

Comment

Two Competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean

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Let him, then, have powers commensurate with his utmost possible need; only let him be held strictly responsible for the exercise of them. Any other course would be injustice, as well as bad policy.

—Richard Henry Dana, Jr.¹

I. INTRODUCTION

In February 2011, in the midst of Japan's widely-criticized research whale hunt, the Japanese Agriculture Minister Michihiko Kano called the whaling fleet home months ahead of plan and hundreds short of its kill quota. The reason given for the abrupt end to the whaling season was harassment by a nongovernmental organization (NGO) called the Sea Shepherd Conservation Society (Sea Shepherds).² For years, the Japanese fleet had taken pride in its ability to outrun environmental activists,³ and Japan had refused to put an end to its research whaling operations in the face of resolutions from the International Whaling Commission (IWC)⁴ and repeated cessation requests. Ultimately, it was confrontation instigated by a renegade group, rather than any international resolution or NGO pressure, that brought an abrupt end to Japan's controversial whaling practices.

In recent years, the NGO community has played an increasingly important and well-recognized role in shaping international law and in focusing enforcement resources. As a result, NGOs have earned invitations as official delegates to several major international conventions, particularly those

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1. RICHARD HENRY DANA, JR., TWO YEARS BEFORE THE MAST 462 (1840).

2. Martin Fackler, *With Whaling Ships Under Attack, Japan Will Recall Fleet*, N.Y. TIMES, Feb. 19, 2011, at A8, available at <http://www.nytimes.com/2011/02/19/world/asia/19japan.html>.

3. *Id.*

4. See *Whaling in the Antarctic (Austl. v. Japan)*, Application Instituting Proceedings, ¶¶ 17-22 (May 31, 2010), available at <http://www.icj-cij.org/docket/files/148/15951.pdf>.

addressing the environment.⁵ Moreover, news of the abrupt end of the Japanese whaling season demonstrates that environmental NGOs now have the ability to compel compliance with international commitments through unilateral action.

According to the Sea Shepherds as well as popular literature, this forced compliance is nothing more than private “enforcement” of international law.⁶ However, this assessment is too simplistic; a more nuanced theory of the principal functions of international lawmaking, known as the “New Haven School,”⁷ identifies seven distinct categories of actions: “*intelligence, promotion or recommendation, prescription, invocation, application, termination, [and] appraisal.*”⁸ Examining NGO activism through this paradigm is particularly useful for a number of reasons. First, the theory’s well-defined, function-based stages better describe the effects of activism than simple, conventional designations that rely on the identity of the actors or the forum. Indeed, NGO activism can be understood as carrying out four of the seven aforementioned functions: promotion, prescription, invocation, or application.⁹ In addition to this descriptive advantage, the legal realist philosophical underpinnings of the New Haven School make it a natural fit for describing the unorthodox, but increasingly legitimate, role of NGOs in the international legal system. Finally, the longevity and prominence of the New Haven School provide a credible, well-understood framework to facilitate continued scholarly debate.

This Comment will use the anti-whaling campaigns in the Southern

5. See generally Philippe J. Sands, *The Environment, Community, and International Law*, 30 HARV. INT’L L.J. 393 (1989) (describing the powerful influence of NGOs on international environmental lawmaking and advocating for their further empowerment through providing them with legal standing in international courts).

6. See Donald K. Anton, *Protecting Whales by Hue and Cry: Is There a Role for Non-State Actors in the Enforcement of International Law?*, 14 J. INT’L WILDLIFE L. & POL’Y (forthcoming 2011) (manuscript at 1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593305 (quoting Raffi Khatchadourian, *Neptune’s Navy*, NEW YORKER, Nov. 5, 2007, at 56) [hereinafter Anton, *Protecting Whales*]; *International Laws and Charters*, SEA SHEPHERD CONSERVATION SOCIETY, <http://www.seashepherd.org/who-we-are/laws-and-charters.html> (last visited Nov. 2, 2011) [hereinafter *International Laws and Charters*, SEA SHEPHERD] (“Sea Shepherd campaigns are guided by the United Nations World Charter for Nature. Sections 21-24 of the Charter provides authority to individuals to act on behalf of and enforce international conservation laws.”).

7. See generally W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC’Y INT’L L. PROC. 118 (1992). The New Haven School is a policy-oriented approach to international legal theory that was pioneered by Myres S. McDougal and Harold D. Lasswell in the 1960s, then carried forward to the height of its prominence by W. Michael Reisman in the latter part of the twentieth century and the beginning of the twenty-first. It is grounded in legal realism as well as the sociological jurisprudence of Roscoe Pound and is based on the idea that lawmaking, particularly at the judicial level, is, at its core, about normative social choices and ordering. The referenced categories describe the tasks necessary to craft policy that best maintains social order and approximates community goals.

8. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 261 (1967) (“1. Intelligence is the obtaining, processing, and dissemination of information (including planning). 2. Promotion (or recommendation) is the advocacy of general policy. 3. Prescription is the crystallization of general policy in continuing community expectations. 4. Invocation is the provisional characterization of concrete circumstances in reference to prescriptions. 5. Application is the final characterization of concrete circumstances according to prescriptions. 6. Termination is the ending of a prescription and the disposition of legitimate expectations created when the prescription was in effect. 7. Appraisal is the evaluation of the manner and measure in which public policies have been put into effect and the responsibility therefor.”).

9. For definitions, see *id.*

Ocean¹⁰ as a case study to analyze two competing models of NGO activism. The Comment defines the two competing models as “protest” and “interventionist” activism.¹¹ This Comment will show that the lawmaking function of activism and the effect it has on international behavioral norms change depending on the model employed. It concludes that, despite serious drawbacks, there are certain circumstances under which NGOs should adopt more interventionist activism to enforce international environmental law.

In the Southern Ocean, two types of environmental campaigns have targeted the whaling industry. One approach, employed by Greenpeace,¹² utilizes consumer boycotts and protests to encourage divestment from the industry. The other approach, taken by the Sea Shepherds, uses a fleet of ships to directly intervene in and obstruct whaling operations in the Southern Ocean.¹³

Greenpeace’s approach exemplifies protest activism, which consists of publicly organized, undoubtedly legal activities meant to put indirect pressure on the governmental or private entities that are purportedly violating international law. This is a law-*promoting* or perhaps law-*prescribing* function; it aspires to shift public policy and community expectations. The Sea Shepherds’ approach, in contrast, exemplifies interventionist activism, a model that involves either borderline- or blatantly illegal tactics to confront violators directly. Interventionist action generally includes law *invocation* and direct *application* of force to implement existing laws and policies. Contrasting the effectiveness and legality of these distinct approaches to anti-whaling activism will inform the international community’s important and inevitable determination of the role of NGOs in international law enforcement.

10. The Southern Ocean is the fourth largest of the five principal oceanic divisions. Although there are competing definitions as to its precise boundaries, the Southern Ocean is generally thought to comprise the area of the ocean that sits south of roughly 60°S latitude and encircles Antarctica. *Oceans: Southern Ocean*, CENTRAL INTELLIGENCE AGENCY—THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/oo.html> (last updated Nov. 17, 2010).

11. These two terms are borrowed from Paul Watson. See, e.g., Michael Shapiro, *Sea Shepherd’s Paul Watson: ‘You Don’t Watch Whales Die and Hold Signs and Do Nothing’*, GUARDIAN, Sept. 21, 2010, <http://www.guardian.co.uk/environment/2010/sep/21/sea-shepherd-paul-watson-whales> (quoting Paul Watson, “We’re an interventionist organization, not a protest organization. Protest is very submissive – it’s like saying, ‘please please, please, don’t kill the whales.’ Then they go and kill them anyway – nobody cares. The fact is, you gotta stop them – you’re dealing with ruthless people, and you have to stop them.”). This Comment defines the “protest” model of activism as essentially a form of grassroots lobbying, utilizing public education and consumer pressure to influence corporate and government policy decisions. It has become the preferred method of larger, international NGOs (e.g., Oxfam, Amnesty International) that want to preserve their legitimacy and increase the number of people and dollars dedicated to their organization. These organizations do not want to be perceived as too radical for fear that they will no longer be taken seriously and will therefore have diminished impact. As the name implies, this Comment defines “interventionist” activism as more direct confrontation with the actors who are carrying out an opposed policy on the ground. For this reason, it is a much more risky and costly endeavor in terms of resources and reputation. NGOs that adopt the “interventionist” model of activism tend to be smaller and narrowly focused on specific issues (e.g., Sea Shepherds, Radical Action for Mountain People’s Survival or RAMPS).

12. Shane Rattenbury, *An Open Challenge to Gorton’s*, GREENPEACE CREW & ACTIVIST WEBLOG (Dec. 8, 2005), http://weblog.greenpeace.org/oceandefenders/archive/2005/12/an_open_challenge.html. Greenpeace, in other campaigns, does employ tactics that would constitute interventionist activism; this Comment focuses solely on Greenpeace’s protest campaign for the purposes of comparison.

13. See *infra* notes 55-60 and accompanying text.

This Comment is divided into four parts. Part I will describe the problem presented by international whaling and provide a historical context of the industry, its relatively recent regulation, and specific actions concerning Japanese whaling in the Southern Ocean. Parts II and III will draw on this case study to illustrate the competing models of activism—protest and interventionist—and highlight the demonstrated advantages of and drawbacks to each. Part IV will lend insight into the implications of permitting each model.

II. HISTORY OF WHALING REGULATION AND INEFFECTIVE FORMAL ENFORCEMENT MECHANISMS

The Japanese have been eating whale meat and using whale products for more than two thousand years.¹⁴ Whales were generally regarded as a natural resource that could be exploited freely by any person with the ability to hunt and kill them; they were a part of the common heritage of mankind that was the sea.¹⁵ In the eighteenth and nineteenth centuries, demand for whale meat, baleen, bones, blubber, and oil grew. Consequently, the commercial whaling industry blossomed in the fishing hubs of Scandinavia, Russia, Japan, and certain areas of the United States.¹⁶

Whaling continued into the twentieth century, and despite a worldwide decline in the industry, the advent of efficient tracking and hunting technologies brought several whale species to the brink of extinction by mid-century.¹⁷ This prompted the whale hunters to realize their industry's survival depended on maintaining healthy whale stocks through managed conservation rather than unrestrained exploitation.¹⁸ In response, the whaling nations gathered and analyzed relevant data to support the case for new regulatory policy and to educate the public. These early efforts to diagnose the danger of extinction served the New Haven School's *intelligence* function.¹⁹ Similarly, the advocacy on the part of the whale hunters and their national governments marked the beginning of the law *promotion* stage.²⁰ These efforts resulted in the formation of the first authoritative international commitments on whaling.

In the face of strong scientific evidence and even stronger appeals to the public conscience, the International Convention for the Regulation of Whaling

14. Joseph Elliott Roeschke, Comment, *Eco-terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters*, 20 VILL. ENVTL. L.J. 99, 102-03 (2009).

15. See Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 28 (1991).

16. Roeschke, *supra* note 14, at 102-03.

17. Karen Sack, *Pew Whale Conservation Project*, THE PEW CHARITABLE TRUSTS, <http://www.pewenvironment.org/campaigns/pew-whale-conservation-project/id/8589941065> (last visited Nov. 29, 2011); see also Amanda M. Caprari, Note, *Lovable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean*, 42 CONN. L. REV. 1493, 1496 (2010) (discussing how increased whaling and improved technology threatened the extinction of several whale species).

18. Caprari, *supra* note 17, at 1496-97.

19. See McDougal et al., *supra* note 8, at 261.

20. See *id.*

(ICRW) served the *prescription* function by explicitly laying out the points of international consensus on the regulation of whaling.²¹ The ICRW was drafted in 1946 with fifteen state parties and has subsequently been amended. It now has eighty-nine state parties and remains the chief international legal document governing the whaling practices of participating nations. For the purposes of this case study regarding Japanese whaling in the Southern Ocean, Article VIII and the Schedule of the ICRW provide the relevant legal prescriptions. As of 1986, the ICRW has included in the Schedule a ban on commercial whaling of any type,²² setting and maintaining annual catch limits of zero in all regions for all types of whales.²³ Despite initially objecting to the moratorium, Japan has since withdrawn its objection and has maintained that it is in compliance with the ICRW. In addition to the general obligations of the moratorium, the IWC established in 1994 a whale sanctuary in the Southern Ocean, specifically forbidding commercial whaling in that area.²⁴ Japan objected to the sanctuary's creation with respect only to Antarctic minke whale stocks.²⁵

Japan has conducted whaling operations in the Southern Ocean after 1986 under the auspices of the “scientific research” or “special permit” exception embodied in Article VIII of the ICRW.²⁶ Article VIII provides in part that “any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research . . . and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be *exempt from the operation of this Convention*.”²⁷ Article VIII further allows the whales taken under this exception to be processed and sold on the commercial market pursuant to the instructions of the country granting the research permit.²⁸

Although Japan has steadfastly asserted the legality of its whaling operations under the special permit system, many other IWC nations regard its

21. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 361 [hereinafter ICRW].

22. *Id.* sched. ¶ 10(e) (“Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.”).

23. *See, e.g., id.* sched. tbls. 1-3.

24. *Id.* sched. ¶ 7(b).

25. *See Whaling in the Antarctic (Austl. v. Japan)*, Application Instituting Proceedings, ¶¶ 17-22 (May 31, 2010), available at <http://www.icj-cij.org/docket/files/148/15951.pdf>.

26. Japan Whale Research Program under Special Permit in the Antarctic (JARPA I) began in the year following the 1986 moratorium. JARPA II began in 2005. GOV'T OF JAPAN, PLAN FOR THE SECOND PHASE OF THE JAPANESE WHALE RESEARCH PROGRAM UNDER SPECIAL PERMIT IN THE ANTARCTIC (JARPA II) - MONITORING OF THE ANTARCTIC ECOSYSTEM AND DEVELOPMENT OF NEW MANAGEMENT OBJECTIVES FOR WHALE RESOURCES (2005), available at <http://www.icrwhale.org/eng/SC5701.pdf>.

27. ICRW, *supra* note 21, art. VIII(1) (emphasis added); *see also* Roeschke, *supra* note 14, at 111 n.85 (noting that the scientific research permit “overrides any other Commission regulations including the moratorium and sanctuaries.”).

28. ICRW, *supra* note 21, art. VIII(2) (“Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.”).

operations as violating the ICRW.²⁹ Even if Japan's whaling activity falls under the Article VIII exception, based on the government's statements, the customary international law principle of *pacta sunt servanda*, codified in the Vienna Convention on the Law of Treaties, requires that Japan perform its treaty obligations in "good faith."³⁰

Japan's programs (JARPA I and II)³¹ do not plausibly serve "purposes of scientific research" within the meaning of Article VIII of ICRW. Although the JARPA program has been in effect since the initial imposition of the moratorium, Japan has produced very few, if any, peer-reviewed studies explaining the program's scientific findings.³² The IWC Scientific Committee, commenting on Japan's studies in the North Pacific in 2000 (then called JARPN, rather than JARPA), has said that the Japanese research "did not address questions of high priority relevant to management, did not make full use of existing data, and revealed many methodological problems."³³ Japan, along with some international commentators, maintains that it need not provide any scientific studies at all showing the results of its research in order to justify classification as a "research" program.³⁴ A majority of the IWC nations have made clear through repeated resolutions³⁵ that the permits granted by Japan in the JARPA I and II programs were beyond the scope of the Article VIII scientific research exception, or, at least, constituted a bad faith use of the exception.³⁶ The aforementioned "good faith" obligation requires that even if

29. See Whaling in the Antarctic, Application Instituting Proceedings, ¶¶ 18-21, 31.

30. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.")

31. JARPA is the Japanese whale research program in the Southern Ocean, both phases of which employed lethal research methods. JARPA I was in place from 1987, when Japan finally agreed to comply with the moratorium on commercial whaling, until 2005. JARPA I first called for the capture of 300 minke whales per season until 1995, after which capture was set at 400 whales per season. JARPA II, which began in 2005 and continues today, calls for the capture of 850 minke whales, 50 fin whales, and 50 humpback whales per season. GOVERNMENT OF JAPAN, *supra* note 26, at 1, 4.

32. KAREN STEUER, WORLD WILDLIFE FUND, SCIENCE, PROFIT AND POLITICS: SCIENTIFIC WHALING IN THE 21ST CENTURY 12-13 (2005), available at <http://assets.panda.org/downloads/wwfsciwhalingreportfinal.pdf> (discussing criticism raised by IWC scientists over Japanese scientific whaling); Phillip J. Clapham et al., *Whaling as Science*, 53 BIOSCIENCE 210, 210 (2003) (criticizing Japan's JARPA II program and its poor scientific results).

33. INT'L WHALING COMM'N, RESOLUTION 2000-5: RESOLUTION ON WHALING UNDER SPECIAL PERMIT IN THE NORTH PACIFIC OCEAN (2000), available at <http://iwcoffice.org/meetings/resolutions/resolution2000.htm#5>.

34. Caprari, *supra* note 17, at 1501.

35. The resolution procedure in the IWC is as follows: "[A]ny Member Government OR GROUP OF GOVERNMENTS CAN PROPOSE Resolutions on any issue. Proposed Resolutions are voted on by the Commission and require a simple majority to be passed. Adopted Resolutions are nonbinding BUT ARE INTENDED TO REFLECT THE GENERAL VIEW OF THE COMMISSION ON AN ISSUE." *Resolutions*, INT'L WHALING COMM'N, <http://www.iwcoffice.org/meetings/resolutions/resolutionmain.htm> (last updated July 28, 2011).

36. See INT'L WHALING COMM'N, RESOLUTION 2005-1: RESOLUTION ON JARPA II (2005), available at <http://www.iwcoffice.org/meetings/resolutions/resolution2005.htm#1> ("[R]ecalling that since the moratorium on commercial whaling came into force in 1985/86, the IWC has adopted over 30 resolutions on Special Permit whaling in which it has generally expressed its opinion that Special Permit whaling should: be terminated and scientific research limited to nonlethal methods only (2003-2); refrain from involving the killing of cetaceans in sanctuaries (1998-4); ensure that the recovery of populations is not impeded (1987); and take account of the comments of the Scientific Committee (1987)."); see also INT'L WHALING COMM'N, RESOLUTION 2007-1, RESOLUTION ON JARPA (2007), available at <http://www.iwcoffice.org/meetings/resolutions/resolution2007.htm#res1> (calling upon the

Japan's self-proclaimed "research" classification controls textually, the Article VIII exception still cannot be abused in this way.

Formal international law enforcement mechanisms, such as resolutions, have been ineffectual in ending Japan's illegal whaling in the Southern Ocean. Lacking the necessary *invocation* and *application* functions of international lawmaking, the ICRW and domestic law prescriptions have had no lasting effect on community behavior.³⁷ Japan has been authorizing whaling through the JARPA programs continuously since 1986.³⁸ It has taken over twenty years of Japanese disregard for IWC recommendations for the Australian government—joined by twenty-nine other nations and the European Commission—to file in 2010 an Application Instituting Proceedings in the International Court of Justice (ICJ).³⁹ Nonetheless, even if the ICJ rules in favor of Australia, which is by no means certain,⁴⁰ that still may not affect the Japanese whale hunt.⁴¹ This effort is too little, too late; it pales in comparison to the effect that both protest and interventionist forms of activism have had on the Japanese whaling industry.

III. PROTEST ACTIVISM

In contrast to the ineffectiveness of formal enforcement mechanisms such as resolutions, even the protest model of informal activist pressure has had a substantial effect on Japan's whaling industry. As described at the outset, protest activism involves entirely legal, coordinated efforts by NGOs and members of the general public. This type of opposition to Japanese whaling includes typical protestor tactics: consumer boycotts, public demonstrations, and awareness campaigns. When these organizations perform protest activism and engage in political discussions, or even act as behavioral coordinating devices for individual consumers exercising their right to choose among a range of product offerings, they engage in law *promotion* or *prescription*.⁴² Boycotts, demonstrations, and campaigns are generally permissible under international law,⁴³ even when coordinated by NGOs.⁴⁴

Government of Japan to "suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary").

37. See McDougal et al., *supra* note 8.

38. See *supra* note 26 and accompanying text.

39. See Whaling in the Antarctic, Application Instituting Proceedings (Austl. v. Japan), ¶¶ 17-22 (May 31, 2010), available at <http://www.icj-cij.org/docket/files/148/15951.pdf>.

40. Donald K. Anton, *Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan)*, 14 AM. SOC'Y INT'L L. INSIGHTS 20 (2010), <http://www.asil.org/files/insight100707pdf.pdf>.

41. Japan has a number of options to continue the hunt, from leaving the IWC to amending its JARPA II program to conform to the ICJ's definition of "scientific purpose."

42. See McDougal et al., *supra* note 8 (defining *promotion* as "the advocacy of general policy," and *prescription* as "the crystallization of general policy in continuing community expectations").

43. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (Dec. 10, 1948) (recognizing the rights of all people to "freedom of peaceful assembly and association" and "freedom of opinion and expression").

44. Cf. Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579, 598 (1999)

The work of Greenpeace in protesting Japanese whaling activity in the Pacific Ocean best exemplifies the protest activism model, shedding light on its usefulness and limits. In 2005, an Environmental Investigation Agency (EIA) report revealed that Nippon Suisan Kaisha Ltd. of Japan (Nissui), the parent company of the famous Gorton's, held a 31.9 percent interest in Kyodo Senpaku, one of the companies whaling under the Japanese special permits.⁴⁵ In response, Greenpeace, in collaboration with EIA and the Humane Society of the United States, called for consumer pressure on Gorton's via an e-mail and letter writing campaign, and advocated for a wholesale boycott.⁴⁶ The Earth Island Institute organized a parallel boycott campaign against the New Zealand company Sealord, which is also a subsidiary of Nissui.⁴⁷ Protest tactics like these generally do not implicate domestic legal restrictions in the countries of origin for NGOs, the countries of the individual activists, or the targeted countries. Many of the NGOs that coordinate consumer boycotts and other protest tactics, like Greenpeace, EIA, and the Humane Society, are based in the United States or the European Union. In the United States, it is unconstitutional for any state to prohibit peaceful consumer boycotts;⁴⁸ the U.S. Constitution protects the freedom of assembly, which encompasses peaceful public demonstration.⁴⁹ Other countries, including Japan, similarly protect organized consumer behavior.⁵⁰ The generally lawful nature of protest activism in both domestic and international contexts is perhaps its greatest advantage when compared to the more extreme, but also more effective, interventionist activism model.

Less than six months after Greenpeace initiated its campaign and in response to mounting consumer pressure, Nissui divested completely from Kyodo Senpaku, donating its shares to "public interest" corporations.⁵¹ Greenpeace and other NGOs claimed victory, but acknowledged that the divestiture would not put an end to the illegal whaling.⁵²

Although Greenpeace and others managed to reduce availability of

(discussing the potential need to control NGO behavior).

45. ENVTL. INVESTIGATION AGENCY, *THE GORTON'S FAMILY WHALE KILLING BUSINESS 1* (2005), available at <http://www.eia-international.org/wp-content/uploads/The-Gortons-Family-W hale-Killing-Business1.pdf>.

46. See *Ocean Defenders Force Whalers to Divest*, GREENPEACE INT'L (Apr. 3, 2006), <http://www.greenpeace.org/international/en/news/features/nissui-sealord-gortons/>; Rattenbury, *supra* note 12.

47. See Paul Watson, *The Truth About Sealord, Nissui and Whales*, N.Z. HERALD (Apr. 5, 2006), http://www.nzherald.co.nz/sealord-roup/news/article.cfm?o_id=188&objectid=10376781.

48. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (finding that although states have broad power to regulate economic activities, they could not prohibit peaceful political activity); see generally Michael C. Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984) (arguing that a consumer's right to boycott accords with social and constitutional values).

49. See U.S. CONST. amend. I.

50. See, e.g., NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21, para. 1 (Japan) (guaranteeing "[f]reedom of assembly and association as well as speech, press and all other forms of expression").

51. Shingo Ito, *Japanese Fishing Firms Quit Whaling*, SPACE DAILY (Apr. 4, 2006), http://www.spacedaily.com/reports/Japanese_Fishing_Firms_Quit_Whaling.html.

52. *Ocean Defenders Force Whalers to Divest*, *supra* note 46.

financing for the industry, the Japanese whale hunt continued. The shares Nissui divested were ultimately acquired by the Japanese government, which now very heavily subsidizes the whaling operations under JARPA II.⁵³ This outcome suggests that protest activism, though it serves law *promotion* and *prescription* functions, ultimately lacks sufficient force to effectively change behavior.

IV. INTERVENTIONIST ACTIVISM

As its moniker suggests, interventionist activism is decidedly more powerful and consequently more effective than its protest counterpart. The Sea Shepherds' active harassment of the Japanese whaling fleet in the Southern Ocean brought an early end to the 2011 whaling season.⁵⁴ Nonetheless, such controversial practices come with a price. Because many interventionist tactics *themselves* violate international law, their continued use threatens to compromise the international rule of law. Ultimately, the global community must decide whether the costs of such repeated violations to the international legal regime are outweighed by the successes of interventionist activists. If global acquiescence towards the Sea Shepherds' campaign to date is any indication, interventionist activism provides an acceptable, albeit imperfect, solution—at least with respect to the enforcement of environmental obligations.

Interventionist activism has been markedly more successful than protest activism in reducing the number of whales taken illegally. A simple call to action will generally lead to under-enforcement where international law violations have *environmental* casualties—such as the whales of the Southern Ocean—rather than human victims. Without staunch and forceful human defenders, these animals have little chance of receiving the amount of protection they are due under international law. The interventionist tactics of the Sea Shepherds, led by Captain Paul Watson, aim to correct this problem of under-protection. The Sea Shepherds, made famous by the Discovery television program *Whale Wars*, have harassed Japanese whalers by ramming their vessels,⁵⁵ throwing bottles of foul-smelling butyric acid onto their vessels,⁵⁶ temporarily blinding whalers with a laser device,⁵⁷ deploying propeller fouling devices to disable vessels,⁵⁸ and even boarding moving whaling vessels.⁵⁹ Interventionist techniques such as these involve direct, often violent,

53. See Watson, *supra* note 47.

54. See *supra* note 2 and accompanying text.

55. *Whale Wars: Close Quarter and Collision*, ANIMAL PLANET, <http://animal.discovery.com/videos/whale-wars-close-quarters-and-collisions.html> (last visited Nov. 3, 2011).

56. *Whale Wars: Butyric Acid (Stink Bombs)*, ANIMAL PLANET, <http://animal.discovery.com/videos/whale-wars-butyric-acid-stink-bombs.html> (last visited Nov. 3, 2011).

57. Media Release, Inst. Of Cetacean Research, Dutch Vessel Attacks Japanese Ship Shonan Maru No. 2 (Dec. 17, 2009), <http://www.icrwhale.org/pdf/091217Release.pdf>.

58. *Whale Wars: New Prop-Fouling Device*, ANIMAL PLANET, <http://animal.discovery.com/videos/whale-wars-new-prop-fouling-device.html> (last visited Nov. 3, 2011).

59. See generally *Whale Wars* *supra* notes 55-58 and accompanying text (showing throughout Season 1 that a main objective of the Sea Shepherds' campaign was to have crewmembers board a Japanese whaling vessel carrying a letter accusing the Japanese of violating international law and demanding that they cease whaling operations).

confrontations between NGOs, like the Sea Shepherds, and alleged violators of international law—in this instance, the Japanese whalers.⁶⁰ Watson and the Sea Shepherds justify their questionable tactics as necessary for the enforcement of international law, relying primarily on a combination of the ICRW and the World Charter for Nature.⁶¹ Rather than promoting a certain policy or attempting to shift community expectations, this type of interventionist activism explicitly *invokes* and *applies* prescriptions already found in international legal agreements.⁶² Interventionist activists serve the New Haven School's *invocation* function when they choose the specific targets of their campaigns; interventionist NGOs specifically mark certain Japanese actors as violators of their international legal commitments.⁶³ When the activists engage their targets in this manner, they then serve the *application* function, because they pass final judgment on the offenders and attempt to use force to curb the illegal action.⁶⁴

Although the results in the Southern Ocean demonstrate that interventionist activism, in this context, is effective in terms of changing the behavior of international actors, the actions of the Sea Shepherds are likely illegal under international law because they constitute piracy, terrorism, or both. Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS) defines piracy as “any illegal acts of violence . . . committed for private ends by the crew . . . of a private ship . . . and directed on the high seas, against another ship . . . or against persons or property on board such ship”⁶⁵ The Belgian case of *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*⁶⁶ held because their motivation was the achievement of the NGO's goals, the seafaring environmentalists acted for “private ends,” and were therefore subject to the UNCLOS piracy laws.⁶⁷ Although this precedent suggests that anti-whaling interventionist activism constitutes piracy, it has not been given much weight and remains the only decision in which environmentalists were held to be pirates within the meaning of UNCLOS.⁶⁸

Even if the interventionist tactics of the Sea Shepherds in the Southern Ocean do not constitute piracy under UNCLOS, they almost certainly violate the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA). This Convention provides that “any

60. For a detailed description of “interventionist” tactics, see PAUL WATSON, *EARTHFORCE! AN EARTH WARRIOR'S GUIDE TO STRATEGY* (1993).

61. See *International Laws and Charters*, SEA SHEPHERD, *supra* note 6 (“Sea Shepherd campaigns are guided by the United Nations World Charter for Nature. Sections 21-24 of the Charter provides authority to individuals to act on behalf of and enforce international conservation laws.”); see also World Charter for Nature, G.A. Res. 37/7, ¶¶ 21-24, U.N. Doc. A/RES/37/7 (Oct. 28, 1982) (setting forth the United Nations' position on nature and the respect it is due).

62. See McDougal et al., *supra* note 8, at 261.

63. See *id.*

64. See *id.*

65. United Nations Convention on the Law of the Sea art. 101(a)(i), Dec. 10, 1982, 1833 U.N.T.S. 397.

66. 77 I.L.R. 537, 537-41 (Belg. Ct. Cass. 1986).

67. *Id.*

68. Caprari, *supra* note 17, at 1514.

person commits an offence if that person unlawfully and intentionally . . . performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship”⁶⁹ The Japanese government,⁷⁰ as well as certain commentators, have deemed activity in violation of this provision “marine terror[ism].”⁷¹

As previously mentioned, Watson defends his actions by invoking the World Charter for Nature, which he contends allows private citizens to take direct enforcement action to “[s]afeguard and conserve nature in areas beyond national jurisdiction.”⁷² The World Charter for Nature, however, makes no mention of enforcement, direct action, or penalties, much less empowering nonstate actors to carry out these objectives. Furthermore, U.N. resolutions have less legal effect than the multi-national conventions UNCLOS and SUA, which condemn the Sea Shepherds’ tactics. Because of this shaky legal footing, most international legal scholars believe that the Sea Shepherds lack the authority to engage in the tactics of interventionist activism, even under the auspices of a citizen’s arrest.⁷³

Despite, or perhaps as a result of, the illegality of the Sea Shepherds’ actions, interventionist activism has proven most effective in ending illegal Japanese whaling in the Southern Ocean. As discussed earlier, the decision by the Japanese government to recall the whaling fleet in February of 2011 reflects the success of the Sea Shepherds’ tactics.⁷⁴ More broadly, the effects of the Sea Shepherds’ brash actions have been felt in Japan, where many believe whaling will soon be banned.⁷⁵

The general reluctance of any nation to prosecute the Sea Shepherds for violations of international law suggests that the benefit of interventionist activism outweighs its costs in this case.⁷⁶ The most notable example of the international community’s acquiescence is Australia’s steadfast refusal to prosecute any Sea Shepherds crewmember despite the Japanese government’s numerous pleas and formal protests regarding Australia’s inaction.⁷⁷ Polling suggests that a majority of the Australian public does not believe the Australian government has done enough to end Japanese whaling and also does not find

69. United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. (1)(b), Mar. 10, 1988, 1678 U.N.T.S. 201.

70. See Yoko Wakatsuki, *Japanese Accuse Anti-Whaling Activists of “Terrorism,”* CNN, Feb. 12, 2007, <http://edition.cnn.com/2007/WORLD/asiapcf/02/12/japan.whaling/index.html> (quoting statement by Hideki Moronuki, chief of Japan’s whaling activities, accusing the Sea Shepherds of an “act of terrorism.” “It is very dangerous action of attack, we would like to appeal to all relevant countries for cooperation to stop such [an] act of terrorism by this group.”).

71. See Caprari, *supra* note 17, at 1519.

72. World Charter for Nature, *supra* note 61.

73. Anton, *Protecting Whales*, *supra* note 6 (quoting and expressing agreement with the positions of Professors Don Rothwell, Natalie Klein, and David Caron).

74. See *supra* note 2 and accompanying text.

75. Roeschke, *supra* note 14, at 131. A recent study found that a majority of the Japanese people do not support their country’s Southern Ocean whaling program. See *id.* at 132.

76. See Roeschke, *supra* note 14, at 124; see also Caprari, *supra* note 17, at 1519-20.

77. See, e.g., Caprari, *supra* note 17, at 1520 n.207 (describing the Australian government’s decision not to prosecute two Sea Shepherds crewmembers who boarded a Japanese whaling vessel at sea in an attempt to disrupt the vessel’s operation).

fault with the Sea Shepherds for the collisions that have occurred between their boat and Japanese whaling vessels.⁷⁸

In the United States, the success of the television program *Whale Wars*, now in its fourth season, suggests that the public community is at the very least fascinated with the Sea Shepherds' campaign, although there has been no significant public outcry to stop them. Indeed, the U.S. government has not taken any formal legal action against the organization, which has its headquarters in Friday Harbor, Washington, despite pleas from the Japanese that the organization's 501(c)(3) tax-exempt status be revoked.⁷⁹ It is quite possible that the global community, at least as evidenced by citizen and government action in Australia and the United States, recognizes that by giving real force to international law, the Sea Shepherds and other interventionist activist organizations are performing the costly, and often unfunded, *invocation* and *application* functions arising from obligations to international conventions. By allowing interventionist activism to continue, either by explicitly recognizing its legitimacy or by refraining from condemning the activists' illegal tactics, countries utilize private funding to monitor and enforce conservation laws, thus saving themselves considerable amounts of tax money and government resources.⁸⁰

Nonetheless, the counterargument goes, interventionist activism suffers from the ethical fallacy that "two wrongs do not make a right," and thus its existence undercuts the international rule of law. The legitimacy of the international legal regime at its core depends on the ability of nations to make reciprocal commitments, trusting that such agreements will be upheld, an idea best expressed in the cardinal maxim of international law, *pacta sunt servanda* (agreements must be kept). If enough actors can ignore binding legal commitments without consequence, then the principle at the foundation of the international legal system may be compromised beyond repair. Cooperative international legal efforts could become increasingly rare, or at the very least much more difficult to undertake, due to a lack of trust. From this perspective, to the extent that the larger goal of international law is to establish a world order that can regulate the global commons, equivocation as to interventionist activism may be a step in the wrong direction.

This counterargument, though theoretically appealing, ignores the reality of the situation in many circumstances in which international laws are significantly under-enforced, such as the case of whaling in the Southern Ocean. In keeping with the legal realist approach of the New Haven School,

78. See Michelle Grattan, *Battle for Whales Too Weak, Poll Finds*, AGE (Jan. 16, 2010), <http://www.theage.com.au/national/battle-for-whales-too-weak-poll-finds-20100115-mcku.html>.

79. See Yoree Koh, *WikiLeaks Japan: Whale Diplomacy*, WALL ST. J. (Japan) (Jan. 3, 2011 7:58 PM JST), <http://blogs.wsj.com/japanrealtime/2011/01/03/wikileaks-japan-whale-diplomacy/> (summarizing the communications revealed by WikiLeaks in which Japanese diplomats asked the United States to remove the Sea Shepherds' tax-exempt status). According to the Sea Shepherds' website, however, the organization still operates as a 501(c)(3) with tax-exempt status. See, e.g., *Donate Your Vehicle*, SEA SHEPHERD CONSERVATION SOCIETY, <http://www.seashepherd.org/support-us/vehicle-donation.html> (last visited Nov. 29, 2011) (claiming 501(c)(3) status in connection with donation solicitation).

80. Roeschke, *supra* note 14, at 130-31.

interventionist activism should be supported and permitted to continue if for no other reason than that it is the best possible actualization of the international community's environmental commitments. Interventionist activism has helped to stop a practice in commercial whaling that the global community has long condemned but that formal legal disapprobation has done nothing to curb. From a legal realist perspective, there can be no better endorsement for a policy. Furthermore, as the illegal interventionist tactics employed in anti-whaling campaigns have been insufficiently threatening to provoke backlash from the greater international community, they do not appear to pose any real risk to the public world order.

V. CONCLUSION

As the events in the Southern Ocean demonstrate, nonstate actors can and do use informal pressure to perform international lawmaking functions, often with greater success than state actors working through traditional channels. The difficult question is not whether activism in general benefits the international legal order, but whether its protest or interventionist form presents a better framework for NGOs and the international community at large.

The legal tactics and limited success of protest activism probably will persist without much opposition, given that the model is a valuable substitute to organized formal actions that also serve *promotion* and *prescription* functions. However, the international community will have to confront the implications of interventionist activism, particularly given that its recent success in the Southern Ocean will likely inspire other NGOs to employ similar tactics. The current strategy of turning a blind eye will not be viable for much longer. Even if interventionist activism fills a void with respect to law *invocation* and *application* functions, which are underserved by formal processes, the international community will ultimately have to decide whether the enforcement benefits are significant enough to merit allowing this activity to continue to undercut the rule of law.

The events in the Southern Ocean demonstrate the strong potential of the interventionist activism model in the environmental context, particularly since the primary victims in such cases have no seat at the international bargaining table. What then, should the international community make of interventionist tactics employed outside the environmental movement? If these tactics become part of the arsenal of radical human rights organizations, the global community should, and likely will, treat their use much differently. NGOs taking direct, abrasive action in defense of people's rights could resemble rebellion rather than activism. Such situations could even result in armed conflict, given that the United Nations Charter takes a firm line against "aggression."⁸¹ Furthermore, the rule-of-law costs could become more significant as interventionist tactics spread. Though such extreme outcomes may never come to pass, movement further along the spectrum and away from respect for the rule of law could incrementally undermine the foundation of international trust.

81. U.N. Charter art. 39.

For these reasons, in order to remain an effective tool, interventionist activism should be employed sparingly by social movements and aimed only at those causes with truly silent and undervalued victims.