

6-2-2017

## Call Me Ishimaru: Independent Enforcement of International Agreements

John Arnold

*Boston College Law School*, [john.arnold@bc.edu](mailto:john.arnold@bc.edu)

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>

 Part of the [Administrative Law Commons](#), [Animal Law Commons](#), [Courts Commons](#), [Environmental Law Commons](#), [International Law Commons](#), [Law of the Sea Commons](#), and the [Natural Resources Law Commons](#)

---

### Recommended Citation

John Arnold, *Call Me Ishimaru: Independent Enforcement of International Agreements*, 44 B.C. Envtl. Aff. L. Rev. 331 (2017), <http://lawdigitalcommons.bc.edu/ealr/vol44/iss2/5>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# CALL ME ISHIMARU: INDEPENDENT ENFORCEMENT OF INTERNATIONAL AGREEMENTS

JOHN ARNOLD\*

**Abstract:** International law does not provide an adequate enforcement mechanism against illegal whaling. The Japanese government claims that its whaling practice falls within the scientific research exception of an international moratorium on commercial whaling. Despite an International Court of Justice ruling finding that its practice does not fall within this exception, Japan has continued to kill thousands of whales each year with no effective opposition. The area in which this whaling occurs, however, falls outside the jurisdiction of any nation. Although the United Nations Security Council has the authority to act, the delicate nature of international diplomacy effectively ties its members' hands on this matter. To fill this void, the International Whaling Commission should amend the International Convention for the Regulation of Whaling to include a provision allowing for enforcement of the moratorium by approved non-governmental organizations. Should this amendment pass, the needless slaughter of thousands of whales each year could be prevented.

## INTRODUCTION

The battle between whale and man has raged on for millennia.<sup>1</sup> Prized as sources of food and useful materials whales have been hunted, a process referred to as whaling, by cultures the world over.<sup>2</sup> In the early twentieth century, technological innovations such as motorized ships and cannon-fired harpoons revolutionized the whaling industry, allowing for greater numbers of whales to be harvested during a single whaling expedition.<sup>3</sup> By the early 1940s, following decades of high-tech whaling and the taking of tens of thousands of whales per year, the stocks of certain species had plummeted with

---

\* Senior Note Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2016–2017.

<sup>1</sup> *Rock Art Hints at Whaling Origins*, BBC (Apr. 20, 2004), <http://news.bbc.co.uk/2/hi/science/nature/3638853.stm> [<https://perma.cc/H9HJ-S4FZ>].

<sup>2</sup> *History of Whaling*, WHALE FACTS, <http://www.whalefacts.org/history-of-whaling/> [<https://perma.cc/Z5G9-X2XQ>].

<sup>3</sup> *Whales and Hunting*, NEW BEDFORD WHALING MUSEUM, <http://www.whalingmuseum.org/learn/research-topics/overview-of-north-american-whaling/whales-hunting> [<https://perma.cc/U75F-BAFJ>] (noting that historically, whales were used in a variety of products ranging from lamp or lubricating oil made from their blubber, to whalebone corsets).

several nearing extinction.<sup>4</sup> It is only in the last seventy-five years that there have been significant efforts to preserve and protect whales.<sup>5</sup>

In response to the noticeable impact of the overuse of whaling, fifteen countries convened to create the International Convention for the Regulation of Whaling (“ICRW”).<sup>6</sup> Following the ICRW’s moratorium on whaling in 1986, the only two types of whaling permitted today are subsistence and research whaling.<sup>7</sup> Subsistence whaling allows indigenous cultures that have historically relied on whaling for survival to continue to do so, both for practical and cultural preservation reasons.<sup>8</sup> The other exception, whaling for scientific research, allows for the annual culling of a limited number of whales.<sup>9</sup> The discretion, though, to determine the annual research quota falls upon the contracting government and not the ICRW.<sup>10</sup> Accordingly, the contracting government must submit its corresponding research to the ICRW annually.<sup>11</sup>

This note argues that the ICRW should be amended to allow non-governmental organizations (NGOs) to enforce its provisions.<sup>12</sup> Part I will begin with an introduction to the history of Japanese whaling, followed by background on Japan’s modern whaling industry.<sup>13</sup> Next, Part II will provide a brief overview of applicable international and U.S. maritime law relating to whaling.<sup>14</sup> Part III will cover global enforcement mechanisms of these laws and regulations.<sup>15</sup> Part IV will document the successes of various NGOs where traditional environmental enforcement has failed. In particular, it will explore the impact of organizations such as the Center for Human Rights and Environment (“CEDHA”) in Uruguay, Ecopravo-Lviv (“EPL”) in Ukraine, the International Anti-Poaching Foundation (“IAPF”) in Zimbabwe, and conclude with a discussion of The Global Anti-Poaching Act (“GAPA”).<sup>16</sup> Finally, Part

---

<sup>4</sup> *Id.*

<sup>5</sup> *History of Whaling*, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Aboriginal Subsistence Whaling*, WHALE & DOLPHIN CONSERVATION, <http://us.whales.org/issues/aboriginal-subsistence-whaling> [<https://perma.cc/5ABA-CLK4>]; *History of Whaling*, *supra* note 2 (citing examples of cultures that continue to uphold this practice including the Inuit islanders of the United States and Canada, as well certain indigenous peoples in Russia and Indonesia).

<sup>9</sup> *History of Whaling*, *supra* note 2.

<sup>10</sup> *See Special Permit Whaling*, INT’L WHALING COMM’N, <https://iwc.int/permits> [<https://perma.cc/6RPM-BGQ6>] (noting that the contract government has full discretion over the permitting process for scientific research exemption).

<sup>11</sup> *Id.*

<sup>12</sup> *See infra* notes 190–192 and accompanying text.

<sup>13</sup> *See infra* notes 18–37 and accompanying text.

<sup>14</sup> *See infra* notes 38–69 and accompanying text.

<sup>15</sup> *See infra* notes 70–130 and accompanying text.

<sup>16</sup> *See infra* notes 131–189 and accompanying text.

V will explore a potential amendment to the ICRW authorizing NGOs the power to enforce wildlife protection laws.<sup>17</sup>

## I. HISTORY OF JAPANESE WHALING

### A. Whaling in Japanese Culture

The history of Japanese whaling dates back to at least the early eighth century.<sup>18</sup> In fact, the oldest Japanese book in existence chronicles the consumption of whale meat by the first emperor of Japan.<sup>19</sup> Japanese whalers traditionally employed hand-held harpoons, but over time kept pace with international improvements in whaling technology and were able to improve the efficacy of their hunting techniques.<sup>20</sup> By 1962, the Japanese whaling industry sold more than 226,000 tons of whale meat nationwide.<sup>21</sup> Since then, annual consumption of whale meat in Japan has declined to just one gram per person, with approximately 4000 tons stored by the Institute of Cetacean Research (“ICR”).<sup>22</sup> In 2012, seventy-five percent of whale meat put up for auction did not sell.<sup>23</sup> Despite the exceedingly low demand, for whale meat, Japan has continued to harvest whales for commercial purposes.<sup>24</sup>

### B. Institute of Cetacean Research

The ICR is a Japanese organization that specializes in the study of whales.<sup>25</sup> It was established in 1987, and granted legal status by the Ministry of Agriculture, Forestry, and Fisheries, a department of the Japanese Government.<sup>26</sup> The asserted purpose of the ICR is to address problems surrounding Japanese fisheries, especially those that have arisen from tightening regulations.<sup>27</sup>

<sup>17</sup> See *infra* notes 190–221 and accompanying text.

<sup>18</sup> See *History of Japanese Whaling*, FACTS ABOUT JAPAN, <http://www.facts-about-japan.com/whaling-history.html> [<https://perma.cc/GGJ2-GMWD>].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (stating that scarcity of food in the wake of World War II and the need for an economical source of protein led to a sharp increase in the consumption of Japanese whale meat in the 1950s).

<sup>22</sup> Rupert Wingfield-Hayes, *Japan and the Whale*, BBC (Feb. 8, 2016), <http://www.bbc.com/news/world-asia-35397749> [<https://perma.cc/7BNZ-EF33>]; *Whale Meat Back on School Lunch Menus*, JAPAN TIMES (Sept. 5, 2010), <http://www.japantimes.co.jp/news/2010/09/05/national/whale-meat-back-on-school-lunch-menus/#.WJNApbYrLX-> [<https://perma.cc/76CQ-4YU8>].

<sup>23</sup> Justin McCurry, *Japan’s Appetite for Whale Meat Wanes*, GUARDIAN (June 14, 2012), <https://www.theguardian.com/environment/2012/jun/14/japan-appetite-whale-meat-wanes> [<https://perma.cc/2ZAZ-HTVH>].

<sup>24</sup> *Id.*

<sup>25</sup> *Overview and Purpose*, INST. OF CETACEAN RESEARCH, <http://www.icrwhale.org/abouticr.html> [<https://perma.cc/2J4L-5V8W>].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

The ICR's fleet consists of at least five Japanese-flagged and Japanese-owned vessels.<sup>28</sup> The largest, the NISSHIN MARU, is a 425-foot long factory ship, meaning it can process on-board the whales it catches and therefore take bigger hauls before returning to shore.<sup>29</sup> The NISSHIN MARU is supported directly by smaller vessels, the YUSHIN MARU number one, number two, and number three, as well as the SHONAN MARU NO.2.<sup>30</sup>

The ICR's website states that in particular, the organization was established in response to the moratorium on commercial whaling that was adopted by the International Whaling Commission ("IWC") in 1982 and the creation of the Southern Ocean Whale sanctuary in 1994, amongst a number of other regulatory measures affecting the operation of Japanese fisheries.<sup>31</sup> The stated purpose of its research is ostensibly to ensure that when commercial whaling is resumed, it will be sustainable due to the replenished stock.<sup>32</sup>

One of the main research programs of the ICR is Japan's Research Whaling in the Antarctic ("JARPA").<sup>33</sup> The first stage of JARPA ran from 1987 to 2005, and was described as a long-term study on sustainable management of whale stocks.<sup>34</sup> Beginning in 2005, the Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA II") expanded this study to a greater number of whale species, seeking to determine whale population numbers and dynamics, overall species health, and the impact of whaling on marine ecosystems.<sup>35</sup> The ICR states that in order to obtain accurate data, the sample size of whales tested through lethal means must be as high as it is.<sup>36</sup> Despite rolling out in 2005, the "Research Results" web page for JARPA II, the page only states the objectives of the program, not any actual results.<sup>37</sup>

---

<sup>28</sup> *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y (Sea Shepherd I)*, 860 F. Supp. 2d 1216, 1222 (W.D. Wash. 2012), *rev'd*, 708 F.3d 1099 (9th Cir. 2013), *amended and superseded by* 725 F.3d 940 (9th Cir. 2013).

<sup>29</sup> *Id.*; Andrew Darby, *New Rules for Safe Shipping May Save Whales*, SYDNEY MORNING HERALD (July 18, 2009), <http://www.smh.com.au/environment/whale-watch/new-rules-for-safe-shipping-may-save-whales-20090717-do9b.html> [<https://perma.cc/52NA-F67N>].

<sup>30</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1222.

<sup>31</sup> *Id.*

<sup>32</sup> *Questions & Answers: Japan's Research Whaling in the Antarctic*, INST. OF CETACEAN RESEARCH, <http://www.icrwale.org/QandA1.html#a1> [<https://perma.cc/TGM6-LL3W>].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; *Scientific Contribution*, INST. OF CETACEAN RESEARCH, <http://www.icrwale.org/scJARPA.html> [<https://perma.cc/9SL6-BBNM>] (noting in particular the effects of contaminants).

<sup>36</sup> *Questions & Answers*, *supra* note 32; *see Whaling in Japan*, WHALE & DOLPHIN CONSERVATION, <http://us.whales.org/issues/whaling-in-japan> [<https://perma.cc/8VFM-R5RX>] (observing that in the past decade, Japanese whale quotas have surpassed 1200 whales annually).

<sup>37</sup> *See Research Results*, INST. OF CETACEAN RESEARCH, <http://www.icrwale.org/JARPAResults.html> [<https://perma.cc/J4CT-MQQW>] (outlining the objectives of ICR research program, Japanese Research Whaling in the Antarctic ("JARPA II")).

## II. APPLICABLE MARITIME, INTERNATIONAL, AND U.S. LAW

### A. *International Convention for the Regulation of Whaling*

Drafted in 1946, the International Convention for the Regulation of Whaling (“ICRW”) was convened to create a system that would manage the then-shrinking whale stocks.<sup>38</sup> The ICRW sought to regulate all facets of the whaling industry.<sup>39</sup> In particular, the convention was designed to safeguard all whale species from the effects of overfishing, and allow for depleted whale stocks to recover while mitigating any related economic distress that whaling countries could experience.<sup>40</sup> Article IX of the ICRW stipulates that each signatory government shall take appropriate measures to ensure enforcement of the stated provisions.<sup>41</sup> Accordingly, punishments for infractions against the provisions of the convention are to be carried out by persons or vessels under that government’s jurisdiction.<sup>42</sup>

The ICRW also established the International Whaling Commission (“IWC”).<sup>43</sup> In 1986, the IWC instituted, and has since maintained, a moratorium on commercial whaling.<sup>44</sup> The moratorium determines a specific catch quota for each stock of whale, but these quotas are not binding and only serve as recommendations to the member countries.<sup>45</sup>

Additionally, Article VIII of the ICRW provides an exception to the moratorium, permitting countries to “kill, take and treat” whales for scientific research.<sup>46</sup> Rather than setting its own parameters for this exception, the ICRW allows each country to set its own quotas.<sup>47</sup> Although it does review mandatory submissions from each country outlining the objectives of their research, the

<sup>38</sup> International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW]; see U.S. DEP’T OF STATE, STATUS OF INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING 5 (2013), <https://www.state.gov/documents/organization/191051.pdf> [<https://perma.cc/7FGP-5EH3>] (stating that the United States deposited an instrument of ratification in 1947, and it went into force in 1948).

<sup>39</sup> *International Whaling Commission*, INT’L WHALING COMM’N, <https://iwc.int/home> [<https://perma.cc/LJ9D-G4D3>] [hereinafter *The International Whaling Commission*] (stating that there are now eighty-eight member nations, with Argentina, Australia, Brazil, Canada, Denmark, France, Iceland, Mexico, the Netherlands, Norway, Panama, South Africa, the Soviet Union, the United Kingdom, and the United States comprising the original fifteen).

<sup>40</sup> ICRW, *supra* note 38, at art. IX, ¶ 1.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at art. III, ¶ 1.

<sup>44</sup> *The International Whaling Commission*, *supra* note 39.

<sup>45</sup> William C. Burns, *The International Whaling Commission and the Future of Cetaceans: Problems and Prospects*, 8 COLO. J. INT’L ENVTL. L. & POL’Y 31, 35–44 (1997).

<sup>46</sup> ICRW, *supra* note 38, at art. VIII, ¶ 1.

<sup>47</sup> *Id.*

ICRW can only offer recommendations as to the merits of the research goals, and cannot prohibit any goals or methods it finds lacking.<sup>48</sup>

Although the drafting of the ICRW was certainly a step in the right direction, it is unfortunately an instrument without any effective means of enforcement.<sup>49</sup> It is a non-binding agreement, and breaches do not carry any direct consequences.<sup>50</sup> For example, despite having withdrawn its initial objection to the moratorium in 1987, Japan has continued to issue research permits that permit the killing of hundreds of whales each year with no repercussions for their actions.<sup>51</sup>

Considering that the whaling activities primarily take place off the coast of Antarctica in the Southern Ocean, and that the ships involved in whaling and whaling related conflicts are based out of Australia and Japan it is unlikely that the laws of the United States would be applicable.<sup>52</sup> Rather, Japanese or Australian laws would likely be the default and it is unlikely that either of the two parties would subject itself to the other's domestic laws.<sup>53</sup> Furthermore, even if an American court did have jurisdiction in a suit seeking to enforce the ICRW, it is unlikely that it would attempt to compel enforcement of a ruling against a country such as Japan.<sup>54</sup> Such action would at best sour diplomatic

<sup>48</sup> *The International Whaling Commission*, *supra* note 39; see ICRW, *supra* note 38, at art. IV, ¶ 1, art. VI.

<sup>49</sup> See *Japanese Whaling Company Found Guilty of "Willful Contempt," Fined \$1 Million AUS in Court Case by Humane Society International*, HUMANE SOCIETY INT'L (Nov. 18, 2015) [hereinafter *Japanese Whaling Company Found Guilty*], [http://www.hsi.org/news/press\\_releases/2015/11/hsi-australia-wins-case-against-japanese-whaling-company-111815.html](http://www.hsi.org/news/press_releases/2015/11/hsi-australia-wins-case-against-japanese-whaling-company-111815.html) [<https://perma.cc/7TEW-DETF>] (noting a recent fine levied against Japan for its defiance of an International Court of Justice ruling and Japan's plan to continue to defy the ruling). See generally Lauren Brooks, Comment, *The International Whaling Commission: All Bark, No Bite*, ARIZ. J. ENVTL. L. & POL'Y (Aug. 23, 2010), <http://www.ajelp.com/comments/the-international-whaling-commission-all-bark-no-bite/> [<https://perma.cc/7NHJ-P52K>] (criticizing the International Convention for the Regulation of Whaling and the International Whaling Commission and stating that they have not fulfilled their original objectives, "cooperation and sacrifice").

<sup>50</sup> *The Whales' Navy*, SEA SHEPHERD, <http://www.seashepherd.org/whales> [<https://perma.cc/GJ7U-SASW>].

<sup>51</sup> *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y (Sea Shepherd I)*, 860 F. Supp. 2d 1216, 1220–21 (W.D. Wash. 2012), *rev'd*, 708 F.3d 1099 (9th Cir. 2013), *amended and superseded by* 725 F.3d 940 (9th Cir. 2013) (describing how in 2012 alone, the permits allowed for a total of over a thousand whales of varying species to be slaughtered for research purposes).

<sup>52</sup> *Id.* at 1236–37; (discussing generally how the inability of a U.S. court to rule under admiralty law in this situation is significant because so far, admiralty law is the only law that either the Institute for Cetacean Research ("ICR") or Sea Shepherd has obeyed).

<sup>53</sup> *Id.* The court reasoned, by applying the factors established in *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953), that because the parties claiming injury were Japanese citizens and defendants base of operations is Australia, that Japan and Australia would be the most appropriate forums for dispute. *Id.*

<sup>54</sup> *Id.*

relations between the two countries, and at worst could be taken as a hostile act, resulting in an international incident.<sup>55</sup>

### *B. United Nations Treaties*

#### 1. World Charter for Nature

The Sea Shepherd Conservation Society (“Sea Shepherd”) relies on paragraph 21 of the World Charter for Nature as the basis for its authority to act in furtherance of international conservation law.<sup>56</sup> Paragraph 21 of the World Charter for Nature provides that in addition to States:

International organizations, individuals, groups and corporations shall: (a) co-operate in the task of conserving nature through common activities and other relevant actions, including information exchange and consultations; (b) establish standards for products and manufacturing processes that may have adverse effects on nature, as well as agreed methodologies for assessing these effects; (c) implement the applicable international legal provisions for the conservation of nature and the protection of the environment; (d) ensure that activities within their jurisdictions or control do not cause damage to the nature systems located within other States or in the areas beyond the limits of national jurisdiction; (e) safeguard and conserve nature in areas beyond national jurisdiction.<sup>57</sup>

Essentially, paragraph 21 empowers any individual or non-governmental organization (NGO) to enforce international conservation law in places outside the scope of national jurisdiction.<sup>58</sup>

#### 2. United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (“UNCLOS”) is a sweeping international agreement created to establish an equitable legal order for the seas.<sup>59</sup> UNCLOS covers a great number of topics, ranging from an explicit prohibition of slavery, to seizure of a pirate ship.<sup>60</sup> To date, 167 nations

<sup>55</sup> *Id.*; Ali Moore, *Court Rules Against Japan’s Whale Hunt*, AUSTL. BROAD. CORP. (Jan. 15, 2008), <http://www.abc.net.au/7.30/content/2007/s2139165.htm> [<https://perma.cc/MP6P-CDX5>] (contending that attempts by Australia to enforce an injunction against Japan would result in a “diplomatic headache with a vital trading partner.”)

<sup>56</sup> G.A. Res. 37/7, ¶ 21 (Oct. 28, 1982) [hereinafter World Charter for Nature]; *Mandate*, SEA SHEPHERD, <http://www.seashepherd.org/who-we-are/mandate.html> [<https://perma.cc/RT8L-A4UA>].

<sup>57</sup> World Charter for Nature, *supra* note 56, at ¶ 21.

<sup>58</sup> *See id.*; *see also Mandate*, *supra* note 56.

<sup>59</sup> United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397; *Sea Shepherd I*, 860 F. Supp. 2d at 1233.

<sup>60</sup> United Nations Convention on the Law of the Sea, *supra* note 59, at art. 101.

have ratified the agreement, including the United States, Australia, and Japan.<sup>61</sup>

### 3. COLREGS

The International Regulations for Preventing Collisions at Sea (“COLREGS”) are a set of navigational rules designed to prevent collisions between vessels.<sup>62</sup> Published by the International Marine Organization, a specialized agency of the United Nations, the COLREGS were adopted as a convention in 1972.<sup>63</sup> In essence, they are a detailed compilation of the established rules for maritime traffic, agreed to by hundreds of countries including the United States and Japan.<sup>64</sup>

#### *C. United States Law*

##### 1. Alien Tort Statute

Under what is commonly known as the Alien Tort Statute, a United States federal court may possess “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>65</sup> In essence, the Alien Tort Statute grants foreign citizens the ability to file suit in U.S. courts for violations of international law that occurred outside the jurisdictional borders of the United States.<sup>66</sup>

##### 2. SUA

Ratified by the United States in 1994, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA”) sought to address concerns about unlawful acts that threatened the safety of ships and the security of their passengers and crews.<sup>67</sup> Introduced at the Fourteenth Session of the International Marine Organization in 1985, SUA prohibits a series

---

<sup>61</sup> *Chronological Lists of Ratifications, Accessions and Successions to the Convention and the Related Agreements*, U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm) [<https://perma.cc/D4TD-69F4>].

<sup>62</sup> See Convention on the International Regulations for Preventing Collisions at Sea pmb1., Jul. 15, 1977, 28 U.S.T. 3459, 1050 U.N.T.S. 16.

<sup>63</sup> *Id.*; *Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs)*, INT’L MAR. ORG., <http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/COLREG.aspx> [<https://perma.cc/8HLV-CCRN>].

<sup>64</sup> See *Sea Shepherd I*, 860 F. Supp. 2d at 1235 (quoting *Crowley Marine Servs. v. Maritrans, Inc.* 530 F.3d 1169, 1172 (9th Cir. 2008)).

<sup>65</sup> 28 U.S.C. § 1350 (2012) (noting that admiralty jurisdiction extends to torts on the high seas that arise out of traditional maritime activity).

<sup>66</sup> *Id.*

<sup>67</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation pmb1., Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA].

of acts that endanger the safe navigation of a ship.<sup>68</sup> Specifically, SUA prohibits acts of violence against shipboard individuals, damaging a ship or its cargo, or placing anything on a ship that would likely damage the ship.<sup>69</sup>

### III. GLOBAL ENFORCEMENT MECHANISMS

#### A. *The Sea Shepherd Conservation Society*

In 1975, having gained experience on a number of missions designed to stop nuclear testing at the Mururoa Atoll in the South Pacific, Captain Paul Watson, a Sierra Club Member and one of the founders of the Greenpeace Foundation, experienced a life-changing event—he served as first officer in a mission to disrupt a Soviet whaling expedition.<sup>70</sup> In this role, he piloted a small inflatable boat directly into the line of fire, positioning the boat between a harpoon vessel and a fleet of sperm whales.<sup>71</sup> While he was between the harpoon and the whales, a harpooned whale leapt out of the water and Watson claims to have witnessed a flicker of understanding in the whale’s eye, recognizing that Watson’s boat was attempting to save the whale.<sup>72</sup> From then on Watson swore a vow to become a lifelong defender of whales and all sea creatures.<sup>73</sup> Two years and many similar missions later, Watson left the Greenpeace Foundation and founded The Sea Shepherd Conservation Society (“Sea Shepherd”) in 1977.<sup>74</sup>

Sea Shepherd was formed to protect marine ecosystems and species by ending the slaughter of marine wildlife and the destruction of their habitats.<sup>75</sup> Officially, Sea Shepherd’s primary mandate is to serve as a form of law enforcement for the United Nations World Charter for Nature.<sup>76</sup> Sea Shepherd uses a fleet composed of three ships for its anti-whaling missions.<sup>77</sup> The BOB BARKER and the STEVE IRWIN are both Dutch-flagged vessels about 160 feet in length, and the BRIGITTE BARDOT is an Australian-flagged trimaran,

<sup>68</sup> SUA, *supra* note 67, at art. 3(1); *Sea Shepherd I*, 860 F. Supp. 2d at 1233.

<sup>69</sup> SUA, *supra* note 67, at art. 3(1)(b)–(d); *Sea Shepherd I*, 860 F. Supp. 2d at 1233.

<sup>70</sup> *Captain Paul Watson’s Biography*, SEA SHEPHERD CONSERVATION SOC’Y, <http://www.seashepherd.org/who-we-are/captain-paul-watson-s-biography.html> [<https://perma.cc/NWV4-3NVF>].

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Watson reportedly left over a dispute relating to tactics. *Id.*

<sup>75</sup> *See Who We Are*, SEA SHEPHERD AUSTL., <http://www.seashepherd.org.au/who-we-are/about-us/who-we-are.html> [<https://perma.cc/8M68-CSTZ>].

<sup>76</sup> *Mandate*, *supra* note 56; *see* World Charter for Nature, *supra* note 56, at ¶ 21.

<sup>77</sup> *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y (Sea Shepherd I)*, 860 F. Supp. 2d 1216, 1222 (W.D. Wash. 2012), *rev’d*, 708 F.3d 1099 (9th Cir. 2013), *amended and superseded by* 725 F.3d 940 (9th Cir. 2013).

roughly 100 feet in length.<sup>78</sup> The ships also have support from a number of small rigid inflatable boats, called zodiacs, which are launched from the larger ships.<sup>79</sup>

Having conducted over two hundred missions to further its goals, Sea Shepherd uses direct action tactics to expose and confront illegal activities on the world's oceans.<sup>80</sup> One tactic often used in anti-whaling missions involves throwing glass bottles filled with paint or butyric acid at the whaling ships.<sup>81</sup> When the bottles smash on the boat deck, they ruin the whale meat aboard the ships, and the butyric acid creates a foul odor on the deck that is unbearable for the whaling crew.<sup>82</sup> Other tactics include the towing of lines in front of the whaling ships with the goal of fouling the propeller, hurling smoke bombs, using of a high-powered laser, and piloting the fleet to collide with the whaling vessels.<sup>83</sup> As of 2012, there was no evidence of any injury to whaling crews as a result of these tactics.<sup>84</sup>

In 2012, the Institute for Cetacean Research ("ICR") brought an action against the Sea Shepherd Conservation Society in the United States District Court for the Western District of Washington, alleging violations of its right to free navigation at sea and piracy.<sup>85</sup> To remedy these alleged violations, the ICR sought to enjoin Sea Shepherd from coming within 800 meters of their vessels.<sup>86</sup>

Regarding the piracy claim, the district court adopted the view used in *United States v. Hasan*, which is consistent with the United Nations Convention on the Law of the Sea ("UNCLOS").<sup>87</sup> Under this view, piracy encompasses any illegal act of violence, or illegal act of detention, committed against a ship or persons aboard that ship for private ends while at sea.<sup>88</sup> The court held that the lack of private ends sought by Sea Shepherd, as well as the lack of violence in their methods, precluded any finding of piracy.<sup>89</sup>

In its analysis of the safe navigation claim, the court utilized 18 U.S.C. § 2280, which codifies the United States' ratification of Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

---

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; *Trimaran*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/trimaran> [<https://perma.cc/Y7Q6-D3PH>] (defining trimaran as a ship with three parallel hulls).

<sup>80</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1222.

<sup>81</sup> *Id.* at 1220.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1223–24.

<sup>84</sup> *Id.* at 1223.

<sup>85</sup> *See id.* at 1221.

<sup>86</sup> *Id.* at 1226.

<sup>87</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1232; *United States v. Hasan*, 747 F. Supp. 2d 599, 640 (E.D. Va. 2010).

<sup>88</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1233.

<sup>89</sup> *Id.*

(“SUA”).<sup>90</sup> Applying the provisions of SUA to the actions of Sea Shepherd, the court found that only two of Sea Shepherd’s tactics could be considered as possible violations.<sup>91</sup> First, the court found there to be only one instance of Sea Shepherd successfully fouling a propeller by dragging lines in front of a whaling vessel, and that there was no evidence that this tactic disabled the ship, even temporarily.<sup>92</sup> Therefore, it could not reach the conclusion that this tactic endangered the safe navigation of a ship, and consequently was not in violation of SUA.<sup>93</sup>

Concerning Sea Shepherd’s tactic of maneuvering in close proximity to the whaling vessels and making collision likely, the district court found the whalers’ SUA claim lacking.<sup>94</sup> In the one documented occurrence of an actual collision between Sea Shepherd and a whaling vessel, there was no evidence that the incident endangered the safe navigation of the whaling ship, nor was there evidence of any damage to the whaling ship itself.<sup>95</sup> The court did find, however, that these tactics are likely violations of the International Regulations for Preventing Collisions at Sea (“COLREGS”), which includes provisions mandating actions to avoid collisions.<sup>96</sup> The court ultimately stated, though, that while they found Sea Shepherd’s tactics to be troubling it was beyond the power of the court to issue the injunction.<sup>97</sup>

In 2013, the United States Court of Appeals for the Ninth Circuit reversed the decision of the lower court.<sup>98</sup> The Ninth Circuit found that Sea Shepherd had indeed engaged in piracy, that the ICR was likely to succeed on the merits of its claim that Sea Shepherd violated SUA, the whalers were likely to suffer irreparable harm in absence of a preliminary injunction, the balance of equities and public interest favored enjoining Sea Shepherd’s activities, and the doctrine of unclean hands did not preclude issuance of an injunction.<sup>99</sup> Accordingly, the Ninth Circuit granted the ICR’s request for a preliminary injunction against

---

<sup>90</sup> *Id.* at 1234; see 18 U.S.C. § 2280 (2012) (making illegal violent acts that impede maritime navigation); *supra* notes 67–69 (describing the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation).

<sup>91</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1234.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; see SUA, *supra* note 67, at art. 3(1)(c).

<sup>94</sup> See *Sea Shepherd I*, 860 F. Supp. 2d at 1234, 1243 (holding that maneuvering a vessel such that a collision is “highly likely” does not meet the SUA threshold of being “likely to endanger the safe navigation of a ship”).

<sup>95</sup> *Id.* at 1224.

<sup>96</sup> *Id.* at 1235; see *Crowley Marine Servs. v. Maritrans, Inc.*, 530 F.3d 1169, 1176 (9th Cir. 2008) (holding that COLREGS requires vessels being overtaken to keep a lookout and take other actions to avoid collision).

<sup>97</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1246.

<sup>98</sup> *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y (Sea Shepherd II)*, 708 F.3d 1099, 1106 (9th Cir. 2013), *amended and superseded by* 725 F.3d 940 (9th Cir. 2013).

<sup>99</sup> *Id.* at 1104–05.

Sea Shepherd, requiring that it stay at least 800 meters from ICR vessels and prohibiting attacks on its crewmembers or its ships.<sup>100</sup>

Pursuant to this ruling, Sea Shepherd has declared on its website that it no longer actively participates in protecting whales in the Southern Ocean from hunters.<sup>101</sup> A separate organization, Sea Shepherd Australia Limited, now operates in its stead in the fight against unauthorized whaling.<sup>102</sup> Refusing to accept donations for Sea Shepherd Australia Limited, or to support it in any way, Sea Shepherd seeks to evade any attempts to link the two organizations by any means except name, organizational and tactical structure, and mission statement.<sup>103</sup> Therefore, because the 2012 injunction only applies to Sea Shepherd Conservation Society, Sea Shepherd Australia Limited, an Australian organization incorporated in 2007, is presumably unaffected by the ruling.<sup>104</sup>

Although admiralty jurisdiction extends to torts at sea that arise out of traditional maritime activity it does not extend to acts, such as whaling, that are not considered torts.<sup>105</sup> Therefore, in *Institute of Cetacean Research v. Sea Shepherd Conservation Society (Sea Shepherd I)*, the United States District Court for the Western District of Washington was able to claim jurisdiction because the suit concerned allegations of tortious behavior by Sea Shepherd.<sup>106</sup> The same court, however, would not be able to hear a suit seeking to enforce the International Convention for the Regulation of Whaling (“ICRW”) against Japan without an underlying tort claim.<sup>107</sup>

---

<sup>100</sup> See *Sea Shepherd I*, 860 F. Supp. 2d at 1226 (noting that the whalers tried to enjoin Sea Shepherd’s ships from coming within 800 meters of their ships); *Sea Shepherd II*, 708 F.3d at 1106 (granting the injunction).

<sup>101</sup> *The Whales’ Navy*, *supra* note 50.

<sup>102</sup> *Id.*

<sup>103</sup> Compare *The Whales’ Navy*, *supra* note 50 (noting that Sea Shepherd Conservation Society has been prohibited from operating in the Southern Ocean and that a separate organization, Sea Shepherd Australia, coordinates operations in that area), with *Who We Are*, *supra* note 75 (stating that the organization exists to protect ocean ecosystems and species, but making no mention of the Sea Shepherd Conservation Society or any relationship to that organization).

<sup>104</sup> See *Sea Shepherd Australia Limited*, AUS61 BUS., <https://www.aus61business.com/company/Sea-Shepherd-Australia-Limited> [<https://perma.cc/G4Z6-9APX>] (giving information about Sea Shepherd Australia in AUS61 Business, an online directory of companies registered to do business in Australia); *The Whale’s Navy*, *supra* note 50 (stating that Sea Shepherd Conservation Society and Sea Shepherd Australia are separate entities).

<sup>105</sup> See *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1120 (9th Cir. 1984) (holding that an employee pipe fitter who was exposed to asbestos products while repairing a ship in navigable waters did not have a cognizable claim against the asbestos manufacturer because the employee’s tort claims “did not bear enough of a relationship to traditional maritime activity to justify the exercise of admiralty jurisdiction”).

<sup>106</sup> See *Sea Shepherd I*, 860 F. Supp. 2d at 1227.

<sup>107</sup> See *Sea Shepherd II*, 708 F.3d at 1106; *Myhran*, 741 F.2d at 1120. Although in *Institute of Cetacean Research*, the alleged tort arose out of traditional maritime activity, in *Myhran v. Johns-Manville Corp.*, the United States Court of Appeals for the Ninth Circuit held that the alleged harm was not a tort arising out of traditional maritime activity and further observing that whaling is not a tort. *Sea Shepherd II*, 708 F.3d at 1106; *Myhran*, 741 F.2d at 1120–21.

### B. Australian Whale Sanctuary

Australia attempted to curb the extent of Japan's whaling by creating the Australian Whale Sanctuary ("AWS") in 1999.<sup>108</sup> Created under the Environment Protection and Biodiversity Conservation Act, this sanctuary extends from the state waters limit to the boundary of the Exclusive Economic Zone, an area that begins at three nautical miles offshore and extends to approximately 200 nautical miles, around Australia and its external islands.<sup>109</sup> Additionally, the sanctuary extends for 200 nautical miles off the coast of Australia's disputed Antarctic territory, and prohibits killing, injuring, or interference with a cetacean.<sup>110</sup> Due to the disputed nature of the Antarctic territory, only the United Kingdom, France, Norway, and New Zealand recognize the Antarctic portion of the AWS.<sup>111</sup>

Despite Japan's lack of recognition of the Antarctic AWS, the Humane Society International brought suit against the ICR under Australian law.<sup>112</sup> The ICR refused to participate in the proceedings, and Australia's Federal Court subsequently granted a permanent injunction against the ICR in 2008, enjoining it from hunting and killing whales in the AWS.<sup>113</sup> Nevertheless, the ICR has continued to whale in defiance of the injunction despite another ruling by the Australian Federal Court against it in 2015.<sup>114</sup>

### C. International Court of Justice Ruling

Australia filed an application for proceedings against Japan in the Registry of the International Court of Justice ("ICJ") in May of 2010.<sup>115</sup> These proceedings were pursuant to Japan's continued large-scale commercial whaling program, the Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA II").<sup>116</sup> Australia alleged that JARPA II violated the obligations that Japan assumes as a current signatory of the ICRW.<sup>117</sup> Specifically,

---

<sup>108</sup> *Australian Whale Sanctuary*, AUSTL. GOV'T: DEP'T OF THE ENV'T, <http://www.environment.gov.au/marine/marine-species/cetaceans/australian-whale-sanctuary> [<https://perma.cc/C2AH-NDVP>].

<sup>109</sup> *Id.*; *Cetacean*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/cetacean> [<https://perma.cc/MKY6-VRDA>] (defining a cetacean as a member of an order of marine mammals—such as a whale or dolphin—with particular forms such as torpedo-shaped bodies, a lack of hind limbs, and an external opening at the top of the head).

<sup>110</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1221; *see Australian Whale Sanctuary*, *supra* note 108.

<sup>111</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1221; *see Australian Whale Sanctuary*, *supra* note 108.

<sup>112</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1221.

<sup>113</sup> *Id.*; *Japanese Whaling Company Found Guilty*, *supra* note 49.

<sup>114</sup> *Japanese Whaling Company Found Guilty*, *supra* note 49. The 2015 ruling, stemming from a lawsuit brought by the Human Society International, held the whalers in willful contempt of court due to their defiance of the 2008 Federal Court ruling. *Id.* Consequently, the court imposed a fine of \$1 million AUS. *Id.*

<sup>115</sup> *Whaling in the Antarctic (Austl. v. Japan)*, Judgment, 2014 I.C.J. Rep. 226, 234, ¶ 1 (Mar. 31).

<sup>116</sup> *Id.* at 234, ¶ 3.

<sup>117</sup> *Id.* at 238, ¶ 24.

Australia alleged that Japan breached its obligations to abide by both the zero catch limit for commercial whaling, and the moratorium on the taking, killing, or treating of non-minke whales by factory ships.<sup>118</sup> In response, Japan asserted that the special permits it issues for its whaling activities are lawful under the scientific research exemption of the ICRW.

In March 2014, the ICJ ruled that the scale of JARPA II, Japan's whaling program, was not justified on scientific research grounds and accordingly, JARPA II breached Article VIII of the ICRW.<sup>119</sup> Article VIII allows for countries to grant special permits for whaling that is done for the purposes of scientific research.<sup>120</sup> In not meeting this exception, Japan's whaling activities did not conform to the various obligations under the ICRW including the moratoriums on commercial whaling, factory ship use, and whaling in the Southern Ocean Sanctuary.<sup>121</sup> Consequently, the ICJ ordered Japan to cease from instituting any whaling permit programs that are not related to scientific research under Article VIII, to terminate the operations of JARPA II, and to revoke licenses or permits that it had already granted pursuant to JARPA II.<sup>122</sup> Following the ICJ ruling, the government of Japan announced plans for a new research program entitled the New Scientific Whale Research Program in the Antarctic Ocean.<sup>123</sup> This new program continues to target the Southern Ocean as the focal point for its research activities.<sup>124</sup> The program intends to target 3996 whales over a twelve-year period, and thus constitutes a departure from its previous allocations, which permitted the killing of over 1000 whales each year.<sup>125</sup>

On the inter-governmental level, it falls on the United Nations Security Council to enforce rulings by the ICJ, and so far, the Security Council has yet to enforce the 2014 ruling against Japan.<sup>126</sup> The Security Council is comprised

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 230.

<sup>120</sup> *Id.* at 249–50, ¶51

<sup>121</sup> *Austl. v. Japan*, 2014 I.C.J. Rep. at 294–95, ¶229–230.

<sup>122</sup> *Id.* at 298, ¶ 244.

<sup>123</sup> RESEARCH PLAN FOR NEW SCIENTIFIC WHALE RESEARCH PROGRAM IN THE ANTARCTIC OCEAN (NEWREP-A), INST. OF CETACEAN RESEARCH 4 (N.D.), <http://www.icrwhale.org/pdf/151127newrep-a.pdf> [<https://perma.cc/G6GV-HWZE>].

<sup>124</sup> *See id.* at 75 (discussing the new program's focus on the Southern Ocean).

<sup>125</sup> Jareen Imam, *Japan Kills 333 Minke Whales*, CNN (Mar. 25, 2016), <http://www.cnn.com/2016/03/24/world/japan-minke-whale-333-irpt/> [<https://perma.cc/L53M-WJ9W>].

<sup>126</sup> *How The Court Works*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=6> [<https://perma.cc/3256-WNN3>]. Concerning the enforcement discretion of the Security Council, the International Court of Justice has stated:

A State which contends that the other side has failed to perform the obligations incumbent upon it under a judgment rendered by the Court may lay the matter before the Security Council, which is empowered to recommend or decide upon the measures to be taken to give effect to the judgment.

of fifteen member-states, and requires a nine-vote majority in order to pass a resolution.<sup>127</sup> In order for the Security Council to take action, it must determine the existence of a threat to the peace or an act of aggression, and typically actions are in response to major events such as terrorist threats or the proliferation of weapons of mass destruction.<sup>128</sup> So, a continued whaling campaign in the face of an ICJ ruling is unlikely to provoke the ire of a majority of members in the face of more pressing international affairs.<sup>129</sup> Further, many members of the Security Council would likely not want to run the risk of jeopardizing relations with Japan—a member of the G7 that boasts the fourth highest gross domestic product in the world.<sup>130</sup>

#### IV. NGOS AS A TOOL WHERE TRADITIONAL ENFORCEMENT HAS FAILED

Whaling is inherently an international issue.<sup>131</sup> Unbound by the laws and borders of nations, whales are a resource shared by all, and the impact of an irreversible decline in stock would be far-reaching.<sup>132</sup> Accordingly, as is common when it comes to international natural resource management, the laws of just one nation are not adequate to govern the culling of whales; whale stock

*Id.*

<sup>127</sup> *Frequently Asked Questions*, U.N. SEC. COUNCIL, <http://www.un.org/en/sc/about/faq.shtml#threat> [<https://perma.cc/3L2D-EZ2K>] [hereinafter *Security Council FAQ*]; *What Is the Security Council?*, U.N. SEC. COUNCIL, <http://www.un.org/en/sc/about/> [<https://perma.cc/CTU8-MGJA>]; *Provisional Rules of Procedure*, U.N. SEC. COUNCIL <http://www.un.org/en/sc/repertoire/rules/overview.shtml#rule8> [<https://perma.cc/EFZ6-FJJP>].

<sup>128</sup> *Security Council FAQ*, *supra* note 127 (stating various factors that influence the Security Council's decision to determine the existence of a threat); *What Is the Security Council*, *supra* note 127 (noting that actions by the Council can include economic sanctions on offending nations, blockades, severance of diplomatic relations, and even collective military action).

<sup>129</sup> William Horobin, *France Vows Continued Vigilance After Capture of Paris Attacks Fugitive*, WALL ST. J. (Mar. 19, 2016), <http://www.wsj.com/articles/france-vows-continued-vigilance-after-capture-of-paris-attacks-fugitive-1458391644> [<https://perma.cc/376G-P4MU>] (collectively acknowledging more pressing global issues confronting prominent member nations of the U.N. Security Council); Jamie Merrill, *EU Referendum: Brexit Would Spark 'Constitutional Crisis' for UK, Warns Welsh First Minister Carwyn Jones*, INDEPENDENT (Mar. 18, 2016), <http://www.independent.co.uk/news/uk/politics/eu-referendum-brexit-would-spark-constitutional-crisis-for-uk-warns-welsh-first-minister-carwyn-a6939786.html> [<https://perma.cc/ABY2-42MC>]; *Syria Conflict: Russia 'Steps up Strikes on IS at Palmyra*, BBC NEWS (Mar. 18, 2016), <http://www.bbc.com/news/world-middle-east-35845855> [<https://perma.cc/ZXC9-KZWE>].

<sup>130</sup> *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2195rank.html> [<https://perma.cc/W43M-V2DH>] (listing more than 200 countries' gross domestic product); *CFR Backgrounders: The Group of Seven (G7)*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/international-organizations-and-alliances/group-seven-g7/p32957> [<https://perma.cc/L7FX-CSTV>] (giving information about the G7 and its member countries).

<sup>131</sup> See *The International Whaling Commission*, *supra* note 39 (observing that eighty-eight countries convened to address the issue of whale depletion).

<sup>132</sup> *Id.* (noting that a significant depletion of whale stocks would result in widespread economic and nutritional catastrophe).

can only be managed through cooperative international efforts and compliance.<sup>133</sup>

### A. Independent Enforcement

Given the inherent difficulties that sovereign nations and inter-governmental organizations face in enforcing international whaling treaties, an alternative enforcer that would likely be more effective is a non-governmental organization (NGO).<sup>134</sup> With the ability to function free of any national or political affiliations, NGOs are able to operate in the international arena unhindered by secondary considerations.<sup>135</sup> With funding coming only from private parties, an NGO can use any means it sees fit, in accordance with international law, to complete its primary objective.<sup>136</sup> The Sea Shepherd Conservation Society (“Sea Shepherd”), for instance, operates solely on private donations with the assistance of volunteers; it is not state-funded, and does not claim to represent the interests of any one nation in particular.<sup>137</sup>

The enforcement of law by non-governmental entities is an increasing global trend.<sup>138</sup> From the Pinkerton railroad bruisers of the late nineteenth cen-

<sup>133</sup> *Id.* (stating the importance of multinational collaboration in order for regulations to be effective).

<sup>134</sup> *Id.*

<sup>135</sup> *Definition of NGOs*, NGO GLOB. NETWORK, <http://www.ngo.org/ngoinfo/define.html> [<https://perma.cc/T933-ZVDA>]. One network of NGOs, affiliated with the United Nations Department of Public Information, has described these organizations as sharing a series of common traits:

A non-governmental organization (NGO) is any non-profit, voluntary citizens’ group that is organized on a local, national or international level. Task-oriented and driven by people with a common interest, NGOs perform a variety of service and humanitarian functions, bring citizen concerns to Governments, advocate and monitor policies and encourage political participation through provision of information. Some are organized around specific issues, such as human rights, environment or health. They provide analysis and expertise, serve as early warning mechanisms, and help monitor and implement international agreements. Their relationship with offices and agencies of the United Nations system differs depending on their goals, their venue and the mandate of a particular institution.

*Id.*

<sup>136</sup> *Support Sea Shepherd*, SEA SHEPHERD, <http://www.seashepherd.org/support-us/> [<https://perma.cc/5N3U-6PXJ>].

<sup>137</sup> *See id.*

<sup>138</sup> *See About Us*, CIVILIAN POLICE INT’L, <http://www.civilianpolice.com/aboutus.html> [<https://perma.cc/694X-NJE8>] (discussing the Civilian Police International, a private security force that supports U.S. security interests internationally); Victoria Eastwood, *Bigger than the Army: South Africa’s Private Security Forces*, CNN (Feb. 8, 2013), <http://www.cnn.com/2013/02/08/business/south-africa-private-security> [<https://perma.cc/3P4T-XVS3>] (discussing a boom in South Africa’s private security industry); Justin Jouvenal, *Private Police Carry Guns and Make Arrests, and their Ranks are Swelling*, WASH. POST (Feb. 28, 2015), <https://www.washingtonpost.com/local/crime/private-police-carry-guns-and-make-arrests-and-their-ranks-are-swelling/2015/02/28/29f6e02e-8f79-11e4-a900->

tury American West to the modern day South African private security companies, private police forces have grown to fill the gaps left by conventional public police.<sup>139</sup> In particular, these private security companies offer services ranging from merely patrolling designated areas, to, in the case of the Pinkertons, breaking strikes and keeping workers aligned with corporate interests.<sup>140</sup> Invariably, a core objective of private security companies the world over appears to be that of deterrence.<sup>141</sup> Having a physically imposing and highly visible presence allows security companies to avoid both legal trouble and physical danger.<sup>142</sup>

Although the private security sector is no stranger to controversy and political polemics, there is widespread demand for the service.<sup>143</sup> Instead of attempting to go against the tide of public demand for increased safety, international entities such as the United Nations Human Rights Council and the International Maritime Organization (“IMO”) have sought to regulate private security in various ways.<sup>144</sup> In particular, the IMO endorses the use of private security companies on ships, but also encourages intensive vetting, selection, and training of individual contractors.<sup>145</sup> Following the spread of private security contractors aboard ships in 2009, hijackings by pirates off the coast of Somalia has plummeted from dozens each year to just fifteen in 2013, and eleven in 2014.<sup>146</sup> Because of their efficacy and prevalence, one private contractor has

---

9960214d4cd7\_story.html [https://perma.cc/B9GC-P3C2] (disusing the example of the private security firm Special Conservatories of the Peace).

<sup>139</sup> David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1222 (1999) (averring that most of the recent growth by private security firms has been funded by business or groups of homeowners dissatisfied with the public police, and has taken place on public property); Eastwood, *supra* note 138; *History*, PINKERTON CONSULTING & INVESTIGATIONS, INC., <http://www.pinkerton.com/history> [https://perma.cc/QL48-ZY54].

<sup>140</sup> Sklansky, *supra* note 139, at 1224–25.

<sup>141</sup> *Id.* at 1198.

<sup>142</sup> Eastwood, *supra* note 138.

<sup>143</sup> Malcolm K. Sparrow, *Managing the Boundary Between Public and Private and Public Policing*, NEW PERSPS. IN POLICING, Sept. 2014, at 1, 3 (2014), <http://www.hks.harvard.edu/index.php/content/download/67532/1242938/version/1/file/ManagingBoundariesPolicing.pdf> [https://perma.cc/9GYM-6WML] (stating that the number of private security personnel in the United States “overtook the number of uniformed public law enforcement officers in the early 1980s, exceeded it by 50 percent by the late 1990s,” and is projected to continue growing). Similarly, in both Australia and Israel, the ratio of private security personnel to public police is as high as 2:1. *Id.*

<sup>144</sup> *International Maritime Organization*, SIÉ CHÉOU-KANG CTR. FOR INT’L SEC. & DIPLOMACY, PRIVATE SEC. MONITOR, [http://psm.du.edu/international\\_regulation/un\\_initiatives/imo.html](http://psm.du.edu/international_regulation/un_initiatives/imo.html) [https://perma.cc/SNP4-LLCF]; *U.N. Human Rights Council and General Assembly*, SIÉ CHÉOU-KANG CTR. FOR INT’L SEC. & DIPLOMACY, PRIVATE SEC. MONITOR, [http://psm.du.edu/international\\_regulation/un\\_initiatives/human\\_rights\\_council\\_and\\_general\\_assembly/index.html](http://psm.du.edu/international_regulation/un_initiatives/human_rights_council_and_general_assembly/index.html) [https://perma.cc/MYY3-Q2F5].

<sup>145</sup> *International Maritime Organization*, *supra* note 144.

<sup>146</sup> Wanda Wang, *Ship Hijackings Up Year on Year in 2014; Total Piracy Attacks Down: IMB*, PLATTS (Jan. 14, 2015), <http://www.platts.com/latest-news/shipping/singapore/ship-hijackings-up-year-on-year-in-2014-total-26982676> [https://perma.cc/DCP8-NZNU]; *Repelling Pirate Attacks: The*

framed the issue of piracy as mostly one of private security, rather than a military issue.<sup>147</sup>

### *B. NGOs in the Environmental Context*

More analogous to the situation at hand, NGOs have demonstrated their effectiveness when national and international laws are impotent.<sup>148</sup> In 2003, and then also in 2005, the government of Uruguay sanctioned the construction of two pulp paper mills near the city of Fray Bentos, Uruguay.<sup>149</sup> The locations of both mills along the Uruguay River portended great detriment to the environment and nearby ecosystems that Uruguay shares with Argentina.<sup>150</sup> Accordingly, the Argentinian government filed suit in the International Court of Justice claiming the planned locations violated the 1975 Statute of the River Uruguay.<sup>151</sup> Argentina requested the grant of a preliminary injunction enjoining the construction of the mills until a decision was reached, but its request was denied.<sup>152</sup>

In conjunction with large-scale roadblocks and protests, an NGO, the Center for Human Rights and Environment (“CEDHA”) filed persistent litigation against the financiers of the two mills, mainly Equator Principle Compliance Complaints.<sup>153</sup> Although not hard-hitting, these complaints essentially served to shame the financial institutions into compliance out of fear of diplomatic retribution and international pressure.<sup>154</sup> Combined, these tactics brought construction of the mills to a halt.<sup>155</sup> Following years of ensuing conflict, the countries were ultimately able to reach an agreement that allowed the construction of the mills while drastically mitigating the initial projected environmental impact, and creating a binational commission to monitor pollution.<sup>156</sup>

---

*Measures to Protect a Ship*, TELEGRAPH (Feb. 10, 2014), <http://www.telegraph.co.uk/sponsored/culture/captain-phillips-film/10367534/security-against-pirate-attacks.html> [<https://perma.cc/CC5Q-P42W>].

<sup>147</sup> *Repelling Pirate Attacks: The Measures to Protect a Ship*, *supra* note 147.

<sup>148</sup> See *infra* notes 138–147 and accompanying text.

<sup>149</sup> Michael K. Lee, *The Uruguay Paper Pulp Mill Dispute: Highlighting the Growing Importance of NGOs and Public Protest in the Enforcement of International Environmental Law*, 7 SUSTAINABLE DEV. L. & POL’Y, Fall 2006, 71, 71.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (noting that Argentina requested “provisionary measures”—an injunction equivalent under Argentine law).

<sup>153</sup> *Id.* at 72 (“The Equator Principles are a voluntary initiative promoted worldwide by the IFC. By adopting the Principles, financial institutions undertake to finance only those projects whose environmental and social risk comply with the criteria.”).

<sup>154</sup> *Id.*

<sup>155</sup> Lee, *supra* note 149, at 71.

<sup>156</sup> Jose “Pepe” Mujica y el Acuerdo con la Argentina: “No es un Día Histórico, es un Día de la Historieta,” INFOBAE (July 29, 2010), <http://www.infobae.com/2010/07/29/528682-jose-pepe-mujica-y-el-acuerdo-la-argentina-no-es-un-dia-historico-es-un-dia-historieta> [<https://perma.cc/732V-EW6T>].

Another field of environmental protection in which NGOs have played a major role is in the Danube Delta, a critical portion of the Danube River Basin and the largest wetland in Europe.<sup>157</sup> In 2004, in order to gain access to the Black Sea for shipping and trade purposes, the Ukrainian government began constructing the Danube-Black Sea Canal.<sup>158</sup> Conducting the planning phase of the operation in secret, the Ukrainian government eschewed public input and expedited the process to avoid any external obstructions.<sup>159</sup> Although it was economically lucrative, the environmental impact was incalculable.<sup>160</sup> Though broad in scope, the primary danger of the plan was the loss of biodiversity in the region.<sup>161</sup> The loss of biodiversity would not only affect Ukrainian territories, but also numerous other countries in Europe, Asia, and Africa.<sup>162</sup> Other negative impacts included pollution from the dredging and shipping, lower water levels in surrounding wetlands, and economic losses to the local fishing industry.<sup>163</sup>

In opposition to the continued construction of the Canal, Ecopravo-Lviv (“EPL”), an NGO, filed complaints against the Ukrainian government under the Espoo Convention, the Aarhus Convention, the Danube River Protection Convention, and the Bonn Convention on the Conservation of Migratory Species.<sup>164</sup> The Espoo Convention is particularly relevant, as it seeks to “prevent, reduce, and control significant adverse transboundary environmental impacts from proposed activities.”<sup>165</sup> This convention requires that parties conduct an environmental impact assessment (“EIA”) prior to commencing any project likely to have an adverse transboundary impact.<sup>166</sup> Additionally, it requires parties to allow members of the public who will be affected to participate in the EIA, and to submit EIA documentation to all parties who will be affected.<sup>167</sup> EPL alleged in its complaint that Ukraine failed to abide by these, and other,

---

<sup>157</sup> Tanya D. Sobol, Note, *An NGO’s Fight to Save Ukraine’s Danube Delta: The Case for Granting Nongovernmental Organizations Formal Powers of Enforcement*, 17 *COLO. J. INT’L. ENVTL. L. & POL’Y* 123, 124 (2006).

<sup>158</sup> *Id.* at 145–46.

<sup>159</sup> *Id.* at 145; Vladimir Boreiko, *Danube-Black Sea Canal Forced to Circumvent Reserve*, BIODIVERSITY CONSERVATION CTR., <http://www.biodiversity.ru/eng/publications/zpnp/archive/n39/canal.html> [<https://perma.cc/X7AV-U83G>].

<sup>160</sup> Sobol, *supra* note 157, at 146.

<sup>161</sup> *Id.*; Boreiko, *supra* note 159.

<sup>162</sup> Sobol, *supra* note 157, at 147.

<sup>163</sup> *Id.* at 147–48. Experts from the Institute of Geological Studies of the National Academy of Sciences of Ukraine confirmed the presence of pollutants, pesticides, and oil products in the bottom sediments of the River. *Id.* Accordingly, the dredging activities necessary for the construction of the canal would reintroduce these contaminants into the water column with predictably devastating results. *Id.*

<sup>164</sup> *Id.* at 150.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 151–52.

<sup>167</sup> *Id.* at 152.

requirements, failing to consult with affected parties concerning the trans-boundary environmental impacts.<sup>168</sup> Unfortunately, despite the timely filing of its complaint, the Implementation Committee of the Espoo Convention was unable to consider EPL's complaint because to procedural prohibitions against hearing complaints brought by NGOs.<sup>169</sup>

Although Romania filed similar complaints against Ukraine regarding the environmental impact of the Canal, they did not do so until after construction on the Canal began.<sup>170</sup> Although Romania, as a nation-state, has the requisite standing to file a complaint under the Espoo Convention, the EPL was better informed of the situation and therefore in a better position to contest the canal.<sup>171</sup> Additionally, EPL lacks the bureaucratic hurdles that the Romanian government must jump over in order to take action, and are therefore better suited to file these kinds of complaints.<sup>172</sup>

Perhaps the most direct analogs to Sea Shepherd are outfits like the International Anti-Poaching Foundation ("IAPF"). Formed in 2009, the IAPF is a nonprofit organization registered in Australia, South Africa, the United States, and Zimbabwe that strives to protect endangered wildlife.<sup>173</sup> The foundation focuses on protecting "high-target" animals—such as elephants and rhinos—that are targeted by increasingly sophisticated poachers.<sup>174</sup> There has been a sharp upsurge in poaching in the past two decades.<sup>175</sup> Sources such as the World Wildlife Fund believe the reason for this increase in demand is a result of a growing middle class in Vietnam that not only sees rhino horn as a status symbol, but also as a panacea of sorts, imbued with mythical properties that can cure cancer, heart conditions, and even hangovers.<sup>176</sup>

Although Zimbabwe has anti-poaching rangers of its own, they are not a focal point of the current government.<sup>177</sup> The Zimbabwean government is still recovering from a recent financial collapse, and economic sanctions from both the United States and the United Nations have stymied government funding of

<sup>168</sup> *Id.* at 151–52.

<sup>169</sup> *Id.* at 153.

<sup>170</sup> *Id.* at 149.

<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

<sup>173</sup> Bryan Schatz, *Interview with Damien Mander of the International Anti-Poaching Foundation: "We Shoot Armed Poachers on Sight,"* PACSAFE: BLOG (Apr. 16, 2012), <https://www.pacsafe.com/blog/interview-with-damien-mander-of-the-international-anti-poaching-foundation-we-shoot-armed-poachers-on-sight/> [<https://perma.cc/4ZG8-WYHV>].

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Sune Engel Rasmussen, *Meet the Australian Ex-Commando Saving Zimbabwe's Rhinos*, TIME (Feb. 22, 2014), <http://world.time.com/2014/02/22/meet-the-australian-ex-commando-saving-zimbabwes-rhinos/> [<https://perma.cc/3WC2-6T9V>] ("Rhino horn trade has morphed into a social status, a badge of wealth and social connections . . . [h]orns sell for an estimated \$60,000 per kilo on the black market. By comparison, ivory sells for between \$500 and \$1,000 per kilo, gold for \$40,000.")

<sup>177</sup> *Id.*

the wildlife sector.<sup>178</sup> Consequently, this instability left a void that created a valuable opportunity for poachers to hunt in some of the country's best preservations with relatively little opposition.<sup>179</sup>

Due to strained diplomatic relations between the United States and the United Nations and Zimbabwe, as well as little governmental funding, Zimbabwe's best hope for preserving its endangered big-game has proven to be an NGO.<sup>180</sup> The IAPF provides direct action to combat poaching, conservation security plans, wildlife crime information systems, and ranger training.<sup>181</sup> Although Zimbabwe has a shoot-on-site policy in place for armed poachers, the IAPF trains its rangers in the proper use of force—the minimum force necessary to deter and capture poachers.<sup>182</sup> At its main area of operations, the Stanley & Livingstone Private Game Preserve, no black rhinos under the guard of the IAPF have been killed since 2010.<sup>183</sup> By contrast, the closest population of black rhinos in Hwange National Park, roughly one hundred kilometers away, has dwindled from 176 down to only a few in essentially the same time span due to poaching.<sup>184</sup>

### C. United States Recognition of NGOs

Although it may be argued that the above examples highlight only enforcement powers granted by struggling national governments, the United States Congress recently passed a bill advocating for independent enforcement powers to protect wildlife on an international level.<sup>185</sup> The Global Anti-Poaching Act (“GAPA”), introduced in May 2015 by Representative Edward R. Royce of California and enacted into law in October 2016, primarily endeavors to ease the process of prosecuting wildlife trafficking cases and increase the accompanying penalties for poaching.<sup>186</sup> Additionally, the bill pro-

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *About the IAPF*, INT’L ANTI-POACHING FOUND., <http://www.iapf.org/index.php/about> [<https://perma.cc/M9AJ-8DQZ>].

<sup>182</sup> Rasmussen, *supra* note 176; Tisha Wardlow, *Desperate Times, Desperate Measures*, FIGHT FOR RHINOS (Aug. 10, 2014), <https://fightforrhinos.com/2014/08/10/desperate-times-desperate-measures/> [<https://perma.cc/9M7R-9APL>].

<sup>183</sup> Rasmussen, *supra* note 176; *Stanley & Livingstone Private Game Reserve*, INT’L ANTI-POACHING FOUND., <http://www.iapf.org/index.php/ourwork/campaigns/snl> [<https://perma.cc/YJ6H-84SY>].

<sup>184</sup> *Stanley & Livingstone Private Game Reserve*, *supra* note 183.

<sup>185</sup> Eliminate, Neutralize, and Disrupt Wildlife Trafficking Act of 2016, Pub. L. No. 114-231, 130 Stat. 949, 951 (2016) (to be codified at 16 U.S.C. §§ 7601, 7611–7612, 7621, 7631, 7641–7644, 18 U.S.C. § 1956, 22 U.S.C. § 1978).

<sup>186</sup> 16 U.S.C.A § 7611 (West Supp. 2017); *Cecil The Lion Fallout: US House Passes Anti-Poaching Bill*, ZIMBABWE NEWS NOW (Nov. 3, 2015) [hereinafter *U.S. Passes Anti-Poaching Bill*], <http://www.zimnewsnow.com/node/108> [<https://perma.cc/AHU3-SYSM>].

vides further resources and tools to aid the fight against this global crisis.<sup>187</sup> Most relevant to the issue at hand is Title IV of GAPA, which promotes supporting the professionalization of the wildlife enforcement sector.<sup>188</sup> By providing greater resources for enforcement of wildlife laws, the United States is, in effect, recognizing the unique efficacy of combined governmental and non-governmental efforts.<sup>189</sup>

## V. USING NGOS TO ENFORCE INTERNATIONAL WHALING REGULATIONS

In order for Non-Governmental Organization (NGO) enforcement to truly be effective, the International Whaling Commission (“IWC”) needs to amend the International Convention for the Regulation of Whaling (“ICRW”) to add a provision comparable to paragraph 21 of the United Nations World Charter for Nature, which allows for enforcement of international environmental legal protections by NGOs, and even other private actors.<sup>190</sup> Explicitly providing for enforcement by a specified class of NGOs, such an amendment would circumvent the various procedural and diplomatic hurdles preventing the United Nations Security Council from compelling Japan to obey the International Court of Justice ruling.<sup>191</sup> Additionally, further legitimizing the enforcement role currently filled by the Sea Shepherd Conservation Society (“Sea Shepherd”) may give rise to parallel organizations, increasing the efficacy of its mission and easing the financial burden they shoulder.<sup>192</sup>

Given the potentially dangerous nature of Sea Shepherd’s tactics this amendment would need to contain safety provisions to make it palatable to the members of the IWC.<sup>193</sup> Such provisions would need to specify what types of tactics are allowable, and those that are inordinately dangerous would need to be expressly prohibited.<sup>194</sup> Legitimizing certain tactics while outlawing others would likely result in Sea Shepherd using safer tactics.<sup>195</sup>

<sup>187</sup> *U.S. House Passes Anti-Poaching Bill*, supra note 186.

<sup>188</sup> See 16 U.S.C.A §§ 7641(a), 7642.

<sup>189</sup> See 16 U.S.C.A §§ 7641(a), 7642 (reasoning logically that passing this piece of anti-poaching legislation into law indicates recognition of poaching as a growing problem).

<sup>190</sup> See World Charter for Nature, supra note 56, at ¶ 21.

<sup>191</sup> See *Security Council FAQ*, supra note 127 (noting that enforcing the ICJ Ruling against Japan does not meet the U.N. Security Council’s standard for a legally cognizable threat).

<sup>192</sup> Sobol, supra note 157, at 153.

<sup>193</sup> See *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y (Sea Shepherd I)*, 860 F. Supp. 2d 1216, 1235 (W.D. Wash. 2012), rev’d, 708 F.3d 1099 (9th Cir. 2013), amended and superseded by 725 F.3d 940 (9th Cir. 2013) (describing generally Sea Shepherd’s aggressive tactics).

<sup>194</sup> See *id.* at 1233 (citing *United States v. Hasan*, 757 F. Supp. 2d 599, 623 (E.D. Va. 2010) (noting that the United States District Court for the Eastern District of Virginia held that Sea Shepherd could not commit violent acts for private ends because that would constitute piracy).

<sup>195</sup> *Sea Shepherd I*, 860 F. Supp. at 1233 (noting that Sea Shepherd does not target people, and is generally not interested in tactics that would likely be illegal under the proposed rule).

Although some may argue that providing an NGO such as Sea Shepherd with the legal ammunition necessary to continue its operations endangers the lives of whalers, in reality, it protects them.<sup>196</sup> By legitimizing NGO enforcement of the whaling moratorium, the ICRW can regulate a class of actors that will presumably continue to operate regardless of any legal backing.<sup>197</sup> The proposed amendment can prohibit enforcement until whalers have reached a newly determined, small quota backed by independent research that allows for the culling of a small number of whales per year.<sup>198</sup> After reaching this point, whalers would need to cease operations or deal with the enforcing NGO.<sup>199</sup> Such a provision would protect whalers from the NGOs while gathering the allowable number of whales for legitimate research purposes, thereby preventing an environmentally dangerous level of commercial slaughter.<sup>200</sup>

Additionally, legitimizing the operations of Sea Shepherd could introduce an increased level of accountability into its operations.<sup>201</sup> With the rising influence and power of NGOs over the past few decades, the issue of their accountability has been illuminated.<sup>202</sup> As some proponents have articulated, the missions and objectives of NGOs are rarely, if ever, reflective of a broad societal acceptance, rather they are a subjective stance on what is right, and what is wrong.<sup>203</sup> Accordingly, for the legitimization of an NGO by an international body such as the United Nations to be widely accepted, certain measures must be introduced to compel some level of accountability in exchange for increased power.<sup>204</sup>

Indeed, a formal structure allowing for NGOs to engage with the United Nations is already in place.<sup>205</sup> Article 71 of the United Nations Charter grants

---

<sup>196</sup> LUCIA OLIVIA SMITH & KATHERINE KLASS, ECOLOGIC INST., NETWORKS AND NGOS RELEVANT TO FIGHTING ENVIRONMENTAL CRIME 21 (2014), [http://efface.eu/sites/default/files/2.EFFACE\\_Networks%20and%20NGOs%20Relevant%20to%20Fighting%20Environmental%20Crime.pdf](http://efface.eu/sites/default/files/2.EFFACE_Networks%20and%20NGOs%20Relevant%20to%20Fighting%20Environmental%20Crime.pdf) [<https://perma.cc/4PV2-NXVJ>]. The Royal Society for the Prevention of Cruelty to Animals (“RSPCA”), an organization based out of the United Kingdom, is an NGO that enjoys legal status to collect evidence, question witnesses, and assist in the prosecution of animal abuse cases. *Id.* The grant of this legal status both empowers the RSPCA, while curtailing the perpetration of extralegal methods that they could otherwise employ. *Id.*

<sup>197</sup> *The Whales’ Navy*, *supra* note 50.

<sup>198</sup> *History of Japanese Whaling*, *supra* note 19.

<sup>199</sup> *Sea Shepherd I*, 860 F. Supp. 2d at 1235.

<sup>200</sup> See 16 U.S.C.A. § 7611 (West Supp. 2017).

<sup>201</sup> Jane Nelson, *The Operation of Non-Governmental Organizations (NGOs) in a World of Corporate and Other Codes of Conduct* 23 (Corp. Soc. Responsibility Initiative, John F. Kennedy Sch. of Gov’t, Harvard Univ., Working Paper No. 34, 2007), [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_34\\_nelson.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_34_nelson.pdf) [<https://perma.cc/2UGG-L4M9>].

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT’L L.J. 243, 247 (2006).

NGOs consultative status with the U.N. Economic and Social Council (“ECOSOC”), allowing ECOSOC to obtain advice or information from NGOs that have specific expertise in relevant fields.<sup>206</sup> Indeed, the role of NGOs in the international arena is increasing.<sup>207</sup> It is likely that this increase is a result of several factors, including the ability of an NGO to specialize in a narrow field and develop a deep expertise, their typical close proximity to the issue and the people most effected by that issue, and largely the growth of international law itself, necessitating special committees and organizations that inherently cannot be controlled by one nation.<sup>208</sup> Accordingly, there is precedent for NGO engagement in United Nations affairs, and depending on the nature of its provisions, an amendment to the ICRW granting enforcement power to certain NGOs would hopefully not experience substantial opposition.<sup>209</sup>

If such an amendment did experience substantial opposition, it would most likely be the result of fears that empowered NGOs could undermine state sovereignty.<sup>210</sup> Although allowing NGOs the limited ability to enforce international law could be seen as infringing on the sovereignty of nations, it would not be much more of an infringement than existing, widely accepted international regulations.<sup>211</sup> The imposition of international environmental laws, in particular those pertaining to the prevention of transboundary harm, have already eroded the idea that nations can be completely independent actors, free of responsibility to other nations.<sup>212</sup>

---

<sup>206</sup> U.N. Charter art. 71; Pearson, *supra* note 205, at 247.

<sup>207</sup> See Kerstin Martens, *The Role of NGOs in the UNESCO System*, 2 TRANSNAT’L ASS’NS 68, 69–70 (1999) (highlighting the increasing number of NGOs that collaborate either regularly with UNESCO or on an ad hoc basis).

<sup>208</sup> See Sobol, *supra* note 157, at 137.

<sup>209</sup> See *id.* at 150–51 (demonstrating the major role an NGO can play in the international legal system by enforcing international legal obligations, specifically by describing an example in which the NGO Ecopravo-Lviv filed a complaint against Ukraine after the country violated the Espoo convention, specifically the Espoo convention requirement to conduct an environmental impact assessment on a navigation canal in accordance with international standards).

<sup>210</sup> *Id.* at 138.

<sup>211</sup> *Kyoto Protocol*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) [<https://perma.cc/DL5G-5KUJ>] (“The Kyoto Protocol is an international agreement linked to the United Nations Framework Convention on Climate Change, which commits its Parties by setting internationally binding emission reduction targets.”); *What Is CITES?*, CONVENTION ON INT’L TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, <https://www.cites.org/eng/disc/what.php> [<https://perma.cc/L7TL-MGJS>] (“[T]he Convention on International Trade in Endangered Species of Wild Fauna and Flora . . . is an international agreement between governments. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival.”). The Convention on International Trade in Endangered species of Wild Fauna and Flora requires that parties to the agreement implement its provisions at a national level. *What Is CITES?*, *supra*.

<sup>212</sup> See Sobol, *supra* note 157, at 150.

The strongest opponent of such an amendment would undoubtedly be Japan.<sup>213</sup> Openly defying a ruling by the International Court of Justice and continuing their whaling campaign into the 2015–2016 season, Japan has made clear their stance on the matter.<sup>214</sup> In order to oppose an amendment to the ICRW, Japan would need to file an objection to said amendment within ninety-days of notification by the commission.<sup>215</sup> If they do this successfully, then the effective date of the amendment is postponed to all contracting governments for ninety days.<sup>216</sup> After this second period, the amendment becomes effective to all contracting governments except any that objected, and does not become effective to these latter governments until they withdraw their objection.<sup>217</sup> Therefore, although Japan could theoretically maintain their objection to this amendment indefinitely, the eighty-eight other contracting nations will be notified of their objection.<sup>218</sup> Accordingly, international pressure on Japan to either cease their whaling campaign or withdraw their objection would increase, as Japan would be defying not only a widely accepted amendment, but also the ICRW itself, in addition to the International Court of Justice.<sup>219</sup> As an NGO such as Sea Shepherd Australia would be the body enforcing the ICRW, no sovereign nation in particular would need to jeopardize relations with Japan in order for the amendment to have teeth.<sup>220</sup> Finally, with whale oil no longer needed for household purposes, whale meat no longer a staple protein of the Japanese diet, and increasing diplomatic friction with the international community over the matter, a cost-benefit analysis of continuing to whale certainly weighs against it.<sup>221</sup>

---

<sup>213</sup> See *Japanese Whaling Company Found Guilty*, *supra* note 49 (noting a recent fine levied against Japan for its defiance of an ICJ ruling and Japan's plan to continue defying the ruling).

<sup>214</sup> *Id.*

<sup>215</sup> *The International Convention for the Regulation of Whaling (ICRW)*, WHALE & DOLPHIN CONSERVATION, <http://us.whales.org/issues/in-depth/international-convention-for-regulation-of-whaling-icrw> [<https://perma.cc/QF65-2BX3>].

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*; *The International Whaling Commission*, *supra* note 39 (noting that there are currently eighty-eight member nations in the ICRW).

<sup>219</sup> See *Japanese Whaling Company Found Guilty*, *supra* note 49 (describing Japan's defiance of the International Court of Justice).

<sup>220</sup> Home, SEA SHEPHERD AUSTRALIA, <http://www.seashepherd.org.au/> [<https://perma.cc/JA69-Q5DX>] (stating that "Sea Shepherd is the world's leading direct-action ocean conservation [organization]"). It is possible, given this experience in leading ocean conservation, that Sea Shepherd could become an enforcer of the ICRW in the future. See *id.*

<sup>221</sup> See Hugh Cortazzi, *Japan Has Little to Gain by Resuming Its Whale Hunt*, JAPAN TIMES (Dec. 7, 2015), <http://www.japantimes.co.jp/opinion/2015/12/07/commentary/japan-commentary/japan-has-little-to-gain-by-resuming-its-whale-hunt/> [<https://perma.cc/G6DZ-7LXW>].

## CONCLUSION

Following technological innovation in the early 1900s, the hunting of whales reached a breaking point after which the depleted stock required international attention. Although whaling nations reached an agreement culminating in a global moratorium on commercial whaling, the exceptions that were carved out continue to give rise to problems today. Although these problems are international in nature, inter-governmental regulation has proven insufficient as a means of enforcement, and national jurisdictions do not extend to whaling grounds. For these reasons, an amendment to the ICRW authorizing independent enforcement of the moratorium on commercial whaling is necessary for it to be truly effective.