

# ‘RAMMING SPEED’: THE SEA SHEPHERD CONSERVATION SOCIETY AND THE LAW OF PROTEST

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*This paper examines the Sea Shepherd Conservation Society as a radical environmental protest group in its self-appointed role in protecting oceanic life. It first briefly examines the group’s history, its attitude to direct protest, its governing philosophy and its attitudes to violence as a means of achieving its goals. It then provides a history of various direct actions carried out by the group: in particular, it examines the organisation’s ongoing confrontations with the Japanese whaling fleet. The paper goes on to critically evaluate the legal justifications claimed by the Sea Shepherd Conservation Society for its actions. In particular it assesses the group’s conduct under various international law of the sea conventions and instruments, including the controversy as to whether its activities constitute vigilantism and/or piracy. Lastly, the paper concludes by asking whether Sea Shepherd Conservation Society’s methods have become counterproductive to its stated goals.*

## I INTRODUCTION

Since its inception in 1977 the Sea Shepherd Conservation Society (‘SSCS’) has gone about its self-appointed task to protect the oceans from ongoing human destruction using both nonviolent and violent protest methods.<sup>1</sup> Over that time the SSCS has grown from one ship seeking to end Canadian sealing to a global franchise tackling issues ranging from overfishing to whaling, with multiple ships and a multi-million-dollar budget.<sup>2</sup>

The group’s protest strategies and tactics are designed to be media-friendly, and often include using violence to inflict property damage to prevent its opponents’ activities. Such practices have included ramming whaling vessels; boarding ships; interfering with ships’ propellers by fouling them with ropes; and throwing butyric acid (rancid butter) onto whaling ships’ decks to taint whale meat and render it unfit for sale.<sup>3</sup> Further, the SSCS has publicly claimed to have sunk

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1 Sea Shepherd, *Mission Statement* (2018) <<http://www.seashepherd.org/mission-statement>>.

2 Sea Shepherd, *Home Page* (2018) <<http://www.seashepherd.org>>.

3 Teale Phelps Bondaroff, ‘Sailing with the Sea Shepherds’ (2011) 13(3) *Journal of Military and Strategic Studies* 1, 42–3 n 72; Amanda M Caprari, ‘Lovable Pirates? The Legal Implications of the Battle between Environmentalists and Whalers in the Southern Ocean’ (2010) 42 *Connecticut Law Review* 1493, 1508; 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 Journal of International Law* 201, 209.

10 ships that it maintains were carrying out illegal whaling.<sup>4</sup> The SSCS's methods have seen its members castigated, particularly by the Japanese government, as criminals, ecoterrorists, pirates or vigilantes and have invited the constant threat of legal action aimed at ending its protests.<sup>5</sup> In response, the SSCS argues that, in the absence of a state or international institution willing to end ongoing marine depredations, international law as embodied in such documents as the *World Charter for Nature* ('*World Charter*') legitimate direct action.<sup>6</sup> Finally, and notoriously, in 2013 a number of its tactics were indeed found to constitute piracy by the United States Federal Court in *Institute of Cetacean Research v Sea Shepherd Conservation Society* ('*Cetacean Research v SSCS*').<sup>7</sup>

The relationship of the law of the sea to human rights is a long-neglected area which is now beginning to attract scholarly interest.<sup>8</sup> The regulation of protest at sea, however, remains largely unexplored. It is not an activity that the law of the sea, as currently framed, appears set up to address. The question then is the extent to which law of the sea instruments devised to regulate questions of safety and criminal law come de facto to regulate protest — especially in the case of direct action.

This paper explores these questions using the SSCS as a case study. First, it lays out the relevant context, briefly investigating the SSCS's birth and growth, including its founder Paul Watson's contentious split from Greenpeace. It then focuses on the group's attitude to direct protest and the use of violence to achieve its goals. It provides an historical survey of SSCS protest actions with a particular emphasis on its attempts to prevent ongoing Japanese whaling in Antarctic waters. The paper goes on to evaluate the legal justifications invoked by the SSCS for its actions.

We then examine a number of instruments to ask whether politically motivated protest of the kind engaged in by the SSCS violates the law of the sea. In particular, we will consider four critical legal issues: whether either the SSCS's self-claimed appellation of vigilante or the label of 'pirate' can be considered accurate; whether in addition such tactics could violate 'terrorism suppression' conventions concerned with safety of navigation; and finally, whether such actions violate international regulations for the prevention of collisions. We will briefly

4 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' (2009) 20 *Villanova Environmental Law Journal* 99, 99.

5 Caprari, above n 3, 1507–9.

6 Sea Shepherd, *Mandate* (2018) <<http://www.seashepherd.org/mandate>>; *World Charter for Nature*, GA Res 37/7, UN GAOR, 37<sup>th</sup> sess, 48<sup>th</sup> plen mtg, Agenda Item 21, Supp No 51, UN Doc A/RES/37/7 (28 October 1982) annex ('*World Charter*').

7 708 F 3d 1099 (9<sup>th</sup> Cir, 2013) ('*Cetacean Research v SSCS*').

8 See, eg, Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, 2018); Natalie Klein, 'A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants' (2014) 63 *International & Comparative Law Quarterly* 787; Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *International Journal of Refugee Law* 174; Douglas Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 *International & Comparative Law Quarterly* 141.

consider the possible consequences in each case. Lastly, the paper questions how effective the SSCS's approach to protest has been and analyses in particular its recent decision to end its campaign of harassment of Japanese ships whaling in Antarctic waters.

## II THE SSCS AND ATTITUDES TO VIOLENT PROTEST

Paul Watson, after being forced to leave Greenpeace, set out to create an organisation with the goal of protecting global marine life that could rival Greenpeace in scope and breadth and conceived of the SSCS in 1977.<sup>9</sup> The SSCS is funded through donations and staffed predominantly by volunteers.<sup>10</sup> The initial membership tended to be drawn from disaffected members of Greenpeace who considered it too passive in its protest techniques. Thus, the SSCS does not consider itself to be pacifist in nature and does not necessarily condemn violence as a means to an end.<sup>11</sup>

The SSCS embodies the belief that, '[t]o remain nonviolent totally is to allow the perpetuation of violence against people, animals, and the environment'.<sup>12</sup> Carrying out opposing violent direct action<sup>13</sup> campaigns is considered a superior

9 Sea Shepherd, *Board of Directors* (2018) <<https://seashepherd.org/board-of-directors/>>. Paul Watson has long been involved in the environmental protest movement. He has claimed that he was an original member of Greenpeace; although the Environmental Non-Governmental Organisation ('ENGO') considers his role merely as being 'an influential early member': 'Paul Watson: The Man Behind Sea Shepherd', *ABC News* (online), 15 May 2012 <<http://www.abc.net.au/news/2012-05-15/paul-watson-sea-shepherd-profile/4011498/?site=newcastle>>; James Marshall Black, 'Paul Watson: Shining Activist Hero or Psychopathic Terrorist?' on *The Costa Rica Star* (22 May 2012) <<https://news.co.cr/paul-watson-shining-activist-hero-or-psychopathic-terrorist-2/6967>>. The precise reasons why Watson left Greenpeace are contested. Watson's actions in confronting sealers were deemed too radical by some Greenpeace members, as they violated the organisation's foundational pacifist principles. The Greenpeace Board determined that Watson's activities had breached Greenpeace policy, was endangering and had potentially endangered and threatened the ENGOs ability to raise funds, and barred Watson from the group: Sea Shepherd Conservation Society, 'Sea Shepherd History' (Winter 1983) *Sea Shepherd Log*, 4; Raffi Khatchadourian, 'Neptune's Navy: Paul Watson's Wild Crusade to Save the Oceans' (5 November 2007) *The New Yorker* 65. Watson disputes the characterisation that he was forced out, maintaining instead that he resigned because the ENGO had departed from its original vision and there was a need for more use of direct action methods to save maritime species: Sea Shepherd, *Board of Directors* (2018) <<https://seashepherd.org/board-of-directors/>>. Articles from the *Sea Shepherd Log* are on file with the authors.

10 Khatchadourian, above n 9, 59. For a more detailed history and structural analysis of the SSCS, see Gerry Nagtzaam, 'Gaia's Navy: The Sea Shepherd Conservation Society's Battle to Stay Afloat and International Law' (2014) 38 *William & Mary Environmental Law and Policy Review* 613.

11 Paul Watson, 'Sea Shepherd Defence Policy' (1991) 6(4) *Earth Island Journal* 41.

12 Paul Watson, *Sea Shepherd: My Fight for Whales and Seals* (WW Norton, 1982) 26.

13 Direct action protests can be broken into two types: nonviolent and violent. The nonviolent direct actions as practices by ENGOs such as Greenpeace encompass activities such as demonstrations or passive civil disobedience. See Get Active, *Making It Happen* <<https://web.archive.org/web/20041016020445/http://www.greenpeace.org.au/getactive/happen/nvda.html>>. Violent direct action includes activities such as 'monkey-wrenching' or 'ecosabotage' activities, for example, tree-spiking and direct physical confrontation of opponents. See Dave Foreman and Bill Haywood (eds), *Ecodefence: A Field Guide to Monkeywrenching* (Abzug Press, 3<sup>rd</sup> ed, 1993) for a further discussion on violent direct action philosophies, strategies and tactics.

means of protest to achieve the environmental goal of protecting marine life.<sup>14</sup> Lethal force against humans is thus not permitted except in cases of self-defence.<sup>15</sup> The SSCS maintain that despite its decades in the field no individual has been killed or injured by its actions.<sup>16</sup> Despite these claims there have been allegations of personal violence made against SSCS members, including firing a line rifle at Faroese police and pouring petrol on dinghies (after which signal flares were also thrown).<sup>17</sup> In 2010, a Maltese diver reportedly had his arm wounded by a fishing hook in a clash with the group.<sup>18</sup>

Paul Watson and the SSCS are comfortable with the idea of breaking the law in order to challenge its validity.<sup>19</sup> For Watson such an approach has two advantages. First, it draws media attention to his cause. Second, he argues that many states are reluctant to pursue legal remedies against the SSCS since doing so only serves to highlight SSCS activities in the global media.<sup>20</sup>

### III THE SSCS PROTEST CAMPAIGNS, STRATEGIES AND TACTICS

#### A Background

The SSCS has become world-famous for its dual approach of direct protest actions designed to inflict economic damage on its opponents, wedded to a media campaign designed to expose those opponents' 'wrongdoings'.<sup>21</sup> For the SSCS there is no such thing as bad publicity. Watson himself has stated that given the nature of the global mass media, objective truth is irrelevant and that accepted 'truth' is effectively written by the mass media.<sup>22</sup> Thus SSCS seeks to influence

14 Paul Watson, *Earthforce! An Earth Warrior's Guide to Strategy* (Chaco Press, 1993) 53 ('*Earthforce!*').

15 Watson, 'Sea Shepherd Defence Policy', above n 11, 42.

16 Michael Shapiro, 'Sea Shepherd's Paul Watson: "You Don't Watch Whales Die and Hold Signs and Do Nothing"', *The Guardian* (online), 21 September 2010 <<https://www.theguardian.com/environment/2010/sep/21/sea-shepherd-paul-watson-whales>>.

17 'Sea Shepherd's Record of Violence', *The High North News* (online), 10 April 1994 <[https://web.archive.org/web/20120327211624/http://www.highnorth.no:80/library/movements/Sea\\_Shepherd/se-sh-re.htm](https://web.archive.org/web/20120327211624/http://www.highnorth.no:80/library/movements/Sea_Shepherd/se-sh-re.htm)>.

18 Kurt Sansone, 'Two Maltese Divers Airlifted to Hospital', *Times of Malta* (online), 18 June 2010 <<https://www.timesofmalta.com/articles/view/20100618/local/two-maltese-divers-airlifted-to-hospital.313178>>.

19 For example, Paul Watson was charged with three counts of criminal mischief by Canadian authorities: Paul Watson, 'Captain's Log' (Second Quarter 1993) *Sea Shepherd Log*, 2.

20 Khatchadourian, above n 9, 66.

21 Sea Shepherd Conservation Society, 'Campaigns for 1984–1986' (Summer 1984) *Sea Shepherd Log*, 3. For example, in the two years before the moratorium on commercial whaling (put in force by the International Whaling Commission and set to begin in 1986), the SSCS planned to use 'diplomatic and educational' methods to convince Japan, the Soviet Union and Norway (and all other nations) to discontinue the practice: at 3.

22 Dan Murphy, 'Whale Wars: The Aggressive Tactics of Sea Shepherd Paul Watson', *The Christian Science Monitor* (online), 6 January 2010 <<http://www.csmonitor.com/World/Global-News/2010/0106/Whale-Wars-The-aggressive-tactics-of-Sea-Shepherd-Paul-Watson>>, citing Watson, *Earthforce!*, above n 14, 43.

the media in pursuit of its cause as a fundamental priority. Its campaigns and adopted tactics reflect this belief. Below we outline some of its historic actions. This list is not intended to be comprehensive but rather to provide an overview of the types of protest action the group has undertaken.<sup>23</sup>

In March 1979, the SSCS staged its first major operation, seeking to disrupt the ongoing Canadian seal hunt by throwing red dye on seal pups, rendering them commercially non-viable.<sup>24</sup> A recurrent tactic the SSCS has used in actions undertaken across the decades includes ramming and even sinking ships. Infamously, this included attacking the unregulated whaling ship the *Sierra*,<sup>25</sup> when it tore a six-foot hole in the ship and ‘stove in 45 feet of the hull’, thus crippling the vessel.<sup>26</sup> Other tactics have included obstructing ships from entering harbour, the use of intimidation and threats, the destruction of a whale processing plant and offering rewards for the conviction of offenders who kill marine animals.<sup>27</sup> The group has tried to disable Japanese whaling ships through a plethora of means including fouling propellers,<sup>28</sup> cutting drift nets, and disabling drift net trawlers.<sup>29</sup> Watson argues the goal is to damage whaling vessels to the point where they need to be repaired, which can be more costly for the owners than sinking them.<sup>30</sup> Violent direct action is not, however, the only strategy the SSCS has adopted. For example, in 1984, it put in place a plan to utilise ‘diplomatic and educational’ methods to convince Japan, the Union of Soviet Socialist Republics (‘USSR’) and Norway in particular to discontinue their ongoing whaling.<sup>31</sup>

In 1981, Watson and SSCS members entered Siberia and obtained evidence that a ‘food-processing facility ... was converting illegally harvested whale meat into feed for animals at a fur farm’.<sup>32</sup> In the same year, Sea Shepherd allegedly sank the whaling ships the *Isba I* and *Isba II*, in the Spanish harbour of Viga.<sup>33</sup> The next year it dropped ‘paint-filled light bulbs’ onto a USSR ship utilising a low-

23 For further detail see Nagtzaam, above n 10.

24 Sea Shepherd Conservation Society, ‘Sea Shepherd History’, above n 9, 4.

25 Pirate whaling continued to operate despite the edicts of the International Whaling Commission: Rex Weyler, *Greenpeace: How a Group of Ecologists, Journalists and Visionaries Changed the World* (Rodale, 2004) 542–3. Reportedly, the ‘whaler was the worst offender in a dirty business. Barred from ports around the world for violating international conventions on whaling and endangered species, and for not paying bills for fuel and provisions, it roved over the globe taking every whale it came across’: Peter Heller, *The Whale Warriors: The Battle at the Bottom of the World to Save the Planet’s Largest Mammals* (Free Press, 2007) 32. The *Sierra* killed 1676 whales during a three-year period and then sold the meat in Japan: Rik Scarce, *Eco-Warriors: Understanding the Radical Environmental Movement* (Left Coast Press, revised ed, 2006) 97.

26 Scarce, above n 25, 99; Weyler, above n 25, 543.

27 Watson, ‘Sea Shepherd Defence Policy’, above n 11, 41.

28 Sea Shepherd, *Sea Shepherd Response to the Media Release from the Institute for Cetacean Research* (9 February 2009) <<https://www.seashepherd.org.au/news-and-commentary/news/090208-1.html>>.

29 Sea Shepherd Conservation Society, ‘Sea Shepherd Confiscates Japanese Drift Net’ (Third Quarter 1992) *Sea Shepherd Log*, 1.

30 Andrew Darby, ‘Attack Plan for Japan’s Whale Ships’, *The Age* (online), 27 December 2006 <<https://web.archive.org/web/20151231125202/https://www.theage.com.au/news/national/attack-plan-for-japans-whale-ships/2006/12/26/1166895297032.html>>.

31 Sea Shepherd Conservation Society, ‘Campaigns for 1984–1986’, above n 21, 3.

32 Khatchadourian, above n 9, 65.

33 ‘Sea Shepherd’s Record of Violence’, above n 17.

flying plane.<sup>34</sup> In 1986, the group allegedly sank two whaling ships and wrecked a whaling station in Reykjavik, Iceland.<sup>35</sup>

In 1992, the SSCS were thought to be involved in attempting to sink the *Nybræna* in the Loften Islands, Norway, but managed to merely cause water damage.<sup>36</sup> The next year the SSCS came across an illegal shark finning operation, run by the Costa Rican ship the *Varadero* and proceeded to attempt to stop the operation.<sup>37</sup> In 2007, the SSCS ships 'delivered six liters of butyric acid [rancid butter] onto the flensing deck of the *Nisshin Maru*. This "butter acid" is a non-toxic obnoxious smelling substance. The foul smell ... cleared the flensing deck and stopped all work of cutting up whales'.<sup>38</sup> The group was also accused of: throwing smoke bombs at the Japanese crew;<sup>39</sup> using lasers to blind Japanese whaling personnel; fouling the propellers of ships with ropes; playing 'chicken' with and/or harassing whaling vessels and ships; and boarding ships at sea, potentially illegally.<sup>40</sup> The legality of such actions are returned to in Part V, below.

## B The SSCS v Japanese Scientific Whaling

For over two decades, the main aim of the SSCS has been the cessation of Antarctic Japanese whaling carried out under the rubric of 'scientific research'.<sup>41</sup> It has targeted this type of whaling in the belief that ending Japanese whaling would be the first 'shot' fired in ending global whaling. The SSCS argue that the Japanese government is using 'scientific research' as a fig leaf to allow what it considers to be 'illegal' whale hunting.<sup>42</sup>

34 Khatchadourian, above n 9, 65.

35 'Sea Shepherd's Record of Violence', above n 17.

36 Ibid.

37 Sea Shepherd, *Captain Paul Watson Arrested in Frankfurt, Germany on Warrant Issued by Costa Rica* (2018) <<https://seashepherd.org/news/captain-paul-watson-arrested-in-frankfurt-germany-on-warrant-issued-by-costa-rica>>.

38 Sea Shepherd Australia, *Whalers Activities Disrupted by Sea Shepherd* (8 February 2007) <<https://www.seashepherd.org.au/news-and-commentary/news/whalers-activities-disrupted-by-sea-shepherd.html>>.

39 Andrew Darby, 'Sea Shepherd Leaves Its Mark on Japanese Whalers', *The Age* (online), 17 February 2007 <<https://www.theage.com.au/national/sea-shepherd-leaves-its-mark-on-japanese-whalers-20070217-ge48u3.html>>; Andrew Darby, 'Film Shows Attempts to Stop Whalers', *The Age* (online), 12 February 2007 <<https://www.theage.com.au/national/film-shows-attempts-to-stop-whalers-20070212-ge47c8.html>>.

40 Bondaroff, above n 3, 42–3 n 72; Caprari, above n 3; Moffa, above n 3, 209.

41 *International Convention for the Regulation of Whaling*, signed 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) art VIII (emphasis added) ('*ICRW*') states in part that: 'any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research ... 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'. Thus, the *ICRW* effectively permits any member-state to award itself a scientific permit despite objections by other states: Moffa, above n 3, 205–6. According to the SSCS the various Japanese scientific research programs are 'bogus research' and commercial whaling in disguise: Heller, above n 25, 4.

42 'Japanese Media Report Arrest Warrant Issued for Sea Shepherd Leader Paul Watson', on Los Angeles Times, *LA Unleashed* (30 April 2010) <<http://latimesblogs.latimes.com/unleashed/2010/04/japanese-media-reports-arrest-warrant-issued-for-sea-shepherd-leader-paul-watson.html>>.

The conflict between the two sides has become more aggressive recently.<sup>43</sup> Japanese whalers maintain their lives are being constantly threatened.<sup>44</sup> Some of the more serious incidents that have occurred include: boarding of vessels by SSCS activists;<sup>45</sup> ramming of vessels by SSCS and Japanese vessels (putting lives at risk in one case); and the sinking of an SSCS ship, the *Ady Gil*.<sup>46</sup>

In terms of vessel boarding, in the 2008–09 whaling season two SSCS members, Australian Benjamin Potts and British citizen Giles Lane, boarded the Japanese whaling ship *Yūshin Maru No 2*.<sup>47</sup> In February 2010, an SSCS protester (who had previously been the captain of the *Ady Gil*) boarded a Japanese whaling ship in order to conduct a citizen's arrest against the Japanese captain; he was instead arrested himself and tried in Japan for his actions.<sup>48</sup> Regarding collisions, on 12 February 2007 the SSCS vessel *Robert Hunter* collided with the *Kaiko Maru* twice, forcing the vessel to broadcast a distress signal.<sup>49</sup> The SSCS has also used Zodiac inflatable boats to nail plates to the *Nisshin Maru*'s drain outlets (near the waterline) with the goal of backing up the blood onto the flensing decks rendering ongoing operation unviable.<sup>50</sup> As noted above, the SSCS has attacked the *Nisshin Maru* flensing decks with foul-smelling butyric acid to stop work.<sup>51</sup>

Over the decades, the SSCS has engaged in annual operations to attempt to prevent the taking of whales by Japanese vessels in Antarctic waters. However, as of this past year's whale hunt, the SSCS has announced that, due to military tracking hardware gifted to the Japanese whaling fleet, it will no longer attempt to interdict the ships. Peter Hammarstedt, an SSCS captain stated: 'they have put such resources into this year's whaling that we cannot hope to find their fleet and stop them. It is simply a matter of us not wasting our own resources. We have other battles to fight.'<sup>52</sup> In Watson's words: 'Essentially, they can see exactly where we are, but we still only have a rough idea of their position.'<sup>53</sup> Thus, Hammarstedt has noted that '[i]t is simply a lot more difficult to find the whaling fleet in a much

43 Ibid.

44 Ibid.

45 Ibid; Jun Hongo, 'Japan May Charge Activist on Whaler', *The Japan Times* (online), 17 February 2010 <<https://www.japantimes.co.jp/news/2010/02/17/national/japan-may-charge-activist-on-whaler/#.XFc3ui0ZP6a>>.

46 Andrew Darby, 'Japanese Ship Destroys Whale Protest Boat Ady Gil', *Sydney Morning Herald* (online), 6 January 2010 <<https://www.smh.com.au/environment/conservation/japanese-ship-destroys-whale-protest-boat--ady-gil-20100106-ltp4.html>>.

47 Sea Shepherd, *Sea Shepherd Crew Remain Hostages on the Japanese Whaling Ship* (16 January 2008) <<https://web.archive.org/web/20101211165436/http://www.seashepherd.org/news-and-media/news-releases/Page-1.html>>.

48 Hongo, above n 45.

49 Darby, 'Sea Shepherd Leaves Its Mark on Japanese Whalers', above n 39.

50 Sea Shepherd Australia, *Whalers Activities Disrupted by Sea Shepherd*, above n 38.

51 Ibid.

52 Robin McKie, 'How Sea Shepherd Lost Battle against Japan's Whale Hunters in Antarctic', *The Guardian* (online), 24 December 2017 <[https://www.theguardian.com/environment/2017/dec/23/sea-shepherd-loses-antarctic-battle-japan-whale-hunters?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/environment/2017/dec/23/sea-shepherd-loses-antarctic-battle-japan-whale-hunters?CMP=Share_iOSApp_Other)>.

53 Ibid.



larger area of sea.<sup>54</sup> The SSCS views the situation as being the result of 'the vast subsidy provided by the Japanese government for their whalers.'<sup>55</sup>

Further, in a sign that the Japanese whaling fleet will continue to operate, the Japanese government has announced that they will overhaul the whaling fleet's ageing mothership to allow it to continue Antarctic whaling operations for the foreseeable future.<sup>56</sup>

#### IV INTERNATIONAL LAW AND THE SSCS'S JUSTIFICATIONS FOR ITS PROTEST ACTIONS

The SSCS justifies its protest actions by arguing in the absence of state or institutional action, it falls to it to act as a 'vigilante' navy to protect marine species.<sup>57</sup> Watson has long argued that enforcement powers cannot be solely invested in states or international biodiversity institutions such as the International Whaling Commission ('IWC') that have proved unwilling to act.<sup>58</sup> In the case of Japanese scientific whaling, the SSCS argues that its actions are justified by two propositions: first, that the Japanese whaling fleet is seeking to circumvent the IWC whaling ban; and second, that the SSCS is empowered to take direct action by the 1982 United Nations *World Charter*.<sup>59</sup> Watson is on record as arguing that when:

[w]e intervene against illegal activities ... we are simply upholding international conservation law, and the United Nations *World Charter for Nature* allows for us to do that. It says that any nongovernmental organization, or individual, is empowered to uphold international conservation law. That's why I've sunk ten whaling ships and destroyed tens of millions of dollars' worth of illegal fishing gear, and I'm not in jail.<sup>60</sup>

The SSCS maintains that it is legally entitled to 'act on behalf of and enforce international conservation laws' as art 24 of the *World Charter* states that 'acting individually ... each person shall strive to ensure that the objectives and requirements of the [*World Charter*] are met.'<sup>61</sup> The SSCS insists this includes

54 Ibid.

55 Ibid.

56 Justin McCurry, 'Japan to Replace Whaling Mother Ship in Sign Hunts Will Go on', *The Guardian* (online), 23 January 2018 <[https://www.theguardian.com/environment/2018/jan/23/japan-to-replace-whaling-mother-ship-in-sign-hunts-will-go-on?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/environment/2018/jan/23/japan-to-replace-whaling-mother-ship-in-sign-hunts-will-go-on?CMP=Share_iOSApp_Other)>.

57 Watson, 'Sea Shepherd Defence Policy', above n 11, 41–2.

58 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 224 ('*UNCLOS*'): 'The powers of enforcement against foreign vessels under this Part may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect'.

59 *World Charter*, UN Doc A/RES/37/7, annex; Sea Shepherd Australia, *Japanese Whaling Fleet Forced to Run from Sea Shepherd* (8 February 2007) <<https://www.seashepherd.org.au/news-and-commentary/news/japanese-whaling-fleet-forced-to-run-from-sea-shepherd.html>>.

60 Roeschke, above n 4, 108, citing Khatchadourian, above n 9, 66.

61 Roeschke, above n 4, 116; *World Charter*, UN Doc A/RES/37/7, annex.



direct protest actions such as ramming whaling vessels.<sup>62</sup> Thus, the SSCS appears to fit the classic definition of a vigilante group espoused by Ehud Sprinzak:

Vigilante movements rarely perceive themselves involved in conflict with the government and the prevailing concept of law. They are neither revolutionary nor interested in the destruction of authority. Rather, what characterizes the vigilante mind is the profound conviction that the government and its agencies have failed to enforce the law or establish order in a particular area ... They believe they are acting legally against criminal elements because the authorities are either too weak to enforce the law or negligent in their duties.<sup>63</sup>

SSCS arguments, however, fail to recognise that the *World Charter* is a ‘soft law’ resolution and is not considered to have the force of international law.<sup>64</sup> Rather, the *World Charter* was designed to espouse moral principles or promote new norms of behaviour and has no binding force.<sup>65</sup> Further, art 24 of the *World Charter* refers only to ‘striv[ing]’ to achieve certain goals; it ‘makes no mention of enforcement’, allowances for direct action or sanctions, and makes no reference to non-state actors assuming an enforcement role.<sup>66</sup> As Anton trenchantly observes: ‘[o]ne cannot bootstrap private enforcement [in]to this striving if it cannot be located elsewhere in the law.’<sup>67</sup>

The SSCS has also justified its protest actions against Japanese whaling by arguing that it is helping to enforce Australia’s right under the *UNCLOS* to establish a whale sanctuary in its maritime exclusive economic zone (‘EEZ’) in Antarctic waters.<sup>68</sup> The Japanese whaling fleet currently conducts hunts within the claimed Australian EEZ.<sup>69</sup> Quite apart from the controversy as to whether Australia can legitimately proclaim an EEZ off the coast of Antarctica,<sup>70</sup> the SSCS fails the most basic scrutiny since no provision in the *UNCLOS* contemplates empowering non-state actors to undertake unilateral enforcement action within the EEZ.<sup>71</sup> Further, Australia is capable of enforcing its own sovereign rights over living resources within its EEZ if it so wishes.

62 Caprari, above n 3, 1510; Roeschke above n 4, 116.

63 Ehud Sprinzak, ‘Right-Wing Terrorism in a Comparative Perspective: The Case of Split Delegitimation’ in Tore Bjørgo (ed), *Terror from the Extreme Right* (Frank Cass, 1995) 17, 29.

64 On the status of General Assembly of the United Nations resolutions see, eg, Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 116; further see, eg, Caprari, above n 3, 1509–10.

65 Caprari, above n 3, 1510; Donald K Anton, ‘Protecting Whales by Hue and Cry: Is There a Role for Non-State Actors in the Enforcement of International Law?’ (2011) 14 *Journal of International Wildlife Law & Policy* 137, 142.

66 Moffa, above n 3, 211; *World Charter*, UN Doc A/RES/37/7, annex art 24 (emphasis added).

67 Anton, above n 65, 142.

68 Caprari, above n 3, 1495–6. There are two sanctuaries extant in the region: the Southern Ocean Whale Sanctuary (‘SOWS’) and the 1999 domestically created Australian Whale Sanctuary including the EEZ of continental Australia and the EEZ’s surrounding Australian external dependencies and the disputed Australian Antarctic region: see Bondaroff, above n 3, 25 n 45.

69 Caprari, above n 3, 1503–4.

70 See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (27 May 2005) [2], [13], [14]; on the application of Australian environmental law to this area, see the decision on appeal: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 429 [7]–[9].

71 Anton, above n 65, 143.

Overall, it is reasonable to conclude that the SSCS's claims to legal justification for direct action protest at sea are spurious. Nonetheless, in conducting such violent direct action protests it is clear the group sees itself as upholding the law in default of legitimate authorities. The SSCS may thus be characterised as a vigilante group.

## V CAN POLITICAL PROTESTERS BE PIRATES?

### A Introduction

A number of questions arise as to the extent to which the international law of the sea may regulate protest. By far the most attention-grabbing issue has been whether violent protest at sea may constitute piracy. The critical debate, explained below, is the meaning to be attributed to the words 'for private ends' in the definition of piracy. A further question is whether violent acts of protest could constitute offences under the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* ('SUA Convention').<sup>72</sup> Such arguments are sometimes opposed on the grounds that this is a 'terrorism' convention and its application to politically-inspired protest would be inappropriate. Finally, there is the question of the application of the international collision regulations or the *Convention on International Regulations for Preventing Collisions at Sea*.<sup>73</sup> Each of these questions is explored in turn below. The conclusion will be that many of the SSCS's tactics simply fall foul of international law.

### B The Elements of Piracy

To consider whether protesters — or vigilantes — can be pirates, we first need to consider the definition of piracy. It is now generally accepted that the definition of piracy found in the *Convention on the High Seas*<sup>74</sup> and the *UNCLOS* represents customary international law.<sup>75</sup> While it may be problematic to argue that these definitions codified a clearly pre-existing historic rule of custom,<sup>76</sup> the

72 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 222 (entered into force 1 March 1992) ('SUA Convention').

73 *Convention on the International Regulations for Preventing Collisions at Sea*, opened for signature 20 October 1972, 1050 UNTS 16 (entered into force 15 July 1977) ('COLREGS').

74 *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art 15 ('HSC').

75 There is some dispute as to whether piracy is a crime under international law or simply a permissive rule of jurisdiction (requiring national legislation to be passed in order to prosecute). See Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, 2011) vol 1, 140–1. For present purposes, it is a distinction without a difference: for piracy to be prosecuted, absent any international tribunal with jurisdiction at present, it must be prosecuted under a national law giving effect to the international rule.

76 The sources the codifiers had to work with were varied and contradictory. See especially Alfred P Rubin, *The Law of Piracy* (Transnational Publishers, 2<sup>nd</sup> ed, 1998) 331–72.

successive re-enactment of this definition from the *HSC* to the *UNCLOS* and then in subsequent treaties, regional instruments and United Nations Security Council (“Security Council”) resolutions evidences states’ general acceptance of its present customary status.<sup>77</sup>

Article 15(1) of the *HSC* and art 101(a) of the *UNCLOS* define piracy as:

- (1) ‘[a]ny illegal acts of violence or detention, or any act of depredation’;
- (2) ‘committed for private ends’;
- (3) ‘[o]n the high seas’ or ‘in a place outside the jurisdiction of any State’; and
- (4) committed by the crew or passengers of a private craft (or aircraft), against another vessel or persons or property aboard.

Piracy also encompasses voluntary participation in a pirate vessel, with knowledge of the facts making it a pirate vessel.<sup>78</sup> A person committing ‘any act of inciting or of intentionally facilitating’ piracy is also guilty of piracy.<sup>79</sup> These elements have raised a number of greater and lesser controversies. The reference to ‘illegal acts’ in (1) has been criticised as question-begging.<sup>80</sup> Under what system of law must the violence be illegal? The best answer is that the drafting, whatever its faults, was clearly intended to cover a broad range of conduct.<sup>81</sup> Further, as any prosecution for piracy must be before a national court, the question is probably moot. The law applied will be that of the forum state.

The words ‘for private ends’ in sub-s (2) have caused substantial debate and are returned to below.<sup>82</sup> Briefly put, one of two views is generally taken. First, that these words inherently exclude acts with a *political* motivation, the dichotomy involved being private/political. On this view politically motivated violence, be it protest or terrorism, cannot be piracy (‘the motives thesis’). Alternatively, some hold that these words were historically intended to mark out piracy as violence

77 *UNCLOS* art 101; *HSC* art 15; *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*, opened for signature 11 November 2004, 2398 UNTS 199 (entered into force 4 September 2006) art 1(1) (*‘ReCAAP’*); International Maritime Organization, *Revised Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships, and Illicit Maritime Activity in the Western Indian Ocean and the Gulf of Aden Area* (12 January 2017) art 1(1). Security Council resolutions on Somali piracy from 2008 have consistently held that the *UNCLOS* ‘sets out the legal framework applicable to combating piracy and armed robbery at sea’: see, eg, SC Res 2077, UN SCOR, 6867<sup>th</sup> mtg, UN Doc S/RES/2077 (21 November 2012) 2.

78 *UNCLOS* art 101(b); *HSC* art 15(2).

79 *UNCLOS* art 101(c); *HSC* art 15(3).

80 Rubin, above n 76, 366–7; D P O’Connell, *The International Law of the Sea*, ed I A Shearer (Clarendon Press, 1984) vol 2, 969.

81 Myres S McDougal and William T Burke, *The Public Order of the Oceans* (New Haven Press, 1985) 811–12.

82 For arguments against the view adopted here, see Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) 30–1; Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 355–6; Robin Churchill, ‘The Piracy Provisions of the *UN Convention on the Law of the Sea* — Fit for Purpose?’ in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, 2014) 9.

which lacked *state sanction*, the dichotomy involved being private/public ('the state sanction thesis').

The remaining points are less controversial. As regards the geographical limitation in sub-s (3), it is not as restrictive as it might appear. While it is frequently noted that the creation of the 200 nautical miles ('nm') EEZ has had the effect of significantly diminishing the area of the high seas, this does not affect the law of piracy. Article 58(2) of the *UNCLOS* provides that the general rules of the high seas 'apply to the exclusive economic zone in so far as they are not incompatible with' the EEZ regime (which allocates, inter alia, certain resource management and fishing rights to the coastal state). The law of piracy thus applies beyond the 12 nm territorial sea. It also applies to 'place[s] outside the jurisdiction of any State'.<sup>83</sup> This phrase was first intended to provide for the possibility of islands unclaimed as territory by any state (*terra nullius*),<sup>84</sup> but may now apply only to Antarctica.

The final element of the offence, in sub-s (4), is that it must be committed by the crew or passengers of a private craft (or aircraft), against another vessel or persons or property aboard. This 'two vessel' requirement excludes acts of mutiny by passengers or crew. However, the drafting requires only that a private craft (or state vessel which has mutinied) attack *another* craft. Thus, attacks from a private craft against a warship constitutes piracy. Indeed, a number of hapless Somali pirates have attacked United States and German military vessels.<sup>85</sup>

### C For Private Ends

As noted, there is a widely held view that the words 'for private ends' exclude politically motivated acts from being piracy (the motives thesis). The view is, however, without historical foundation. To begin with, the words 'for private ends' are found nowhere in the historic case law.<sup>86</sup> For example, in 1820 Story J of the US Supreme Court conducted a copious review of classical authorities in an extraordinary 18-page footnote in *United States v Smith*.<sup>87</sup> His comprehensive survey does not contain the phrase in English nor any obvious equivalent in French or Latin. The quoted material tends to focus on either the lack of state sanction or the intention to plunder (*depredendi causa, pour piller*, etc). The words 'for ... private ends' first appear (with no real explanation) in a popular United States

83 *UNCLOS* art 101(a)(ii); *HSC* art 15(1)(b).

84 'Documents of the Eighth Session including the Report of the Commission to the General Assembly' [1956] II *Yearbook of the International Law Commissioner* 253, 282.

85 On US cases arising from attacks on the *USS Nicholas* and *USS Ashland*, see Megan McKee, *Federal Judge Sentences Somali Pirate to 30 Years* (30 November 2010) JURIST: Legal News and Research <<http://jurist.org/paperchase/2010/11/federal-judge-sentences-somali-pirate-to-30-years.php>>.

86 See generally Douglas Guilfoyle, 'Piracy and Terrorism' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, 2014) 33, 52.

87 *United States v Smith*, 18 US (5 Wheat) 153 (1820).

criminal law textbook of the 1890s to 1920s.<sup>88</sup> They were first introduced at the international level by the League of Nations and Harvard Research codification projects to deal solely with what would now be considered a relatively narrow question of the laws of armed conflict.

The *League of Nations Draft Articles of 1926* read: ‘Piracy occurs only on the high sea and consists in the commission for private ends of depredations upon property or acts of violence against persons ... but acts committed with a purely political object will not be regarded as constituting piracy’.<sup>89</sup> This appears to emphasise the motives thesis. Notably, however, the accompanying memorandum explained: ‘According to international law, piracy consists in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property or acts of violence against persons.’<sup>90</sup> This would appear a plain statement of the state sanction thesis. How is the discrepancy to be explained?

The challenge at the time was the question of civil-war insurgents who took to sea and attacked foreign shipping. Were such acts piracy because the actors involved did not (yet) represent a state, or should such acts be regulated by the laws of naval war? Should the characterisation change if the rebels succeeded in forming a government? The words ‘for private ends’ were designed as a fudge. The position taken by the relevant League of Nations Committee of Experts appears to have been that the law of piracy could generally extend to certain acts of insurrection, but there could be an exception for those acts of rebels which were ‘uniquely political’.<sup>91</sup>

This same language of ‘private’ ends was taken up and copy-pasted into successive new draft instruments, first by the Harvard Codification Project on International Law — whose drafters appreciated the civil war point<sup>92</sup> — and then by the International Law Commission (‘ILC’). The ILC special rapporteur, however, adopted the Harvard Project language without appearing to appreciate

88 See Joel Prentiss Bishop, *New Commentaries on the Criminal Law upon a New System of Legal Exposition* (T H Flood, 8<sup>th</sup> ed, 1892) vol 1, 339 [553]; Joel Prentiss Bishop, *New Commentaries on the Criminal Law upon a New System of Legal Exposition* (T H Flood, 8<sup>th</sup> ed, 1892) vol 2, 617 [1058]; Joel Prentiss Bishop, *Bishop on Criminal Law* (John M Zane and Carl Zollmann (eds), T H Flood, 9<sup>th</sup> ed, 1923) vol 1, 406 [553]. This appears to be Bishop’s first use of the phrase. It does not seem to appear in previous editions under different titles: see, eg, Joel Prentiss Bishop, *Commentaries on the Criminal Law* (Little, Brown, 6<sup>th</sup> ed, 1877).

89 The relevant documents are reproduced in Shabtai Rosenne (ed), *League of Nations: Committee of Experts for the Progressive Codification of International Law (1925–1928)* (Oceana Publications, 1972) vol 2, 145; League of Nations Committee of Experts for the Progressive Codification of International Law, ‘Second Session of the Committee of Experts for the Progressive Codification of International Law’ (1926) 20 *American Journal of International Law Special Supplement* 17, 228–9.

90 This quote is reproduced in Rosenne, above n 89, 142; League of Nations Committee of Experts for the Progressive Codification of International Law, above n 89, 223–4.

91 *Minutes of the League of Nations Committee of Experts for the Progressive Codification of International Law*, 2<sup>nd</sup> sess, 14<sup>th</sup> mtg (20 January 1926), reproduced in Shabtai Rosenne (ed), *League of Nations: Committee of Experts for the Progressive Codification of International Law (1925–1928)* (Oceana Publications, 1972) vol 1, 124–6 (‘uniquement politique’ in the original).

92 See League of Nations Committee of Experts for the Progressive Codification of International Law, ‘Codification of International Law: Piracy’ (Pt IV) (1932) 26 *American Journal of International Law Supplement* 739, 764.

or consider the distinction it attempted to make regarding civil war insurgencies. That ILC drafting in turn found its way into the provisions of the *HSC* and the *UNCLOS*.

The point of this exegesis is simply to show that if there is any historically stable meaning one can give to the words 'for private ends' it does not correspond to the motives thesis. The history points more towards the state sanction thesis. However, if we discount the history as ambiguous we still have a choice to make. The *Vienna Convention on the Law of Treaties* directs us in the first place to give treaty terms the 'ordinary meaning ... in their context and in the light of [the treaty's] object and purpose'.<sup>93</sup> Of possibly open interpretations of the plain meaning of 'private ends', which should be preferred?

First, proponents of the motives thesis have yet to explain why as a matter of principle the violence of non-state actors at sea is unacceptable and punishable if the motive is private gain but beyond the law if politically motivated. The idea that, for example, political motives might excuse acts of terrorism committed against civilians has generally died out in other branches of international criminal law.<sup>94</sup> An allied approach to the motives thesis is to suggest that a pirate is the 'enemy of all mankind' (*hostis humani generis*) whose acts offend all states, and that such a characterisation cannot be applied to environmental protest.<sup>95</sup> It suffices to note that *hostis humani generis* has never been a formal element of the law of piracy but rather a term of condemnatory invective.<sup>96</sup> (To the extent lawyers attribute authority to a Latin phrase, although the term was coined by Cicero he was likely misstating the Roman law of his day.)<sup>97</sup>

As outlined above, the alternative, and preferable, approach is that the question is not one of the subjective motive of the pirate (be it *animus furandi* or some political cause), but whether the violence in question is state-sanctioned.<sup>98</sup> On this

93 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1); on the use of historical material under art 32, see Julian Davis Mortenson, 'The *Travaux* of *Travaux*: Is the *Vienna Convention* Hostile to Drafting History?' (2013) 107 *American Journal of International Law* 780.

94 See the express rejection of the 'political offence' exemption as a grounds to refuse extradition in: *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 256 (entered into force 23 May 2001) art 11 ('*Terrorist Bombings Convention*'); *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002) art 14 ('*Terrorist Financing Convention*'); *International Convention for the Suppression of Acts of Nuclear Terrorism*, opened for signature 14 September 2005, 2445 UNTS 89 (entered into force 7 July 2007) art 15 ('*Nuclear Terrorism Convention*'). See also references in the preamble of each convention condemning violence against civilians, whatever its motive.

95 See Barry Hart Dubner and Claudia Pastorius, 'On the Ninth Circuit's New Definition of Piracy: Japanese Whalers v the Sea Shepherd — Who Are the Real "Pirates" (ie Plunderers)?' (2014) 45 *Journal of Maritime Law and Commerce* 415, 415–43.

96 League of Nations Committee of Experts for the Progressive Codification of International Law, above n 92, 796, 806–7.

97 Rubin, above n 76, 14–19.

98 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009) 33–7.

view, the correct dichotomy is not ‘private/political’ but ‘private/public’.<sup>99</sup> It is an approach which has been broadly upheld in two national court cases concerning violent environmental protest at sea, one involving the SSCS.<sup>100</sup> Thus, the majority said in *Cetacean Research v SSCS*:

You don’t need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be ...<sup>101</sup>

Once the motives thesis is set aside, that view is not obviously wrong.<sup>102</sup> The only relevant question under the state sanction thesis would be whether these acts pass the requisite threshold of violence. Given the actual danger to life posed by attempting to foul propellers and rudders, let alone actually ramming ships, in the hostile waters of the Southern Ocean, the correct answer would appear to be ‘yes’. As noted above, those who advocate the view that subjective motivation is the key test have yet to explain why international law should generally make violence between vessels on the high seas the subject of universal jurisdiction but then provide a complete defence to suspects who can establish that they acted with political motives.

## D Conclusion

The critical questions in applying the law of piracy to direct protest actions on the high seas will be the level of violence involved and whether the words ‘for private ends’ exclude politically motivated acts. Our argument is that the preferable interpretation of these words is that they refer to actions which are not state-sanctioned. Arguments to the contrary are tantamount to claiming that there is a complete defence to a charge of unlawful violence on the high seas so long as one is politically motivated. This is unsustainable as a matter of principle, especially when the trend in modern international or transnational criminal law has been to hold that questions of motive are irrelevant to whether a crime defined by treaty has been committed.<sup>103</sup> Arguments based on the supposed history of the crime or

99 Ibid 32–42; Dino Kritsiotis, ‘The Contingencies of Piracy’ (2011) 41 *California Western International Law Journal*, 312; Geiß and Petrig, above n 75, 61–2.

100 *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin* (1986) 77 ILR 537, 539; *Cetacean Research v SSCS*, 708 F 3d 1099, 1102 (9<sup>th</sup> Cir, 2013).

101 *Cetacean Research v SSCS*, 708 F 3d 1099, 1101 (Kozinski CJ) (9<sup>th</sup> Cir, 2013).

102 For a good argument that this may be the emerging law but is still *in statu nascendi*, see Arron N Honniball, ‘The “Private Ends” of International Piracy: The Necessity of Legal Clarity in Relation to Violent Political Activists’ (Brief No 13, International Crimes Database, October 2015) <<http://www.internationalcrimesdatabase.org/upload/documents/20151102T100953-Honniball%20ICD%20Brief.pdf>>.

103 A full account of this argument is given in Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 98, 38–40; see also treaties stating acts of violence against civilians ‘are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature’ such as the *Terrorist Bombings Convention* art 5; *Terrorist Financing Convention* art 6; *Nuclear Terrorism Convention* art 6.



of the modern treaty provisions are of very limited assistance, given the complex and fractured history of efforts to 'codify' piracy.

## VI COULD MARITIME POLITICAL PROTEST BE PROSECUTED UNDER THE *SUA* CONVENTION?

### A Introduction: 'Terrorism' Conventions or 'Suppression' Conventions?

The *SUA Convention* came about as a result of the *Achille Lauro* incident of 1985. This saw an Italian cruise ship internally hijacked by members of the Palestinian Liberation Front who took the crew and passengers hostage, ultimately killing one of them.<sup>104</sup> The incident was not covered by the law of piracy as an internal hijacking could not meet the 'two ships' requirement; a number of the states advocating for a new maritime hijacking convention were also concerned by the possibility that politically motivated hijackers might be considered not to have acted for 'private ends'.<sup>105</sup> In the result, the *SUA Convention* brought the shipping industry more into line with aviation, which had had a number of hijacking suppression conventions for some time.<sup>106</sup> In 2005 a *Protocol* to the *SUA Convention* was concluded,<sup>107</sup> expanding the *SUA Convention* to include new offences related to the proliferation of biological, chemical or nuclear weapons or their use in acts of terrorism against or originating from ships. It is unsurprising, then, that the *SUA Convention* and its *Protocol* may be considered as falling within what Trapp categorises as 'terrorism suppression conventions' (we shall use the term 'suppression convention').<sup>108</sup> While this may be a commonsense characterisation, the word 'terrorism' only appears in the preamble to the *SUA Convention*: a terrorist motive forms *no* part of the *SUA Convention* offences. It therefore follows that a person can commit an offence under the *SUA Convention* even if they are not politically motivated.

104 For a concise account see Larry A McCullough, 'International and Domestic Criminal Law Issues in the *Achille Lauro* Incident: A Functional Analysis' (1986) 36 *Naval Law Review* 53.

105 Guilfoyle, 'Piracy and Terrorism', above n 86, 46, citing International Maritime Organization, IMO Doc PCUA/1/3 (3 February 1987) annex, para 2.

106 *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, opened for signature 14 September, 1963, 704 UNTS 219 (entered into force 4 December 1969); *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971); *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).

107 *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, LEG/CONF.15/21 (entered into force 28 July 2010) ('*SUA Protocol 2005*'). A consolidated text is found in A V Lowe and S A G Talmon (eds), *The Legal Order of the Oceans: Basic Documents on the Law of the Sea* (Hart Publishing, 2009).

108 Kimberley N Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011) 9, 17–18, 63, ch 4.2.

This result is logical enough considered within the broader history of suppression conventions. It was long the case that within the United Nations system no general definition of terrorism could be agreed, the difficulty being whether acts committed in self-determination struggles could ever or should ever be classified as terrorism.<sup>109</sup> The result was a series of ‘sectoral’ treaties prohibiting certain tactics associated with terrorism which were agreed to be criminal in all cases, regardless of motivation.<sup>110</sup>

## B Offences under the SUA Convention

The *SUA Convention* establishes a number of crimes capable of overlapping with acts of piracy.<sup>111</sup> Under art 3(1), *inter alia*, each of:

- (a) seiz[ing] or exercis[ing] control over a ship by force or threat thereof or any other form of intimidation; or
- (b) perform[ing] 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) destroy[ing] a ship or caus[ing] damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- (d) plac[ing] ... 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;

is an offence.<sup>112</sup> Article 3 also covers attempting, abetting or threatening such an offence; and killing or injuring anyone in the course of committing, or attempting to commit, such offences. Under art 4, the *SUA Convention* applies only to vessels engaged in international navigation. Thus, it does not apply in cases where what might otherwise be a *SUA Convention* crime is committed within a single state’s territorial sea and the vessel in question was not scheduled to navigate beyond it.

State parties have obligations to assert their prescriptive jurisdiction over *SUA Convention* offences. Thus, state parties *must* establish jurisdiction over *SUA Convention* crimes carried out against or aboard one of their flagged vessels, within their territorial sea or internal waters, or by one of their nationals.<sup>113</sup> Further, the *SUA Convention* creates a form of limited universal jurisdiction among the

109 Ibid 14–19.

110 Arguably no general definition of terrorism was agreed before the *Terrorist Financing Convention* art 2(1)(b). Article 2(1)(b) covers, without exceptions,

[a]ny ... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Obviously, this definition cannot be read back into earlier instruments.

111 Geiß and Petrig, above n 75, 153–65; Douglas Guilfoyle, ‘Piracy and Suppression of Unlawful Acts against the Safety of Maritime Navigation’ in Neil Boister and Robert J Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge, 2014) 364–78.

112 *SUA Convention* art 3(1).

113 Ibid art 6.

state parties. That is, by delegating jurisdiction to each other, state parties are able to prosecute crimes covered by the *SUA Convention* in the absence of an ordinary jurisdictional link (albeit only in cases where another state party would have jurisdiction). The advantage of the *SUA Convention* when compared to the law of piracy is — at least in theory — that it operationalises this jurisdiction by expressly requiring states to investigate those suspected of *SUA Convention* crimes and, if appropriate, to prosecute them.<sup>114</sup>

In such cases the state party with the suspect in its territory 'shall ... if it does not extradite him, be obliged ... to submit the case without delay to its competent authorities for the purpose of prosecution', in accordance with national law.<sup>115</sup> That is, if a person suspected of a crime under the *SUA Convention* (over which any party has jurisdiction) enters the territory of any state party, that territorial state must either prosecute the suspect or extradite him or her to another state party willing to do so. As a consequence, the *SUA Convention* obliges state parties to enact a national law permitting the domestic prosecution of such crimes even in the absence of any direct jurisdictional 'link' to the prosecuting state.<sup>116</sup>

It would thus also seem possible that if SSCS activity has caused damage to a ship in a manner 'likely to endanger ... safe navigation', then that constitutes an offence under the *SUA Convention* which state parties are obliged to cooperate in prosecuting if a suspect comes within their territory.<sup>117</sup> Arguments that *SUA Convention* offences should only be applied to politically motivated acts have failed in national courts.<sup>118</sup> Again, ramming and propeller fouling in dangerous waters could fit the bill. Indeed, on the request of Japanese authorities, the Australian Federal Police boarded and inspected the SSCS vessels *Steve Irwin* and *Bob Barker* in 2010, though in relation to what suspected offences, it is not entirely clear.<sup>119</sup> In the event, no charges were laid.

## VII DO SSCS TACTICS VIOLATE THE COLLISION REGULATIONS?

Observed SSCS tactics against Japanese whaling vessels could possibly violate one other body of rules under the law of the sea: the *COLREGS*.<sup>120</sup> The *COLREGS* are a treaty concluded under International Maritime Organization ('IMO')

114 Ibid art 10, subject to art 6.

115 Ibid art 10(1).

116 Ibid art 6(4).

117 Ibid art 3(1)(d).

118 See, eg, *United States v Shi*, 525 F 3d 709 (9<sup>th</sup> Cir, 2008).

119 Kym Agius and Paul Carter, 'AFP Raids Anti-Whaling Boats — For Japan', *The Sydney Morning Herald* (online), 6 March 2010 <<https://www.smh.com.au/national/afp-raids-antiwhaling-boats-for-japan-20100306-ppal.html>>. The *Steve Irwin* was also subject to similar inspection in 2010: 'Australian Police Raid Sea Shepherd Ship', *The Sydney Morning Herald* (online), 21 February 2009 <<https://www.smh.com.au/environment/conservation/australian-police-raid-sea-shepherd-ship-20090221-8ebp.html>>.

120 The point is noted briefly in *Cetacean Research v SSCS*, 708 F 3d 1099 (9<sup>th</sup> Cir, 2013).

auspices governing the safety of navigation at sea, having 159 state parties and covering approximately 99 per cent of world shipping by tonnage.<sup>121</sup> They are undoubtedly ‘one of the most widely adopted multilateral conventions in force.’<sup>122</sup> Their importance during acts of protest on the high seas is underscored by a resolution of the IMO’s Maritime Safety Committee calling upon all flag states to urge ‘persons and entities under their jurisdiction to refrain from actions that intentionally imperil human life, the marine environment, or property during demonstrations, protests or confrontations on the high seas’ and to this end to ‘to comply with *COLREG[S]* ... by taking all steps to avoid collisions and safeguard ... safety of life at sea’.<sup>123</sup>

Under the *COLREGS*, ships must act to avoid the risk of collision.<sup>124</sup> Deliberately causing a collision or failure to take necessary steps to avoid a collision are both, therefore, violations of the *COLREGS*. However, such a violation does not per se give rise to direct individual liability or criminal sanction. Rather, it could give rise to responsibility on the part of the flag state which has a responsibility to take necessary regulatory steps to secure the observance of ‘generally accepted international regulations’ such as the *COLREGS*.<sup>125</sup> In respect of, for example, the 2010 collision between the SSCS catamaran *Ady Gil* and the Japanese whaling support vessel *Shōnan Maru No 2*, one would expect that both flag states involved (New Zealand and Japan) would commence investigations and disciplinary proceedings in the event of the vessel’s master causing a collision, either deliberately or negligently. Indeed, such an investigation was commenced by Maritime New Zealand which found that the masters of both vessels failed to comply with the *COLREGS* and take necessary actions to avoid a collision.<sup>126</sup> The report did not, however, conclude that the collision was intentional but rather found that in a ‘tense’ operating environment both masters had failed to ‘appreciate [fully] and react appropriately to the potential for collision’.<sup>127</sup> Nonetheless, such a finding could still have underpinned a criminal prosecution under the *Maritime Transport Act* (NZ) for operating a ship ‘in a manner which causes unnecessary danger or risk to any other person or to any property’.<sup>128</sup> (Notably, the Japanese Coastguard undertook a separate investigation and concluded there were no grounds for a criminal prosecution.)<sup>129</sup> Such a violation of international law might

121 See International Maritime Organization, ‘Status of IMO Treaties: Comprehensive Information on the Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions’ (21 September 2018) 95.

122 *South China Sea Arbitration (Philippines v China) (Awards)* (Permanent Court of Arbitration, Case No 2013–19, 12 July 2016) [1081] (*‘Philippines v China’*).

123 International Maritime Organization, *Resolution MSC 303(87): Assuring Safety during Demonstrations, Protests or Confrontations on the High Seas*, IMO Doc MSC/87/26/Add.1 (17 May 2010) annex 22, [3(1)], [3(3)], quoted in *Philippines v China* [1106].

124 *COLREGS* rr 7–8; *Philippines v China* [1099]–[1101].

125 *UNCLOS* art 94(3). See also *UNCLOS* art 94(5), quoted in *Philippines v China* [1082].

126 Maritime New Zealand, *‘Ady Gil and Shonan Maru No 2: Collision on 6 January 2010’* (Investigation Report, November 2010) 40 [222].

127 *Ibid* 39 [209], 40 [222].

128 *Maritime Transport Act 1994* (NZ) s 65.

129 Maritime New Zealand, above n 126, 3 [23].

also form the basis of an application for injunctive relief against the repetition of such conduct in the future, as was sought in *Cetacean Research v SSCS*.<sup>130</sup>

In the event, the master of the *Ady Gil*, Peter Bethune, was charged in Japan of 'trespass, assault, illegal possession of a knife, destruction of property and obstruction of business' when, in a separate incident in February 2010, he boarded the *Shōnan Maru No 2* and attempted to make a citizen's arrest on the captain for attempted murder of himself and his crew.<sup>131</sup> The Japanese Fisheries Minister at the time, Hirotaka Akamatsu, stated, '[a]s it is outrageously illegal behaviour, we want to deal with it strictly.'<sup>132</sup> The incident resulted in him being detained aboard, returned to Japan for trial and being given a two-year sentence suspended for five years and a five-year ban from entering Japan.<sup>133</sup>

## VIII ARE THE SSCS PROTEST METHODS COUNTERPRODUCTIVE?

There are numerous bases on which to conclude that the law of the sea prohibits violent direct action protest of the type engaged in by the SSCS. The question then is whether such protest is capable of achieving public goods such that the law of the sea ought to be changed to accommodate it. In this light, it is relevant to ask how effective the SSCS's methods have been in achieving its stated goal of rendering the Japanese whale hunt uneconomic to the point where it is terminated.<sup>134</sup> On the one hand, it can be observed that until the last Antarctic whaling season, the organisation's harassment of Japanese whaling vessels had significantly reduced the whales caught and put the ongoing Japanese scientific whaling program under the microscope.<sup>135</sup> Financially, the Japanese whaling industry is entirely reliant on government subsidies for its existence as it runs at a loss of millions of dollars

130 708 F 3d 1099 (9<sup>th</sup> Cir, 2013).

131 Jackson Brown, 'Eco-Warriors: An Invisible Line?' (2012) 26 *Australian and New Zealand Maritime Law Journal* 152, 155, quoting Barbara Veiga, 'Anti Whaling Activist Peter Bethune Receives Suspended Sentence', *The Sunday Times* (online), 7 July 2010 <<https://www.thetimes.co.uk/article/anti-whaling-activist-peter-bethune-receives-suspended-sentence-36qx9npjwlv>>; Hongo, above n 45.

132 Andrew Darby, 'Protester May Face Charges in Japan', *The Age* (online), 17 February 2010 <<http://www.theage.com.au/environment/whale-watch/protester-may-face-charges-in-japan-20100216-o915.html>>.

133 Ibid; Mari Yamaguchi, 'Japan Court Convicts New Zealand Anti-Whaling Activist', *HeraldNet* (online), 7 July 2010 <<https://www.heraldnet.com/news/japan-court-convicts-new-zealand-anti-whaling-activist>>.

134 Sea Shepherd UK, *Will This Be the Sea Shepherd's Last Antarctic Campaign?* (28 January 2011) <<https://www.seashepherd.org.uk/news-and-commentary/commentary/will-this-be-sea-shepherd-s-last-antarctic-campaign.html>>.

135 'Japanese Whalers Have "Worst Catch" Ever', *The Age* (online), 6 April 2013 <<http://www.theage.com.au/environment/whale-watch/japan-whalers-have-worst-ever-catch-20130406-2hed5.html>>.

annually.<sup>136</sup> However, the SSCS's violent direct action strategies and tactics are unlikely to achieve its ultimate goal of ending global whaling. Many IWC member-states perceive violent strategies as counterproductive, in view of the fact that they are highly unlikely to change long-held positions, particularly from whaling nations, at the IWC and bring about a negotiated end to non-commercial whaling.<sup>137</sup>

As noted previously, the SSCS argues that it is enforcing IWC rules and international law. However, IWC member-states have publicly disavowed its use of violent direct action.<sup>138</sup> Watson has been banned from attending IWC meetings and airing his views before the members since 1986 after being linked to the sinking of two whaling vessels in Iceland.<sup>139</sup> Other conservationists and environmental NGOs believe the organisation's approach has denied sympathy to anti-whaling nations, undercutting their arguments to end whaling.<sup>140</sup> Dr Sidney Holt, one of the architects of the 1986 commercial whaling moratorium, argues the SSCS actions are counterproductive and insists that '[a]most 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 [by the international community].'<sup>141</sup>

In addition, the SSCS seems unlikely to achieve its goal of making whaling economically non-viable through protest action. The annual budget for the whaling industry is only US\$86 million, a relatively trivial amount but Japanese governments have been loath to cut back the whaling program, fearing a political backlash.<sup>142</sup> The leader of the Democratic Party of Japan, Tadamas Kodaira, spoke for many Japanese when he stated that his political party is 'committed to research whaling'.<sup>143</sup> Kodaira is reported as having acknowledged that the number of jobs available in the whaling trade had significantly declined and that those which still exist are primarily paid for by the government, but that the actions of groups such as the SSCS 'had fanned popular ire, making it impossible for Tokyo to compromise now'.<sup>144</sup> The fact the Japanese government is willing to

136 Andrew Darby, 'Japan Props Up Floundering Whale Business: Greenpeace', *The Age* (online), 21 December 2012 <<http://www.theage.com.au/environment/whale-watch/japan-props-up-floundering-whale-business-greenpeace-20121220-2bpg5.html>>; Neil Reid, 'The Sea Shepherd Extends Battlefield', *Stuff Co* (online), 28 October 2012 <<http://www.stuff.co.nz/national/7873346/The-Sea-Shepherd-extends-battlefield>>.

137 Caprari, above n 3, 1507.

138 'Sea Shepherd's Record of Violence', above n 17.

139 Caprari, above n 3, 1507.

140 Ibid.

141 Andrew Hoek, 'Sea Shepherd Conservation Society v Japanese Whalers, the Showdown: Who Is the Real Villain?' (2010) 3 *Stanford Journal of Animal Law and Policy* 159, 182, quoting Richard Grant, 'Paul Watson: Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts', *The Telegraph* (online), 17 April 2009 <<https://www.telegraph.co.uk/news/earth/5166346/Paul-Watson-Sea-Shepherd-eco-warrior-fighting-to-stop-whaling-and-seal-hunts.html>>.

142 Martin Fackler, 'Uncertainty Buffets Japan's Whaling Fleet', *The New York Times* (online), 15 May 2010 <<http://www.nytimes.com/2010/05/16/world/asia/16whaling.html>>.

143 Ibid.

144 Ibid.

pay to retrofit its whaling fleet to continue its whaling in Antarctic waters also demonstrates that they are likely to continue such operations into the future.<sup>145</sup>

The decision to no longer hunt the Japanese Antarctic whaling fleet due to whalers using military-grade technology to avoid the SSCS sees the organisation at a turning point. The decision to withdraw from this arena has implications for SSCS both in terms of its effectiveness in preventing individual whales being killed and also in how the organisation is perceived both globally and internally.

On the one hand, the withdrawal could be perceived as acknowledging defeat, in that its decades-long strategy of violent direct action has not achieved its long-term goals of ending whaling. The annual attempt to interdict the Japanese whaling ships in Antarctic waters is the SSCS's iconic campaign. The SSCS's fame is directly attributable to its headline-grabbing brand of direct action especially as regards whaling. Its withdrawal could well impact on its public standing, ability to attract volunteers, fundraising capabilities and its media operations.

On the other hand, the statement acknowledging it will no longer go to Antarctica to protest the whale hunt acknowledges the reality that the SSCS has grown bigger than one campaign.<sup>146</sup> There are currently a multitude of different maritime issues the SSCS is involved in, from preventing dolphin hunts, interdicting whaling in other parts of the globe, to seeking to end tuna exploitation. The methods it adopts to achieve its goals have also changed.

The SSCS still uses violent direct action if it believes it is warranted as a tactic, but it is willing to work with other actors, including governments if that is deemed a superior method.<sup>147</sup> Further, it should be acknowledged that of those groups commonly branded as 'ecoterrorists' by their detractors (including the Animal Liberation Front and the Earth Liberation Front), the SSCS is the only entity still functioning effectively. However, beyond attracting the publicity which has sustained it as an organisation, it is not apparent that the SSCS's tactics have made much headway in achieving its stated goals. One can hardly, therefore, see in its actions an indictment of the law of sea's effect in curtailing effective or legitimate direct action at sea.

## IX CONCLUSION

The SSCS has, from its inception, been a top-down group led by a charismatic leader — Paul Watson. Watson has always understood that a violent direct action strategy married to a global media campaign could be effective in countering ongoing marine ecological devastation. This insight has seen the SSCS grow

145 McCurry, 'Japan to Replace Whaling Mother Ship', above n 51.

146 McKie, above n 52.

147 See Sea Shepherd, *Sea Shepherd Signs Historic Agreement with the Government of Ecuador to Protect the Galapagos: Second Agreement Signed Allows for Joint Protection of Marine Species in the Amazon* (12 July 2007) <<https://www.seashepherd.org.au/news-and-commentary/news/sea-shepherd-signs-historic-agreement-with-the-government-of-ecuador-to-protect-the-galapagos.html>>.



from a small group with one ship and limited financial support to a global entity with multiple ships carrying out simultaneous campaigns, supported by a multi-million-dollar budget and a cadre of willing volunteers.

Its strategy of direct protest action has also evolved over time depending on the circumstances confronting the organisation. While the group is willing to adopt nonviolent methods where deemed appropriate, including working with states, it is more famous for its use of violence against property to achieve its goals. Over the decades it has continued to ram vessels, hurl butyric acid at vessels, foul ship's propellers and allow SSCS personnel to risk their lives boarding whaling vessels amongst other methods. The only tactic it has foresworn over time is that of sinking vessels using high explosives. For Watson, such tactics needed to be adopted given that the nonviolent solutions offered by ENGOs such as Greenpeace appeared ineffective. Watson maintains that Greenpeace's approach of merely being witness cannot stop ongoing Japanese whaling.<sup>148</sup> Greenpeace continues to denounce the SSCS approach of violent direct action as 'morally wrong' and 'counterproductive' to the cause of ending whaling.<sup>149</sup>

While the SSCS has been accused of injuring humans by its actions, the SSCS disputes this and — with the notable exception of Peter Bethune's assault conviction in Japan<sup>150</sup> — no court has ever convicted SSCS members of violent crimes against humans. However, the very nature of its activities, despite ostensible 'good' intentions, creates a real risk of human injuries or fatalities on both sides. If it continues with such tactics, it is almost inevitable that someone will be hurt or killed. This would risk the support the organisation has engendered. This is the paradox at the heart of violent direct action: environmentalists will often cheer a group willing to use such tactics against environmental despoilers but tend to draw the line at human death or injury. The SSCS thus has to walk a fine line, as its actions risk seeing it branded as pirates under the law of the sea, potentially as 'terrorists' under the *SUA Convention*, and at the least as endangering life through its disregard of the *COLREGS*.

The labelling of the SSCS as vigilantes by their opponents is, as we have outlined, accurate. Watson and his acolytes do not see themselves necessarily as violating the law so much as upholding it where the status quo legal system has failed. They do not seek to impose a new social vision onto global society (as terrorists or revolutionaries might wish), but rather see its role as one of enforcement.<sup>151</sup> However, its attempts to use the *World Charter* and the failure of the IWC as legal cover for its actions do not withstand even cursory legal scrutiny. It is also a short step from vigilantism to piracy or violations of the *SUA Convention*. The doctrinal obstacles to *violent* protest on the high seas committed from one vessel against another being classed as piracy are modest: a threshold of 'illegal'

148 Nagtzaam, above n 10, 691.

149 Murphy, above n 22.

150 Justin McCurry, 'Sea Shepherd Man Sentenced for Whaler Assault', *The Guardian* (online), 7 July 2010 <<https://www.theguardian.com/world/2010/jul/07/peter-bethune-sea-shepherd-sentence>>.

151 Gerry Nagtzaam and Pete Lentini, 'Vigilantes on the High Seas? The Sea Shepherds and Political Violence' (2007) 20 *Terrorism and Political Violence* 110, 123.

violence must be crossed, and a view on whether such acts are 'for private ends' must be taken. As argued here, it is entirely legitimate for the words 'for private ends' to be interpreted as meaning 'lacking state sanction'. Fewer obstacles stand between such acts and the application of the *SUA Convention*: essentially all that is required is an act of violence 'likely to endanger the safe navigation' of the targeted vessel.<sup>152</sup> Ramming, at the least, would appear to fit the bill.

Time will tell if the SSCS has begun to run aground or whether it is maturing and adopting more diverse tactics. With its decision to no longer seek to interdict the Japanese Antarctic whaling fleet it can be observed that the organisation is at an inflection point regarding what protest strategies and tactics it needs to adopt to achieve its goals. It is not obvious that its violation of law of the sea norms has, to date, assisted.

152 *SUA Convention* art 3(1)(d).