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Yearbook of Polar Law

Regulating the Whale Wars: Freedom of Protest, Navigational Safety and the Law of the Sea in the Polar Regions

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Abstract

In recent years, strong concerns have been raised over the increasing numbers of disorderly protests and aggressive activism at sea. Maritime protests raise difficult – and understudied – legal questions concerning the boundaries between the legitimate application of rights of freedom of speech and assembly on the one hand, and the need to ensure safety of navigation on the other. This article examines the legal arguments in favour of maritime protest as well as national responses to it, in the context of two Polar case studies. Firstly, this article appraises the confrontational activism of the Sea Shepherd Conservation Society in its anti-whaling campaign in Antarctica, and the problematic application of anti-piracy legislation to more aggressive campaign groups. Secondly, this article examines the position in relation to oil platforms, as exemplified by the Prirazlomnaya dispute in the Arctic, as well as controversial developments in Antarctic jurisdictions. In so doing, this article argues that the protection accorded to direct action protests at sea is considerably more limited than many campaign groups might appreciate.

Keywords

protest – freedom of speech – navigation – piracy – offshore installations

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I Introduction

The exercise of a right to peaceful public protest remains a regular feature of civic life and, as has been entrenched by national and international courts, constitutes a significant component of a robust and tolerant democracy.[1] A substantial proportion of modern-day protest activities engage environmental considerations, ranging from small-scale dissent against decisions affecting local communities, to high-profile actions addressing pressing issues of global concern, such as climate change, nuclear testing or biodiversity loss. While freedom of assembly and expression have long been considered universal human rights, states have nonetheless proved markedly less tolerant of direct action protests, which have conversely grown considerably more common over the past twenty years. Direct action, which may be distinguished from more peaceful forms of campaigning, typically involves impeding efforts to undertake particular operations, disrupting commercial activities, harassing employees of the target venture or occupying and even damaging property. As an occupational hazard, direct action campaigners frequently run the gauntlet of criminal sanctions,[2] and increasingly, civil actions, restitutionary claims and other restrictive machinations of private rights.[3]

As exemplified by the boarding of the *Prirazlomnaya* oil platform by Greenpeace activists in September 2013, direct action at sea can provide a dramatic and effective means of securing widespread media coverage and focusing sustained global attention upon a particular cause. Indeed, the marine environment has long provided an arena for protests and direct action campaigns. Blockading ports remains a popular tactic for disgruntled coastal interests and environmental campaigners alike, while activists also have a long history of

1 On this issue generally see Mead, D. *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era*. Oxford: Hart, 2010, 57–117.

2 On the array of criminal offences that may be triggered in England and Wales in the context of environmental campaigning see Tromans, S., and C. Thomann. "Environmental Protest and the Law." *Journal of Planning and Environmental Law* (2003): 1367–1373.

3 On recent (UK-based) examples of this trend see Finchett-Maddock, L. "Responding to the Private Regulation of Dissent: Climate Change Action, Popular Justice and the Right to Protest." *Journal of Environmental Law* 25 (2013): 293 (appraising issues raised by a civil claim – which was ultimately abandoned on public relations grounds – arising from the occupation of a power station); and Caddell, R. "Militant Environmental Protest and Maritime Torts." *Journal of International Maritime Law* 19 (2013): 101 (analysing a successful compensation action for the vandalism of fishing nets by environmental activists).

attempting to occupy structures at sea and of harassing vessels that are considered to have committed environmental infractions or to pose a wider risk to ocean ecology. In recent years, an increasing number of prominent direct action campaigns have been waged within the Polar Regions. In addition to protests against oil and gas exploration in the Arctic, strong concerns have also been raised by the actions of anti-whaling activists in the Antarctic. Since 2005 the Sea Shepherd Conservation Society ("Sea Shepherd"), which has gained a degree of international notoriety for its uncompromising tactics, has sought to harass Japanese vessels undertaking lethal scientific whaling in the Southern Ocean. Since 2007, footage from these campaigns has been broadcast as a popular television series, with the dramatic clashes between the protest and whaling vessels depicted in *Whale Wars* attracting a significant global audience. However, such incidents have increasingly raised fears, within both domestic and international fora, over shipping safety, the health and welfare of activists and their targets and, indeed, of the ironic potential for serious ecological damage resulting from the accidental pollution of sensitive wilderness areas. While all forms of confrontational protest at sea involve an inherent degree of risk, this is amplified within the Polar Regions, which present hazardous nautical conditions and an isolated and inhospitable environment, within which the prospects for successful intervention in the event of a human or ecological casualty are decidedly limited.

In recent months, a series of judicial and legislative developments have sought to further address the distinct problems raised by disorderly protest at sea in particular contexts. This has raised the possibility that violent confrontations may ultimately fall foul of piracy provisions in particular jurisdictions, while a degree of uncertainty pervades the current legislative response to protest actions concerning the hydrocarbon industry. Accordingly, this article seeks to evaluate the current challenges inherent in balancing entitlements to freedom of expression and assembly within the global oceans with the necessary limitations placed upon these rights in the interests of ensuring safe public navigation. To this end, this article first advances an appraisal of the powers of flag and coastal states to claim and restrain such activities, before evaluating the extent to which a discernible right to maritime protest has been recognised under pertinent instruments. This article then considers the specific issues raised by anti-whaling protests within Polar waters and the limitations of current legal approaches to address these concerns. Finally, there follows an appraisal of the position in relation to protests against oil and gas installations at sea and the evolving state practice of certain Polar jurisdictions.

II Freedom of Maritime Protest and the Law of the Sea

Despite the relative prevalence of campaigning at sea and in near-shore areas, until recently few specific principles had emerged to regulate maritime protest. A degree of clarity concerning the acceptable limits of nautical conduct has been advanced through the UN Convention on the Law of the Sea 1982,[4] the so-called 'constitution for the oceans'. Meanwhile, national constitutions and international human rights instruments have consolidated a strong endorsement for a right to demonstrate, albeit with evolving boundaries as to the appropriate exercise of this vital civil liberty. Multilateral bodies have also established a broad recognition of the co-existence of the fundamental interests of safety of navigation and freedom of speech at sea. Nevertheless, state practice concerning maritime protest has been somewhat inconsistent and, to a considerable extent, the balance between promoting free expression, ensuring security of private interests and property and safeguarding public safety remains firmly a matter for national interpretation.

As a preliminary point, it should be observed that maritime protest actions have tended to fall into one of two distinct categories of behaviour. In the first instance, protests can be essentially passive or symbolic in nature, a softer form of activism whereby a vessel intends to document particular activities and collect evidence of alleged wrongdoing, pursue vessels and largely confine its actions to sloganeering and non-confrontational expressions of disapproval for certain maritime behaviour. This tactic has been dubbed 'bearing witness' by Greenpeace,[5] and aims to increase public awareness of environmental deterioration or the practices of a particular entity so as to mobilise public opinion, generate informed debate and, ultimately, to seek to influence a change in legislation or commercial behaviour. Alternatively, protest actions may be considerably more interventionist, prompted by a belief that passive protest is unlikely to inspire a discernible change in conduct and that private enforcement of the law is therefore necessary. In a nautical context, this may include aggressive navigation, physical attacks upon a rival interest and property damage. Self-evidently, the greater the degree of intimidation, obstruction

4 1883 UNTS 396 [hereinafter "LOSC"].

5 On the maritime application of this policy see Teulings, J. "Peaceful Protests against Whaling on the High Seas – A Human-Rights Based Approach." In *Selected Contemporary Issues in the Law of the Sea*, edited by C.R. Symmons, 221–251. Leiden: Brill, 2011, 223–25. Greenpeace activists have however been convicted of public order offences in a plethora of national courts where more robust tactics have been employed by the organisation, hence it has a history of using both models of activism.

and violence associated with protest activities, the less likely that legal protection will be forthcoming for such conduct, leaving direct action campaigners operating at the margins of free speech laws. Nevertheless, despite fundamental differences in the ethos and intentions of campaign groups, the distinction between the two forms of activism "is, however, not always clear cut and to a large extent turns around the amount of sea room left to the target activity or ship in view of the sizes, number and disposition of the protest vessels and the surrounding geography."[6]

1 *Freedom of Navigation, Protest Activism and the Law of the Sea*

The capacity to engage in protest actions within the marine environment is closely bound to the concept of freedom of navigation, which remains a fundamental tenet of the modern law of the sea. Although the LOSC prescribes strong protection for this privilege, it should be observed that freedom of navigation is by no means absolute and must be weighed against the interests of the coastal state, where navigation occurs within its jurisdictional waters, and against those of other states, where navigation occurs upon the high seas. The LOSC adopts a zonal approach to ocean governance, with states exercising stronger measures of control over their coastal waters. Accordingly, protest activities have generally – although by no means always – tended to occur within areas for which navigational freedoms are subject to lesser constraints under national law.

Within internal waters, which lie on the landward side of the national baseline of a coastal state,[7] and typically include ports, canals and navigable rivers, a right to protest is established at the discretion of the national authorities. Internal waters are subject to the exclusive sovereignty of the coastal state in question.[8] Constraints on protest activities may therefore be as restrictive as national law and the wider application of overarching human rights norms will permit. Protest actions in these waters will typically be against shipments of a particular cargo deemed objectionable (such as hazardous substances, waste or armaments) or certain practices in near-shore areas, such as sealing or the controversial drive hunts of whales and dolphins conducted by Japan and the Faeroe Islands. A coastal state can bar foreign protestors from these waters, since access to ports is a privilege conferred at the discretion of the national

6 Plant, G. "International Law and Direct Action Protests at Sea: Twenty Years On." *Netherlands Yearbook of International Law* 33 (2002): 77.

7 LOSC, *supra* note 4, Article 8(1)

8 Ibid., Article 2(1).

authorities, rather than an absolute right.[9] No fundamental right to navigation for the purposes of campaigning in internal waters can be demanded under the LOSC, although many coastal states are tolerant of a degree of dissent in these areas and have made appropriate accommodations for protestors. For instance, in 2013 a series of safety zones were established on the Columbia and Willamette rivers by the US authorities in respect of an on-going labour dispute concerning grain shipments. The zones were established to ensure the safety of protestors lacking local nautical knowledge, due to the hazardous currents on the rivers in question.[10] Significantly, they were applicable to all river users and expressly recognised the right to free speech as advanced through the First Amendment to the US Constitution.

A clear basis to restrict protest activity also exists in relation to the territorial sea, which extends up to 12 nautical miles from the national baseline.[11] Article 2(1) is also applicable to these waters, hence the sovereignty of the coastal state again applies. Vessels of all nationalities enjoy innocent passage in these waters,[12] although this privilege is unlikely to extend to all cases of protest-related navigation. Indeed, passage itself must be 'continuous and expeditious' and, while stopping is permitted, this is only tolerated for acts 'incidental to navigation'.[13] A vessel is not technically in 'passage' unless it fulfils these criteria and to navigate otherwise constitutes an abuse of access privileges. Moreover, even if a protest vessel is in passage, it may not be acting innocently. 'Innocence' is defined under Article 19(1) as an act that is "not prejudicial to the peace, good order or security of the coastal state." Article 19(2) outlines a series of activities that are not considered innocent, establishing a broad discretion for coastal states to eject protestors from these waters. Non-innocent passage occurs *inter alia* where there is a threat of force,[14] which may be construed from aggressive navigation, or "any act of propaganda aimed at affecting the defence or security of the coastal state."[15] There appears to be no basis for restricting the notion of 'propaganda' to that espoused solely by state agents,[16] hence NGOs and other aggrieved private interests could con-

9 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *United States*) 1986 ICJ Rep 14, at 111 (at para. 213).

10 *Federal Register*: Volume 78, Number 229 (Wednesday, November 27, 2013).

11 LOSC, *supra* note 4, Article 3.

12 Ibid., Article 17.

13 Ibid., Article 18(2).

14 Ibid., Article 19(2)(a).

15 Ibid., Article 19(2)(d).

16 Plant, *supra* note 6, at 91.

ceivably fall within this provision. In any event, an expansive sweep-up clause is provided under Article 19(2)(l), which allows the coastal state to consider "any other activity not having a direct bearing on passage" to be non-innocent, thereby establishing a clear jurisdictional basis to proceed against aggressive campaigning in these waters.

If a coastal state does tolerate protest activities within its territorial sea, it may adopt laws and regulations consistent with general international law and the LOSC to regulate innocent passage to maintain, *inter alia*, the "safety of navigation and the regulation of maritime traffic."[17] This may include, for example, designating particular areas within which protest actions are to occur, for which a failure to comply could be viewed as non-innocent passage. In extreme cases, where disorder associated with protest actions is sufficient to imperil the security of the coastal state, a temporary closure of the territorial sea may be appropriate.[18] Nevertheless, as observed below, it appears that denying access to these waters to protest vessels without any evidence of violent intent or wrongdoing is unlikely to be endorsed by an international court.

A considerably stronger degree of protection is accorded to activities occurring seawards of territorial waters. Under Article 87(1) LOSC, freedom of navigation on the high seas is consolidated as a fundamental principle of the law of the sea. Likewise, freedom of overflight is also recognised, which is to the benefit of a number of professional campaign groups such as Greenpeace and Sea Shepherd, which routinely deploy helicopters and light aircraft to assist in their activities.[19] The LOSC prescribes no basis for asserting that a vessel or aircraft cannot engage in protest activities while exercising its freedom of navigation or overflight; unilateral measures to restrict the movement of vessels upon the high seas are generally considered to be of dubious legality.[20] The only restrictions placed upon vessels (or aircraft) by the LOSC are to exercise such freedoms in a manner that pays 'due regard' to the rights of other states and to activities taking place within areas under the jurisdiction of the

17 LOSC, *supra* note 4, Article 21(1)(a).

18 Ibid., Article 25(3).

19 A right of overflight is not recognised in respect of the territorial sea, however: under Article 19(2)(e) the "launching, landing or taking on board of any aircraft" may be considered by the coastal state to be non-innocent passage.

20 This appears to be the case even where there are compelling safety reasons for restricting vessels from particular areas, exemplified by France's designation of high seas exclusion zones during its controversial nuclear testing programme at sea: Plant, G. "Civilian Protest Vessels and the Law of the Sea." *Netherlands Yearbook of International Law* 14 (1983): 146. The legality of the French tests – and thereby the legitimacy of the safety zones – has also been strongly questioned.

International Seabed Authority.[21] The notion of 'due regard' remains one of the more vague elements of the 1982 Convention, although it is self-evident that protest actions that obstruct the passage of another vessel, cause collisions or provoke other physical altercations between ships are less likely to qualify on this basis. Indeed, there appears to be near universal support for a right to non-obstructive protest at sea, including pursuing vessels, monitoring their activity and collecting evidence of alleged wrongdoing, with objections having only once been raised – unsuccessfully – in 1967.[22]

On the high seas, vessels are subject to the exclusive jurisdiction of the flag state.[23] Therefore, in principle, should a particular state seek to place restrictions on the protest activities of its nationally-registered vessels it is technically free to do so – subject again to the compatibility of this approach with pertinent national and international laws addressing freedom of speech and assembly. For instance, the Netherlands has communicated informal rules of engagement concerning the Sea Shepherd vessels flagged to its national registry. Aspiring protestors must then determine whether the balance of these conditions and the protection afforded by a particular registry justify re-flagging the vessel to another, less restrictive, jurisdiction.

The exclusive nature of flag state jurisdiction means that the flag state of the target vessel (assuming that it carries different nationality) is generally unable to take enforcement action beyond reporting the alleged delinquency to the appropriate authorities in the flag state of the protest vessel and seeking to apply diplomatic pressure thereto. This is, however, subject to three key exceptions in the case of protestors. Firstly, if the protest vessel can be considered to have committed an act of piracy, universal jurisdiction applies and the aggrieved flag state has a basis for the exercise of criminal jurisdiction against the vessel in question. However, as noted in section III below, despite a small measure of domestic judicial authority to the contrary, states have proved deeply reluctant to proceed on this basis. Secondly, as illustrated vividly by the *Mavi Marmara* incident in 2010, where a protest vessel attempts to breach a legitimate naval blockade, the state in question is empowered to take defensive action. Here, a purported aid convey was met with a robust military response when it took the ill-advised decision to navigate towards an Israeli blockade of the Gaza Strip.

21 LOSC, *supra* note 4, Article 87(2).

22 Plant, *supra* note 20, at 153. The USSR had taken umbrage against the pursuit of a vessel suspected by campaigners of abusing its annual whaling quota, although it now appears to be a settled principle of customary international law that the 'mere shadowing' of a vessel by protestors on the high seas is permissible: ibid.

23 LOSC, *supra* note 4, Article 94.

The flotilla of vessels was intercepted and attacked on the high seas, resulting in a number of fatalities, serious injuries and the mistreatment of passengers by the Israeli authorities.[24] Notwithstanding legitimate misgivings over the proportionality of the Israeli response,[25] the activists were largely considered to have suffered the consequences of a security risk that they had freely chosen to take.[26] Thirdly, and rather more prosaically, Article 109 prescribes a power of arrest for unauthorised broadcasting on the high seas. This has, however, been sporadically applied,[27] and may be considered rather anachronistic, although it remains a potential basis for action in the case of unsolicited and sustained campaign broadcasts. The misuse of nautical radio also remains a criminal misdemeanour in most coastal jurisdictions. Nevertheless, despite occasionally terse exchanges between vessels, there is little evidence of a systemic problem of abusive maritime broadcasting that would justify a wider application of this provision.

Finally, the privileges associated with freedom of navigation also apply within the Exclusive Economic Zone (EEZ),[28] which extends up to 200 nautical miles from the national baseline.[29] These are also subject to the requirement of 'due regard' associated with the high seas, as well as compliance with rules and regulations adopted by the coastal state.[30] Again, this would provide a basis for coastal states to adopt restrictions on protest activities in line with powers prescribed under the LOSC in respect of these waters. Hence a coastal state could take a series of limited measures to address marine environmental considerations and to protect artificial installations and the conduct of marine scientific research in these waters.[31] This is most likely to arise in the context of

24 *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, (New York: United Nations, 2011), at para. 145 [hereinafter the "Palmer Report"].

25 For a searching analysis of this incident see Guilfoyle, D. "The *Mavi Marmara* Incident and Blockade in Armed Conflict." *British Yearbook of International Law* 81 (2010): 171.

26 *Palmer Report*, *supra* note 24, at para. 158 (declaring that, under the pertinent international law of blockade, "[t]here is no right within those rules to breach a lawful blockade as a right of protest. Breaching a blockade is therefore a serious step involving the risk of death or injury").

27 For an overview of the limited state practice that exists in this respect see Guilfoyle, D. *Shipping Interdiction and the Law of the Sea*. Cambridge: Cambridge University Press, 2009, 170–79.

28 LOSC, *supra* note 4, Article 58(1).

29 Ibid., Article 57.

30 Ibid., Article 58(3).

31 The extent of sovereign rights and jurisdiction over the EEZ exercisable by the coastal state is prescribed under Article 56 of the LOSC.

offshore installations, as outlined further in Part IV below, although legitimate protective measures have also been taken to defend lawful whaling activities within national EEZs against the actions of protestors.[32]

Global navigational standards are addressed through the International Maritime Organization (IMO), the UN agency responsible for marine affairs. In recent years, problems associated with protest actions at sea have been raised with increasing frequency within this forum, culminating in the elaboration of guiding principles for safe marine campaigning. Concerns over militant protest at sea were first referred to the IMO in 2001 by the International Whaling Commission (IWC), following complaints by the Japanese government over the harassment of their scientific whaling fleet by a number of activists. In view of the modest overlap between the work of the two organisations, the IMO has historically treated the IWC with limited regard,[33] and duly rebuffed these concerns on the ground that whaling "is not mainstream to the IMO's activities."[34] In 2007, these concerns were raised independently of the IWC within the IMO's Sub-Committee on Navigation, where a sweeping provision against maritime protest was initially proposed by Japan. Other participants, concerned over its implications for civil activism and the traditional tolerance of non-violent demonstrations at sea, swiftly rejected this.[35] Instead, in May 2010, the IMO adopted a Resolution formally affirming "the rights and obligations relating to legitimate and peaceful forms of demonstration, protest or confrontation" while simultaneously upholding the importance of vessel safety and condemning "any actions that intentionally imperil human life, the marine environment, or property during demonstrations, protests or confron-

32 Plant, *supra* note 20, at 152 (noting enforcement actions taken by the Spanish authorities in 1979 against anti-whaling protestors); see also the discussion below of the approach of the European Court of Human Rights in endorsing Norwegian enforcement efforts.

33 On the relationship between the IMO and IWC, which has subsequently grown somewhat closer due to the shared interest in the dangers to navigation posed by vessel-strikes of large whales see Caddell, R. "Shipping and the Conservation of Marine Biodiversity: Legal Responses to Vessel-Strikes of Marine Mammals." In *Shipping, Law and the Marine Environment in the Twenty-First Century*, edited by R. Caddell and D.R. Thomas, 89–136. London: Lawtext, 2013, 119–122.

34 *Annual Report of the IWC 2001.* Cambridge: IWC, 2002, at 30.

35 Extensive discussions were raised within the IMO's Sub-Committee on Navigation in this respect: the Japanese proposal is reproduced at NAV 53/Inf.11 and discussed by the Sub-Committee at NAV 54/25, at 29–33. On the arguments raised by this approach see Teulings, note 5 *supra*, at 230.

tations on the high seas."[36] Resolution MSC.303(87) called upon protest vessels to refrain from actions that would violate international navigational standards and for governments to establish a clear jurisdictional basis to proceed against vessels that fail to heed this appeal. Ultimately, the Resolution merely provides an additional political imperative for flag states to take disciplinary action against delinquent protest vessels upon the high seas. Through this measure, the IMO mandates compliance with global navigational rules as a minimum standard for protests at sea, a position largely reinforced within the margin of appreciation accorded to states under human rights norms to establish the boundaries of acceptable activism.

2 *The Parameters of the Right to Protest at Sea*

As established under IMO Resolution MSC.303(87), a right to engage in protest at sea is founded – if not expressly in name – by major human rights instruments and the vast majority of national constitutions and civil liberties legislation, through the rights to freedom of expression and freedom of assembly. Freedom of expression and of assembly have been recognised on an international level within the Universal Declaration of Human Rights 1948,[37] the International Covenant on Civil and Political Rights 1966,[38] and on a regional level through the European Convention on Human Rights and Fundamental Freedoms 1950,[39] the American Convention on Human Rights 1969,[40] and the African Charter on Human and Peoples' Rights 1982.[41] Rights to freedom of expression and freedom of assembly arise separately and are frequently invoked independently. However, in the context of protest actions there is a strong degree of coexistence between them and, as Teulings observes,

36 IMO Resolution MSC.303(87): Assuring Safety During Demonstrations, Protests or Confrontations on the High Seas. The IMO expressly confined the scope of its Resolution to the high seas and considered that there was no need to extend it to "territorial waters or ports, since there were other appropriate national instruments in place": NAV 55/21, at para. 9.11.

37 UN General Assembly Resolution 217AIII; UN Doc A/810 at 71; Articles 19 (freedom of expression) and 20(1) (freedom of assembly).

38 999 UNTS 171 [hereinafter "ICCPR"]; Articles 19 (freedom of expression) and 21 (freedom of assembly).

39 213 UNTS 722 [hereinafter "ECHR"]; Articles 10 (freedom of expression) and 11 (freedom of assembly).

40 1144 UNTS 123 [hereinafter "ACHR"]; Articles 13 (freedom of expression) and 15 (freedom of assembly).

41 1520 UNTS 217 [hereinafter "African Charter"]; Articles 9 (freedom of expression) and 11 (freedom of assembly).

"[c]ourts tend to choose the most appropriate legal ground to settle a dispute and refer to the other within the framework of its construction."[42] Notwithstanding the near-universal recognition of the fundamental nature of these rights, these claims are not unqualified and restrictions may be imposed upon their usage. By way of summary, restrictions on freedom of expression and assembly must generally be prescribed by law and be necessary in a democratic society as justified on the basis of public order, national security and safeguarding the legitimate rights of others. Accordingly, peaceful protest actions on land or at sea – especially those that are essentially passive or symbolic in nature – ought to fulfil these requirements in a relatively straightforward manner. Difficulties are instead encountered in ascertaining the limits of these entitlements in direct action campaigns and finding a balance with the competing rights of other constituents and the overarching public interest in safety at sea.

To date, there has been little direct consideration of the acceptable limits of protest at sea. To the extent that a transnational judiciary has examined these issues, the jurisprudence of the European Court of Human Rights may be considered particularly instructive since its voluminous case-law in comparison to other fora provides a degree of persuasive precedent, while a considerable majority of protest vessels are flagged to European registries. Article 10 ECHR guarantees freedom of expression, subject to the possibility of derogations:

> as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The exercise of freedom of assembly is subject to similar limitations imposed by the national authorities.[43] While this article cannot provide an exhaustive account of the nuances of Articles 10 and 11,[44] it may be observed that although a strong degree of support has been granted to non-violent protest, direct action has largely failed to secure the endorsement of the Court. Indeed, there has been a marked reluctance to intervene against the national margin

42 *Supra* note 5, at 236.

43 ECHR, *supra* note 39, Article 11(2).

44 For a full appraisal of these rights in the context of public protest see Mead, *supra* note 1.

of appreciation granted to states in interpreting Convention rights, except in clear cases of disproportionality.

The Court has tended to offer little protection to protest activities that are not conducted in a peaceful and unobtrusive manner. As a general principle protestors are to be welcomed, "so long as the person concerned does not himself commit any reprehensible act on such an occasion."[45] The distinction is perhaps best illustrated by reference to the leading case on direct action protests before the Court, *Steel and Others* v. *UK*.[46] Here, five separate applicants appealed against various criminal convictions incurred during the course of direct action protest activities. The first applicant had disrupted a grouse-shooting event and had prevented a hunter from shooting a bird. The second applicant had broken into a building site and impeded digging equipment in protest at construction activities in an environmentally-sensitive area. The final three applicants had distributed anti-war literature to participants at an arms conference and placarded the event. The Court found a violation of Article 10 in the latter application, given the lack of obstructive conduct, but endorsed the findings of the national courts in the other cases, ruling that "physically impeding the lawful activities of others"[47] lay outside the protection accorded to freedom of expression under the Convention.

This approach was clearly followed by the Court in, what is to date, the sole occasion upon which it has been called upon to review the protection accorded to direct action at sea. In *Drieman and Others* v. *Norway*,[48] four Greenpeace activists had sought to hinder whaling efforts within the Norwegian EEZ and were subsequently charged with a series of navigation-and fisheries-related offences. During the 1994 whaling season the *Solo*, a Greenpeace-owned vessel flagged to the Netherlands, was involved in a series of minor altercations with the *Senet*, a Norwegian whaling vessel. A series of dinghies were launched from the *Solo*, one of which managed to navigate at close-quarters to the *Senet*, forcing the harpoon vessel to change course to avoid a collision and thereby preventing it from striking an individual minke whale. This action resulted in a confiscation order for one of the dinghies, while in a separate incident the *Solo* conducted a manoeuvre that forced the *Senet* to alter course during a hunt and obscured its visibility with water cannons. The Norwegian Supreme Court reduced the fines that had been levied against the applicants by the municipal authorities, but upheld the confiscation order and rejected claims of a

45 *Ezelin* v. *France* (1992) 14 EHRR 362, at para. 53.

46 *Steel and Others* v. *UK* (1998) 20 EHRR 603.

47 Ibid., at para. 160.

48 *Drieman and Others* v. *Norway*, (App no. 33678/969) ECHR, May 4, 2000.

violation of Articles 10 and 11 ECHR. An application to the European Court of Human Rights was rejected as manifestly ill-founded, with the measures adopted by Norway considered to have been supported by relevant and sufficient reasons and underpinned by a rationale for public maritime safety that was necessary in a democratic society.[49] Moreover, the Court reiterated that national policies to restrict obstructive protest "must be allowed a wide margin of appreciation" and was accordingly "not persuaded by the applicants' argument that the proscribed conduct should be assimilated to an incident of navigation and that the discretion enjoyed by the respondent State in restraining it was accordingly circumscribed by Article 97 of the Law of the Sea Convention."[50]

Notwithstanding the broad policy objective of disincentivising disruptive protest activities, it is nonetheless a crucial element of Article 10 in a maritime context that campaigners be afforded a reasonable opportunity to express their views. Indeed, the Court in *Dreiman* explicitly noted that "the applicants were able to express and demonstrate without restraint" their opposition to Norwegian whaling throughout the entirety of their campaign without having to resort to obstructive navigation, a privilege that was fatal to their allegation of a violation of free expression.[51] The precise degree of opportunity to protest, especially in marine areas, is likely to be an issue to which a generous margin of appreciation is granted to the state, not least in view of the valid safety issues raised by these activities. Nevertheless, restrictions on access to marine areas by campaigners – at least in jurisdictions subject to the ECHR – must clearly be proportionate to the wider aim pursued by the state in question. In *Women On Waves and Others* v. *Portugal*,[52] a controversial Dutch NGO was banned from the entirety of the Portuguese territorial sea. The applicants had intended to operate an awareness campaign on family planning and sexual health issues aboard its vessel, mooring at a variety of Portuguese ports. However, fears had been raised over the group's history of prescribing medication to facilitate at-sea abortions at a time at which this was still essentially illegal under national law. Despite no meaningful evidence that the group was planning to engage in any activity contrary to innocent passage or national laws on abortion, warships were deployed to ensure that the applicants were prevented from disembarking at any point within the territorial sea. This was considered to be a violation of their Article 10 rights on the basis that the Portuguese authorities had other, less intrusive, means at their disposal to address the perceived prob-

49 Ibid., at para. 10.

50 Ibid.

51 Ibid.

52 *Women On Waves and Others* v. *Portugal*, (App no. 31276/05) ECHR, February 3, 2009.

lem posed by the activists including, if the allegations as to their intentions were correct, the possibility of seizing medication and equipment proscribed under national law.[53]

Moreover, the Court held that there had been no legal basis to bar campaigners from the entirety of the territorial sea, which was considered to be "un espace public et ouvert de par sa nature meme, contrairement aux locaux d'une administration ou d'un ministère."[54] The combined effect of *Women On Waves* and *Dreiman* suggests that, absent a reasonable basis to presume intended misconduct, a state cannot preclude access to its territorial waters to activists *per se*, although localised restrictions on movement may be imposed where necessary to safeguard public safety and the legitimate rights of others. Nevertheless, this does not equate to an automatic right to maritime access in all cases. Freedom of speech may be upheld even where campaigners are refused entry to marine areas, provided that an effective alternative basis to espouse their views is maintained. Indeed, this has been the recent approach of the US courts, which, perhaps surprisingly given the comparative strength of First Amendment rights, have declared that "the high seas are not a public forum."[55] This case involved a restraining order estopping Greenpeace activists from campaigning upon and around Alaskan oil platforms. The designation of exclusion zones was considered compatible with the First Amendment, since they "do not prevent Greenpeace USA from communicating with its target audience because, as the district court observed, Greenpeace USA has no audience at sea."[56] Similarly, the Russian authorities considered the boarding of the *Prirazlomnaya* platform unjustified since Greenpeace had been accorded an opportunity to contribute to appropriate Arctic governance fora concerning the broad regulation of oil and gas installations in the High North.

A similarly broad margin of appreciation is granted to the state to restrain protest actions on safety grounds. States have a duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully.[57] However, the national authorities may concurrently impose restrictions upon the locus of an assembly in order to secure the personal safety of its participants. To date, such issues have arisen primarily in the context of counter-demonstrations, where protestors have challenged restrictions on freedom of

53 Ibid., at para. 41.

54 Ibid., at para. 40.

55 *Shell Offshore Inc.* v. *Greenpeace Inc.* 709 F.3d 1281 (2013), at 1291 (*per* Tashima J.).

56 Ibid.

57 *Plattform Ärzte für das Leben* v. *Austria* (App no. 10126/82) ECHR 15, series A no. 139, June 21, 1988, (at para. 32).

assembly imposed to prevent violent disorder between rival interests. Under such circumstances the national authorities may direct protestors to alternative locations, provided that the decision to do so is subject to a clear, balanced and well-founded assessment of the potential implications for public order.[58] Nonetheless, provided that such an assessment is undertaken, restrictions upon nautical protest to ensure the safety of protestors in hazardous marine conditions or where there is a strong risk of collision would appear to be compatible with rights under Articles 10 and 11 in national waters.

Finally, although states have clear powers to restrict protests occurring within their jurisdictional waters or aboard nationally-registered vessels, there is little obligation to prevent activists from engaging in dangerous activities abroad. As highlighted by the *Mavi Marmara* incident, and reflected in the extensive waivers required by NGOs for campaign activism, the decision to engage in confrontational protest is inherently personal. However, in attempting to breach the Gaza blockade, there was some evidence that the well-meaning naivety of humanitarian campaigners had been exploited by the flotilla's more militant organisers, who were confident that a predictably uncompromising response to these vessels would generate greater criticism of Israeli policies in the region. While the Palmer Report was purely recommendatory in nature, it nonetheless expressed an obligation for governments to ensure that their nationals were "aware of the risks of engaging in such a hazardous activity, and to actively discourage them from attempting it."[59] This was deemed necessary since campaign organisers might either be unaware of the legal position underpinning their proposed course of action and the full extent of the danger attendant to it, or indifferent as to the ultimate fate of the participants in comparison to the perceived higher imperative of the cause in question. The Panel considered that this was an obligation of counsel rather than intervention, and could be discharged "consistent with the travel warnings many governments issue as a matter of course regarding hazards that may be encountered at a particular destination and offering advice to their citizens on the risks involved."[60] It may therefore be considered unlikely that an international court would be willing to construe a positive obligation upon a state to restrain its citizens from placing themselves in danger in furtherance

58 *Alekseyev* v. *Russia* (Apps no. 4916/07, 25924/08 and 14599/09) ECHR 1562, October 21, 2010, at para. 85. Moreover, this decision cannot be influenced by the government's view of the protestors' message, with the scope for violent counter-activism considered in this case to have been overplayed by the strong Russian stance against gay rights activism.

59 *Supra* note 24, at para. 159.

60 Ibid.

of their personal beliefs, unless clear evidence of the particular vulnerability of an individual to the pervasive influence of others has been explicitly communicated to the national authorities in question. This is indeed a significant consideration given the uncertain legal status of confrontational activism at sea, to which this article now turns.

III Direct Action in the Antarctic: Legal Aspects of the Sea Shepherd Anti-Whaling Campaign

1 *Southern Ocean Scientific Whaling and its Discontents*

The krill-rich Southern Ocean has been historically synonymous with the global whaling industry.[61] Whaling in these waters is regulated under the auspices of the International Convention for the Regulation of Whaling 1946 (ICRW)[62] and, more specifically, its constituent management body, the International Whaling Commission, a position that was explicitly reinforced within subsequent Antarctic treaties.[63] Antarctic whaling was conducted extensively throughout the early years of the IWC. However, by the mid-Twentieth Century the industry had begun to fall into a steady decline, with the commercial feasibility of Antarctic operations having virtually collapsed. Throughout the 1960s New Zealand, the UK and the Netherlands abandoned whaling in these waters, while the Norwegian fleet had formally ceased Antarctic operations by 1968. In Australia, a government review of whaling policies in November 1977, in the wake of sustained public protests, recommended *inter alia* the prohibition of commercial hunting in national waters.[64] Since 1991 Japan has remained the sole participant to maintain an active whaling fleet in these waters, an

61 On the development of Antarctic whaling see Tønnessen, J.N. and A.O. Johnsen. *The History of Modern Whaling*. London: C. Hurst & Co., 1982, 16–54.

62 International Convention for the Regulation of Whaling 1946; 161 UNTS 72.

63 Convention on the Conservation of Antarctic Marine Living Resources 1980; 1329 UNTS 48. Under Article VI of the Convention, regulatory authority over Antarctic whale stocks is expressly deferred to the IWC, although the Commission for the Conservation of Antarctic Marine Living Resources retains oversight over krill, the staple prey of many whale species in the region.

64 Frost, S. *The Whaling Question: The Inquiry by Sir Sydney Frost of Australia*. San Francisco: Friends of the Earth, 1979, 209–211. Whaling was subsequently prohibited within Australian jurisdictional waters by virtue of the Whale Protection Act 1980: on this process see Suter, K.G. "Australia's New Whaling Policy: Formulation and Implementation." *Marine Policy* 6 (1982): 287.

operation that has long constituted one of the more controversial aspects of modern Antarctic relations.

The rapid decline of the Antarctic industry has had dramatic implications for the IWC. Notwithstanding its longevity, the Commission has endured a chequered history in recent decades and is now widely perceived as a rather beleaguered organisation. Having initially operated with a broadly unified regulatory ethos, the IWC has grown markedly more fractious as the whaling question has become acrimoniously politicised into a totem of the environmental movement.[65] Although the origins of these current institutional difficulties are multifaceted,[66] the emergence of a discernable anti-whaling movement exerted a strong influence upon many of the parties to the ICRW and, ultimately, the direction of the IWC itself.[67] These developments fundamentally and irrevocably altered the dynamic of the Commission, prompting the oft-cited truism that it metamorphosed during the late 1970s and 1980s from a so-called 'whalers' club' into a largely protectionist institution.[68]

In 1982 the IWC instituted a moratorium upon commercial whaling, intended as a temporary – if open-ended – set of restrictions to provide a window of opportunity for imperilled stocks to regenerate and to reformulate its hitherto discredited quota-setting policies. Thus far, however, progress towards an alternative management mechanism has stalled, leaving the moratorium on commercial hunting technically in place. This has generated significant discord within the IWC, as pro-consumption parties have been forced to consider other legal avenues in order to continue directed catches.[69] By far the most

65 For an account of this process see Stoett, P. *The International Politics of Whaling*. Vancouver: University of British Columbia Press,,1997, at 61–102; on the ideological trend behind these developments see D'Amato, A. and S.K. Chopra, "Whales: Their Emerging Right to Life." *American Journal of International Law* 85 (1991): 21.

66 Although having inspired considerable volumes of at-sea protest, the regulatory trajectory of the IWC remains outside the scope of this article. For a thorough appraisal of the status quo see Bowman, M. "'Normalizing' the International Convention for the Regulation of Whaling." *Michigan Journal of International Law* 29 (2008): 293.

67 On this issue generally see Epstein, C. *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse.* Cambridge, Massachusetts: MIT Press, 2008, 87–164.

68 See Suhre, S. "Misguided Morality: The Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation." *Georgetown International Environmental Law Review* 12 (1999): 305; see also Sigvaldsson, H. "The International Whaling Commission: The Transition from a 'Whaling Club' to a 'Preservation Club'." *Cooperation and Conflict* 31 (1996): 311.

69 In essence, under Article V(3) ICRW a party may enter a reservation to the treaty or, pursuant to Paragraph 13 of the Convention's Schedule, may apply for a quota to conduct so-

controversial basis for continued whaling is that advanced under Article VIII ICRW, which allows parties to allocate national permits "for the purposes of scientific research . . . as the Contracting Government thinks fit."[70]

Notwithstanding sporadic disputes,[71] scientific whaling had constituted a relatively peripheral aspect of IWC affairs until the inception of the commercial moratorium. However, since the late 1980s, lethal sampling in the Antarctic has expanded on an unprecedented scale.[72] This has been primarily undertaken by Japan, in the form of the JARPA,[73] and JARPN programmes,[74] which coincided with the withdrawal in 1988 of the national reservation to the

called Aboriginal Subsistence Whaling. Both options are exercised by Polar jurisdictions. Norway and Iceland each maintain reservations to the moratorium, although this proved controversial in the case of the latter, where the Icelandic authorities eventually secured a hard-fought re-admission to the Commission in October 2002: see Gillespie, A. "Iceland's Reservation at the International Whaling Commission." *European Journal of International Law* 14 (2003): 977. Aboriginal whaling, which recognised as being fundamentally distinct from commercial hunting, is primarily conducted in the Arctic. Likewise, while states are not obliged to accede to the ICRW, Article 65 LOSC prescribes a contentious obligation to "work through" multilateral bodies deemed "appropriate" for the conservation, management and study of cetaceans. This issue has raised some controversy in the case of Canada, which sanctions a miniscule hunt for bowhead whales outside the auspices of the IWC: see McDorman, T.L. "Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention." *Ocean Development and International Law* 29 (1998): 179.

70 On the recent legal issues raised by lethal scientific whaling see Caddell, R. "Science Friction: Antarctic Research Whaling and the International Court of Justice." *Journal of Environmental Law* 26 (2014): 331.

71 In 1957, Norway accused the USSR of manipulating its scientific activities under Article VIII to gain an enhanced Antarctic quota, prompting demands that such permits ought to be allocated on "a limited and cogent basis": Tønnessen and Johnsen, *supra* note 61, at 579. In 1962 the IWC established a requirement for proposed permits to be subject to consultation with its Scientific Committee.

72 Indeed, the rate of scientific catches in the years between 1986 and 2002 alone was almost three times higher than the entire period between 1949 and 1987: Gillespie, A. *Whaling Diplomacy: Defining Issues in International Environmental Law*. Cheltenham: Edward Elgar, 2005, 120.

73 The Japanese Whale Research Program under Special Permit in the Antarctic (JARPA) commenced in 1987 in the Southern Ocean and was replaced in 2005 with a second phase, JARPA II.

74 The Japanese Whale Research Program under Special Permit in the North Pacific (JARPN) commenced in the western North Pacific in 1994 and was replaced in 2000 with a second phase, JARPN II.

moratorium, due largely to US diplomatic pressure.[75] Consequently, lethal scientific research has long been viewed cynically in many quarters as little more than a convenient means of circumventing the current commercial restrictions.[76] While Japan has sought to defend its programme as an important source of ecosystem research,[77] this claim has been consistently rejected by the IWC's Scientific Committee and condemned by Commission itself as "contrary to the spirit of the moratorium on commercial whaling."[78] Scientific hunting has attracted further political notoriety since lethal sampling has been primarily undertaken within an official whale sanctuary, established by the IWC in 1994.[79]

Southern Ocean whaling has generated considerable regional discord, culminating in a ruling by the International Court of Justice (ICJ) in March 2014 that these practices had consistently fallen below the methodological standards expected of a reasonable programme of scientific research conducted under Article VIII ICRW.[80] Japan has undertaken to adhere to the judgment and has subsequently suspended its Antarctic operations indefinitely. However, the convoluted nature of jurisdictional claims in Antarctica has rendered the region traditionally difficult to police effectively, which has contributed to sustained and increasingly violent confrontations between protestors and whalers. In 1994 Australia established an EEZ in respect of its claimed

75 On this issue generally see Siegel, A.J. "The US-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment." *George Washington Journal of International Law and Economics* 19 (1985): 577.

76 Baker, C.S. et al. "Scientific Whaling: Source of Illegal Products for Market?" *Science* 290 (2000): 1695.

77 Aron, W., W.T. Burke, and M.M.R. Freeman. "Science and Advocacy: A Cautionary Tale from the Whaling Debate." In *The Future of Cetaceans in a Changing World*, edited by W.C.G. Burns and A. Gillespie, 87–97. New York: Transnational Publishers, 2003, 90–92.

78 Resolution 2003–2: Resolution on Whaling under Special Permit. Concerns had previously been raised over the potential international trade in whale meat taken for scientific purposes: Resolution 1994–7: Resolution on International Trade in Whale Meat and Products (noting that whale products acquired through lethal research activities should be sold only within domestic markets).

79 Article V(1)(c) ICRW provides a basis for the creation of protected areas, although Japan has consistently and staunchly opposed the establishment of the Southern Ocean Sanctuary (SOS) under the auspices of the IWC: these developments see Gillespie, A. "The Southern Ocean Sanctuary and the Evolution of International Environmental Law." *International Journal of Marine and Coastal Law* 15 (2000): 293.

80 *Case Concerning Whaling in the Antarctic* (*Australia* v. *Japan; New Zealand Intervening*), at para. 227. For an appraisal of the judgment and its implications see Caddell, *supra* note 70. The judgment is reproduced on-line at http://www.icj-cij.org/docket/files/148/18136.pdf (accessed June 1, 2014).

Antarctic territory,[81] and later formally designated these waters a national whale sanctuary,[82] including a significant proportion of the area within which the JARPA programmes have been conducted. Article IV of the Antarctic Treaty 1959,[83] seemingly precludes the designation of such zones, although a small number of states have purported to assert a degree of sovereignty over these waters.[84] The legitimacy of the Australian position was not substantively addressed by the ICJ in the recent dispute,[85] but is considered dubious by the wider international community and has attracted a consistent degree of objection from Japan. This has perpetuated a marked reluctance to enforce national law in these waters, with the Australian authorities hesitant both to expose Antarctic claims to higher judicial attention,[86] and to disturb the delicate balance of the Antarctic Treaty System through provocative unilateralism or by cross-contaminating this regime with the dysfunction associated with the whaling debate.[87] While NGOs have sought to force Australia's hand in this

81 Kaye, S., and D.R. Rothwell. "Australia's Antarctic Maritime Claims and Boundaries." *Ocean Development and International Law* 26 (1995): 195.

82 Environment Protection and Biodiversity Conservation Act 1999 [hereinafter "EPBCA"], section 225.

83 Antarctic Treaty 1959, 402 UNTS 71. Article IV(2) provides, *inter alia*, that "[n]o new claim, or enlargement of an existing claim, to territorial sovereignty shall be asserted while the present Treaty is in force."

84 Thus far, only France (1978) and Australia (1994) have formally established an EEZ alongside their territorial claims in Antarctica, although a part of the Chilean *mar presencial* also extends to Antarctic waters. Australian sovereignty over these waters is recognised only by France, New Zealand, Norway and the UK.

85 The contested nature of the Australian claim was raised only as argument against the valid exercise of jurisdiction by the ICJ over the present dispute, with Australia having reserved aspects of maritime delimitation from consideration within this forum. This contention was rejected by the Court: *supra* note 80, at paras. 36–37.

86 Klein, N. "Litigation over Marine Resources: Lessons for the Law of the Sea, International Dispute Settlement and International Environmental Law." *Australian Yearbook of International Law* 28 (2009): 155–56.

87 See Anton, D.K. "Antarctic Whaling: Australia's Attempt to Protect Whales in the Southern Ocean." *Boston College Environmental Affairs Law Review* 36 (2009): 350; and Mossop, J. "The Security Challenge Posed by Scientific Permit Whaling and its Opponents in the Southern Ocean." In *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* edited by A.D. Hemmings, D.R. Rothwell and K.N. Scott, 307–326. Abingdon: Routledge, 2012, 325. Indeed, this is no idle fear, with lingering difficulties over whaling proving to be a corrosive distraction to the work of other multilateral bodies: see Caddell, R. "Inter-Treaty Cooperation, Biodiversity Conservation and the Trade in Endangered Species." *Review of European, Comparative and International Environmental Law* 22 (2013): 267–269.

regard, through the sweeping *locus standi* accorded to 'any interested person' to enforce the provisions of the EPBCA,[88] domestic judgments have remained essentially symbolic, given that "Australia has established a practice of not seeking to enforce its domestic law against foreign nationals in the claimed EEZ off the AAT."[89] The practical result of this policy has been a fluctuating approach to law enforcement within these waters,[90] rendering successive Australian governments an attractive target for accusations of vacillation.

Consequently, Sea Shepherd has sought to occupy the enforcement vacuum created by Australian reticence towards implementing the full range of environmental measures that it has applied to these waters. Sea Shepherd is a controversial body that actively considers itself a global enforcement agency committed to 'innovative direct action tactics'[91] as a means of securing compliance with its interpretation of international environmental law. Sea Shepherd considers that it has a mandate to forcibly intervene to prevent environmental infractions and protect areas beyond national jurisdiction pursuant to the World Charter for Nature, adopted by the UN General Assembly in 1982.[92] This interpretation has nonetheless found little support in legal circles. The Charter is essentially a hortatory and platitudinous document for which, "[a]t most, its terms could be viewed as soft law."[93] Indeed, this position has been forcefully rejected by at least one national court, which considered that "the

88 EPBCA, *supra* note 82, section 475. A series of domestic appeals resulted in an injunction estopping Japanese whaling activities in these waters, which was served by the NGO in question but never ultimately enforced by the Australian authorities: *Humane Society International Inc.* v. *Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116. On this issue generally see Stephens, T., and D.R. Rothwell. "Japanese Whaling in Antarctica: *Humane Society International Inc.* v. *Kyodo Senpaku Kaisha Ltd*." *Review of European Community and International Environmental Law* 16 (2007): 243 and Davis, R. "Enforcing Australian Law in Antarctica: The *HSI* Litigation." *Melbourne Journal of International Law* 8 (2007): 6.

89 Klein, N. and N. Hughes. "National Litigation and International Law: Repercussions for Australia's Protection of Marine Resources." *Melbourne University Law Review* 33 (2009): 172.

90 On the implications for future enforcement activities see Mossop, J. "When is a Whale Sanctuary Not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones." *Victoria University of Wellington Law Review* 36 (2005): 773. Klein and Hughes nonetheless suggest that the trade-off for HSI's practical inability to enforce the ruling has been "an opening to influence Australia's position within the IWC, in addition to various fora within the ATS": ibid., at 197.

91 As professed upon the Sea Shepherd organisational website; www.seashepherd.org (accessed June 1, 2014).

92 UN General Assembly, A/Res/37/7 of 28 October 1982.

93 Klein, N. *Maritime Security and the Law of the Sea*. Oxford: Oxford University Press, 2011, 142.

Nature Charter authorises nothing."[94] The Charter advances no position on enforcement by either public or private entities and, in any case, UN General Assembly Resolutions do not usually generate binding legal obligations. There is accordingly little legal foundation for a non-state actor to claim an entitlement to unilaterally enforce ecological standards. Moreover, even if the Charter *had* provided a universally accepted basis for private enforcement, it is by no means certain whether the 'defendant' may ultimately be guilty of the charges levelled against it by the actor in question.[95] This highly personalised interpretation of the Charter thereby facilitates a self-prescribed licence for vigilantism based on the judgment of an environmental campaign group. Indeed, although NGOs regularly contribute in a positive manner to infringement proceedings concerning environmental offences, Sea Shepherd has frequently taken "an unjustifiably broad view both of what 'the law' is and what action it permits it, an NGO, to take in the absence of effective government 'enforcement' efforts."[96]

The response of Sea Shepherd to Southern Ocean whaling has been to attempt to harass the vessels and impede their ability to hunt effectively. Sea Shepherd has pursued the Japanese fleet with a gleeful Corinthian zeal for over a decade, undertaking an array of activities that range from the entertainingly comic to the potentially tragic. Popular tactics have included pelting the decks of vessels with butyric acid, a foul-smelling but essentially harmless substance that renders deck work a highly unpleasant experience for those concerned, firing paint and rotten vegetables at the hulls of vessels and attempting to taint the meat of any whales caught by the fleet.[97] Activists have also launched small crafts within the close vicinity of whaling vessels, deploying propeller-foulers in a bid to disable the navigational capacity of the Japanese ships. Sea Shepherd has, on at least one occasion, manufactured a so-called 'can-opener' device intended to tear the hull of a whaling vessel, although it appears not to

94 *Institute of Cetacean Research et al.* v. *Sea Shepherd Conservation Society et al.* 860 F. Supp 2d 1216 (W.D. Wash 2012) at 1236. As the Honourable Richard A. Jones stated in the judgment, "[w]hatever solace Sea Shepherd takes from it, the Nature Charter provides no legal authorization for its Southern Ocean tactics and provides it no defense": ibid.

95 Nonetheless, as Klein and Hughes observe, Sea Shepherd has used the injunction resulting from the HSI action as a further basis to justify their pursuit of the Japanese whaling fleet: *supra* note 89, at 200.

96 Plant, *supra* note 6, at 80.

97 On these campaigns generally, see Caprari, A.M. "Loveable Pirates? The Legal Implications of the Battle between Environmentalists and Whalers in the Southern Ocean." *Connecticut Law Review* 42 (2010): 1506–1507. For a concise summary of the incidents arising from the clashes between Sea Shepherd and the Japanese fleet see Mossop, *supra* note 87, at 311.

have been actively deployed.[98] There have also been minor collisions between vessels as both fleets have been reluctant to change course and to facilitate the successful activities of the other. Sea Shepherd has also blocked refuelling efforts, most dramatically in February 2013, which resulted in a series of collisions between its protest vessel, the *Bob Barker*, and the Japanese factory vessel the *Nisshin Maru*. Activists connected with Sea Shepherd have also boarded individual vessels on at least three separate occasions. Most significantly a trimaran operated by Sea Shepherd, the *Ady Gil*, was destroyed in January 2010 following a collision with the *Shonan Maru No. 2*, a security vessel attached to the Japanese whaling fleet. The subsequent investigation by Maritime New Zealand, as the flag state of the *Ady Gil*, considered that both parties had breached the International Regulations for Preventing Collisions at Sea,[99] but found no evidence that either master had deliberately engineered the eventual collision.[100] The actions of Sea Shepherd have seemingly prompted the Japanese fleet to curtail its activities in recent whaling seasons, although commentators have raised doubts as to whether these actions represent the most successful long-term anti-whaling strategy.[101] Throughout its Antarctic campaign, Sea Shepherd has received decidedly mixed messages from a number of governments, which frequently condemn their actions yet still willingly provide them with flag and port facilities and express little regret over the resulting travails of the Japanese whalers.

Thus far, despite a discernible escalation in the violence between the two sides, serious injury and loss of life has been avoided – although this appears to be more a matter of good fortune than prudent seamanship. Minor injuries have been sustained by both protestors and whalers, as well as by the television crew recording the Sea Shepherd campaigns, while objections over the conduct of both sides have been raised by the flag states of the protest,[102] and

98 Heller, P. *The Whale Warriors: The Battle at the Bottom of the World to Save the Planet's Largest Mammals.* New York: The Free Press, 2007, 94.

99 International Regulations for Preventing Collisions at Sea, 1050 UNTS 16 [hereinafter "COLREGS"].

100 Maritime New Zealand. *Investigation Report:* Ady Gil *and* Shonan Maru No. 2. *Collision on 6 January 2010* Wellington: MNZ, 2010, at para. 222. A striking feature of these proceedings is that neither party seemingly wished to cooperate with the investigating authorities.

101 See Ryan, T. "Sea Shepherd v. Greenpeace? Comparing Anti-Whaling Strategies in Japanese Courts." *New Zealand Yearbook of International Law* 7 (2009): 131 and Moffa, A.L.I. "Two Competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean" *Yale Journal of International Law* 37 (2012): 201.

102 The Netherlands, as flag state to the *Bob Barker*, has formally complained about missiles being thrown by the Japanese crews, with *Whale Wars* footage depicting golf balls and metal nuts being hurled at protestors.

whaling vessels.[103] Ecological damage to Antarctica has also been avoided to date, which would raise difficult questions concerning responsibility for clean-up and liability for precipitating a disaster of this nature. Indeed, the insurance status of Sea Shepherd vessels is somewhat questionable;[104] moreover, the deliberate ramming or obstruction of another vessel could arguably encompass a rare situation in which a vessel, even if fully insured, might lose its privilege to limit liability for the resulting damage.[105] The Netherlands has threatened to review its conditions for flag privileges and to facilitate the deregistration of delinquent vessels, but Sea Shepherd has thus far found a relatively accommodating home within Dutch and Australian nationality.

Strong concerns over the Sea Shepherd's Antarctic campaign have accordingly been raised within the IWC. The organisation has been banned from attending IWC Meetings since 1987 "because of unacceptable behaviour and tactics,"[106] while the "threatening behaviour of some NGOs, such as that of Sea Shepherd"[107] has threatened to precipitate a backlash against a number of observer groups within the IWC.[108] The safety issues raised by anti-whaling

103 Japan has consistently complained about the actions of Sea Shepherd, within both the IMO and IWC.

104 Valid marine insurance is predicated upon an implied warranty of legality. If an insurer provided services for an entity that is almost certain to commit an illegal act at sea, such as a breach of the COLREGS or, in the present case, potential piracy, the contract would be voidable. Moreover, the contract itself could be considered vitiated by means of illegality, depending on the position of the national law in question, while a reinsurer would also be likely to seek to avoid liability on this basis. This would appear to be the position under English law, under which a significant majority of insurance contracts are conducted. The original insurer could nonetheless opt to pay the claim, if they supported the aims of the insured to such an extent, but this would appear as improbable as it is imprudent.

105 Convention on Limitation of Liability for Maritime Claims 1976; 1456 UNTS 221. Under Article 4, a liable party may lose the privilege of limitation only "if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." Accordingly, as the English courts have neatly summarised, "[w]hen a claim is made for damage resulting from a collision, it is virtually axiomatic that the defendant shipowner will be entitled to limit his liability": *The Leerort* [2001] 2 *Lloyd's Rep*. 291, at 295 (*per* Lord Phillips MR). Pollution claims are addressed under the specific limitation provisions of pertinent civil liability conventions: Article 3.

106 IWC, *Statement on Safety at Sea*. Intersessional Meeting, 2008; reproduced at http://iwc.int/intersession08 (accessed June 1, 2014).

107 *Annual Report of the International Whaling Commission 2001, supra* note 34, at 5.

108 In 2001, a Resolution on the Conduct of NGOs was tabled at the IWC's Annual Meeting, which would have introduced constraints upon NGO participation within the IWC. This was ultimately rejected on the basis that Sea Shepherd has no standing at the IWC and

protests have been examined as a standing item within meetings of the IWC since they were first raised in 2006, following a minor collision between vessels in 2005. IWC members from all sides of the whaling debate have consistently expressed concerns over the potential ramifications of violent confrontations in the Southern Ocean. The IWC itself has adopted three separate Resolutions on the issue that, while supportive of the right to legitimate and peaceful forms of protest and demonstration, have called upon activists not to undertake any action that poses a risk to human life or property.[109] Since 2007 the IWC has explicitly condemned such behaviour,[110] although a majority of its participants are seemingly unconvinced that this is still the appropriate forum through which to address these concerns.[111] Since 2009, Australia, the Netherlands, New

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that the collateral damage of these provisions would solely afflict bodies that had long played a constructive and important role within proceedings: ibid. Since 1998, observer status has been nominally contingent upon a degree of on-going "good behaviour," with the IWC sensitive to the impact of NGO-led economic boycotts upon particular member states. The IWC can review the accreditation of any organisation against which evidence is provided of activity that has caused economic hardship to a particular party as a result of participation or views expressed within the Commission: Resolution 1998–12: Resolution on Review of Observer Status. The evidential threshold and the overall effectiveness of such a measure is nonetheless questionable and also raises clear concerns over freedom of expression for particular advocacy groups in certain states.

109 IWC: Resolution 2006–2: Resolution on the Safety of Vessels Engaged in Whaling and Whale Research-Related Activities; Resolution 2007–2: Resolution on Safety at Sea and Protection of the Environment; Resolution 2011–2: Safety at Sea. In 2008, the IWC issued a Statement on Safety at Sea, calling upon Sea Shepherd to "refrain from dangerous actions that jeopardise safety at sea"; *supra* note 106. This remains the only formal pronouncement in which Sea Shepherd has been expressly named.

110 The wording of Resolution 2007–2 was amended from the softer tone of Resolution 2006 to specify that the IWC and the contracting parties to the ICRW "do not condone and *in fact condemn*" such actions: *Annual Report of the International Whaling Commission 2007*. Cambridge: IWC, 2008, at 42 (emphasis added).

111 Indeed, in 2006 the IWC refused to discuss an alleged collision between a Greenpeace protest vessel and a Japanese whaling vessel on that basis that the Commission is "not a court" and could therefore not hear Greenpeace's version of events and that, moreover, it "does not have competency in this area, [and] cannot determine whether an offence has been committed": *Annual Report of the International Whaling Commission 2006.* Cambridge: IWC, 2007, at 8. At its most recent meeting, maritime protests were considered to be a matter exclusively for the IMO, although some members argued that the IWC ought still to be considered appropriate in this regard since the issue also affected its remit: *Annual Report of the International Whaling Commission 2012.* Cambridge: IWC, 2013, at 45. Resolution 2011–2, the most recent formal pronouncement of the IWC on this

Zealand and the US have issued annual quadripartite statements upholding support for freedom of speech, but condemning dangerous actions arising out of this conduct.[112] Meanwhile, the financial backers of the Japanese whaling fleet have sought to restrain the actions of Sea Shepherd through civil actions, which has called into further question the most appropriate and effective legal ground upon which to address militant environmental campaign groups at sea.

3.2 *Direct Action Protests and the Law of Piracy*

In light of the threat posed by violent clashes between activists and hunters, coupled with the absence of a clearly enforceable domestic position, the law of piracy has been explored as a potential basis for addressing overly-confrontational protests at sea. This has proved to be controversial, and something of an option of last resort for the Japanese whaling fleet. Nonetheless, there is an arguable basis that the actions of marine campaigners could be caught by the law of piracy although, as suggested below, it appears preferable that such activities are addressed through sundry offences of maritime criminal law or, alternatively, a less senior norm of international law.

The law of piracy has been codified within the LOSC under Article 101, as constituting:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
    (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
    (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

While activists may commit illegal acts of violence against a ship on the high seas, it had long been considered in principle that environmental or political

matter, expressly recognises "the primacy of the International Maritime Organization (IMO) on safety at sea."

112 See, most recently, *Joint Statement on Whaling and Safety at Sea*, 20 December 2013; reproduced on-line at http://dfat.gov.au/media/releases/department/2013/dfat-release-20131220.html (accessed June 1, 2014).

campaigning fails to meet these criteria, since its primary motivation is essentially public or altruistic in nature – or, at the very least, is not generally undertaken for self-enriching ends. There has been considerable unease at the prospect of protest organisations being caught within the definition of piracy. Indeed, as Klein observes, "[t]hese groups may not typically be recognised as pirates, as their goals are not for 'private ends' but are related to the quest for marine environment protection."[113] Nevertheless, the notion that blanket immunity from any allegation of piracy is conferred due to the existence of a less private motivation is also seen as objectionable and counter-productive to the public benefit of maintaining orderly conduct on the high seas. As Guilfoyle convincingly argues, "[t]he test of piracy lies not in the pirate's subjective sanction for his or her acts . . . Put simply, the words 'for private ends' must be understood broadly. All acts of violence that lack state sanction are acts undertaken 'for private ends'."[114]

To date, notwithstanding Guilfoyle's consideration that protestors cannot escape an allegation of piracy by citing the mere virtue of the non-personal nature of their actions, there has nonetheless been a discernible reluctance by injured parties to proceed on this basis. Until a recent action brought in the US courts by the Japanese whaling fleet, there was only one prior instance of an environmental campaign group having been sanctioned for piracy. In 1986, a number of Greenpeace activists were convicted by the Belgian courts of having boarded, occupied and damaged two vessels, which they alleged had been discharging noxious waste in the North Sea. The court of first instance declined to find jurisdiction to hear the case, viewing this as a matter exclusively for the flag state. This decision was subsequently over-ruled by the Court of Appeal for Antwerp, which declared that the Greenpeace action could properly be considered piracy and was thus subject to universal jurisdiction. This ruling was subsequently upheld in a concise judgment of the national Cour de Cassation.[115] Here, the Cour de Cassation found that the activists had resorted to violence and, moreover, that this had been committed for private ends, "in particular the pursuit by the applicant of the objects set out in its articles of association."[116]

The decision in the *Castle John* was initially treated with bemusement and hostility by commentators, who raised concerns both over the practical dif-

113 *Supra* note 93, at 141.

114 Guilfoyle, *supra* note 27, at 36–37.

115 *Castle John and Nederlandse Stitchting Sirius* v. *NV Mabeco and NV Parfin*; reproduced at *International Law Reports* 77 (1994): 537

116 Ibid., at 540.

ficulties of proving the subjective element of the offence,[117] and the wider societal implications for civil activism should acting in the pursuit of the stated aims of an organisation be considered piratical.[118] This may be countered, however, by the caveat that maritime activists may pursue their ideals without committing acts of violence or depredation towards other vessels and thereby remain outside the parameters of the offence. Indeed, this reflects the views of national and international courts concerning the boundaries of free speech, as noted above. Otherwise, there is a considerable scope to abuse the definition of piracy by allusion to a higher cause as justification for an act of violence at sea. Accordingly, as Guilfoyle observes, "[t]he rule against piracy exists to protect the freedom of navigation and safety of persons upon the high seas. This function is not served by reading the definition as inherently excluding acts with a subjective 'political' motive."[119]

In 2012, these considerations were largely endorsed by the US courts. Proceeding under the Alien Torts Act,[120] a collective of economic interests behind the Japanese scientific whaling programme sought an injunction against Sea Shepherd on the basis, *inter alia* of the alleged piracy of the activists.[121] The initial judgment by the US District Court found in favour of the defendants, albeit based upon on a heavily flawed foundation. In the first instance, the District Court rejected a claim of piracy on the finding that Sea Shepherd was not acting for private ends, declaring that "[a]bsent an international consensus that preventing the slaughter of marine life is a 'private end' the court cannot say that there is a specific, obligatory, and universal international norm against violence in the pursuit of the protection of marine life."[122] Moreover, the court rejected the contention that the defendant's objectives could be considered 'private' by virtue of the revenue generated through their *Whale Wars* fees and additional donations received by viewers supportive of their efforts, which were considered to be "merely a byproduct" of the campaign.[123] This conclusion survived the rather odd assertion by the defendants

117 David, E. "Greenpeace: Des Pirates!" *Revue Belge de Droit International* 22 (1989): 300.

118 Menefee, S.P. "The Case of the *Castle John*, or Greenbeard the Pirate? Environmentalism, Piracy and the Development of International Law." *California Western International Law Journal* 24 (1993): 15.

119 *Supra* note 27, at 38.

120 Reproduced at 28 U.S.C. § 1350.

121 *Institute of Cetacean Research et al.* v. *Sea Shepherd Conservation Society et al.; supra* note 94. The four bases for the injunction claimed by the applicant were freedom of navigation, freedom from piracy, freedom from terrorism and civil conspiracy.

122 Ibid., at 1233.

123 Ibid.

that "donors will cease their financial support if the court enjoins their tactics in the Southern Ocean,"[124] a claim that the judge rejected but seemingly opted not to view as an admission that a degree of financial gain was inherent within their activities. Furthermore, Sea Shepherd was deemed not to have committed any act of violence pursuant either to the LOSC or the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988,[125] with the launching of projectiles considered to occupy its own idiosyncratic category of "acts akin to malicious mischief."[126] The District Court further declined injunctive relief on the basis of international comity and the highly contentious basis that the applicants had not demonstrated 'clean hands' by failing to comply with the disputed order issued by the Australian courts.

Perhaps unsurprisingly, these findings were swiftly and strongly challenged and the initial judgment was overturned by the US Court of Appeals for the Ninth Circuit,[127] which considered that the District Court had erred on several key issues – including, most significantly, that a charge of piracy could indeed be deemed appropriate. Indeed, as the Court rather memorably observed, "[y]ou 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."[128] Rejecting the prior judgment, the Court ruled that the concept of private ends encompassed "those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public."[129] Furthermore, the notion that Sea Shepherd had engaged in a form of nautical misdemeanour as opposed to 'violence' was also rejected, with the defendants considered to have perpetrated "clear instances of violent acts for private ends, the very embodiment of piracy."[130] An injunction was thereby granted in favour of the applicants, estopping Sea Shepherd from navigating within 500 yards of the

124 Ibid., at 1244.

125 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, 1678 UNTS 201 [hereinafter "SUA Convention"].

126 *Supra* note 94, at 1235.

127 *Institute of Cetacean Research and Others* v. *Sea Shepherd Conservation Society and Watson* 725 F.3d 940 (9th Cir. 2013).

128 Ibid., at 942–43.

129 Ibid., at 944, endorsing Guilfoyle's view as to the status of acts undertaken outside the authority of a state as being inherently private in nature.

130 Ibid.

Japanese whaling fleet. In response, the defendants promptly redirected the Southern Ocean campaign through their Australian wing and are accordingly facing an action for contempt of court, for which, at the time of writing, arguments had been presented but judgment had yet to be rendered.

3 *Maritime Disorder, Piracy and State Practice*

Although national measures to combat piracy differ considerably between jurisdictions, fluctuating with the level of threat posed by maritime crimes, the varying manifestations of it and the areas in which it occurs, a general trend against criminalising confrontational activities under the law of piracy can be identified. Notwithstanding the recent position of the US courts, state practice reveals a distinct reluctance to utilise piracy provisions to address concerns over the safety ramifications of aggressive conflict between opposing interests at sea.

EU Member States in recent years have endured a series of confrontations in coastal waters, as the principle of open access to Community fishing grounds has provoked tensions between local fishing communities and incomers from disparate parts of the Union. For instance in 2001, following a series of altercations between fishing vessels in national waters, the Irish government proposed legislation to expand the traditional definition of piracy to include, *inter alia*, two distinct offences of "intentionally ramming another ship" and "intentionally proceeding at excessive speed in close proximity to another ship in a manner calculated to endanger or cause an emergency on board that other ship."[131] The Bill was ultimately abandoned due to a combination of internal opposition and concerns over its compatibility with EU law but, had it successfully negotiated the legislative process, it could have "created a useful international precedent for use elsewhere in the World,"[132] not least in respect of the Southern Ocean. Similar problems have been encountered in northern Spain, where Basque fishermen waged a coordinated campaign of intimidation against foreign driftnet vessels in the late 1980s.[133] This appears

131 Law of the Sea (Repression of Piracy) Bill 2001; section 3(1). For an extensive account of these developments see Symmons, C.R. "Use of the Law of Piracy to Deal with Violent Inter-Vessel Incidents at Sea beyond the 12-Mile Limit: The Irish Experience." In *Selected Contemporary Issues in the Law of the Sea*, edited by C.R. Symmons, 169–193. Leiden: Brill, 2011, 170–181.

132 Ibid., at 170.

133 Driftnets set in the Bay of Biscay were systematically vandalised and there were even instances of French, Irish and British vessels being rammed in these waters: Lequesne, C. *The Politics of Fisheries in the European Union.* Manchester: Manchester University Press, 2004, 118–9.

to have been orchestrated, at least in part, by the proscribed separatist group *Euzkadi 'ta Askatasuna*,[134] although the Spanish authorities neither invoked piracy provisions nor sought the elaboration of alternative criminal laws by way of response.

Perhaps more pertinently, the practice of Japan – which has arguably been subject to the most sustained volume of maritime harassment by activists – also reveals a distinct national aversion to the use of piracy laws in this manner. The Japanese whaling fleet has been confronted by maritime protesters since the early 1990s and, initially, confined its response to diplomatic expressions of disapproval to the flag states in question and to informally raising its concerns within the IWC.[135] By 2007 however, due to increasing concerns over shipping safety, Japan considered these incidents to have "fallen into a category of piracy"[136] and, equally gravely, "viewed the activities of the Sea Shepherd Conservation Society to be acts of terrorism."[137] In 2009, Japan adopted a new Anti-Piracy Law, inspired primarily by concerns over the susceptibility of Japanese commercial interests to depredation by pirates within the Gulf of Aden. Nevertheless, the threats posed to whaling vessels by environmental campaigners was clearly also a strong motivating factor in these deliberations, resulting in a definition of piratical acts within the legislation that could conceivably apply to confrontational protests. While much of the statute is concerned with addressing the traditional *modus operandi* of piracy,[138] Article 2

134 Findlay, M. and A.E. Searle, "The North East Atlantic Albacore Fishery: A Cornish Crisis of Confidence." *Marine Policy* 22 (1998): 103.

135 Minutes of the Budget Committee, House of Representatives, 123rd Session, 20 February 1992; cited in Kanehara, A. "Japanese Practices concerning the International Regulation of Whaling." *Japanese Annual of International Law* 46 (2003): 148.

136 Kanehara, A. "Legal Responses of Japan to the Impediments and Harassments by Foreign Vessels against Japanese Vessels during Research Whaling in the Antarctic Sea." *Japanese Yearbook of International Law* 52 (2009): 554.

137 *Annual Report of the International Whaling Commission 2007, supra* note 111, at 41.

138 This is, however, subject to one key departure: the Anti-Piracy Law, unlike Article 101 of the LOSC, does not apply to attacks from aircraft. As noted above, Sea Shepherd uses helicopters in reconnaissance missions – and, it should be emphasised, in an exemplary and law-abiding manner. It is accordingly questionable whether the pilot of an aircraft could be charged with assisting in the commission of piracy under these provisions, such as by guiding vessels towards their intended target or relaying instructions to the crews. The non-application of aerial piracy arguably draws a firm distinction between the pirate vessel and any aircraft associated with it as actors in the crime. Therefore any subsequent prosecution would seemingly have to be founded upon aiding and abetting the commission of an alternative (and lesser) criminal offence.

of the Anti-Piracy Law,[139] prescribes a seven-pronged definition of the offence, for which two key provisions are of particular interest in the current context.

Article 2(1) defines piracy *inter alia* as:

> seizing another ship in navigation or taking control through the operation of another ship by rendering persons irresistible through assault, intimidation or other means.

Meanwhile, more specifically, Article 2(6) proscribes

> operating a ship and approaching in close proximity of, beleaguering, or obstructing the passage of, another ship in navigation, for the purpose of committing acts of piracy.

Despite the obvious inspiration of Sea Shepherd's anti-whaling campaign behind the wording of Article 2(6), it is questionable whether such actions would ultimately qualify as 'piracy' under the legislation. Given the penchant of Sea Shepherd for fouling propellers and impeding navigation, there may be some foundation for asserting that such conduct could technically constitute 'taking control' of a vessel – albeit on a very transient basis – by temporarily disabling its means of propulsion (which raises questions as to whether the offence has, strictly speaking, yet occurred, given that the vessel is arguably not under the control of its attackers while it is stationary and attempting to free itself from entanglement) or, more plausibly, by forcing it to steer away from its intended course to avoid a collision. If so, these actions could be sufficient to trigger an offence under Article 2(6). Ultimately, however, this first requires the incident to have been considered piratical under Article 2(1), since the specific navigational offence within Article 2(6) is only established when it arises during the commission of an act of 'piracy'.

Notwithstanding the stern rhetoric of the Japanese authorities, it must be considered unlikely that the anti-whaling activism as manifested to date would ultimately qualify as piracy. Indeed, in reviewing the notion of 'private ends', this concept was considered to mean acts without state sanction that are committed for "profit gaining, hatred, revenge and others."[140] Such campaigning might be considered, on an especially strict appraisal, to be

139 Reproduced in English in Hayashi, M. "Japan: Anti-Piracy Law." *International Journal of Marine and Coastal Law* 25 (2010): 147.

140 Minutes of the Special Committee on Combatting Piracy and Terrorism, House of Representatives, 171st Session, 15 April 2009; cited in Kanehara, A. "Japanese Legal Regime

espousing national hatred, although this appears an unlikely stretch in practice. As Kanehara observes, Japan "in principle takes the stance that such obstructive acts against its research whaling are *not* piracy."[141] This echoes the view of the relevant minister at the material time that the designation of confrontational campaigning as piratical is "very difficult to be generally understood in international society. Thus, we decided to exclude such obstructive activities from the acts of piracy in the Piracy Act."[142] Nevertheless, Japan's Minister for Foreign Affairs has warned that "they are not necessarily excluded from acts of piracy."[143] Ultimately, however, the insinuation that environmental activism may not be fully excluded from the legal definition of piracy is a very different prosecutorial signal to an express assertion as to the certainty of its inclusion. Furthermore, doubts have been expressed over the compatibility of Article 2(6) of the Anti-Piracy Law with national obligations under the LOSC,[144] and it may be speculated that Japan would be somewhat reluctant to defend this position before an international tribunal in a prompt release action.

Moreover, Japanese practice towards activists detained on board whaling vessels suggests that there is little inclination to test the parameters of the 2009 Act. Campaigners have boarded Japanese whaling vessels on three recent occasions: in 2008 by Australian Benjamin Potts and Briton Giles Lane, both crew members of the Sea Shepherd flagship the *Steve Irwin*; in 2010 by New Zealander Pete Betheune, the aggrieved master of the sunken *Ady Gil*; and in 2012 by three Australian activists from Forest Rescue, an allied NGO that had apparently volunteered to divert the attention of a trailing Japanese security vessel. Betheune remains the sole activist to have been transported to Japan to face criminal charges, although this selective enforcement policy appears to have been heavily influenced by the logistical problems of detaining boarders on merchant vessels and on-going commercial considerations underpin-

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Combating Piracy – The Act of Punishment of and Measures against Acts of Piracy." *Japanese Yearbook of International Law* 53 (2010): 476.

141 Kanehara, A. "So-Called Eco-Piracy and Interventions by NGOs to Protest against Scientific Research Whaling on the High Seas: An Evaluation of the Japanese Position." In *Selected Contemporary Issues in the Law of the Sea*, edited by C.R. Symmons, 195–219. Leiden: Brill, 2011, 206 (emphasis in the original).

142 Comments of Mr. Kazuyoshi Kaneko, Minister for Land, Infrastructure, Transport and Tourism; Minutes of the Special Committee on Combatting Piracy and Terrorism, *supra* note 140, at 479.

143 Comments of Mr Hirofumi Nakasone, Minister for Foreign Affairs: ibid.

144 Hayashi, M. "Japan's Anti-Piracy Law and UNCLOS." In *Regions, Institutions, and the Law of the Sea: Studies in Ocean Governance*, edited by H.N. Scheiber and J.-H. Paik, 257–269. Leiden: Brill, 2013, 265.

ning the fleet's deployment.[145] Notably, Potts and Lane were released without charge since "they did not intend to do any violent acts."[146] Nonetheless, they could in principle have faced charges in their home jurisdictions subject to the extent of the extra-territorial application of national criminal law.[147] Instead, the Japanese Criminal Code was amended in 2004 to apply to foreign nationals committing criminal acts against Japanese citizens outside the territory of Japan,[148] which secures the availability of a range of nautical offences of varying severity if required by prosecutors. Accordingly Betheune, who had also refrained from vandalism and violence in boarding the *Shonan Maru No. 2*, was ultimately convicted in Japan of a series of minor trespass-related offences. Save for the unlikely event that Sea Shepherd's founder and leader Paul Watson were to submit to Japanese criminal jurisdiction, there appears in practice to be a convenient array of alternative criminal offences that may be brought against captured activists without resorting to the law of piracy.

Given that piracy remains an unattractive foundation for proceeding against protestors – at least at a governmental level – other jurisdictional options beyond the application of sundry nautical misdemeanours are also worthy of exploration. In this respect, the SUA Convention may offer similar prospects for restraint that are unburdened by the severity of a piracy action. The Convention, which was adopted in the wake of the infamous *Achille Lauro* incident, was developed as a means of addressing dangerous maritime conduct that nevertheless fails to meet the specific definition of piracy advanced under the LOSC. The SUA Convention primarily seeks to ensure a jurisdictional basis to prosecute acts of terrorism or hijacking that, due to its political nature, might ultimately fail to qualify as 'private ends' and prescribes an array of offences linked to the destruction or boarding of a vessel. An arguable case can be made that aggressive conduct at sea may be sufficient to trigger a series of offences under the SUA Convention. Indeed, Article 3(1) of the Convention establishes an offence where a person unlawfully and intentionally "seizes or

145 Rothwell, D.R. "Law Enforcement in Antarctica." In *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives*, edited by A.D. Hemmings, D.R. Rothwell and K.N. Scott, 134–152. Abingdon: Routledge, 2012, 150.

146 Minutes of the Committee on Foreign Affairs, House of Representatives, 169th Session, 4 April 2008; cited in Kanehara, *supra* note 136, at 570.

147 Lane, for instance, would have been concurrently subject to English criminal jurisdiction, which may be applied against UK nationals committing offences aboard foreign vessels or upon the high seas – indeed, both grounds were technically triggered in this incident – since a broad immunity "is hardly a satisfactory form of control of miscreants returning to the United Kingdom": *R* v. *Kelly* [1982] AC 605, at 676 (*per* Lord Roskill).

148 Kanehara, *supra* note 141, at 219.

exercises control over a ship by force or threat thereof or any other form of intimidation." Moreover, Article 3(3) proscribes "destroying or causing damage to a ship or its cargo which is likely to endanger the safe navigation of that ship." Likewise, in view of attempts by Sea Shepherd to foul propellers and damage rudders, Article 3(5) addresses conduct that "destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship." Although it was initially suggested that the SUA Convention ought to apply solely to instances of terrorism and politically-inspired hijacking,[149] the language of the instrument is neutral as to the motivation of the perpetrators of its constituent offences and there appears to be no grounds for suggesting that it should be so restricted.[150] While it is clearly not intended to address minor inconveniences created by non-violent protests,[151] there is clear scope to apply it to dangerous situations created by more militant activists. Unlike piracy, however, the SUA Convention does not give rise to universal jurisdiction and an arresting state may only board the offending vessel with the express authorisation of the flag state.[152] This could create an uncomfortable diplomatic position for a flag state where activists or their targets have clearly acted in an especially disproportionate and excessively violent manner. Thus far, the SUA Convention has not been invoked in this context and concerns raised by the flag states of both sides in the 'Whale Wars' have been confined to diplomatic exchanges through pertinent international fora.

Perhaps surprisingly, the SUA Convention has received minimal judicial attention to date.[153] Indeed, it appears to have been directly raised for the first time in 2008 in *United States* v. *Lei Shi*,[154] to address the jurisdictional complications raised where Hawaiian officials had taken reluctant possession of an unstable Chinese mariner accused of a double homicide that neither the state of nationality nor the flag state appeared interested in prosecuting. Most significantly, however, the Convention was substantively invoked in *Institute of Cetacean Research*, in which the US courts considered that it could be suc-

149 See Halberstam, M. "Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety." *American Journal of International Law* 82 (1988): 269.

150 Kontorovich, E. "*United States* v. *Shi*." *American Journal of International Law* 103 (2009): 735.

151 Plant, *supra* note 6, at 90.

152 SUA Convention, *supra* note 125, Article 8 *bis*.

153 For rare examples of its invocation before national courts, see Doby, D. "Whale Wars: How to End Violence on the High Seas." *Journal of Maritime Law and Commerce* 44 (2013): 151–52.

154 525 F.3d 709 (9th Cir.2008).

cessfully applied against protestors. This was initially rejected by the District Court, as in its view no evidence of disablement to any of the claimant's vessels had been adduced.[155] This was overturned by the appellate court, which ruled that this was "a clear error," since the notion of endangerment required solely that the affected party need demonstrate that the defendant "create dangerous conditions, regardless of whether the harmful consequences ever come about [. . .] An attempt is sufficient to invoke the SUA Convention, even if unsuccessful."[156] This logic is consistent with the tenor of the Convention, for Article 3(2) addresses attempts to commit the proscribed acts under Article 3(1). While there has been no further consideration of Article 3 within any other jurisdiction, or in a higher US court, the appellate reasoning follows the fundamental ethos of the SUA Convention, which is to safeguard the public interest associated with unobstructed navigation and global shipping safety.[157]

Given that such charges carry lesser connotations than an accusation of piracy and, as confirmed in at least one jurisdiction, may be invoked where the defendant creates a set of circumstances in which dangerous navigational conditions arise, there is an attractive logic to applying the SUA Convention as a substitute to piracy legislation in the case of especially dangerous protests at sea.[158] Indeed, there would appear to be three key advantages in doing so. Firstly, if a group is considered piratical by advancing their individual agenda in a violent manner without state sanction, an awkward question is raised where the actors in question do appear to have a measure of official authorisation to legitimise their activities. There is some evidence to suggest that Sea Shepherd has been engaged by government bodies to assist in patrolling the national waters of developing states, conducting operations against poachers within marine protected areas at the instigation of the pertinent authorities. In 2002 the organisation was contracted by Costa Rica to patrol its remote Cocos Island marine sanctuary, although the agreement was rescinded shortly before it could take effect after the *Farley Mowat* rammed a vessel that it had accused of illegal shark fishing, resulting in an on-going international arrest warrant against Paul Watson. More recently, in February 2014 Sea Shepherd

155 *Supra* note 94, at 1234.

156 *Supra* note 127, at 945.

157 Moreover, the preamble of the Convention emphasises that "unlawful acts against the safety of maritime navigation jeopardize the safety of persons and property, seriously affect the operation of maritime services, and undermine the confidence of the peoples of the world in the safety of maritime navigation": SUA Convention, *supra* note 125, preamble, fourth recital.

158 Doby, *supra* note 153, at 163–68.

was requested to assist Guatemalan enforcement efforts against illegal fishing, an operation that seemingly proceeded without violent confrontation.[159] The precise status of this regulatory 'outsourcing' is not entirely clear – and patently ought not to legitimise the ramming of vessels – but may give an organisation an arguable defence that their motivation was no longer for 'private ends'.

Secondly, Article 3 of the SUA Convention applies only to those that have committed, or sought to commit, dangerous acts against navigation. This avoids problematic definitional issues associated with designating such actors as 'terrorists' or 'pirates' and provides a more straightforward means of exercising criminal jurisdiction. Thirdly, although a demonstrable case can be made that protestors may be caught by the definition of piracy – even where the nature of their objectives are less typically 'private' than those committing the more traditional felony of robbery at sea – to insist upon doing so arguably dilutes the gravity of the offence. Judicial bodies have, in recent years, been prepared to expand the ambit of peremptory norms to address problematic conduct that has hitherto proved difficult to compartmentalise – most notably by allowing for the incorporation of human trafficking and exploitative and predatory behaviour within a broader understanding of slavery and forced labour.[160] While this has had positive – if not necessarily uncomplicated – effects upon human rights norms, it remains an ironic and highly unsatisfactory practice for piracy offences to be applied to an expanding cast of nautical miscreants, while states concurrently and steadfastly avoid the detention and prosecution of genuine pirates acting within noted global trouble-spots. This is especially acute given that campaigners have recently demonstrated a clear intent to harass and board vessels laden with Arctic oil as an emergent long-term protest strategy,[161] – thereby raising the spectre of future piracy charges

159 Sea Shepherd. "Sea Shepherd Successfully Helps Guatemalan Officials Halt Poaching Operation. Sea Shepherd, News and Media, (February 18, 2014)." http://www.seashepherd.org/news-and-media/2014/02/18/sea-shepherd-successfully-helps-guatemalan-officials-halt-poaching-operation-1557 (accessed June 1, 2014).

160 See especially the considerations of the European Court of Human Rights in *Rantsev* v. *Cyprus and Russia* (App no. 25965/04) ECHR 22, January 7, 2010, (ruling that a failure to provide an effective system of enforcement against human trafficking constituted a violation of Article 4 of the ECHR, addressing "slavery and forced labour": at paras. 281–84) and the International Tribunal for the Former Yugoslavia in *Prosecutor* v. *Kunarac, Kovac and Vukovic*, Case No. IT-96–23-T and 23/1 (asserting, more contentiously, that *inter alia* human trafficking could be considered akin to slavery: at para. 542).

161 BBC News. "Greenpeace Russian Tanker Activists Held in Netherlands." *BBC* (May 1, 2014). http://www.bbc.co.uk/news/world-europe-27236750 (accessed June 1, 2014).

in various European jurisdictions – in light of the considerable legal problems raised by activism targeting offshore installations, to which this article now turns.

IV Maritime Protest and the Law concerning Offshore Installations

In recent years, oil and gas activities in offshore waters have expanded on an unprecedented scale, provoking a significant level of corresponding environmental activism. Particular concerns have been raised by an increased industrial presence within the Polar Regions, which, as vividly demonstrated by the fouling of the Alaskan coastline following the *Exxon Valdez* tanker disaster in 1989, are especially vulnerable to the effects of oil pollution. The apocalyptic ecological prospect of a *Deepwater Horizon*-style incident in Polar waters has aroused strong agitation against the hydrocarbon industry, especially concerning the Arctic. This has inspired sporadic, yet highly publicised, actions against offshore installations and support vessels. A particular target has been the controversial *Prirazlomnaya* oil platform installed in the Russian EEZ in 2011, which has twice been boarded by Greenpeace activists, first in November 2012 and, rather more infamously, in 2013. Although the security threat posed by environmental activism in the Arctic is generally considered low,[162] at-sea campaigns have been instigated against similar developments in Greenland and Alaska. These have included attempts to board structures and vessels and to physically impede drilling activities, resulting in a series of injunctions imposed by a variety of national courts. Meanwhile, mirroring these developments, the proliferation of industrial activities within Antarctic states has generated similar opposition, resulting in novel legal developments to address nautical protests.

Offshore installations are most commonly sited within the EEZ of a coastal state which, under Article 58 LOSC, exercises sovereign rights over the natural resources of the seabed as well as jurisdiction over the establishment and use of installations for the purpose of exploiting these resources. The coastal state also exercises jurisdiction over marine scientific research attendant thereto and the protection and preservation of the marine environment;[163] it thereby licences oil and gas exploration and exploitation and can impose

162 Byers, M. *International Law and the Arctic.* Cambridge: Cambridge University Press, 2013, 268–69.

163 LOSC, *supra* note 4, Article 58(1)(b).

environmentally-orientated restrictions in accordance with the general rights and duties prescribed to other states under the Convention. More specifically, powers concerning offshore installations are conferred through Article 60 LOSC. Under Article 60(2), the coastal state has exclusive jurisdiction over installations and therefore controls access to these structures, as well as imposing criminal sanctions for breaching these rules. Reasonable safety zones may also be established around installations to ensure the safety of navigation and of the structures themselves.[164] Under Article 60(5), the coastal state may determine the dimensions of the safety zone up to a maximum of 500m as measured from each point of their outer edge, except as authorised by "generally accepted international standards or as recommended by the competent international organization," which is generally considered to be the IMO. Notwithstanding a degree of agitation by coastal states, the IMO has resisted a general expansion of the 500m limit for safety zones.[165] Nevertheless, state practice remains somewhat variable and a degree of creeping jurisdiction has been experienced in this regard.

Where such a zone is lawfully designated, "[a]ll ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity."[166] The LOSC therefore prescribes no general foundation for vessels to enter these areas. Nevertheless, if the vicinity' is understood as encapsulating the remaining areas of the EEZ that are not pockmarked by installations and their accompanying safety zones, it would be a logical assumption that activists may assert a right to demonstrate in these waters, subject to the responsible exercise of EEZ privileges as outlined above. This was indeed the approach of Judges Wolfrum and Kelly in the *Arctic Sunrise* case, who considered that the *Prirazlomnaya* activists "could invoke, among others, the freedom of expression as set out in the International Covenant on Civil and Political Rights whereas in the safety zone, depending on the factual situation, the exercise of such rights may have to yield to the safety interests of the operator of the platform."[167] As far as navigational requirements are concerned, whether the IMO's protest Resolution may be so considered is perhaps more debateable. An international standard need not necessarily derive from a

164 Ibid., Article 60(4).

165 NAV 56/20, at 14–17.

166 LOSC, *supra* note 4, Article 60(6).

167 *Arctic Sunrise Case* (*Kingdom of the Netherlands* v. *Russian Federation*), *Provisional Measures*: International Tribunal for the Law of the Sea, Case 22, Order of 22 November 2013, Joint Separate Opinion of Judge Wolfrum and Judge Kelly; reproduced on-line at http://www.itlos.org/index.php?id=264 (accessed June 1, 2014), at para. 13.

treaty, so long as the criterion of general acceptance is met,[168] hence in principle a non-binding instrument such as Resolution MSC.303(87) could suffice. It was ultimately adopted unanimously by the relevant organ of the IMO and has already been cited as a guiding principle by both the IWC,[169] and in national positions concerning whaling protests.[170] On a practical level, however, the issue is perhaps rather moot, since the central imperative of the Resolution is for protest vessels to adhere to the COLREGs, a set of international rules and standards applicable to all vessels in navigation that has unquestionably attained the status of having been 'generally accepted'.

Ultimately, however, offshore installations are likely to remain an attractive target for determined campaigners, which will generally provoke a defensive response from the coastal state in question. Under Article 58(2) LOSC, the exclusivity of flag state jurisdiction is broadly extended to issues arising within the EEZ. Indeed, the IMO has suggested that reporting infractions to the flag state is the most appropriate course of action where a safety zone has been violated.[171] Nevertheless, this appears to be subject to two broad exceptions operating in favour of the coastal state, although neither is without practical and legal difficulties. In the first instance, Article 111(2) establishes a right to hot pursuit in respect *inter alia* of violations of safety zones. This would seemingly extend to incursions by small boats launched from another ship, which under the doctrine of constructive presence, would justify the eventual arrest of the parent vessel if the conditions inherent in the exercise of hot pursuit are lawfully followed.[172] The precise conditions regulating pursuit from inside a specific safety zone are not explicitly stated under the LOSC. However, Article 111(2) has been applied *mutatis mutandis* from the core principles established in Article 111(1) concerning pursuit from internal or archipelagic waters, the territorial sea or contiguous zone, specifying that pursuit must commence from

168 Harrison, J. *Making the Law of the Sea: A Study in the Development of International Law.* Cambridge: Cambridge University Press, 2011, 174.

169 IWC Resolution 2011–2, *supra* note 109.

170 *Joint Statement on Whaling and Safety at Sea, supra* note 112.

171 IMO Resolution A.671(16): Safety Zones and Safety of Navigation around Offshore Installations and Structures. The Resolution expressly cites Article 60 LOSC as underpinning these considerations. Nevertheless, this Resolution was largely based on concerns over authorised incursions into safety zones by fishing vessels, rather than the physical boarding of an installation.

172 This broad approach was asserted by at least one judge in the *Arctic Sunrise* case, who observed that "[t]he Convention is quite clear in article 111 on the right of hot pursuit that a mother ship is responsible for the activities of its boats or other craft as they work as a team": Dissenting Opinion of Judge Golitsyn, *supra* note 167, at para. 35.

within the zone in question. The implication is that hot pursuit in response to a violation of Article 60 must accordingly commence from within this zone to fulfil such criteria. As the *Arctic Sunrise* dispute amply illustrates, this may be a significant evidential burden for the arresting state to discharge. Moreover it would seemingly necessitate a considerable logistical investment in maintaining a security presence around vulnerable platforms in remote and inhospitable regions to ensure the proper assertion of criminal jurisdiction in these waters. Further legal complications are likely to be forthcoming in this regard since, as with counter-piracy operations generally, an increasing security role has been allocated to private military contractors.[173]

The second alternative is to invoke the law of piracy, which would also override flag state jurisdiction. As with the Sea Shepherd controversy, this is unlikely to prove an attractive option for coastal states in this context given the considerable legal and diplomatic obstacles that would be generated as a result. Indeed, the initial piracy indictments against the crew of the *Arctic Sunrise* were swiftly downgraded to the rather more nebulous charge of 'hooliganism' following widespread international condemnation and legitimate scepticism as to whether the conditions for piracy had been met. Two distinct problems are apparent in this respect. Firstly, assuming that the act of unauthorised boarding of an oil platform qualifies as 'violence', as outlined above the requirement of 'private ends' must still be established. If *Institute of Cetacean Research* is a reliable barometer of global judicial orientation, this may be less problematic for the arresting authorities than has traditionally been considered the case, although it is by no means certain that every jurisdiction would adopt this approach. Secondly, and rather more significantly in this context, Article 101 LOSC requires piracy to be directed against a "ship or aircraft." It is highly doubtful whether an installation that has been affixed to the seabed to the extent that the designation of a safety zone is necessary would qualify as a 'ship'.

173 Indeed, in April 2014, in the light of the *Prirazlomnaya* saga, the Russian authorities adopted new legislation permitting the use of private military contractors to protect Arctic installations: Федеральный закон Российской Федерации от 20 апреля 2014 О внесении изменений в отдельные законодательные акты Российской Федерации по вопросу создания ведомственной охраны для обеспечения безопасности объектов топливно-энергетического комплекса г. N 75-ФЗ [Federal Law of April 20, 2014 on Amendments to Certain Legislative Acts of the Russian Federation on the Establishment of Departmental Security to Ensure the Safety of the Fuel and Energy Complexes; N 75-FZ]. Under Article 4 of the legislation, companies have the right to establish "departmental security" to protect *inter alia* offshore oil rigs.

Thus far, no international court has been called upon to ascertain the legal nature of an oil platform. This issue was fleetingly raised in an application for provisional measures before the ICJ, but was settled before judgment could be rendered.[174] Nevertheless, it appears that the overwhelming majority of national maritime laws would expressly preclude such an interpretation. Many jurisdictions have adopted a formulation similar to that of England, which considers a ship to be "every description of vessel used in navigation."[175] While this concept has generated a raft of entertainingly enterprising litigation, "it can safely be said that offshore platforms, which are firmly fixed to the sea-floor, will not satisfy the definition of a ship."[176] Nevertheless, a small number of jurisdictions have explicitly extended the national definition of a ship to include permanent marine fixtures, most notably Spain,[177] although this firmly remains a minority approach. However, while most jurisdictions exclude fixed platforms from this definition, objects need not be self-propelled to qualify. A variety of maritime apparatus associated with the offshore industry – including drilling equipment, floating platforms and other ancillary units,[178] could feasibly be considered 'ships' while in transit to their destination. If attacked with sufficient force by protestors at sea, such actions could potentially fall within the ambit of piracy legislation.

Unlike the parallel position concerning the Sea Shepherd activists, little assistance is provided by the SUA regime as an alternative basis for prosecution. The scope of the SUA Convention is explicitly restricted to vessels "of any type whatsoever not permanently attached to the sea-bed,"[179] which clearly excludes installations that are not in transit. A widely-ratified Protocol to the

174 *Case Concerning Passage through the Great Belt* (*Finland* v. *Denmark*) [1991] ICJ Rep 12.

175 Merchant Shipping Act 1995 (c. 21), section 313.

176 Soyer, B. "Compensation for Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources." In *Pollution at Sea: Law and Liability*, edited by B. Soyer and A. Tettenborn, 59–79. London: Informa, 2013, 65.

177 Spanish legislation defines a ship as including, *inter alia*, "las plataformes y cualquier otra construcción en el mar, *sea fija o flotante*": Ley 21/1977 de 1 abril, sobre aplicación de sanciones en los casos de contaminación marina provocada por vertidos desde buques y aeronaves, Article 1(3); reproduced at BOE-A-1977–8604 (emphasis added).

178 Indeed, in the context of rig safety the IMO has expressly stated that "mobile offshore drilling units (MODUs) used for exploratory drilling operations offshore are considered to be vessels when they are in transit and not engaged in a drilling operation, but are considered to be installations or structures when engaged in a drilling operation": IMO Resolution A.671(16), *supra* note 171.

179 SUA Convention, *supra* note 125, Article 1(1)(a).

Convention does, however, apply to fixed platforms,[180] and creates a series of offence against such structures, which are increasingly vulnerable to the attentions of armed criminals and militias.[181] Of most immediate relevance to at-sea protests is Article 2(1)(a), which creates the offence of unlawfully and intentionally seizing or exercising control over a fixed platform "by force or threat thereof or any other form of intimidation." The nuances of this provision have not been tested by national courts to date and little direct analogy can be drawn from the two US cases that have considered aspects of Article 3 of the parent convention. Accordingly it remains questionable whether the actions of groups such as Greenpeace, who typically suspend themselves temporarily from platforms with ropes or in plastic survival pods,[182] would meet the standards of force or intimidation established under the 2005 Protocol.

Indeed, given the difficulties associated with establishing rig-based protest as a form of piracy, or in meeting the criteria established under the SUA regime, it is likely that states will more readily proceed against protestors through specific maritime offences established under national law, as has been the broad practice associated with confrontational navigation. In this respect, breaching a safety zone will constitute a criminal act within all jurisdictions with an offshore industrial presence. Although Article 60(4) LOSC was intended to promote navigational safety within oil fields rather than the operational security of

180 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 2005; 1678 UNTS 304. Under Article 1(3), the Protocol applies to "an artificial island, installation or structure permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purposes."

181 For a helpful survey of documented attacks on offshore platforms see Kashubsky, M. "A Chronology of Attacks on and Unlawful Interferences with Offshore Oil and Gas Installations, 1975–2010." *Perspectives on Terrorism* 5 (2011): 141–59. A miniscule proportion of such interferences have been for the purposes of environmental activism, hence the SUA regime is correctly orientated towards addressing problems posed by hijacking and armed robbery.

182 Most recently on 30 May 2014 in Svalbard, where campaigners boarded a drilling rig operated by Statoil, with the ensuing disruption to production estimated to have cost some 7.5 million NOK daily: MarineLink. "Norway Rejects Greenpeace Appeal over Arctic Drilling" *MarineLink News* (May 30, 2014): http://www.marinelink.com/news/greenpeace-rejects-norway370163.aspx (accessed June 1, 2014). The Greenpeace protest vessel *Esperanza* was also boarded by Norwegian officials, with the exercise of criminal jurisdiction further complicated by the rig itself having been registered to the Marshall Islands: Hovland, Kjetil Malkenes. "Norway Police Order Greenpeace Ship to Leave Statoil Drilling Site." *Wall Street Journal*, 30 May 2014. http://online.wsj.com/articles/norway-moves-to-protect-barents-sea-site-from-greenpeace-protest-1401481129 (accessed June 1, 2014).

installations,[183] coastal states have developed an array of provisions to address transgressions at sea. Of most recent concern has been the current legislative position of New Zealand, where the burgeoning offshore industry has been heavily affected by the actions of protestors. Traditionally, criminal jurisdiction in a maritime context in New Zealand had been primarily confined to the territorial sea, with little history of sustained nautical misconduct in offshore waters. Commentators had nonetheless expressed concerns as to the whether the domestic legal framework would be sufficient to address disruptive protest actions beyond the twelve-mile limit.[184] Indeed, the national position came under considerable scrutiny in 2011, where campaigners boarded vessels associated with the oil industry,[185] and a flotilla of vessels and individual swimmers caused the abandonment of a planned programme of seismic surveys. The protests generated extensive public policing costs and ultimately led the oil giant Petrobras to relinquish its licensed acreage upon the New Zealand continental shelf.[186]

In 2013, following judicial confirmation that the ambit of national criminal law extended to offences committed in the course of protest actions occurring on the high seas,[187] New Zealand contentiously amended the Crown Minerals Act 1991 to address violations of safety zones and interference with vessels associated with offshore activities. The new legislation was influenced by a parallel provision of Australian law, which creates the specific offence of "interfering with offshore petroleum installations or operations" and carries a

183 On the development of Article 60(4) in this respect see Kaye, S. "The Protection of Platforms, Pipelines and Submarine Cables under Australian and New Zealand Law." In *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand*, edited by N. Klein, J. Mossop and D.R. Rothwell, 186–200. Abingdon: Routledge, 2010, 188.

184 Smith, T. "Fighting on the Ocean Blue: New Zealand's Extra-Territorial Jurisdiction and Maritime Protest." *Victoria University of Wellington Law Review* 32 (2001): 511–519.

185 This campaign was especially newsworthy as it was led by New Zealand's most prominent actress, Lucy Lawless. The activists were subsequently convicted of the rather prosaic maritime crime of being unlawfully aboard a ship and received sentences of community service and small personal fines: Backhouse, Matthew. "Lucy Lawless Gets Fined for Protest." *The New Zealand Herald*, 7 February 2013. http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10863945 (accessed June 1, 2014)

186 Davison, Isaac. "$1.7m Bill for Oil Protest on High Seas." *The New Zealand Herald*, 24 April 2013. http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10879424 (accessed June 1, 2014).

187 *New Zealand Police* v. *Elvis Heremia Teddy* [2013] NZHC 432; paras. 27–34.

maximum sanction of ten years imprisonment.[188] The New Zealand position, which entered into force in May 2013, established a new offence of "interfering with structure or operation in the offshore area,"[189] which is seemingly one of strict liability.[190] Unlike the Australian legislation, however, the 2013 amendments prescribed powers to establish "specified non-interference zones" of 500m within offshore waters that may be designated around installations and individual vessels associated with a permitted prospecting, mining, or exploration activity.[191] This clearly exceeds the position prescribed by Article 60(4), which allows only for the designation of safety zones around "artificial islands, installations and structures."

To prosecute a peaceful, non-obstructive protest that nevertheless involves the infringement of a specified non-interference zone designated around a vessel would raise strong and valid concerns over the legitimacy of this provision in the light of the principle of free navigation and, indeed, national human rights norms. As Keith J. (as he then was) clearly stated in the leading national case on maritime crime, "New Zealand Courts have for over a century made it plain that legislation regulating maritime matters should be read in the context of the international law of the sea and, if possible, consistently with that law."[192] If a domestic court were to heed this counsel there would be little basis to uphold the legal validity of a vessel-based specified non-interference zone. Indeed, the resolve of the national authorities has been tested in November 2013 and March 2014, where the Oil-Free Seas Flotilla of protest vessels conducted a peaceful campaign in the New Zealand EEZ, which included breaching a zone established around the *Noble Bob Douglas*, a licensed drill ship undertaking preliminary excavations in the Tasman Sea.[193] The New Zealand Police monitored the flotilla but, as yet, no charges have been forthcoming against the activists in question. It appears that this will be a sensible approach for the authorities to maintain. Ironically, however, the true test of these provisions will arise in an instance of more confrontational protest at sea, a situation that the legislation was expressly designed to avoid.

188 Offshore Petroleum and Greenhouse Gas Storage Act no. 14 of 2006; section 603. As yet, however, no prosecution has been brought under this provision.

189 Crown Minerals Act 1991, no. 70, section 101B as inserted by the Crown Minerals Amendment Act 2013 no. 14.

190 Ibid., Section 101B(3).

191 Ibid., Section 101B(6) – (8). These zones are applicable to the territorial sea, EEZ and continental shelf of New Zealand: section 101A.

192 *Sellers* v. *Maritime Safety Inspector* (1999) 2 NZLR 44, at 57.

193 "Oil Free Seas Flotilla Returns to NZ." *The New Zealand Herald*, 1 December 2013.

V Concluding Remarks

Despite a significant volume of at-sea protest, the legal position of marine campaigning has been subject to relatively little sustained attention to date. This has, however, become an increasingly pressing matter, given the expanding array of risky direct action campaigns undertaken in treacherous and unforgiving nautical conditions, especially within the Polar Regions. To the extent that specific principles can be identified in relation to protest activities – which vary considerably in their execution, effect and intent – it is clear that the overarching objective of the current national and international provisions is to secure safety at sea. Where campaigns jeopardise this fundamental consideration, pertinent human rights norms will offer little protection to activists. Accordingly, it is clear that a right to campaign peacefully may be distilled from the pertinent rules of the law of the sea and the limits of provisions addressing freedom of speech and assembly. Obstructive protests and actions that endanger life and property at sea, irrespective of the worthiness of and global interest in the cause, will therefore continue to operate at the fringes of the law. There is a distinct naivety to this consideration on the part of many activists, as the stern response to the *Prirazlomnaya* and *Mavi Marmara* incidents attest. *Caveat protestor* clearly applies in many jurisdictions.

At present there is sufficient flexibility within international human rights provisions to regulate at-sea campaigns in a proportionate manner on the grounds of safety and in providing appropriate alternative platforms for protest activism. Equally clearly, many campaign groups consider that softer tactics are of limited utility in addressing issues of pressing global concern. The development of alternative bases to address especially dogged campaigners accordingly constitutes an alarming legal trend. Recent litigation has confirmed that the parameters of international piracy law can provide a theoretical foundation to control dangerous misconduct at sea. State practice, however, demonstrates a justifiable reluctance to apply these rules against protestors, with valid concerns raised over the impact of such considerations for campaign activism and for the scope of the offence of piracy itself. Likewise, clear rules of national law exist to address incursions into valid safety zones for offshore installations. The creeping jurisdiction encapsulated by the current approach of New Zealand ought to be resisted by other states and reconsidered by the appropriate national authorities.

To date, there has been a discernible degree of tacit toleration of confrontational protests, especially where the central motivation of the activists is broadly aligned with that of the state in question. The lenient treatment accorded by particular jurisdictions to groups such as Sea Shepherd has,

fortuitously, not been tested by nautical tragedy, a collision-related environmental calamity or an overly-aggressive response by security contractors. The inevitable legislative aftermath of a protest-related disaster at sea will accordingly have significant implications for a loose regulatory framework that has, thus far, maintained a pragmatic balance between the essential values of civil activism and public safety.