Comments on International Law

Celebrity Funded Pirates: Bob Barker’s *Bob Barker* and the Curse of the Thunder

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I. INTRODUCTION

On April 6, 2015, the Bob Barker and the Sam Simon stood by as the Thunder sank under mysterious circumstances in international waters as part of “Operation Icefish.” Although the vessels’ namesakes, former The Price is Right television host, Bob Barker, and recently deceased The Simpsons co-creator, Sam Simon, were nowhere near the site where the ship sank, it was their financial contributions to the Sea Shepherd Conservation Society (Sea Shepherd) that allowed for the purchase of the vessels that ostensibly sank the Thunder. The Thunder is an alleged poaching boat, believed to be a member of the “Bandit 6”—a group of boats in the Southern Ocean that engage in illegal fishing practices with little fear of enforcement. Prior to the ship’s sinking, the Bob Barker pursued the Thunder for over four months, breaking the record for “longest sea chase” of one vessel by another. No one was hurt as the Thunder sank, but the incident garnered Sea Shepherd much media attention.

Considerable scholarship and controversy exists regarding Sea Shepherd and theories of liability about its actions. In 2013, the United States Court of Appeals for the Ninth Circuit launched a judicial cannonball across Sea Shepherd’s bow, holding that Sea Shepherd is a pirate organization. The Court further held Japan had a valid claim against Sea Shepherd under the United Nations Convention on the Law of the Sea (UNCLOS) and The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). The question lingers whether the organization’s United States based donors, including Bob Barker and The West Wing actor Martin Sheen, can be held liable for Sea Shepherd’s actions. Donors, like Barker, provided the money to purchase ships that Sea Shepherd now uses to pursue and harass fishing and

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4. Id.
5. Id.
9. See infra Part III (discussing the donor’s potential liability under SUA).
whaling ships. The group’s actions include throwing rancid butter, dragging long metal ropes to damage propellers, pointing high-powered lasers at Japanese fishermen, ramming whaling boats, and sinking whaling boats. The celebrity-financed vessels have the donor’s name emblazoned on them, leaving little doubt as to the celebrity benefactor’s endorsement of this behavior.

Countries around the world criticize and denounce Sea Shepherd as pirates, criminals, and eco-terrorists. Though many of its targets engage in allegedly illegal activity as well, some believe that it does not justify Sea Shepherd’s aggressive conduct. If States want to stop Sea Shepherd, one way would be to target its wealthy benefactors. By making an example of celebrity donors like Bob Barker and Martin Sheen, Sea Shepherd’s opponents could deter those who seek to help the activist group. This Comment will explore United States, as well as international, criminal theories that could establish responsibility for those who assist Sea Shepherd.

The Ninth Circuit’s decision labeling Sea Shepherd as pirates creates an opportunity for interested Governments to prosecute the organization’s donors for intentionally facilitating piracy and violating the SUA. Additionally, Sea Shepherd’s opponents could petition the United States government to label Sea Shepherd a terrorist organization: thereby enabling the prosecution of donors for materially supporting a terrorist organization. However, it may not be in the opponent’s best interest to attack the donors due to declining support for whaling, as well as the impracticability of extraditing the donors. Therefore, although the

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11. *Inst. of Cetacean Research*, 725 F.3d at 942.
14. *Id.* at 1510.
16. Cf. *id.* (stating that the U.S. government goes after those who send material support to terrorist organizations, in part, to deter others from doing the same).
17. *Infra* Part III (reviewing possible theories of criminal liability).
18. *Infra* Part III (discussing the donor’s potential liability under SUA).
19. *Infra* Part III (explaining how the Stop Terrorism of Property Act would establish liability for the donors).
20. *Infra* Part IV (investigating whether it would be worthwhile for the United States to get involved in this dispute).
law allows for their prosecution, Bob Barker and other United States donors should be left alone.21

Part II discusses the history of Sea Shepherd and piracy, defining relevant legal terminology.22 Part III focuses on criminal theories of liability and emphasizes the most direct liability theory would be under the United States’ terrorism laws.23 Part III then discusses how Japan, or another interested nation, may be able to use the criminal theory of aiding and abetting to prosecute Sea Shepherd’s donors.24 Finally, Part IV discusses why it would not be good public policy to go after Sea Shepherd’s donors.25

II. NEPTUNE’S PIRATES

Section A discusses Sea Shepherd’s background and its rise to prominence.26 Sections B and C explore the modern definitions of the terms “piracy,” “material support,” and “terrorism” under United States and international law.27 Section C also navigates through areas of international law that countries interested in or already prosecuting Sea Shepherd could use.28

A. We Will Sink Your Stinking Ship!: The Origins of Sea Shepherd

Sea Shepherd is a conservation group that takes direct action against marine vessels it believes harm marine life, such as whalers, seal hunters, and other types of poachers.29 Former Greenpeace member Paul Watson created the group as a result of his belief that Greenpeace was not aggressive enough in protecting the environment.30 Sea Shepherd and its members have been labeled as rock-stars, criminals, heroes, and even terrorists.31 The fleet, nicknamed Neptune’s Navy,32

21. Infra Part IV (concluding that it would be not be in Japan’s, or any nation’s best interest, to prosecute Sea Shepherd donors).
22. Infra Part II (giving the history of the Sea Shepherd organization).
23. Infra Part III (looking at how terrorism and material support of terrorism provisions have been used to prosecute donors and benefactors of organizations labelled as terrorist groups).
24. Infra Part III (discussing aiding and abetting theories both within the US and in the international arena in countries such as Japan, Australia, and Costa Rica).
25. Infra Part IV.
26. Infra Part II.A.
27. Infra Part II.B.
28. Infra Part II.C.
31. Caprari, supra note 6, at 1507; Magnuson, supra note 6, at 924–25.
hoists the Jolly Roger flag and consists of four boats: Steve Irwin, Bob Barker, Sam Simon, and Brigitte Bardot. Recently, the group added the Martin Sheen, named after the actor and now Sea Shepherd donor.

Sea Shepherd faces intense media exposure and legal scrutiny. Animal Planet’s Whale Wars follows Sea Shepherd’s Australian branch as it combats whalers in the Southern Ocean. The show draws a large number of viewers, thereby increasing awareness of Sea Shepherd’s existence and goals. With increased awareness comes a rise in both civil and criminal litigation against Sea Shepherd. Former donor Ady Gil is suing Sea Shepherd, claiming that they intentionally scuttled the ship Gil lent them as a publicity stunt to glean more attention and sympathy for the group. Additionally, in June 2015, Sea Shepherd settled with the Institute for Cetacean Research for violating a Ninth Circuit injunction that temporarily prevented them from operating in the Southern Ocean. The court ordered Sea Shepherd to pay more than two and a half million dollars for violating the injunction. The Institute for Cetacean Research previously filed for a permanent injunction against Sea Shepherd to prevent them from operating in the Southern Ocean. That case is currently pending.

Internationally, the Danish police arrested two Sea Shepherd members and blocked other Sea Shepherd vessels from entering the Faroe Islands after the group blocked a bay where residents kill pilot whales as part of local tradition.

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34. Id.
37. Id.
38. Enders, supra note 35.
39. Id.; Nagtzaam, supra note 10, at 655–56.
42. Magnuson, supra note 6, at 926.
43. Id. at 926–27.
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B. Applicable United States’ Legal Definitions

This section explains the modern legal definition and origins of “piracy,” as well as the United States’ legal definitions of “terrorist organization” and “material support.”


Piracy has been an international problem since before the United States existed. Famed pirates, such as Calico Jack and Blackbeard, plied the seas during the seventeenth century—the “Golden Age of Piracy”—and engaged in various crimes, including kidnapping, robbery, and murder. Since its establishment, the United States of America has dealt with pirates and privateers. After the American Revolution, the newly formed United States lost the protection Britain gave them against the fearsome Barbary Pirates and, as a result, the Barbary Pirates continually tormented American ships. Privateers also created a problem for the newly founded republic. Privateers are, at their core, state-backed mercenaries who operate on the high seas. During the nineteenth century, privateers of foreign nations captured American sailors and “impressed” them into service for the vessel or the vessel’s state benefactor. In the twentieth century, the world saw a dramatic decline in piracy. Many nations considered piracy effectively dead, leading contemporary scholars to declare piracy as having permanently ended. Although the threat of piracy was in

45. *Infra* Part II.B.1; *Infra* Part II.B.2; *Infra* Part II.B.3.
47. At this time, piracy was a crime under national law as there were no international treaties proscribing the behavior. Jonathan Bellish, *A High Seas Requirement for Inciters and Intentional Facilitators of Piracy Jure Gentium and its (Lack of) Implications for Impunity*, 15 SAN DIEGO INT’L L.J. 115, 120 (2013).
49. *Id*.
52. *Id. at 101* (explaining “during the American Revolution, there were 800 vessels in commission in the “ . . . reserve naval force” (i.e., privateers) but only 198 vessels in commission in the Continental Navy . . . “)); Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221, 237 (2009) (stating “ . . . the Royal Navy’s practice of impressment, or seizure of American sailors to serve on British vessels . . . ”).
53. Bellish, * supra* note 47, at 120.
54. *Id.* at 121.

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decline, the international community still believed it an important task to codify a
workable definition of piracy.\textsuperscript{55}

The 1932 Harvard Draft Convention on Piracy created the first modern
definition of piracy.\textsuperscript{56} The definition was then expanded for the 1958 Geneva
Convention on the High Seas and copied verbatim into UNCLOS in 1982.\textsuperscript{57} The
definition of piracy, as laid out in UNCLOS, is widely accepted.\textsuperscript{58} Even those
nations, like the United States, which are not among the 168 nations that have
ratified the treaty, use the UNCLOS definition in their piracy statutes.\textsuperscript{59} The
United States Constitution allows Congress to “define and punish” piracy;\textsuperscript{60} however, Congress has historically deferred to international customary law to
define piracy, and continues to do so today.\textsuperscript{61}

The current definition of piracy, as described in UNCLOS and accepted by
the United States, is as follows:

Piracy consists of any of the following acts:

(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 another 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 intentionally facilitating an act described in subparagraph (a) or (b).\textsuperscript{62}

\textsuperscript{55. Id. at 122.}
\textsuperscript{56. Id.}
\textsuperscript{57. Id.}
\textsuperscript{58. Id.}
\textsuperscript{60. U.S. Const. art. I, § 8, cl. 10.}
\textsuperscript{61. 18 U.S.C.A. § 1651 (Westlaw through Pub. L. No. 114-163); see also United States v. Smith, 18 U.S. (5 Wheat.) 153, 155 (1820) (discussing Congress’ tendency of deferring to the law of nations regarding defining and punishing acts of piracy).}
\textsuperscript{62. UNCLOS, supra note 8.}
Although helpful, there is a great deal of controversy regarding several gaps left open by this definition of piracy. Three issues of particular interest to this Comment are: (1) whether piracy is an international crime; (2) what constitutes “private ends”; and (3) whether it contains a high seas requirement for the individual or individuals being charged under it.

Despite its problems, the definition of piracy in UNCLOS has resurfaced because of the unexpected rising tide of pirates around the world, particularly in international waters surrounding the Caribbean and Africa. The most dreaded and famous example of this resurgence is the Somali pirates. The Somali pirates arose from the chaos surrounding the collapse of Somalia’s central government in the 1990s. As a result of the collapse, piracy became one of the few sources of income for an angry, destabilized, and heavily armed populace. Somali pirates receive arms and financial backing from interested parties around the world, and employ locals as translators, negotiators, and foot soldiers. The international community fears that the actions of the Somali pirates pose a real threat and curb free use of international waters. As a result, the United States and other nations have attempted to prosecute both those who commit the acts and those who either back them financially or assist the pirates in some way.

2. Terrorist Organization

In the United States, a common way for an entity to be designated as a terrorist organization is through the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA allows the Secretary of State to label a group as a terrorist organization if the group meets the following criteria:

(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title or terrorism (as defined in section 2656f(d)(2)
of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism); and

(C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.73

Once an organization is deemed as a terrorist organization, it is placed on the United States Department of State’s list of designated terrorist organizations, and the government can prosecute individuals who give support to the organization.74

As environmental activism increases, so do the rates of environmental-political motivated violence.75 The Animal Enterprise Protection Act of 1992 (AEPA)76 and the Animal Enterprise Terrorism Act of 2006 (AETA)77 provide criminal punishment for groups that engage in “the use or threatened use of violence of a criminal nature against innocent victims78 or property by an environmentally-oriented, subnational group for environmental-political reasons . . . .”79 However, the punishment attached to these crimes is relatively minor, with a maximum of one year in prison, and the laws only cover domestic actions against legitimate animal enterprises.80 Congress considered more stringent laws following the terrorist attacks on September 11, 2001.81 One of these laws was the STOP Act, which would have broadened the scope of United States environmental-political violence laws to include any act that affects foreign or interstate commerce.82 The proposed law would have increased the maximum prison sentence of the convicted environmental-political motivated

78. Whether whalers would be considered “innocent” parties is a controversial debate outside the scope of this Comment.
82. H.R. 3307 § 2.
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actors.83 However, STOP never progressed further than its introduction in the House of Representatives.84

3. What is Considered Material Support?

Legally, “material support” is defined in the case of terrorism as knowingly “provid[ing] money, shelter, or technical advice to anyone involved with terrorism.”85 United States federal law makes material support of terrorist organizations a felony.86 Prior to September 11, 2001, approximately six people were charged with material support of a terrorist organization.87 However, in the first three years after September 11, 2001 the government used the statute to charge over one hundred groups and individuals.88 In 2015 alone, the United States government charged over 57 individuals with materially supporting a terrorist organization.89

4. Alien Tort Statute

The Alien Tort Statute allows United States district courts original jurisdiction over any civil action “committed in violation of the law of the nations or a treaty of the United States.”90 Although enacted as part of the Judiciary Act of 1789, the Alien Tort Statute was used only once prior to the 1980s.91 In order to bring a claim under the Alien Tort Statute, the plaintiff must (1) be an alien;92 (2) sue for a tort; and (3) show that the tort was committed in violation of the law of the nations or a treaty of the United States.93 The third prong is a controversial subject.94 In some cases, it is difficult to determine what is considered a violation of the law of the nations.95 Some scholars suggest that it refers to “customary international law,” but, as the “law of the nations” and

83. Id.
86. Osnos, supra note 15.
87. Id.
88. Id.
89. Id.
92. Id. That is, “any person who is not a citizen or a national of the United States.” Alien, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/alien (last visited Jun. 23, 2016).
94. Kemper, supra note 91.
95. Id.
“customary international law” are largely considered synonyms, that definition is circular.96 Another legal term of art used to help determine what is a violation of the law of the nations is *jus cogens.*97 *Jus cogens* refers to norms of international laws that are binding on all nations, regardless of whether a nation agreed to them and despite any inconsistent treaty.98 As a result, *jus cogens* crimes are a narrow category.99 Therefore, if the Alien Tort Statue allowed suits for only *jus cogens* violations, there would be few eligible plaintiffs.100 Thus, courts hold that suits based on *jus cogens* violations will always be allowed under the Alien Tort Statute, providing its other requirements are satisfied, but it is not necessary that the action be based on an alleged violation of *jus cogens.*101

Courts now use the framework developed by the Supreme Court in *Sosa v. Alvarez-Machain* to determine what a violation of the law of nations is under the ATS.102 *Sosa* held that the Alien Tort Statute allows suits to be brought for few international law violations “thought to carry personal liability” at common law, including piracy.103 *Sosa* also allows for the creation of new claims, as long as they are based on international norms that are “specific, universal, and obligatory.”104 This definition is imperfect and creates jurisdictional splits on many issues including slavery and inhumane treatment.105

Courts agree a party that commits an accessory liability crime—such as aiding and abetting or conspiracy—has violated the law of the nations.106 As a result, assuming the other requirements of the ATS are satisfied, an alien plaintiff can bring a claim of aiding and abetting or conspiracy against a defendant in a United States district court utilizing the Alien Tort Statute.107 A plaintiff can sue under a theory of conspiracy if he or she can show that the defendant intended to accomplish the purpose of the conspiracy.108 Although most jurisdictions will allow a claim of aiding and abetting under the Alien Tort Statute, there is a split amongst courts regarding the level of proof required.109 Some courts require a

96. Id.
98. Id. Examples include genocide and torture; Kemper, *supra* note 91.
100. Kemper, *supra* note 91.
101. Id.
103. Id. at 694.
104. Id. at 732 (quoting In re Estate of Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).
107. Id.
108. Id.
109. Id.
plaintiff bringing such a claim to show that the defendant acted with the specific intent or purpose of facilitating the violation while other courts require mere knowledge.\textsuperscript{110}

C. International Law

This section navigates through the tumultuous seas of jurisdiction in international waters and attempts to define international terrorism law.\textsuperscript{111}

1. The Murky Depths of the Law of the Sea: Jurisdiction and International Waters

The law as it relates to international waters is clear on the surface; however, the application of UNCLOS can be complex.\textsuperscript{112} A ship in international waters is held under the jurisdiction of its flag state.\textsuperscript{113} However, if a ship seems to be stateless while in international waters, any nation has the ability to exercise jurisdiction over the vessel.\textsuperscript{114} Criminal acts in international waters create problems of jurisdiction between the flag state and the victim’s flag state.\textsuperscript{115} Thus, Sea Shepherd is often held accountable for its behavior by foreign governments that are not its flag states.\textsuperscript{116} A prime example is Denmark’s decision to deport, fine, and threaten jail time to the \textit{Bob Barker} crew, which is registered as a Dutch vessel, for disrupting the pilot whale hunt in the Faroe Islands.\textsuperscript{117}

\textsuperscript{110}. Id.

\textsuperscript{111}. Infra Part III.C.2.


\textsuperscript{113}. The country the vessel is registered; UNCLOS, supra note 8, at pt. VII, §1, art. 91–94.


2. Terrorism Under International Law

There is no true international definition of terrorism.\textsuperscript{118} Further, there is no concept of environmental terrorism because environmental terrorism is largely a United States’ construct.\textsuperscript{119} However, in an attempt to create some kind of relief for parties injured by terroristic acts, the international community created the SUA convention making unlawful activity in the ocean, such as an act of violence against a person or a ship in international waters, an extraditable offense.\textsuperscript{120} The SUA states:

(1) Any person commits an offence if that person unlawfully and intentionally: . . .

(b) 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; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship. . . .\textsuperscript{121}

The SUA creates an obligation for any member state to prosecute or extradite a bad actor or actors it finds committing any of the above acts.\textsuperscript{122} This obligation is not strong: the capturing state must only initiate a prosecution and, depending on the terms of its extradition treaty with the receiving state, may choose whether or not to extradite the captured party or parties.\textsuperscript{123}

III. CRIMINAL THEORIES OF LIABILITY

This part explores the criminal liability theories the United States, and other interested nations, could use to stop people from donating to Sea Shepherd’s cause.\textsuperscript{124} Section A focuses on terrorism laws, both within the United States and internationally, and explores whether labeling Sea Shepherd as a terrorist organization would be the best avenue to ensure the benefactors are held liable

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\textsuperscript{118} See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (“[T]he nations of the world are so divisively split on the legitimacy [of terrorism] as to make it impossible to pinpoint an area of harmony or consensus.”)


\textsuperscript{120} SUA, supra note 8; Doby, supra note 6, at 150–51, 154.

\textsuperscript{121} SUA, supra note 8, at art. 3(a)–(c).

\textsuperscript{122} Id. at art. 10.

\textsuperscript{123} Id. at art. 10(1), 11.

\textsuperscript{124} \textit{Infra} Part III.A and B (detailing antiterrorism and piracy laws and how they affect Sea Shepherd donors).
for their support. Section B focuses on whether criminal theories, such as aiding and abetting or conspiracy, could be used to prosecute Bob Barker and other United States Sea Shepherd donors.

A. Terrorism and Liability Through Material Support Law

As both maritime terrorism and piracy may involve similar acts, it is possible for the line between the two categories to blur, but the two terms should not be used interchangeably. Whereas pirates are motivated by their own gain, terrorists generally seek to further an ideological position. Sea Shepherd is motivated by a conservationist creed: to stop the large scale slaughter of wildlife and destruction of marine habitat. As they allegedly commit illegal acts furthering a conservationist position, it could be argued that Sea Shepherd is a terrorist organization.

The most direct way to punish those who donate to organizations like Sea Shepherd would be to label the environmental group as a terrorist organization and thereby make it illegal to aid Sea Shepherd with material support. The Material Support of Terrorism statute provides that an individual found guilty will serve a maximum of 20 years in jail, pay a fine of fifty thousand dollars per violation, or both. This punishment should be severe enough to dissuade future benefactors from donating money or support to supposedly eco-terrorist groups like Sea Shepherd.

It is unlikely that Sea Shepherd would be labelled a terrorist organization under AEDPA. AEDPA requires that: (1) the organization be foreign; (2) the organization engage in terrorist activity; and (3) the terrorist activity threatens the

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125. Infra Part III.A (examining terrorism laws within the United States and abroad, and whether they are applicable to the donors).
126. Infra Part III.B (describing piracy law and how, due to the fact that Sea Shepherd has been labelled a pirate, accessory liability can attach to the donors).
130. Tuerk, supra note 128, at 343.
132. Id.
security of United States nationals or the national security of the United States.\textsuperscript{135} Here, Sea Shepherd has branches originating around the world.\textsuperscript{136} Although there is a Sea Shepherd USA branch, that may not preclude it from being considered a foreign organization.\textsuperscript{137} The international branches form a network and all Sea Shepherd branches coordinate with one another under a singular board of directors.\textsuperscript{138} Therefore, they most likely satisfy the first prong of the test.\textsuperscript{139} The federal statute defining terrorist activity includes sabotaging a vessel and using a dangerous device “with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.”\textsuperscript{140} These are behaviors Sea Shepherd’s opponents already accuse it of utilizing in its naval battles with whalers and illegal poachers.\textsuperscript{141} Although Sea Shepherd has argued that its actions have not caused substantial damage,\textsuperscript{142} its conduct creates dangerous conditions and may, at the very least, constitute an attempt to cause substantial damage.\textsuperscript{143} Therefore, Sea Shepherd likely satisfies the second prong of AEDPA’s test.\textsuperscript{144}

Finally, the Secretary of State must show that Sea Shepherd endangers either United States nationals or the national security of the United States.\textsuperscript{145} It is difficult to suggest that Sea Shepherd threatens national security.\textsuperscript{146} As for the security of United States nationals, scholars argue that the maritime vigilantism behavior of the Somali pirates and Sea Shepherd threaten the security of any who set sail into international waters.\textsuperscript{147} This argument against Sea Shepherd is

\textsuperscript{135} 8 U.S.C.A. § 1189 (West 2016).
\textsuperscript{136} See Donate, SEA SHEPHERD GLOBAL, https://www.seashepherdglobal.org/support-us/donate.html. (allowing interested parties to donate to Sea Shepherd branches in Australia, Austria, UK, Luxemburg, Spain, etc.).
\textsuperscript{137} Cf. Al Haramain Islamic Foundation, Inc. v. U.S. Dept. of Treasury, 686 F.3d 965, 978 (9th Cir. 2011) (holding that an Oregon based nonprofit was a foreign organization because it had the same name as similar organizations around the world and share leaders).
\textsuperscript{138} Chaired by Pamela Anderson, another celebrity donor. Other celebrity donors include Mick Jagger, Christian Bale, Pierce Brosnan, and Sean Connery among many others. See Board of Directors, SEA SHEPHERD, http://www.seashepherd.org/who-we-are/board-of-directors.html. (last visited April 1, 2016) (stating that the board of directors coordinates Sea Shepherd’s short and long term plans.
\textsuperscript{139} 8 U.S.C.A. § 1189 (West 2016).
\textsuperscript{141} Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 725 F.3d 940, 942 (9th Cir. 2013).
\textsuperscript{142} Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 860 F.Supp.2d 1216, 1224 (W.D. Wash. 2012), rev’d 725 F.3d 940, 942 (9th Cir. 2013).
\textsuperscript{143} See Inst. of Cetacean Research, 725 F.3d 945, 945–46 (holding that such an attempt was sufficient alone to trigger SUA).
\textsuperscript{144} 8 U.S.C.A. § 1189 (West 2016).
\textsuperscript{145} Id. at § 1189(a)(1)(C).
\textsuperscript{146} See Alana Preston, Note and Comment, Eco-Terrorism in the Southern Ocean: A Dangerous Byproduct of the Tangled Web of International Whaling Conventions and Treaties, 34 WHITTIER L. REV. 117 (2012) (arguing that Sea Shepherd is a force for good where the law is uncertain).
Although Sea Shepherd targets are diverse, they usually involve Japanese ships. The federal government is wary to list groups as terrorist organizations as there are serious constitutional implications. Therefore, it is unlikely that Sea Shepherd will be labeled a terrorist organization under AEDPA.

However, even though Sea Shepherd and donors escape the terrorist label under United States law, they still face criminal liability under SUA. Sea Shepherd meets the definition of unlawful acts described in the SUA; Sea Shepherd endangers the safe operation of ships they target. In fact, the Ninth Circuit held that Sea Shepherd violated the SUA, and could either be prosecuted under it, or extradited to Japan. The court held that even though Sea Shepherd had not disabled the Cetacean Institute’s ships, the conservation group violated SUA by endangering the Japanese whalers. As Sea Shepherd violated SUA, a Japanese whaling organization, like the Cetacean Research Institute, could bring another suit under the Alien Tort Statute against Bob Barker for aiding and abetting or conspiracy. In a specific intent or general knowledge jurisdiction, Japan may be successful in an action against Bob Barker because he has not made any attempt to keep his involvement in and support of Sea Shepherd’s efforts a secret.

148. Sterio, supra note 147, at 401.
153. Id.
154. Id.; Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 725 F.3d 940, 945 (9th Cir. 2013).
156. Id.
Japan would claim that the United States would have to extradite the television personality.\textsuperscript{159}

However, Sea Shepherd and Bob Barker would likely escape criminal liability because many countries lack the will to prosecute or extradite members of the organization.\textsuperscript{160} Some countries, including Australia and the Netherlands, have stated that they will not arrest members of Sea Shepherd, or implicitly, their benefactors.\textsuperscript{161} Further, although the United States and Japan have an extradition treaty, the United States is unlikely to extradite a television icon\textsuperscript{162} such as Bob Barker for Japanese prosecution, especially since the treaty allows the exercise of such discretion.\textsuperscript{163}

\textbf{B. Run up Your White Flag!: Piracy Laws and Their Impact on Sea Shepherd}

Now that the United States Court of Appeals for the Ninth Circuit broadsided Sea Shepherd by holding that Sea Shepherd’s actions constitute piracy, it is likely that criminal theories of aiding and abetting and conspiracy would attach to donors, such as Bob Barker and Martin Sheen, for providing the money to buy the boats and supplies that support Sea Shepherd’s unique brand of environmental activism.\textsuperscript{164} However, the definition and customary enforcement of piracy create a number of problems when attempting to attach liability to the pirates’ donors.\textsuperscript{165} Ultimately, while theories of accessory liability may be used against the donors of Sea Shepherd, using them in this way constitutes extraterritorial overreach.\textsuperscript{166} As a result, these theories should only be used against those pirates whose conduct poses a grave threat to the safety of the international community, such as the Somali Pirates.\textsuperscript{167}

As noted earlier, the nations that have ratified UNCLOS and the United States share a definition of piracy that contains three primary elements: (1) whether piracy is an international crime; (2) what constitutes private ends; and

\textsuperscript{159} United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, supra note 152.
\textsuperscript{160} Nagtzaam, supra note 10, at 670.
\textsuperscript{161} Id. at 671.
\textsuperscript{163} Treaty on Extradition Between the United States of America and Japan, Japan-U.S., Nov. 30, 1979, 31 U.S.T.I.A. 892.
\textsuperscript{165} Bellish, supra note 47, at 120.
\textsuperscript{166} Id. at 121, 124.
\textsuperscript{167} Id. at 120.
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(3) whether it contains a high seas requirement for the individual or individuals being charged under it.\(^{168}\) To determine the liability of Sea Shepherd donors, these questions must be addressed.\(^{169}\)

1. To Catch a Pirate: Whether Piracy is a Crime of Universal Jurisdiction

Universal jurisdiction allows a country to prosecute an offense even if that country has no connection to that offense.\(^{170}\) Universal jurisdiction creates a number of problems of notice, process, and the doctrine of *nullum crimen sine lege*.\(^{171}\) The doctrine holds that an individual should not be charged unless the act was criminalized prior to the individual committing it. This can often be an issue with crimes that occur in international waters because it is difficult to ascertain which state’s laws apply and whether that state’s law criminalizes the party’s conduct.\(^{172}\) The Sea Shepherd’s composition does not add any clarity as, at any given time, Sea Shepherd’s crew is a veritable hodgepodge of individuals from diverse countries on ships with different flag states getting into altercations with fisherman from many countries on boats with their own diverse flag states.\(^{173}\) As a result, it is unclear at any given time which nation’s piracy laws may apply. If the piracy laws of the different countries vary greatly, it may violate the principle of *nullum crimen sine lege* because there is no binding international law that defines piracy.\(^{174}\) Thus, the prosecuting state may not have a piracy law, causing any prosecution and potential subsequent conviction to be legally invalid.\(^{175}\)

Other critics state that piracy should not be an international crime because it lacks the gravity of other international crimes such as genocide.\(^{176}\) According to these critics, criminalizing piracy, unlike criminalizing genocide, does not serve a community value, and crimes allowing for universal jurisdiction should be

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168. Id. at 124.


173. See Second Internationally Wanted Toothfish Poaching Vessel, Viking, Detained in Malaysia, SEA SHEPHERD, March 30, 2015 http://www.seashepherd.org/news-and-media/2015/03/30/second-internationally-wanted-toothfish-poaching-vessel-viking-detained-in-malaysia-1679 (stating that the poaching vessel had Nigeria as their flag-state, a Peruvian captain, and an Indonesian crew member and were detained by Malaysian authorities).


reserved for only the gravest crimes.\textsuperscript{177} These concerns are rooted in fears of too many crimes being of universal jurisdiction, which may put an individual nation’s sovereignty at risk.\textsuperscript{178} Some scholars take this argument further by stating that the use of international waters should not be under any nation’s authority in order to maintain its status as free from any nation claiming dominion over it.\textsuperscript{179} Finally, scholars argue that piracy should not be an international crime as a matter of consistency, because similar crimes\textsuperscript{180} occurring on international waters are not considered piracy and not open to universal jurisdiction.\textsuperscript{181}

However, these arguments against classifying piracy as a crime of universal jurisdiction do not consider the belief that all nations should have unfettered use of international waters for the “benefit of all nations” and principles of sovereignty.\textsuperscript{182} Piracy has a detrimental effect on peace at sea and prevents nations from using the waters freely. Historically, piracy was seen as an offense against all nations, thus the pirate was \textit{hostis humani generis}.\textsuperscript{183} All nations should be able to act to keep the high seas open to prevent piracy.\textsuperscript{184} However, the international community should only be able to respond when the wrongful act occurs in international waters, or else there would be confusion over which nation has the authority to prosecute the pirates.\textsuperscript{185} Additionally, most states have a great interest in maintaining sovereignty over their own territorial waters and allowing other nations to police within these waters may cause increased tension.\textsuperscript{186} As a result of these considerations, most courts accept piracy as a crime of universal jurisdiction.\textsuperscript{187} If piracy is seen as an international crime, then Sea Shepherd’s donors may be subject to universal jurisdiction if they traveled abroad.\textsuperscript{188}

\textsuperscript{177} \textit{Id.}
\textsuperscript{179} Phillips, \textit{supra} note 169, at 283.
\textsuperscript{180} S.C. Res. 1816, (June 2, 2008).
\textsuperscript{181} Phillips, \textit{supra} note 169, at 283.
\textsuperscript{182} \textit{Id.} at 286.
\textsuperscript{184} Bellish, \textit{supra} note 47, at 120.
\textsuperscript{185} \textit{Id.} at 121.
\textsuperscript{186} Phillips, \textit{supra} note 169, at 283–85.
\textsuperscript{188} Phillips, \textit{supra} note 169, at 283.
2. Pirates With a Cause: Is Trying to Save the Whales a “Private End”? 

The second question regarding Sea Shepherd and its donors’ status as pirates and abettors to pirates is whether Sea Shepherd engages in certain activities for “private ends” as laid out in the UNCLOS definition of pirates.\(^{189}\) Scholars are split over what the proper definition of “private ends” should be because UNCLOS does not provide one.\(^{190}\) Many argue that “private ends” refers to the pursuit of a self-interested motivation, such as an economic benefit.\(^{191}\) Under this theory, Sea Shepherd is not acting for its own enrichment but to protect the marine environment and therefore does not meet the UNCLOS definition of pirates.\(^{192}\) However, there are those who believe the private ends requirement was added as a way to distinguish piracy from terrorism.\(^{193}\) Those who advocate for this approach look to the commentary accompanying the Harvard Draft Convention—on which UNCLOS is based—which states that politically motivated attacks should be under municipal jurisdiction because “these cases often involve serious political considerations” for the states involved and therefore should be left for them to take care of.\(^{194}\) 

However, in its decision to label Sea Shepherd as pirates, the United States Court of Appeals for the Ninth Circuit determined that “private ends” does not refer solely to the pursuit of an economic benefit.\(^{195}\) Instead, the court held that “private ends” means any act that is “not taken on behalf of a state” and includes action taken on “personal, moral or philosophical grounds,” including protecting the environment.\(^{196}\) As long as the Institute of Cetacean Research decision remains in good standing, Sea Shepherd and their donors satisfy the “private ends” requirement of piracy in the United States, at least in courts that accept the Ninth Circuit’s definition.\(^{197}\)

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\(^{192}\) *Who We Are, SEA SHEPHERD*, (last visited Feb. 15, 2016), http://www.seashepherd.org/who-we-are/ (last visited Feb. 15, 2016).


\(^{195}\) Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 725 F.3d 940, 943 (9th Cir. 2013).

\(^{196}\) Id. at 944.

3. The Tumultuous High Seas Requirement

Since piracy is a crime of universal jurisdiction and Sea Shepherd satisfies the definition of piracy, it appears that Sea Shepherd’s donors could be prosecuted for aiding and abetting pirates. However, there is one final obstacle in the way of such prosecution: whether a “high seas” requirement exists in the definition of materially supporting piracy. While courts have held that there is no high seas requirement for pirate facilitators, UNCLOS itself only applies to international waters. Therefore, any suggestion of authority or jurisdiction under UNCLOS must be limited to international waters.

Whether the plain language of UNCLOS contains a high seas requirement is unclear. The statutory construction of Article 101 and its sub-provisions results in ambiguity. Provision (a) gives the definition of a pirate and requires that the criminal actor must be on the high seas. Provision (c) prohibits the inciting or intentional facilitation of any act described in the earlier provisions. This provision is the basis for any charge against the benefactors of pirates. Using the interpretive canon of *in pari materia* leads to the argument that a high seas requirement for facilitators exists. Article 86 of UNCLOS states that “the provisions of this part applies to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.” This language suggests that UNCLOS applies only to international waters; therefore, there is no justification for extending its reach to facilitators whose actions took place while within a nation’s territory. Additionally, the treaty assigns a duty to party states that only extends to the high seas or any other place outside the jurisdiction of any other state. Thus, authority under UNCLOS was not meant to extend

199. Id. at 276.
200. Bellish, supra note 47, at 120.
201. Phillips, supra note 169, at 293–95.
202. Id.
204. Id.
205. *In pari materia*, BLACK’S LAW DICTIONARY (9th ed. 2009) (meaning “[U]pon the same matter or subject. Provisions or terms within a statute must be taken together to form a unified whole).
207. UNCLOS, supra note 8, at 86.
208. Bellish, supra note 47, at 120.
209. Id. at 130.
outside of international waters. This evidence seems to favor the existence of a high seas requirement.

However, in both U.S. v. Shibin and U.S. v. Ali, the United States Court of Appeals for the Fourth Circuit and the Columbia Circuit found there was no high seas requirement for instigators and facilitators of piracy in article 101(c), as long as the underlying pirates engaged in the pirate acts on the high seas, as required by 101(a). Opponents of a high seas requirement, using the statutory canon of expressio unius, identify that there is no “high seas” language in provision (c) even though it exists in provision (a). Thus, proponents of this theory argue that the high seas requirement only attaches to the piracy perpetrators and not to those who incite or facilitate them. This view was adopted by the courts in Shibin and Ali.

Consequently, Sea Shepherd donors could face prosecution for aiding and abetting piracy even if they never travel through international waters. Additionally, Ali held that piracy is an ongoing crime, thus an accessory can be charged as long as the piratic acts continue. Therefore, as long as the Bob Barker spreads fear in the hearts of poachers and cetacean researchers throughout the Southern Ocean in the name of environmentalism, the real Bob Barker could be liable.

IV. WHAT ABOUT BOB?

Japan or other injured nations could bring a claim of accessory liability against Bob Barker, but doing so would not be in their best interest. There is no doubt that Bob Barker gave Sea Shepherd the money used to purchase the Bob Barker, nor is there doubt that he knew what the ship would be used for.

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210. Id.
211. Id.
213. Boudette v. Boudette, 923 F.2d 754, 756-57 (9th Cir. 1991) (“When a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.”).
215. Id.
217. Ali, 718 F.3d at 941.
218. Id.
219. Id.
220. Supra Part III.
221. E.g., The Rachel Maddow Show (MSNBC television broadcast Jan. 6, 2010); Huckabee (Fox News Channel Jul. 27, 2010); The Time is Right for Bob Barker to Rescue the Whales, SEA SHEPHERD, Jan. 5, 2010, available at http://www.seashepherd.org/news-and-media/2010/01/05/the-time-is-right-for-bob-barker-to-rescue-the-whales-265 (detailing how Bob Barker gave the Sea Shepherds five million dollars to purchase a vessel—now named the Bob Barker—worth five million dollars that is now engaged in anti-whaling behavior in the Southern Ocean and elsewhere).
Barker has given multiple interviews explaining how he gave the money to Paul Watson and Sea Shepherd to purchase the boat that sank the Thunder in 2015.\footnote{Id.} Bob Barker gave the money to Sea Shepherd after being told that the vessel was going to put an end to commercial whaling.\footnote{Rachel Maddow Show, supra note 221 at 155.} However, there are policy and practicality concerns that would prevent a simple litigation process.\footnote{Joseph Elliott Roeschke, Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters, 20 VILL. ENVTL. L. J. 99, 101–02 (2009).}

First, it would not be in Japan’s best interest as a matter of policy to go after Bob Barker and other United States donors. Without the large subsidies the Japanese government provides, commercial whaling is not economically viable.\footnote{See IFAW, THE ECONOMICS OF JAPANESE WHALING: A COLLAPSING INDUSTRY BURDENS TAXPAYERS, 2 (2013) (finding that over the past twenty-five years, thirty billion yen was spent on subsidies to commercial whaling enterprises and that roughly two and a quarter billion yen were diverted away from earthquake and tsunami funds to subsidize whaling [this is of particular interest following the 9.0 earthquake that devastated Japan in 2011]).} This is partly because the demand for whale has diminished drastically since the late 40s and 50s when whale was used to provide a large supply of protein to aid in the postwar recovery.\footnote{IFAW, supra note 225, at 2.} Since then, whale meat consumption has declined drastically.\footnote{See Whaling in Norway, WHALE AND DOLPHIN CONSERVATION, available at http://us.whales.org/issues/whaling-in-norway (on file with The University of the Pacific Law Review) (describing the Norwegian government’s failed attempts to popularize whale meat to make up for the decline in demand).}

Japan has roughly 4,600 tons of frozen whale meat in storage and continues to pull in about 1,300 tons every year.\footnote{Sarah Zhang, The Japanese Barely Eat Whale. So Why do They Keep Whaling? WIRED, Dec. 4, 2015, available at http://www.wired.com/2015/12/japanese-barely-eat-whale-whaling-big-deal/ (on file with The University of the Pacific Law Review).} Most Japanese people under the age of 40 have never eaten whale.\footnote{Mari Yamaguchi, Big Threat to Japan Whaling: Declining Appetites, THE SEATTLE TIMES (Mar. 27, 2014), available at http://www.seattletimes.com/nation-world/big-threat-to-japan-whaling-declining-appetites/ (on file with The University of the Pacific Law Review).} Additionally, 85 percent of the Japanese populace is opposed to Japan subsidizing whaling.\footnote{IFAW, supra note 225, at 2.} In Norway, where whaling industries also receive large subsidies, there is a drastic decline in demand for whale meat.\footnote{Of those that had eaten whale, more than percent half of those polled under the age of 40 stated that it had been a long time since they had eaten whale. Clearly, the younger Japanese do not carry the same feelings toward whale consumption as previous generations. Nippon Research Institute, Opinion Poll on Scientific Whaling, GREENPEACE, June 15, 2006, available at http://www.greenpeace.org/international/Global/international/planet-2/report/2007/8/whaling-poll-japan.pdf (on file with The University of the Pacific Law Review).} As a result, Norwegian whalers sell their excess whale
meat to be used as animal feed on fur farms increasing public criticism regarding the need for whaling.232

Internationally, the tide is turning overwhelmingly against whaling.233 There is a “zero catch” restriction on most commercial whaling under the current terms of the International Whaling Commission (IWC).234 One exception to this rule is whaling for research purposes.235 The Japanese government licensed whale hunting for scientific research in 1987 as a reaction against the “zero catch” rule being established.236 However, these research institutions are only a “thinly-veiled attempt” to continue commercial whaling practices as, under the IWC, Japanese whalers can sell the whale meat once research has been conducted.237 Japan is not required to submit any findings that result from their research—effectively preventing other nations from questioning the existence of any study of whales.238 As there is no sanctioning mechanism under the IWC, it is left open to the member states to police other members who may be violating the established quotas.239 Australia successfully sued Japan for breaching international whaling treaties.240 Japan, Norway, and other nations that sanction whaling are losing the popularity contest, and prosecuting Bob Barker, a beloved figure, would only hurt the country’s reputation more.241

Second, as a practical manner, it would be difficult for Japan to reach, let alone prosecute and imprison, Bob Barker and other United States donors.242 Under the terms of the extradition treaty between the United States and Japan, either party can request the partner country to extradite an individual who has

233. Hoek, supra note 149, at 188.
236. Id.
238. Japan’s stated research goal is very self-serving: “Japan is killing whales to research when the whale population will be healthy enough to hunt whales commercially.” Caprari, supra note 6 at 1501.
239. Japan Whaling Ass’n v. American Cetacean Soc’y, 478 U.S. 221, 225 (1986) (noting that IWC is unable to enforce its own quotas, therefore the United States—and implicitly other nations—are able to come up with their own enforcement scheme to enforce the quotas given by the IWC).
241. See generally IFAW, supra note 225, at 2 (stating that the Japanese government and whaling industry are losing the public’s support).
committed an offense that is “punishable by the laws of both Contracting Parties by death, by life imprisonment, or by deprivation of liberty for a period of more than one year.” Under United States law, a person found guilty of piracy is punishable by a mandatory life sentence. Additionally, a person found guilty of aiding and abetting a principal actor in the commission of a crime is punishable as if they were a principal.

Japan’s piracy statute, enacted in 2009, contains a sentence of five years to life. Japan’s accessory liability calls for a lesser punishment than the principal, unless the accessory induces the principal into acting. Extradition is possible since both nations’ statutes call for a sentence of at least a year for facilitating piracy. However, it is highly unlikely to occur due to the broad discretionary powers the treaty gives to the United States. While the United States government does not support Sea Shepherd’s vigilantism, it has been at the forefront of eliminating commercial whaling.

V. CONCLUSION

The Sea Shepherd Conservation Society is now a pirate organization according to the United States Court of Appeals for the Ninth Circuit. As a result, the environmental group’s benefactors are potentially in jeopardy of facing legal action for facilitating piracy. Japan is increasingly relentless in its attempt to take down Sea Shepherd as evinced by the numerous lawsuits it has brought against Sea Shepherd. It may only be a matter of time before the country turns its attention to the environmental activist group’s big name benefactors. Japanese whalers could look to United States’ law and file a suit under the Alien Tort Statute to receive civil damages from Bob Barker and other donors, or interested States could, with the help of other nations, detain the benefactors as violators of international criminal law. Either is an unlikely scenario because restraint should be used in an area of law as difficult as piracy and crimes of universal
These laws were intended to curb rampant piracy akin to the depravity of the seventeenth century or the modern Somali pirates who utilize murder, rape, kidnapping, and robbery as a means of increasing their own wealth.254 Although Sea Shepherd’s behavior is risky, it does not rise to such a level. Therefore, its actions should not trigger universal jurisdiction for the principal actors or their donors.255 Public opinion and the international community are shifting away from supporting whaling.256 As such, it would be imprudent for any nation to go after those that support one of the few parties taking action against whalers and poachers. Although Bob Barker is safe for now, he may want to ask Paul Watson to take down the Jolly Roger flag—just in case.

253. Supra Part III.B.1. (discussing whether piracy is a crime of universal jurisdiction).
254. Supra Part II.B.I. (discussing the origins of piracy law).
255. Supra Part III.B. (discussing the impact of piracy laws on Sea Shepherd).
256. Supra Part IV. (discussing Bob Barker’s potential liability).