Diversity. She argues that under the shadow of Article 6 of the Convention, Japan may be unable to “justify the sustainable basis for its dolphin hunts.”¹⁰² Article 6 requires nations to “[d]evelop national strategies, plans or programmes for the conservation and sustainable use of biological diversity.”¹⁰³ However, with respect to whales, Japan could argue that their hunts are justified as research for stock population trends.

In addition, Article 7 requires documentation relating to the identification and monitoring of “processes and categories of activities which have or are likely to have significant adverse impacts on the conservation or sustainable use of biological diversity.”¹⁰⁴ Adam proposes that Japan would not be able to supply the required documentation with respect to its dolphin hunting.¹⁰⁵ In contrast, however, Japan has stockpiled documentation of their whaling activities¹⁰⁶ so they would probably be able to produce the documentation necessary under Article 7.

Articles 8 and 10 of the Convention on Biological Diversity present more promising avenues for challenging Japan’s activities. Under Article 8, each contracting party shall “[d]evelop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.”¹⁰⁷ Japan could be found in violation because they are hunting endangered whales.¹⁰⁸

¹⁰⁰ See A.W. Harris, *The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 375, 446-48 (2005).

¹⁰¹ See *id.* at 448-49.

¹⁰² Rachele Adam, *The Japanese Dolphin Hunts: In Quest of International Legal Protection for Small Cetaceans*, 14 ANIMAL L. 133, 173 (2008).

¹⁰³ Convention on Biological Diversity, *supra* note 97, at art. 6.

¹⁰⁴ *Id.* at art. 7.

¹⁰⁵ Adam, *supra* note 102, at 173.

¹⁰⁶ See, e.g., JARPA II Media Release, *supra* note 74.

¹⁰⁷ Convention on Biological Diversity, *supra* note 97, at art. 8.

¹⁰⁸ See International Whaling Commission: Catches Under Permit, *supra* note 61; *infra* notes 72-73 and accompanying text.

Finally, Article 10 provides that contracting nations should “[i]ntegrate consideration of the conservation and sustainable use of biological resources into national decision-making; [and] [a]dopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.”¹⁰⁹ Clearly it can be argued that Japan’s whaling activities may have adverse impacts on biological diversity. Thus, it is arguable that Japan is in violation of the Convention on Biological Diversity.

The problem associated with these Articles is that they are difficult to enforce.¹¹⁰ They require compliance only “as far as possible and appropriate,”¹¹¹ and similar to other international law, they “suffer[] from . . . a lack of precision” and a lack of ramifications.¹¹² Furthermore, Japan could simply object to any new annexes or protocols imposing stronger requirements.¹¹³ Therefore, even if Japan is violating the Convention on Biological Diversity, it will be hard to discern and enforce.

4. *Japan’s Response to Claims of Illegal Whaling*

Undeniably, Japan has suffered much political persecution over their actions. Critics of Japan argue that very little research has been accomplished as a result of Japan’s lethal “research.”¹¹⁴ The Institute of Cetacean Research, which runs Japan’s whaling program using government funds, has not produced a single “peer-reviewed scientific paper[.]”¹¹⁵ Many individuals and groups have publicly condemned the actions of Japan. For example, former U.S. Commerce Secretary Norman Mineta stated, “Putting it plainly, Japan is killing whales in the name of scientific research to satisfy a demand for whale meat in a few high-end restaurants and gourmet boutiques.”¹¹⁶ Furthermore, the IWC

¹⁰⁹ Convention on Biological Diversity, *supra* note 97, at art. 10.

¹¹⁰ See Adam, *supra* note 102, at 172 (“As a framework agreement, implementation of the [Convention] is problematic because it contains mostly soft-law, general provisions instead of the necessary unambiguous, focused, hard-law obligations.”).

¹¹¹ Convention on Biological Diversity, *supra* note 97, at arts. 8, 10.

¹¹² Byers, *supra* note 92, at 424-25.

¹¹³ See Convention on Biological Diversity, *supra* note 97, at art. 30.

¹¹⁴ See, e.g., Paul Watson: *Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1.

¹¹⁵ *Id.*

¹¹⁶ Ackerman, *supra* note 74, at 325 (quoting Norman Mineta).

has openly criticized Japan's research program as not "critically important" enough to kill whales.¹¹⁷ Japan's research permits are widely viewed as an extension of commercial whaling. In one study, "samples from Japanese restaurants showed that a high proportion of the whale meat being consumed came from a highly endangered subspecies of minke whales."¹¹⁸ One study by the Scientific Committee of the IWC found that Japan's special permits "provide over 3,000 tons of commercial whale meat each year."¹¹⁹

Another reason that many anti-whalers question Japan's research whaling is that Japan openly supports overturning the 1986 moratorium and a return to commercial whaling.¹²⁰ Japan actually recruits smaller countries to persuade them to join the IWC and vote in favor of overturning the moratorium.¹²¹ Thus far, Japan has convinced Guinea, Morocco, Mauritania, and Laos to join the IWC.¹²² With the assistance of these countries, and others potentially on the way, Japan is closing in on the three-quarters vote needed to put an end to the moratorium.¹²³

Japan counters these allegations with the fact that its research program, known as JARPA, has in fact contributed scientific knowledge about whales. Japan boasts that JARPA has made significant findings:

The JARPA research program has contributed greatly to the advancement of scientific knowledge of whale resources in the Antarctic. JARPA made clear that Antarctic minke whale and common minke whale are two separate species. JARPA provided a wide variety of information on biological parameters such as the natural mortality coefficient and changes over time in the age at maturity as well as narrowing down the parameters of relevance for stock management.

The research program also elucidated that there are two Antarctic minke whale stocks in the research area but that

¹¹⁷ *Id.* at 329.

¹¹⁸ *Id.*

¹¹⁹ Creason, *supra* note 16, at 107.

¹²⁰ Carlarne, *supra* note 65, at 33-34.

¹²¹ *Id.* at 35.

¹²² *Id.*; John Rolfe & Alison Rehn, *Japan 'Buys Whaling Support'*, DAILY TELEGRAPH, May 17, 2007, available at <http://www.dailytelegraph.com.au/news/nsw-act/japan-buys-whaling-support/story-e6freuzi-1111113558550>.

¹²³ Carlarne, *supra* note 65, at 35.

the geographical boundaries between these stocks are different from those used by IWC to manage baleen whale species in the Antarctic. Further, JARPA found that pollutant concentration in whale tissues, such as heavy metals and PCBs, was extremely low, confirming the view that the Antarctic Ocean environment is one of the cleanest in the world. JARPA has thus successfully obtained data related to the initially proposed objectives. It is expected that the results will greatly contribute to the rational management of the Antarctic minke whale stocks.¹²⁴

Japan maintains that these results could not have been attained using non-lethal methods and insists that the number of whales killed each year is relatively small, with only minimal effects on international whale stocks.¹²⁵

Ultimately, Japan is facially in compliance with the ICRW. However, it is arguable that Japan's whaling with the use of research permits is violating the "abuse of rights" doctrine embraced by the IWC or the "good faith" provision of the Vienna Convention. The argument that Japan is in violation of the Convention on Biological Diversity may also have some validity. However, until Japan is actually found in violation of one of these agreements they will be allowed to continue whaling with research permits.

III. Sea Shepherd

Anti-whaling advocates and environmentalists alike are frustrated with the lack of repercussions faced by Japan. This frustration has led some activists to take matters into their own hands. Sea Shepherd Conservation Society founder Paul Watson states that the problem with the international laws is that "[g]overnments are not enforcing the laws, so we have to."¹²⁶

¹²⁴ JARPA II Media Release, *supra* note 74, at 1.

¹²⁵ Ackerman, *supra* note 74, at 330.

¹²⁶ Paul Watson: *Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1 (quoting Paul Watson).

A. *History of Sea Shepherd*

Sea Shepherd was incorporated in 1981 by Paul Watson.¹²⁷ Watson was co-founder of the environmental group Greenpeace, but broke away and formed the Earth Force Society in 1977.¹²⁸ The Earth Force Society was founded with the goal of “shutting down illegal whaling and sealing operations.”¹²⁹ In 1979, the Earth Force Society purchased its first ship, renamed it *Sea Shepherd*, and rammed the whaling ship *Sierra*, ending its whaling career.¹³⁰ The Earth Force Society was renamed the Sea Shepherd Conservation Society in 1981.¹³¹

B. *Anti-Whaling Efforts*

Sea Shepherd is best known for their anti-whaling efforts. Sea Shepherd receives global recognition through the hit series *Whale Wars* on Animal Planet. Sea Shepherd attempts to interfere with Japanese whaling efforts through a variety of techniques including ramming the ships, “firing smoke canisters onto decks, using nylon rope to disable propellers, [and] nailing shut drains that spill whale blood into the ocean.”¹³²

Sea Shepherd asserts that the Japanese whalers are whaling illegally under the 1986 moratorium¹³³ because the purpose of the whaling is really commercial rather than research. Sea Shepherd insists

¹²⁷ Sea Shepherd Conservation Society, The History of Sea Shepherd, <http://www.seashepherd.org/who-we-are/our-history.html> (last visited June 6, 2010).

¹²⁸ Sea Shepherd Conservation Society, Captain Paul Watson, <http://www.seashepherd.org/who-we-are/captain-watsons-biography.html> (last visited June 6, 2010). One of the reasons Watson left Greenpeace was “disagreement over the appropriate level of aggression needed to protect the environment.” Roeschke, *supra* note 81, at 106.

¹²⁹ Sea Shepherd Conservation Society, The History of Sea Shepherd, *supra* note 127.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Roeschke, *supra* note 81, at 107.

¹³³ Sea Shepherd Conservation Society, Defending Whales, <http://www.seashepherd.org/whales/> (last visited June 6, 2010).

that they are empowered to enforce international law under the United Nations World Charter for Nature.¹³⁴ In pertinent part, the Charter provides: “States and, to the extent they are able, other public authorities, international organizations, *individuals, groups and corporations* shall . . . [i]mplement the applicable international legal provisions for the conservation of nature and the protection of the environment.”¹³⁵

Sea Shepherd boasts that in their trips to the Southern Ocean, they have successfully disrupted Japan’s whaling expeditions enough to cause them to come up 83 whales short in the 2005-2006 season,¹³⁶ about 500 whales short in both the 2006-2007 and 2007-2008 seasons,¹³⁷ and 305 short in the 2008-2009 season.¹³⁸

C. *Eco-Terrorism Claims Against Sea Shepherd*

In the wake of the terrorist attacks of September 11, 2001, terrorism has received broadened coverage. Environmental terrorists are different than traditional terrorists, but they still can create trouble for governments all over the world. The Federal Bureau of Investigation (FBI) estimates that the criminal acts of extremist groups Animal Liberation Front and Earth Liberation Front alone have caused damage in excess of 43 million dollars.¹³⁹

The FBI defines eco-terrorism¹⁴⁰ as “the use or threatened use of violence of a criminal nature against innocent victims or property by an environmentally oriented, sub-national group for environmental-political reasons, or aimed at an audience beyond the target, often of a

¹³⁴ *Id.*

¹³⁵ G.A. Res. 37/7, para. 21, U.N. Doc. A/RES/37/7 (Oct. 28, 1982) (emphasis added).

¹³⁶ Sea Shepherd Conservation Society, Operation Migaloo Campaign Report, <http://www.seashepherd.org/migaloo/> (last visited June 6, 2010).

¹³⁷ Sea Shepherd Conservation Society, Operation Waltzing Matilda Background, <http://www.seashepherd.org/matilda/background.html> (last visited June 6, 2010).

¹³⁸ *Id.*

¹³⁹ *Eco-Terrorism and Lawlessness on the National Forests: Oversight Hearing Before the Subcomm. on Forests and Forest Health of the Comm. on Resources, H.R.*, 107th Cong. 50 (2002) (statement of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, Federal Bureau of Investigation).

¹⁴⁰ Ron Arnold is credited with coining the term “eco-terrorism.” Rebecca K. Smith, Comment, “*Ecoterrorism*”?: A Critical Analysis of the Vilification of Radical Environmental Activists as Terrorists, 38 ENVTL. L. 537, 539 (2008).

symbolic nature.”¹⁴¹ According to James F. Jarboe, Domestic Terrorism Section Chief of the FBI’s Counterterrorism Division, “[a]cts of international terrorism are intended to intimidate or coerce a civilian population, influence the policy of a government, or affect the conduct of a government.”¹⁴² The proposed Stop Terrorism Property Act of 2003 defined an eco-terrorist as someone who “intentionally damages the property of another with the intent to influence the public with regard to conduct the offender considers harmful to the environment.”¹⁴³

In a recent publication, Chrystal Mancuso-Smith explains the role of the eco-terrorist as twofold in purpose. “First, [the eco-terrorist] intends that [her violent or destructive] acts will thrust environmental issues to the forefront of the public’s attention. Second, [the eco-terrorist] hopes that causing fear and economic damage will scare perceived ‘violators’ into stopping behavior she finds offensive or harmful.”¹⁴⁴ Eco-terrorists hope to ultimately “deter or cause economic harm” to those groups which they oppose.¹⁴⁵ Finally, just like a traditional terrorist, eco-terrorists are “quick to claim credit” for incidents.¹⁴⁶

Japan openly accuses Sea Shepherd of eco-terrorism and has issued warrants for the arrest of members of Sea Shepherd.¹⁴⁷ Recently, Japan obtained an arrest warrant for Watson himself.¹⁴⁸ The Japanese Coastguard is accusing Watson of assault and obstruction of business.¹⁴⁹

¹⁴¹ *Eco-Terrorism and Lawlessness on the National Forests: Oversight Hearing Before the Subcomm. on Forests and Forest Health of the Comm. on Resources, H.R.*, *supra* note 139, at 50 (statement of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, Federal Bureau of Investigation).

¹⁴² *Id.* at 49.

¹⁴³ Paul J. Karasick, Note, *Curb Your Ecoterrorism: Identifying the Nexus Between State Criminalization of Ecoterror and Environmental Protection Policy*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 581, 583 (2009) (quoting H.R. 3307, 108th Cong. (1st Sess. 2003)).

¹⁴⁴ Chrystal Mancuso-Smith, Comment, *From Monkeywrenching to Mass Destruction: Eco-Sabotage and the American West*, 26 J. LAND RESOURCES & ENVTL. L. 319, 322 (2006).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Japan Issues Arrest Warrants for Sea Shepherd ‘Eco-Terrorists’*, *supra* note 4.

¹⁴⁸ Justin McCurry, *Japan Obtains Arrest Warrant for Anti-Whaling Group Leader*, GUARDIAN.CO.UK, Apr. 30, 2010, <http://www.guardian.co.uk/environment/2010/apr/30/japan-whaling-sea-shepherd>.

¹⁴⁹ *Id.*

It appears that Japan's accusations of eco-terrorism are valid. Sea Shepherd "intentionally damages" property of others "with the intent to influence the public" or for the purpose of affecting "the conduct of a government." Sea Shepherd does in fact use violence such as ramming ships "for environmental-political reasons." One of the primary purposes of Sea Shepherd is to influence the public and persuade the world against whaling. Furthermore, Sea Shepherd seeks nothing more than to affect Japanese whaling so much that the government abandons their hunting campaigns.

In recounting Sea Shepherd's historic take-down of the whaling ship *Sierra*, David Day, author of the book *The Whale War*, describes the scene as follows:

[T]he *Sea Shepherd* cut across the bow of the *Sierra* in an attempt to sheer off the harpoon gun. The warning blow knocked the crew off their feet. The *Sea Shepherd* then swung about in a tight 360-degree turn and, charging like a mad bull whale made of steel, attempted a full scale ramming amidship. The concrete-reinforced steel bow of *Sea Shepherd* tore into the *Sierra* like a big axe blade, ripping the whaler open with a gash eight feet long and six feet wide, buckling in the whole side of the ship. In the ensuing mêlée, the *Sierra*—hull torn open—fled for safety within the harbour, and the *Sea Shepherd* attempted to escape Portuguese waters.¹⁵⁰

Just months after the ramming of the *Sierra*, the ship was refurbished and mooring in port when a bomb exploded, sinking the ship.¹⁵¹ The bomb was placed on the exterior of the ship below the water line and exploded while eleven crewmembers were on board, sinking the ship in only ten minutes.¹⁵² Sea Shepherd has since taken credit for the bombing and sinking of the ship.¹⁵³

¹⁵⁰ DAVID DAY, *THE WHALE WAR* 55 (1987).

¹⁵¹ *Id.* at 57.

¹⁵² *Id.*

¹⁵³ See Sea Shepherd Conservation Society: Greenpeace Attempts to Make Captain Paul Watson "Disappear", <http://www.seashepherd.org/who-we-are/paul-watson-and-greenpeace.html> (last visited June 6, 2010); see also *Paul Watson: Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1.

Sea Shepherd takes credit for ramming or sinking at least nine other ships since the Sierra.¹⁵⁴ The radical conservation society continues to engage in violent conduct to further their purpose.¹⁵⁵

Watson admits that their campaign is a dangerous one. Currently, Sea Shepherd has not claimed the lives of any of their volunteers or any whalers. Sea Shepherd has, however, certainly endangered many lives. Watson staunchly believes that “[i]f you’re not willing to risk your life to save a whale, you don’t belong on this ship and you won’t get past our vetting process.”¹⁵⁶ Watson greets his new volunteers with the Lakota Sioux saying “hoka hey,” which means “it’s a good day to die.”¹⁵⁷ Watson’s aggressive tactics go beyond putting his own life in danger as he puts the lives of his young, ambitious volunteers and the lives of the Japanese whalers in serious danger. For example, a Japanese harpoon boat collided with a Sea Shepherd powerboat named the *Ady Gil* on January 6, 2010. The *Ady Gil* was split in two and sank to the bottom of the Southern Ocean.¹⁵⁸ No one was killed in the collision, but one of the *Ady Gil* crewmen suffered broken ribs.¹⁵⁹

Sea Shepherd’s violent tactics have appalled some fellow anti-whaling advocates. Dr. Sidney Holt, one of the architects of the 1986 moratorium, believes that Watson and his actions are an “absolute disaster.”¹⁶⁰ Holt insists that “[a]lmost everything [Watson] has been doing has had blowback for those who want to see an end to whaling. In too many cases, playing piracy on the ocean, and creating danger for other ships, is simply not liked.”¹⁶¹ Furthermore, Greenpeace, which

¹⁵⁴ Roeschke, *supra* note 81, at 107.

¹⁵⁵ *Id.* at 106-07; see also Paul Watson: *Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1.

¹⁵⁶ Paul Watson: *Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1 (quoting Paul Watson).

¹⁵⁷ *Id.*

¹⁵⁸ Amy Coopes, *Australia Unable to Pin Blame for Ady Gil Crash*, AFP, May 8, 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5jQaRSZXRvNeQoio6FRpLhsszNDRQ>.

¹⁵⁹ Anti-Whaler Reaches out to Family from Tokyo Prison, ONE NEWS, May 11, 2010, available at <http://tvnz.co.nz/national-news/anti-whaler-reaches-family-tokyo-prison-3536385>.

¹⁶⁰ Paul Watson: *Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1 (quoting Dr. Sidney Holt).

¹⁶¹ *Id.* (quoting Dr. Sidney Holt).

Watson co-founded, has referred to Watson as “a violent extremist and an eco-terrorist.”¹⁶²

Watson vehemently opposes the title “eco-terrorist,” claiming that the title is “preposterous.”¹⁶³ To Watson, an eco-terrorist is one “who brings terror into the natural environment, like a whaling fleet with explosive-tipped harpoons coming into a whale sanctuary to kill a thousand whales.”¹⁶⁴ Watson further states that “you . . . have to look at our record. We’ve never hurt anybody. We’ve never been convicted of a felony. We’ve never been sued. We don’t destroy property unless it’s been used in the commission of a crime.”¹⁶⁵

Contrary to what Watson believes, it is arguable that Sea Shepherd’s actions fit the definition of eco-terrorism provided by the FBI and under the proposed Stop Terrorism Property Act of 2003. Watson tries to turn the definition of eco-terrorism against the Japanese whalers, but ultimately confuses “eco-terrorism” with one potential definition of “environmental terrorism.” Environmental terrorism “includes . . . the targeting of the environment itself.”¹⁶⁶ Conversely, recall that eco-terrorism intends to spread a message *about* the environment (or stop certain environmental acts) through the use of violence or threats of violence. Watson is correct that Sea Shepherd does not engage in environmental terrorism, but his organization does appear to engage in eco-terrorism by engaging in violent actions to spread a message.

Ultimately, confusing and overlapping international laws allow Sea Shepherd to continue their pursuits virtually unpunished.¹⁶⁷ For example, Sea Shepherd’s ship the *Steve Irwin* sails under the Dutch flag, which means that The Netherlands is ultimately responsible for imposing justice on the ship.¹⁶⁸ Under the United Nations Convention

¹⁶² *Id.*

¹⁶³ *Id.* (quoting Paul Watson).

¹⁶⁴ *Id.* (quoting Paul Watson).

¹⁶⁵ *Id.* (quoting Paul Watson).

¹⁶⁶ Timothy Schofield, *The Environment as an Ideological Weapon: A Proposal to Criminalize Environmental Terrorism*, 26 B.C. ENVTL. AFF. L. REV. 619, 620 (1999).

¹⁶⁷ But see Sea Shepherd Conservation Society, <http://www.seashepherd.org/> (last visited June 6, 2010) for various articles about arrests of members and detainments by foreign governments.

¹⁶⁸ *A Most Dangerous Precedent Has Been Set With MS Steve Irwin*, Jan. 20, 2009, <http://gcaptain.com/maritime/blog/a-most-dangerous-precedent-has-been-set-with-ms-steve-irwin/>; see also Roeschke, *supra* note 81, at 119 (“[F]lag-states are responsible for controlling any sea vessels that register under the flag of that flag-state or nation. At sea, that registered ship is then considered a part of the flag-state itself,

on the Law of the Sea (UNCLOS),¹⁶⁹ only the flag state of a ship can make arrests and detainments, while certain other disciplinary actions against a person can be taken only by the flag state or the “State of which the person is a national.”¹⁷⁰ Thus far, The Netherlands has refused to take any action against Sea Shepherd, although it appears that The Netherlands is taking steps to remove Sea Shepherd ships from sailing under its flag.¹⁷¹

Watson’s claim that Sea Shepherd has never hurt anyone is problematic as well. Even if Sea Shepherd has not hurt anyone to date, and even if they do not intentionally harm people, they are constantly putting Japanese whalers into situations where life-threatening injuries *could* occur. In episodes of *Whale Wars* on Animal Planet, Watson repeatedly speaks of the dangers of the Southern Ocean and its treacherous nature. The distance of the ships from port, the temperature of the freezing water, and the threats of ice are all issues that the Sea Shepherd crew discusses as they ram Japanese whaling ships. In one particular episode, Watson discusses the danger of ice crushing the hulls of ships and the fear of being stranded without power in the middle of ice-laden water. With this in mind, Watson orders his crew to attempt to foul the propellers of the Japanese whaling ships and leave them without any source of power to negotiate the icebergs present in the area. While Watson can boast that Sea Shepherd has never hurt anyone, they have certainly taken measures that could put the lives of the Japanese whalers in severe danger. As Watson and his crew state over and over, even minor mishaps can easily turn into deadly situations when thousands of miles from port in treacherous waters such as the Southern Ocean.

D. *Sailing Without a Flag State*

In response to questions about Sea Shepherd’s ship the *Farley Mowat* sailing without a flag state, Watson offered the following thoughts:

and legal jurisdiction under that country would apply accordingly.” (citation omitted)).

¹⁶⁹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

¹⁷⁰ *Id.* at art. 97.

¹⁷¹ Willemien Groot, *Sea Shepherd Could Lose Dutch Flag*, RADIO NETHERLANDS WORLDWIDE, Nov. 10, 2009, available at <http://www.rnw.nl/english/article/sea-shepherd-could-lose-dutch-flag>.

We have a mission and that mission is to save whales. We will not surrender this ship to any navy and we will not comply with any order to cancel our campaign. If anyone wishes to stop us from protecting whales they will have to sink us.

....

. . . If they want us to be pirates, th[e]n we will be damn pirates¹⁷²

Despite this carefree attitude, the *Farley Mowat* now sails under the Dutch flag along with the *Steve Irwin* and the *Bob Barker*.¹⁷³ However, if The Netherlands ever decides to strike these flags,¹⁷⁴ Sea Shepherd could again be left without a flag state. Sailing without a flag state is not enough to make a ship a pirate ship;¹⁷⁵ ships sailing without nationality simply do not have any legal status.¹⁷⁶ Traditionally, a ship sailing without nationality “has no standing when at sea.”¹⁷⁷ Under UNCLOS, “a warship which encounters on the high seas a foreign ship . . . [is] justified in boarding it [if] there is reasonable ground for suspecting that . . . the ship is without nationality.”¹⁷⁸ In short, this means that if Sea Shepherd pursues Japanese whalers in the Southern Ocean sailing under only the Jolly Roger flag, the Imperial Japanese Navy would have international authority to board their ship whenever desired.

Note that Japan does already pursue other legal action against environmental extremists. In February 2010 Sea Shepherd team member Peter Bethune was arrested after boarding a Japanese whaling

¹⁷² Sea Shepherd Conservation Society, *Pirates of Compassion Sail into Hostile Waters*, Jan. 5, 2007, <http://www.seashepherd.org/news-and-media/news-070105-1.html>.

¹⁷³ Sea Shepherd Conservation Society, *The Bob Barker Goes Dutch*, May 24, 2010, <http://www.seashepherd.org/news-and-media/news-100524-1.html>.

¹⁷⁴ See *Sea Shepherd's Registry Safe for Now*, May 27, 2010, <http://www.virere.org/2010/05/sea-shepherds-registry-safe-for-now/>.

¹⁷⁵ UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 208 (1995).

¹⁷⁶ See *Sea Shepherd Could Lose Dutch Certificate of Registry*, July 1, 2009, <http://www.virere.org/2009/07/sea-shepherd-could-lose-dutch-certificate-of-registry>.

¹⁷⁷ UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, *supra* note 175, at 127.

¹⁷⁸ UNCLOS, *supra* note 169, at art. 110.

vessel to protest.¹⁷⁹ Bethune is presently in detention and awaiting trial in Japan. There are five charges against him, including assault, trespassing, forcible obstruction of business, and violation of the swords control law.¹⁸⁰ He faces up to fifteen years in prison if convicted.¹⁸¹ Furthermore, two Greenpeace activists are facing ten years in Japanese prison on theft and trespassing charges stemming from a 2008 incident.¹⁸² A decision in that case is expected in June 2010.¹⁸³

E. *Piracy Claims Against Sea Shepherd*

UNCLOS defines piracy as

- (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).¹⁸⁴

UNCLOS further explains that a ship becomes a pirate ship when “it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101.”¹⁸⁵ Under UNCLOS, it is the duty of all states to suppress acts of piracy on the

¹⁷⁹ See McCurry, *supra* note 148.

¹⁸⁰ *Id.*; Yomiuri Shimbun, *Antiwhaling Activist Faces Additional Charges in Japan*, VANCOUVER SUN, Apr. 1, 2010, <http://www.vancouversun.com/technology/Antiwhaling+activist+faces+additional+charges+Japan/2753986/story.html>.

¹⁸¹ McCurry, *supra* note 148.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ UNCLOS, *supra* note 169, at art. 101. For a discussion on the multitude of definitions of piracy and an explanation of the lack of a single uniform definition, see Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT’L & COMP. L. 43 (2009).

¹⁸⁵ UNCLOS, *supra* note 169, at art. 103.

high seas.¹⁸⁶ In an effort to combat piracy on the high seas, UNCLOS provides that “every state may seize a pirate ship . . . and arrest the persons and seize the property on board.”¹⁸⁷ The seizure “may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”¹⁸⁸ It is likely that Sea Shepherd does not meet the exact definition of piracy under UNCLOS because they do not commit their pirate-like acts for private ends, although this point is debatable.

F. *Australian Action*

In general, Australia appears sympathetic to Sea Shepherd’s cause. Australia has allowed Sea Shepherd to use its ports, and a recent poll shows that “[t]here quarters of Australian citizens . . . would be prepared to boycott Japanese products to force an end to the slaughter of whales.”¹⁸⁹

Australia has also taken the strongest stance against Japanese whalers in its courts. Recently, in *Humane Society International, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, the Federal Court of Australia imposed an injunction against the company that operates the vessels used by Japan’s Institute of Cetacean Research, ordering it to cease whaling activities in the Australian Whale Sanctuary.¹⁹⁰ The court declared Japan in violation of the Environment Protection and Biodiversity Conservation Act of 1999 (EPBC Act),¹⁹¹ which was enacted to protect the environment, and in particular for “matters of national environmental significance.”¹⁹² The EPBC Act created the Australian Whale Sanctuary “in order to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth

¹⁸⁶ *Id.* at art. 100.

¹⁸⁷ *Id.* at art. 105.

¹⁸⁸ *Id.* at art. 107.

¹⁸⁹ Sea Shepherd Conservation Society, *The Polls Demonstrate that Sea Shepherd Has the Support of the Australian People*, Jan. 15, 2010, <http://www.seashepherd.org/news-and-media/news-100115-1.html>.

¹⁹⁰ *Humane Soc’y Int’l, Inc. v. Kyodo Senpaku Kaisha, Ltd.* (2008) FCA 3, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2008/3.html.

¹⁹¹ *Id.*

¹⁹² Environment Protection and Biodiversity Conservation Act, 1999, c. 1, § 3 (Austl.).

marine areas and prescribed waters.”¹⁹³ Among other areas, the Australian Whale Sanctuary covers most of the Australia’s exclusive economic zone (EEZ),¹⁹⁴ a region which extends 200 nautical miles from any Australian land mass.¹⁹⁵ Australia claims a chunk of Antarctica known as the Australian Antarctic Territory.¹⁹⁶ The Federal Court of Australia determined that Australia’s EEZ “extends to the waters adjacent to . . . Australia’s external territories, including . . . the Australian Antarctic Territory.”¹⁹⁷ Unlike the IWC’s Southern Ocean Sanctuary, the Australian Whale Sanctuary does not have a broad research exception.¹⁹⁸ The Australian Federal Court held that Japan’s killing, injuring, taking, and interfering with whales within the EEZ off the Australian Antarctic Territory were in direct violation of the EPBC Act.¹⁹⁹

Many environmentalists celebrated this strong stance against Japanese whaling. However, there are international problems associated with the holding. First, only four countries (New Zealand, France, Norway, and the United Kingdom) recognize Australia’s claim over the Australian Antarctic Territory.²⁰⁰ Because Japan does not recognize Australia’s sovereignty over the territory, Japan insists they have not violated any law and maintains that the ruling is meaningless.²⁰¹ Japan has openly stated they will continue their whaling activities regardless of the Australian Federal Court’s ruling.²⁰² Australia is not likely to seek repose against Japan in for violation of the injunction because of their questionable sovereignty over the relevant territory²⁰³ and because prosecution could cause potential political rifts between Japan and Australia.

¹⁹³ *Id.* at c. 5, § 225.

¹⁹⁴ *Id.*

¹⁹⁵ UNCLOS, *supra* note 169, at art. 57.

¹⁹⁶ *Humane Soc’y Int’l, Inc. v. Kyodo Senpaku Kaisha, Ltd.* (2008) FCA 3, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2008/3.html.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See Roeschke, *supra* note 81, at 115 & n.111.

²⁰² *Id.*

²⁰³ See *id.* at 134 (“Australia would not likely pursue Japan in an Australian court under *Humane Society*, because this would ‘raise the sensitive question of Australian sovereignty over Antarctica which is only recognized by four other countries’” (quoting *It’s Ocean Warfare*, CANBERRA TIMES, Feb. 23, 2008)).

Although Sea Shepherd's activities are controversial, especially given the pressure Japan puts on countries to oppose the organization,²⁰⁴ Australia recently reaffirmed its strong stance against whaling by filing a lawsuit with the International Court of Justice aiming to stop Japan's whaling activities.²⁰⁵

IV. Proposed Solutions to End Whaling Other than Eco-Terrorism and Violence

Frustration over the current system is what has led extremists like Paul Watson to take matters into their own hands. As a result lives are in danger, and neither side will stop until the other has. Therefore, a change from the status quo is essential.

A. IWC

Further action by the IWC is likely not the best option for change. A clause in the ICRW allows signatory nations to object to any proposed amendment with which they do not agree. By objecting, they will not be subject to the amendment.²⁰⁶ Therefore, if the IWC takes further action to curtail Japan's whaling activities by imposing a new amendment to the ICRW, Japan can simply object to the amendment and continue their present whaling activities.

B. Sanctions

Sanctions are another option available to pressure Japan to stop its whaling activities. However, imposing sanctions poses the very real threat of impairing political relations between countries, especially for engaging in an activity that appears to be legal on its face. It is arguable that many countries would not conclude that the hunting of whales is a

²⁰⁴ Nate Kharrl, *Whale Wars and Sea Shepherd Create Waves*, ECOFACTORY, July 6, 2009, <http://www.ecofactory.com/news/whale-wars-and-sea-shepherd-create-waves>.

²⁰⁵ Kyoko Hasegawa, *Australia Takes Legal Action to Stop Japan Whaling*, AFP, May 31, 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5hdfESis9kpYS83iQfAmqUnv7L7JA>.

²⁰⁶ ICRW, *supra* note 2, at art. V; see also Harris, *supra* note 100, at 381-82. However, by objecting, Japan runs the risk of facing political pressures from foreign nations. Potentially, Japan may face sanctions and other measures from anti-whaling nations for their objections.

great enough reason to risk a political strife between countries. Under the Pelly Amendment,²⁰⁷ the United States can place sanctions against countries that are “engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species.”²⁰⁸ However, the Pelly Amendment allows such sanctions only if they do not violate any United States obligations to the World Trade Organization.²⁰⁹ Japan has declared that if the United States imposes sanctions, they will pursue a claim against the United States with the World Trade Organization.²¹⁰

The mere threat of sanctions can prove useful, however. The United States enacted the Pelly Amendment in 1971 and the comparable Packwood-Magnuson Amendment in 1979²¹¹ to help promote the policies of the IWC.²¹² While neither of these amendments has been used to sanction Japan thus far²¹³ they have been threatened against Japan with some success.²¹⁴ It is undeniable that the possibility of sanctions puts political pressure on Japan and increases global awareness of anti-whaling measures.

C. *Quota System*

Another viable option that has been proposed is the creation of a quota system. A quota system might work as follows:

[E]ach member of the IWC should receive a quota, based in part on each nation’s population, of the number of whales each could hunt on a sustainable basis. For example, if 2,000 minke whales could currently be hunted on a sustainable basis throughout the world, that number should not be divided only among the whaling nations; it should be

²⁰⁷ 22 U.S.C. § 1978 (West 2010). This is an amendment to the Fishermen’s Protective Act of 1967.

²⁰⁸ *Id.* § 1978(a)(2).

²⁰⁹ *Id.* § 1978(a)(4); Ackerman, *supra* note 74, at 331.

²¹⁰ *See* Ackerman, *supra* note 74, at 332.

²¹¹ 18 U.S.C. § 1821 (West 2010). This is an amendment to the Fishery Conservation and Management Act of 1976. It provides for a reduction of fishing allocations in U.S. waters for countries “engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling.” *Id.* § 1821(e)(2).

²¹² Berger-Eforo, *supra* note 40, at 470.

²¹³ *Id.* at 471.

²¹⁴ *Id.* at 470-71 (describing how Japan was persuaded to withdraw its objection to the whaling moratorium).

divided among all of the members of the IWC. Each nation should get a quota of whales to use as it pleases. By doing so, the whaling nations will still have the right to continue their cultural whaling practices, while at the same time, the anti-whaling nations will be able to practice preservation by not whaling.²¹⁵

While extremists like Paul Watson would not be satisfied with this approach, the overall number of whales killed each year would decrease from this quota system as long as the non-whaling nations abstained from selling their allotted rights to Japan.

D. *Combined Effort*

A combination of these techniques, together with education, appears to be the most effective solution. A mixture of education, political pressure, and private enforcement may lead to the eventual end of Japanese whaling. Currently, Japan is fighting to keep their whaling campaign alive. The yearly whaling campaign costs have increased to between 65 and 76 million dollars annually to run.²¹⁶ The sale of whale meat allows Japan to offset this cost and usually turn a profit.²¹⁷

Lately, however, Japan has had trouble meeting its typical sales in whale meat.²¹⁸ Reportedly, only one percent of Japanese admit to eating whale meat regularly,²¹⁹ and younger generations are much less likely to eat whale meat than older generations.²²⁰ The change in attitude about whale meat appears to be twofold. First, the increased knowledge of the risks associated with eating the mercury found in whale meat has younger generations leery of whale meat.²²¹ Second, the global controversy surrounding their nation's whaling practices has

²¹⁵ Matera, *supra* note 11, at 41. Arguably, the system would work better if there were restrictions placed on the ability of non-whaling nations to sell their quota limits to whaling nations. Such restrictions would make it more likely that Japan would have to lower the number of whales it kills each year.

²¹⁶ *Protests or Not, Japan Won't Let Whale Meat Go*, USA TODAY, Jan. 10, 2009, http://www.usatoday.com/news/world/2009-01-10-japan-whale-meat_N.htm.

²¹⁷ *Id.*

²¹⁸ See Faiola, *supra* note 82.

²¹⁹ Paul Watson: *Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1.

²²⁰ Roeschke, *supra* note 81, at 105.

²²¹ See *id.*; Paul Watson: *Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1.

fewer Japanese youths interested in whale meat.²²² Japan recognizes these problems and is attempting to confront them by introducing whale meat into children's diets through school programs.²²³ As Japan struggles to keep its whaling campaigns alive, other countries should encourage Japan to end whaling through political pressures.

Finally, environmentalists such as Sea Shepherd should also continue to pressure the Japanese whalers. However, this should be done in a *non-violent* manner. Watson and his crew regularly boast about their extreme and violent measures to end whaling, but it is *education* that has resulted in the decline in the demand for whale meat, not violence. While Sea Shepherd does in fact indirectly educate the world on whaling via the television show *Whale Wars*, education is not Sea Shepherd's ultimate goal. Furthermore, Sea Shepherd currently enjoys some support in their endeavors from the Japanese youth. This support would surely dwindle if Sea Shepherd became responsible for the death of a Japanese whaler while engaging in an eco-terrorist act. Therefore, Sea Shepherd should continue in their mission to educate the world about Japan's whaling activities and should attempt to thwart Japan's whaling initiatives by using non-violent means.

The combined effort of educating the Japanese people about whaling, using political pressure to cease whaling activities, and allowing for non-violent independent enforcement of laws appears to be the best way to end whaling.

Conclusion

Japanese whaling remains one of the most controversial environmental problems in the world today. The struggle between Japan holding onto their culture and a world growing in anti-whaling sentiment has led to explosive conduct on the high seas. While Japan's whaling activities are gruesome to most, their actions are arguably facially within the letter of the ICRW. As discussed, there are some arguments against the legality of Japanese whaling. However, it will take a nation willing to risk political strife with Japan to determine if

²²² Roeschke, *supra* note 81, at 105-06; see also Paul Watson: *Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts*, *supra* note 1 (discussing how Sea Shepherd had its first Japanese volunteer in 2009).

²²³ See *infra* notes 85-87 and accompanying text.

the claims are valid. It remains to be seen if Australia will successfully play this role.

Extremists such as Sea Shepherd serve a purpose in furthering environmental awareness. However, engaging in eco-terrorism is not helping to end Japanese whaling in the long-term, but rather adding fuel to the fire. The life-threatening actions that Sea Shepherd engages in serve only to further frustrate Japanese whalers and the Japanese government and add to their determination to continue whaling. While they have largely escaped punishment for their actions, this may change if Sea Shepherd crosses the line and sacrifices human life—even inadvertently—in furtherance of their cause. Ultimately, it is no surprise that the Sea Shepherd Conservation Society is as controversial as the Japanese whaling they seek to end.