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

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Comments on International Law

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

Charles Wiseman*

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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.”¹ 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*.² 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.³ 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.⁴ No one was hurt as the *Thunder* sank, but the incident garnered Sea Shepherd much media attention.⁵

Considerable scholarship and controversy exists regarding Sea Shepherd and theories of liability about its actions.⁶ 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.⁷ 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).⁸ 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.⁹ Donors, like Barker, provided the money to purchase ships that Sea Shepherd now uses to pursue and harass fishing and

1. *Poaching Vessel, Thunder, Sinks in Suspicious Circumstances*, SEA SHEPHERD, (Apr. 6, 2015), <http://www.seashepherd.org/news-and-media/2015/04/06/poaching-vessel-thunder-sinks-in-suspicious-circumstances-1681> (on file with *The University of the Pacific Law Review*).

2. Ian Urbina, *A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes*, N.Y. TIMES (July 28, 2015), available at http://www.nytimes.com/2015/07/28/world/a-renegade-trawler-hunted-for-10000-miles-by-vigilantes.html?_r=0 (on file with *The University of the Pacific Law Review*).

3. *Poaching Vessel, Thunder, Sinks in Suspicious Circumstances*, *supra* note 1.

4. *Id.*

5. *Id.*

6. Debra Doby, *Whale Wars: How to End the Violence on the High Seas*, 44 J. MAR. L. & COM. 135 (2013); Whitney Magnuson, Comment, *Marine Conservation Campaigners as Pirates: The Consequences of Sea Shepherd*, 44 ENVTL. L. 923, 923 (2014); Amanda M. Caprari, *Lovable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean*, 42 CONN. L. REV. 1493, 1493 (2010).

7. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 725 F.3d 940, 944 (9th Cir. 2013).

8. United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art.3, Mar. 10, 1988, 1678 U.N.T.S. 201 [hereinafter SUA]; *Inst. of Cetacean Research*, 725 F.3d at 945.

9. See *infra* Part III (discussing the donor’s potential liability under SUA).

whaling ships.¹⁰ 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.¹¹ 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.¹²

Countries around the world criticize and denounce Sea Shepherd as pirates, criminals, and eco-terrorists.¹³ Though many of its targets engage in allegedly illegal activity as well, some believe that it does not justify Sea Shepherd's aggressive conduct.¹⁴ If States want to stop Sea Shepherd, one way would be to target its wealthy benefactors.¹⁵ 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.¹⁶ This Comment will explore United States, as well as international, criminal theories that could establish responsibility for those who assist Sea Shepherd.¹⁷

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.¹⁸ 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.¹⁹ 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.²⁰ Therefore, although the

10. Gerry Nagtzaam, *Gaia's Navy: The Sea Shepherd Conservation Society's Battle to Stay Afloat and International Law*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 613, 628–29 (2014).

11. *Inst. of Cetacean Research*, 725 F.3d at 942.

12. Dan Murphy, *How Bob Barker joined Sea Shepherd Paul Watson and the Whale Wars*, THE CHRISTIAN SCIENCE MONITOR (Jan. 7, 2010), <http://www.csmonitor.com/World/Global-News/2010/0107/How-Bob-Barker-joined-Sea-Shepherd-Paul-Watson-and-the-whale-wars> (on file with *The University of the Pacific Law Review*).

13. Caprari, *supra* note 6, at 1507.

14. *Id.* at 1510.

15. Cf. Evan Osnos, *The Imam's Curse*, THE NEW YORKER (Sept. 21, 2015), at 71, available at <http://www.newyorker.com/magazine/2015/09/21/the-imams-curse> (on file with *The University of the Pacific Law Review*) (stating that the U.S. government goes after those who send material support to terrorist organizations to harm those groups).

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.

29. *Who We Are*, SEA SHEPHERD, <http://www.seashepherd.org/who-we-are/> (last visited Feb. 15, 2016).

30. Peter Heller, *The Whale Warriors: Whaling in the Antarctic Seas*, NAT'L GEOGRAPHIC ADVENTURE (May 2006), available at <http://www.nationalgeographic.com/adventure/0605/features/whales.html> (on file with *The University of the Pacific Law Review*).

31. Caprari, *supra* note 6, at 1507; Magnuson, *supra* note 6, at 924–25.

32. Raffi Khatchadourian, *Neptune's Navy*, THE NEW YORKER (Nov. 5, 2007), available at <http://www.newyorker.com/magazine/2007/11/05/neptunes-navy> (on file with *The University of the Pacific Law Review*).

hoists the Jolly Roger flag and consists of four boats: *Steve Irwin*, *Bob Barker*, *Sam Simon*, and *Brigitte Bardot*.³³ Recently, the group added the *Martin Sheen*, named after the actor and now Sea Shepherd donor.³⁴

Sea Shepherd faces intense media exposure and legal scrutiny.³⁵ Animal Planet's *Whale Wars* follows Sea Shepherd's Australian branch as it combats whalers in the Southern Ocean.³⁶ The show draws a large number of viewers, thereby increasing awareness of Sea Shepherd's existence and goals.³⁷ With increased awareness comes a rise in both civil and criminal litigation against Sea Shepherd.³⁸ 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.³⁹ 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.⁴⁰ The court ordered Sea Shepherd to pay more than two and a half million dollars for violating the injunction.⁴¹ The Institute for Cetacean Research previously filed for a permanent injunction against Sea Shepherd to prevent them from operating in the Southern Ocean.⁴² That case is currently pending.⁴³ 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.⁴⁴

33. Dr. Reese Halter, *Martin Sheen Protects Oceans, Newest Sea Shepherd Vessel Unveiled*, HUFFINGTON POST (Oct. 19, 2014, 12:25 AM ET), http://www.huffingtonpost.com/dr-reese-halter/martin-sheen-protects-oce_b_6009666.html (last updated Dec. 18, 2014).

34. *Id.*

35. Caty Enders, *Can Sea Shepherd Survive Its Own Success?*, THE GUARDIAN (June 5, 2015, 9:46 EDT), <http://www.theguardian.com/environment/2015/jun/05/sea-shepherd-whale-wars-animal-planet>.

36. *About Whale Wars*, ANIMAL PLANET (Aug. 13, 2012), <http://www.animalplanet.com/tv-shows/whale-wars/about-this-show/about-whale-wars/> (last visited Nov. 15, 2015).

37. *Id.*

38. Enders, *supra* note 35.

39. *Id.*; Nagtzaam, *supra* note 10, at 655–56.

40. Emilie Gramenz, *Sea Shepherd agrees to pay Japanese whalers more than \$3 million for breaching court injunction*, AUSTRALIAN BROADCASTING CO. (Jun. 10, 2015, 9:14 PM), available at <http://www.abc.net.au/news/2015-06-11/sea-shepherd-pays-japanese-whalers-more-than-3-million/6538734> (last updated June 10, 2015, 9:55 PM) (on file with *The University of the Pacific Law Review*).

41. AFP, *Sea Shepherd Agrees \$2.55m Payment to Japanese Whalers for Injunction Breach*, THE GUARDIAN (June 10, 2015, 7:19 EDT), <http://www.theguardian.com/environment/2015/jun/10/sea-shepherd-payment-japanese-whalers-breaching-injunction>.

42. Magnuson, *supra* note 6, at 926.

43. *Id.* at 926–27.

44. John Vidal, *Two Sea Shepherd whale hunt protesters arrested in Faroe Islands*, THE GUARDIAN (July 22, 2015, 11:31 EDT).

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.”⁴⁵

1. *Blasted Pocket Picking Pirates: Origins of Piracy Law*

Piracy has been an international problem since before the United States existed.⁴⁶ 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.⁴⁷ Since its establishment, the United States of America has dealt with pirates and privateers.⁴⁸ 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.⁴⁹ Privateers also created a problem for the newly founded republic.⁵⁰ Privateers are, at their core, state-backed mercenaries who operate on the high seas.⁵¹ 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.⁵² In the twentieth century, the world saw a dramatic decline in piracy.⁵³ Many nations considered piracy effectively dead, leading contemporary scholars to declare piracy as having permanently ended.⁵⁴ Although the threat of piracy was in

45. *Infra* Part II.B.1; *Infra* Part II.B.2; *Infra* Part II.B. 3.

46. Helmut Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Time*, 17 U. MIAMI INT’L & COMP. L. REV. 1, 33 (2009).

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).

48. Michael B. Oren, *The Middle East and the Making of the United States, 1776 to 1815*, COLOM. NEWS (Nov. 16, 2005), available at <http://www.columbia.edu/cu/news/05/11/michaelOren.html> (on file with *The University of the Pacific Law Review*).

49. *Id.*

50. Todd Emerson Hutchins, *Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates*, 99 CAL. L. REV. 819, 847 (2011).

51. Gary M. Anderson & Adam Gifford, Jr., *Privateering and the Private Production of Naval Power*, 11 CATO J. 99, 100 (Spring/Summer 1991), available at <http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/1991/5/cj11n1-8.pdf> (on file with *The University of the Pacific Law Review*).

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.

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

The 1932 Harvard Draft Convention on Piracy created the first modern definition of piracy.⁵⁶ The definition was then expanded for the 1958 Geneva Convention on the High Seas and copied verbatim into UNCLOS in 1982.⁵⁷ The definition of piracy, as laid out in UNCLOS, is widely accepted.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.⁵⁹ The United States Constitution allows Congress to “define and punish” piracy;⁶⁰ however, Congress has historically deferred to international customary law to define piracy, and continues to do so today.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).⁶²

55. *Id.* at 122.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*; *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements*, UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA (Updated Sept. 23 2016), http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Oct. 25, 2015) (on file with *The University of the Pacific Law Review*).

60. U.S. CONST. art. I, § 8, cl. 10.

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).

62. UNCLOS, *supra* note 8.

Although helpful, there is a great deal of controversy regarding several gaps left open by this definition of piracy.⁶³ 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.⁶⁴

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.⁶⁵ The most dreaded and famous example of this resurgence is the Somali pirates.⁶⁶ The Somali pirates arose from the chaos surrounding the collapse of Somalia’s central government in the 1990s.⁶⁷ As a result of the collapse, piracy became one of the few sources of income for an angry, destabilized, and heavily armed populace.⁶⁸ Somali pirates receive arms and financial backing from interested parties around the world, and employ locals as translators, negotiators, and foot soldiers.⁶⁹ The international community fears that the actions of the Somali pirates pose a real threat and curb free use of international waters.⁷⁰ 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.⁷¹

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).⁷² 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)

63. Bellish, *supra* note 47, at 124.

64. *Id.*

65. Tuerk, *supra* note 46, at 4.; Alistair Deans, *Suing Organized Piracy: An Application of Maritime Torts to Pirate Attacks, and Subsequent Civil Actions Against the Supporters of Organized Piracy*, 16 ROGER WILLIAMS U. L. REV. 655, 656 (2011).

66. Deans, *supra* note 65, at 660.

67. *Id.*

68. *Id.* at 659.

69. *Id.* at 663–65.

70. Bellish, *supra* note 47, at 121.

71. *United States v. Ali*, 718 F.3d 929, 932 (D.C. Cir. 2013); *United States v. Shibin*, 722 F.3d 233, 234 (4th Cir. 2013).

72. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, § 302, 110 Stat. 1214 (effective Apr. 24, 1996).

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

73. 8 U.S.C.A. § 1189 (Westlaw through Pub. L. No. 114-163).

74. *Foreign Terrorist Organizations*, U.S. DEPT. OF STATE: BUREAU OF COUNTERTERRORISM, available at <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Feb. 17, 2016) (on file with *The University of the Pacific Law Review*).

75. 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, 116-17 (2009).

76. Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928 (effective Aug. 26, 1992).

77. 18 U.S.C.A. § 43 (Westlaw through Pub. L. No. 114-163).

78. Whether whalers would be considered "innocent" parties is a controversial debate outside the scope of this Comment.

79. *The Threat of Eco-Terrorism: Hearing Before the H. Comm. on Resources, Subcomm. on Forests and Forest Health*, Cong. (2002) (testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, FBI), available at <https://www2.fbi.gov/congress/congress02/jarboe021202.htm> (on file with *The University of the Pacific Law Review*).

80. 18 U.S.C.A. §43(b); Animal Enterprise Terrorism Act, Pub. L. No. 109-374, § 2, 120 Stat. 2652 (effective Nov. 27, 2006).

81. Stop Terrorism of Property Act of 2003, H.R. 3307, 108th Cong. (2003), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h108-3307> (on file with *The University of the Pacific Law Review*); Ecoterrorism Prevention Act of 2004, H.R. 4454, 108th Cong. (2004).

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 alien⁹²; (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.*

84. H.R.3307 *Stop Terrorism of Property Act of 2003*, CONGRESS GOV., <https://www.congress.gov/bill/108th-congress/house-bill/3307/all-actions> (last visited Jun. 26, 2016) (on file with *The University of the Pacific Law Review*).

85. 18 U.S.C.A. § 2339B (Westlaw through Pub. L. No. 114-163); Osnos, *supra* note 15.

86. Osnos, *supra* note 15.

87. *Id.*

88. *Id.*

89. *Id.*

90. 28 U.S.C. § 1350 (Westlaw through Pub. L. No. 114-163).

91. Kurtis A. Kemper, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350)—Tort in Violation of Law of Nations or Treaty of United States*, 28 U.S.C.A. § 1350, 64 A.L.R. Fed. 2d § 2 (2012).

92. 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).

93. 28 U.S.C. § 1350; Kemper, *supra* note 91.

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 Statute 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.*

97. *Jus Cogens*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/jus_cogens (last visited Feb. 20, 2016).

98. *Id.* Examples include genocide and torture; Kemper, *supra* note 91.

99. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996).

100. Kemper, *supra* note 91.

101. *Id.*

102. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

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)).

105. *John Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988, 988 (S.D. Ind. 2007); *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995); Kemper, *supra* note 91, at § 25.

106. Kemper, *supra* note 91.

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.¹¹⁰

C. *International Law*

This section navigates through the tumultuous seas of jurisdiction in international waters and attempts to define international terrorism law.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.¹¹² A ship in international waters is held under the jurisdiction of its flag state.¹¹³ However, if a ship seems to be stateless while in international waters, any nation has the ability to exercise jurisdiction over the vessel.¹¹⁴ Criminal acts in international waters create problems of jurisdiction between the flag state and the victim's flag state.¹¹⁵ Thus, Sea Shepherd is often held accountable for its behavior by foreign governments that are not its flag states.¹¹⁶ A prime example is Denmark's decision to deport, fine, and threaten jail time to the *Bob Barker* crew, which is registered as a Dutch vessel, for disrupting the pilot whale hunt in the Faroe Islands.¹¹⁷

110. *Id.*

111. *Infra* Part III.C.2.

112. Melody Finnemore, *Fluid Body of Law, From Maritime Statutes of Old to New Developments in Wave and Tidal Energy, Ocean Law Continues to Evolve*, 70-MAY OR. ST. B. BULL. 19 (2010); Asia N. Wright, *Crime Takes a Vacation: Sea Marshals and Criminal Jurisdiction over High Seas Cruise Ship Crimes*, 7 LOY. MAR. L.J. 1, 2 (2009).

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

114. Monroe Leigh, *Jurisdiction Over Stateless Vessels—United States Criminal Jurisdiction Over Drug Trafficking in International Waters*, 77 AM. J. INT'L L. 630, 630–31 (1983).

115. Sandra L. Hodgkinson, et al., *Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap*, 22 AM. U. INT'L L. REV. 583, 590 (2007).

116. Inter-Am. Comm'n H.R., *Report on Terrorism & Human Rights*, OEA/Ser.L/V/II.116, doc. 5, rev. 1, corr. ¶¶ 18, 21, 22 (Oct. 22, 2002), available at <http://www.cidh.org/Terrorism/Eng/toc.htm> (on file with *The University of the Pacific Law Review*).

117. Vidal, *supra* note 44; Agence France-Presse, *Sea Shepherd anti-whaling ship Bob Barker refused entry to Faroe Islands*, THE GUARDIAN (Aug. 24, 2015, 10:28 EDT), <http://www.theguardian.com/environment/2015/aug/25/sea-shepherd-anti-whaling-ship-bob-barker-refused-entry-to-faroe-islands> (on file with *The University of the Pacific Law Review*); *Bob Barker*, MARINE TRAFFIC, <http://www.marinetraffic.com/ais/details/ships/5280540> (last visited March 11, 2016) (on file with *The University of the Pacific Law Review*).

2. *Terrorism Under International Law*

There is no true international definition of terrorism.¹¹⁸ Further, there is no concept of environmental terrorism because environmental terrorism is largely a United States' construct.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.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. . . .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.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.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.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

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.”)

119. Daniel M. Schwartz, *Environmental Terrorism: Analyzing the Concept*, 35 J. PEACE RES. 483, 483–84 (1998), available at <http://www86.homepage.villanova.edu/maghan.keita/readingsterrorism/terrorism/Daniel%20M.%20Schwartz,%20Environmental%20Terrorism.pdf> (on file with *The University of the Pacific Law Review*).

120. SUA, *supra* note 8; Doby, *supra* note 6, at 150–51, 154.

121. SUA, *supra* note 8, at art. 3(a)–(c).

122. *Id.* at art. 10.

123. *Id.* at art. 10(1), 11.

124. *Infra* Part III.A and B (detailing antiterrorism and piracy laws and how they affect Sea Shepherd donors).

for their support.¹²⁵ 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.¹²⁶

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.¹²⁷ Whereas pirates are motivated by their own gain, terrorists generally seek to further an ideological position.¹²⁸ Sea Shepherd is motivated by a conservationist creed: to stop the large scale slaughter of wildlife and destruction of marine habitat.¹²⁹ As they allegedly commit illegal acts furthering a conservationist position, it could be argued that Sea Shepherd is a terrorist organization.¹³⁰

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.¹³¹ 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.¹³² This punishment should be severe enough to dissuade future benefactors from donating money or support to supposedly eco-terrorist groups like Sea Shepherd.¹³³

It is unlikely that Sea Shepherd would be labelled a terrorist organization under AEDPA.¹³⁴ AEDPA requires that: (1) the organization be foreign; (2) the organization engage in terrorist activity; and (3) the terrorist activity threatens the

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).

127. Tammy M. Sittnick, Comment, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia To Take Additional Steps To Secure the Strait*, 14 PAC. RIM L. & POL'Y J. 743, 751 (2005).

128. Helmut Tuerk, *Combating Terrorism at Sea-The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. MIAMI INT'L & COMP. L. REV. 337, 343 (2008).

129. *Who We Are*, SEA SHEPHERD, available at <http://www.seashepherd.org/who-we-are/> (last visited Feb. 15, 2016) (on file with *The University of the Pacific Law Review*).

130. Tuerk, *supra* note 128, at 343.

131. 18 U.S.C.A. § 2339B (West 2015).

132. *Id.*

133. Alistair Deans, *Suing Organized Piracy: An Application of Maritime Torts to Pirate Attacks, and Subsequent Civil Actions Against the Supporters of Organized Piracy*, 16 ROGER WILLIAMS U. L. REV. 655, 666 (2011).

134. See Sahar Aziz, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism*, 9 TEX. J. ON C.L. & C.R. 45, 51 (2003) (listing the requirements for the terrorist designation—which Sea Shepherd does not meet).

security of United States nationals or the national security of the United States.¹³⁵ Here, Sea Shepherd has branches originating around the world.¹³⁶ Although there is a Sea Shepherd USA branch, that may not preclude it from being considered a foreign organization.¹³⁷ The international branches form a network and all Sea Shepherd branches coordinate with one another under a singular board of directors.¹³⁸ Therefore, they most likely satisfy the first prong of the test.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.”¹⁴⁰ These are behaviors Sea Shepherd’s opponents already accuse it of utilizing in its naval battles with whalers and illegal poachers.¹⁴¹ Although Sea Shepherd has argued that its actions have not caused substantial damage,¹⁴² its conduct creates dangerous conditions and may, at the very least, constitute an attempt to cause substantial damage.¹⁴³ Therefore, Sea Shepherd likely satisfies the second prong of AEDPA’s test.¹⁴⁴

Finally, the Secretary of State must show that Sea Shepherd endangers either United States nationals or the national security of the United States.¹⁴⁵ It is difficult to suggest that Sea Shepherd threatens national security.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.¹⁴⁷ This argument against Sea Shepherd is

135. 8 U.S.C.A. § 1189 (West 2016).

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.).

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).

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).

139. 8 U.S.C.A. § 1189 (West 2016).

140. 8 U.S.C.A. § 1182(a)(3)(B)(iii)(V)(b) (West 2016).

141. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 725 F.3d 940, 942 (9th Cir. 2013).

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).

143. See *Inst. of Cetacean Research*, 725 F.3d 945, 945–46 (holding that such an attempt was sufficient alone to trigger SUA).

144. 8 U.S.C.A. § 1189 (West 2016).

145. *Id.* at § 1189(a)(1)(C).

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).

147. Jessica Piquet, *Changing Tide: An Adaptable Prosecution Approach to Piracy’s Shifting Problem*, 52 COLUM. J. TRANSNAT’L L. 238, 240 (2013); Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More is Needed*, 33 FORDHAM INT’L L.J. 372, 373 (2010).

unpersuasive.¹⁴⁸ Although Sea Shepherd targets are diverse, they usually involve Japanese ships.¹⁴⁹ The federal government is wary to list groups as terrorist organizations as there are serious constitutional implications.¹⁵⁰ Therefore, it is unlikely that Sea Shepherd will be labeled a terrorist organization under AEDPA.¹⁵¹

However, even though Sea Shepherd and donors escape the terrorist label under United States law, they still face criminal liability under SUA.¹⁵² Sea Shepherd meets the definition of unlawful acts described in the SUA¹⁵³; Sea Shepherd endangers the safe operation of ships they target.¹⁵⁴ In fact, the Ninth Circuit held that Sea Shepherd violated the SUA, and could either be prosecuted under it, or extradited to Japan.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ If a successful SUA claim were brought against Bob Barker,

148. Sterio, *supra* note 147, at 401.

149. Andrew Hoek, *Sea Shepherd Conservation Society v. Japanese Whalers, the Showdown: Who is the Real Villain?*, 3 STAN. J. ANIMAL L. & POL'Y 159, 184 (2010).

150. *E.g.*, Geoffrey Sant, *So Banks are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 586 (2013); Peter Budoff, *How Far is too Far?: The Proper Framework for Civil Remedies Against Facilitators of Terrorism*, 80 BROOK. L. REV. 1057 (2015); Jason Binimow, *Validity, Construction, and Application of 18 U.S.C.A. § 2339B, Which Criminally Prohibits Provision of Material Support or Resources to Foreign Terrorist Organizations*, 184 A.L.R. FED. 545, 545 (2015) (discussing the constitutional ramifications of the material support statute and how it should be utilized).

151. 8 U.S.C.A. § 1189 (West 2016).

152. United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 3, Mar. 10, 1988, 1678 U.N.T.S. 201.

153. *Id.*

154. *Id.*; *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 945 (9th Cir. 2013).

155. United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 152.

156. *Id.*

157. *See generally* Kurtis A. Kemper, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350) Tort in Violation of Law of Nations or Treaty of United States*, 64 A.L.R. FED. 2D 117 § 25 (2012) (stating that aiding and abetting piracy is a valid claim to bring under the alien torts Statute).

158. *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, <http://www.seashepherd.org/news-and-media/2010/01/05/the-time-is-right-for-bob-barker-to-rescue-the-whales-265>.

Japan would claim that the United States would have to extradite the television personality.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.¹⁶⁰ Some countries, including Australia and the Netherlands, have stated that they will not arrest members of Sea Shepherd, or implicitly, their benefactors.¹⁶¹ Further, although the United States and Japan have an extradition treaty, the United States is unlikely to extradite a television icon¹⁶² such as Bob Barker for Japanese prosecution, especially since the treaty allows the exercise of such discretion.¹⁶³

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.¹⁶⁴ However, the definition and customary enforcement of piracy create a number of problems when attempting to attach liability to the pirates' donors.¹⁶⁵ Ultimately, while theories of accessory liability may be used against the donors of Sea Shepherd, using them in this way constitutes extraterritorial overreach.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.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

159. United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 152.

160. Nagtzaam, *supra* note 10, at 670.

161. *Id.* at 671.

162. Judy Faber, *Bob Barker Bids Farewell to 'Price'*, CBS NEWS, June 6, 2007, <http://www.cbsnews.com/news/bob-barker-bids-goodbye-to-price/> (on file with *The University of the Pacific Law Review*).

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.

164. *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 725 F.3d 940, 944 (9th Cir. 2013); *The Time is Right for Bob Barker to Rescue the Whales*, SEA SHEPHERD, Jan. 5, 2010, <http://www.seashepherd.org/news-and-media/2010/01/05/the-time-is-right-for-bob-barker-to-rescue-the-whales-265>; *Martin Sheen Unveils Sea Shepherd's Newest Vessel, R/V Martin Sheen, Named in his Honor*, SEA SHEPHERD, October 18, 2014, <http://www.seashepherd.org/news-and-media/2014/10/18/martin-sheen-unveils-sea-shepherds-newest-vessel-rv-martin-sheen-named-in-his-honor-1642>.

165. Bellish, *supra* note 47, at 120.

166. *Id.* at 121, 124.

167. *Id.* at 120.

(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

168. *Id.* at 124.

169. E.g. Roger L. Phillips, *Pirate Accessory Liability: Developing A Modern Legal Regime Governing Incitement and Intentional Facilitation of Maritime Piracy*, 25 FLA. J. INT'L L. 271, 277 (2013); J. Deveaux Stockton, *Pirates Who Neither Pillage Nor Plunder? The Ninth Circuit is on Board*, 8 FED. CTS. L. REV. 185, 187 (2014).

170. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004) (defining "universal jurisdiction" as allowing any nation to prosecute the group or individual responsible for the crime no matter what nation the perpetrator or victim(s) are from).

171. The phrase translates to "No crime before law," *Nullum Crimen Sine Lege*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/nullum_crimen_sine_lege (on file with *The University of the Pacific Law Review*).

172. Phillips, *supra* note 169, at 291.

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).

174. Phillips, *supra* note 169, at 290-93.

175. Jordan J. Paust, *Nullum Crimen and Related Claims*, 25 DENV. J. INT'L L. & POL'Y 321 (1997).

176. Phillips, *supra* note 169, at 285.

reserved for only the gravest crimes.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.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.¹⁷⁹ Finally, scholars argue that piracy should not be an international crime as a matter of consistency, because similar crimes¹⁸⁰ occurring on international waters are not considered piracy and not open to universal jurisdiction.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.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 *hostis humani generis*.¹⁸³ All nations should be able to act to keep the high seas open to prevent piracy.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.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.¹⁸⁶ As a result of these considerations, most courts accept piracy as a crime of universal jurisdiction.¹⁸⁷ If piracy is seen as an international crime, then Sea Shepherd's donors may be subject to universal jurisdiction if they traveled abroad.¹⁸⁸

177. *Id.*

178. Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 125 (2004).

179. Phillips, *supra* note 169, at 283.

180. S.C. Res. 1816, (June 2, 2008).

181. Phillips, *supra* note 169, at 283.

182. *Id.* at 286.

183. Thomas J.R. Stadnik, *Pirates-The Common Enemies of All, the Enemies of the Human Race, the law of War, and the Rule of Law*, LEXIS NEXIS, May 5, 2009, https://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/archive/2009/05/05/pirates-_2d00_-the-common-enemies-of-all_2c00_-the-enemies-of-the-human-race_2c00_-the-law-of-war-and-the-rule-of-law.aspx?Redirected=true.

184. Bellish, *supra* note 47, at 120.

185. *Id.* at 121.

186. Phillips, *supra* note 169, at 283–85.

187. *United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013).

188. Phillips, *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

189. UNCLOS, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

190. See Samuel Pyeatt Menefee, *The Case of the Castle John, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT’L L.J. 1, 4 (1993) (discussing the lack of an established definition for private ends in UNCLOS and the problems such a deficiency can cause).

191. Monica Pathak, *Maritime Violence: Piracy at Sea & Marine Terrorism Today*, 20 WINDSOR REV. LEGAL & SOC. ISSUES 65, 73-74 (2005).

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

193. See *Republic v. Dahir* [2010] S.C.S.C. 81 § 34, <http://www.seyilii.org/sc/judgment/supreme-court/2010/81> (on file with *The University of the Pacific Law Review*) (differentiating piracy and terrorism based private ends not including political objectives).

194. Harvard Research on International Law, *Piracy*, 26 20 AM. J. INT’L. SUP. 739, 857 (1932).

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

196. *Id.* at 944.

197. J. Deveaux Stockton, *Pirates Who Neither Pillage nor Plunder? The Ninth Circuit is on Board*, 8 FED. CTS. L. REV. 185, 189 (2014).

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.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰

Whether the plain language of UNCLOS contains a high seas requirement is unclear.²⁰¹ The statutory construction of Article 101 and its sub-provisions results in ambiguity.²⁰² Provision (a) gives the definition of a pirate and requires that the criminal actor must be on the high seas.²⁰³ 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.²⁰⁴ Using the interpretive canon of *in pari materia*²⁰⁵ leads to the argument that a high seas requirement for facilitators exists.²⁰⁶ 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."²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ Thus, authority under UNCLOS was not meant to extend

198. *Supra* Part III.B.1-2; see generally Roger L. Phillips, *Pirate Accessory Liability: Developing a Modern Legal Regime Governing Incitement and Intentional Facilitation of Maritime Piracy*, 25 FLA. J. INT'L L. 271, 283 (2013) (listing the requirements for piracy and the difficulty in their application).

199. *Id.* at 276.

200. Bellish, *supra* note 47, at 120.

201. Phillips, *supra* note 169, at 293-95.

202. *Id.*

203. UNCLOS, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

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).

206. George White, *Landlubbers as Pirates: The Lack of "High Seas" Requirement for the Incitement and Intentional Facilitation of Piracy*, 27 EMORY INT'L L. REV. 705, 708 (2013).

207. UNCLOS, *supra* note 8, at 86.

208. Bellish, *supra* note 47, at 120.

209. *Id.* at 130.

outside of international waters.²¹⁰ This evidence seems to favor the existence of a high seas requirement.²¹¹

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).²¹² Opponents of a high seas requirement, using the statutory canon of *expressio unius*,²¹³ identify that there is no “high seas” language in provision (c) even though it exists in provision (a).²¹⁴ 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.²¹⁵ This view was adopted by the courts in *Shibin* and *Ali*.²¹⁶

Consequently, Sea Shepherd donors could face prosecution for aiding and abetting piracy even if they never travel through international waters.²¹⁷ Additionally, *Ali* held that piracy is an ongoing crime, thus an accessory can be charged as long as the piratic acts continue.²¹⁸ 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.²¹⁹

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.²²⁰ 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.²²¹ Bob

210. *Id.*

211. *Id.*

212. *United States v. Shibin*, 722 F.3d 233, 241 (4th Cir. 2013); *United States v. Ali*, 718 F.3d 929, 937 (D.C. Cir. 2013).

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.”).

214. Phillips, *supra* note 169, at 293–95.

215. *Id.*

216. *Shibin*, 722 F.3d at 241; *United States v. Ali*, 718 F.3d 929, 937 (D.C. Cir. 2013).

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 2015.²²² Bob Barker gave the money to Sea Shepherd after being told that the vessel was going to put an end to commercial whaling.²²³ However, there are policy and practicality concerns that would prevent a simple litigation process.²²⁴

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.²²⁵ 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.²²⁶ Since then, whale meat consumption has declined drastically.²²⁷ Japan has roughly 4,600 tons of frozen whale meat in storage and continues to pull in about 1,300 tons every year.²²⁸ Most Japanese people under the age of 40 have never eaten whale.²²⁹ Additionally, 85 percent of the Japanese populace is opposed to Japan subsidizing whaling.²³⁰ In Norway, where whaling industries also receive large subsidies, there is a drastic decline in demand for whale meat.²³¹ As a result, Norwegian whalers sell their excess whale

222. *Id.*

223. Rachel Maddow Show, *supra* note 221 at 155.

224. 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).

225. 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]).

226. Brendan Nicholson, *Blame General MacArthur for Whaling Row*, THE AGE, Dec. 19, 2007, available at <http://www.theage.com.au/news/climate-watch/blame-general-macarthur-for-whaling-row/2007/12/18/1197740272644.html> (on file with *The University of the Pacific Law Review*).

227. 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*).

228. 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*).

229. 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*).

230. IFAW, *supra* note 225, at 2.

231. 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).

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 matter, 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

232. Rachael Bale & Tim Laman, *Norway’s Whaling Program Just Got Even More Controversial*, NATIONAL GEOGRAPHIC (Mar. 31, 2016), available at <http://news.nationalgeographic.com/2016/03/160331-norway-minke-whaling-fur-farms/> (on file with *The University of the Pacific Law Review*).

233. Hoek, *supra* note 149, at 188.

234. Int’l Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 361, Sch. 10(e).

235. 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> (on file with *The University of the Pacific Law Review*).

236. *Id.*

237. Adrienne M. Ruffle, *Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort*, 27 BROOK. J. INT’L L. 639, 656 (2002).

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).

240. *Court Orders Stay on Japanese Antarctic Whaling*, NY DAILY NEWS (Mar. 31, 2014), available at <http://www.nydailynews.com/news/world/court-orders-stay-japanese-antarctic-whaling-article-1.1740335> (on file with *The University of the Pacific Law Review*).

241. See generally IFAW, *supra* note 225, at 2 (stating that the Japanese government and whaling industry are losing the public’s support).

242. Treaty on Extradition Between the United States of America and Japan, March 3, 1978, 31.1 U.S.T.I.A. 892.

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.”²⁴³ Under United States law, a person found guilty of piracy is punishable by a mandatory life sentence.²⁴⁴ 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.²⁴⁵

Japan’s piracy statute, enacted in 2009, contains a sentence of five years to life.²⁴⁶ Japan’s accessory liability calls for a lesser punishment than the principal, unless the accessory induces the principal into acting.²⁴⁷ Extradition is possible since both nations’ statutes call for a sentence of at least a year for facilitating piracy.²⁴⁸ However, it is highly unlikely to occur due to the broad discretionary powers the treaty gives to the United States.²⁴⁹ While the United States government does not support Sea Shepherd’s vigilantism, it has been at the forefront of eliminating commercial whaling.²⁵⁰

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.²⁵¹ 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.²⁵² Either is an unlikely scenario because restraint should be used in an area of law as difficult as piracy and crimes of universal

243. *Id.* at art. II.

244. 18 U.S.C.A. § 1651 (West 2016).

245. 18 U.S.C.A. § 2 (West 2015).

246. Masami Ito, *The Long Arm of the Anti-Piracy Law*, THE JAPAN TIMES, Feb. 28, 2013, available at <http://www.japantimes.co.jp/news/2013/02/28/national/crime-legal/the-long-arm-of-the-antipiracy-law/#.VwGeEPkrLIU> (on file with *The University of the Pacific Law Review*).

247. KEIHŌ (PEN C.) art. 61–63 (2006), available at <http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf> (on file with *The University of the Pacific Law Review*).

248. Treaty on Extradition Between the United States of America and Japan, *supra* note 242, at 908.

249. *Id.* at art V.

250. Stephen S. Boynton, *Whaling Policy of the United States Yesterday, Today and Tomorrow*, 11 ISANA (1994), available at http://luna.pos.to/whale/jwa_v11_boy.html (on file with *The University of the Pacific Law Review*).

251. *Supra* Part.II.A. (discussing Sea Shepherd’s rise to prominence and public scrutiny).

252. *Supra* Part III.A. (examining terrorism laws within the United States and abroad, and whether they are applicable to the donors).

jurisdiction.²⁵³ 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).