

## Note

### **Animal Planet: Supporting Terrorism Since 2008?**

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A recent collision in the South Sea has led to further confrontation between the Sea Shepherd Conservation Society (Sea Shepherd) and the Japanese Institute for Cetacean Research (ICR). On January 6, 2010 one of Sea Shepherd's small boats collided with a Japanese whaling vessel, the *Shonan Maru Number 2*, and had to be scuttled. Recently, Sea Shepherd filed a legal complaint against the Japanese whaling fleet in the Netherlands where the *Steve Irwin*, Sea Shepherd's flagship, is registered. The complaint seeks an investigation into what Sea Shepherd considers to be piracy on the high seas. Unfortunately for Sea Shepherd, this legal action is likely to be stymied by the long established rules of customary international law that place the responsibility to avoid collisions on smaller, more agile craft. Potential legal claims by Japanese whalers against the Sea Shepherd, and their bully pulpit, Animal Planet are likely to prove more interesting.

Since 2008, Animal Planet has produced and broadcasted the show *Whale Wars*. The show depicts the "battle" between Sea Shepherd and the ICR from aboard Sea Shepherd's flagship. Unquestionably, many of the actions that the Sea Shepherd takes in its campaign against Japanese whaling are illegal—including a number of tactics that are quite violent. It is clear that Animal Planet knew about Sea Shepherd's violent tactics before promoting, developing, and airing *Whale Wars*. Some have suggested that the Sea Shepherd is a terrorist organization and that Animal Planet should be liable for supporting it. This article examines Animal Planet's liability, and the possible legal

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claims that could be brought against it.

## I. BACKGROUND ON THE RELEVANT PARTIES

### A. PAUL WATSON AND SEA SHEPHERD

Sea Shepherd was formed in 1977 by Greenpeace founder Paul Watson, who sought to stop illegal fishing operations.<sup>1</sup> Since its inception, the organization has sunk at least ten vessels via ramming and other means.<sup>2</sup> Generally, the intentional sinking of a ship is illegal, but Paul Watson claims that he is acting under the United Nation's 1982 *World Charter for Nature*.<sup>3</sup> This resolution calls on all "States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations [to]: . . . Safeguard and conserve nature in areas beyond national jurisdiction."<sup>4</sup> Sea Shepherd also relies on the International Whaling Commission's (IWC) moratorium on commercial whaling.<sup>5</sup> According to Sea Shepherd, these two documents (1) make all whaling illegal, and (2) allow Sea Shepherd to use any means necessary to stop whaling.

Despite these arguments, Watson was convicted of numerous crimes in Canada during the 1980s.<sup>6</sup> Then, in 1997, Watson was arrested and served ninety days in Dutch jail awaiting extradition to Norway on charges of scuttling a whaling vessel, but extradition was denied amidst political backlash.<sup>7</sup> Despite these legal troubles, Watson maintains that Sea Shepherd is acting legally, stating "You don't beg criminals [the whalers] to stop doing what they're doing. You intervene,

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1. Sea Shepherd Conservation Society, Our History, <http://www.seashepherd.org/who-we-are/our-history.html> (last visited Jan. 18, 2010).

2. *Id.*

3. World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982). This resolution was passed in the General Assembly by a vote of 111 to 1, with 18 abstentions. Importantly, the United States was the one negative vote, meaning that this resolution would not have been passed by the Security Council.

4. *Id.* ¶ 21, (e). *But see id.* ¶ 18 (noting that "[c]onstant efforts shall be made to increase knowledge of nature by scientific research and to disseminate such knowledge unimpeded by restrictions of any kind").

5. International Whaling Commission, IWC Information, <http://www.iwcoffice.org/commission/iwcmain.htm> (last visited Jan. 18, 2010).

6. Sea Shepherd Conservation Society, *supra* note 1.

7. *Id.*

and you physically and aggressively shut them down.”<sup>8</sup>

#### B. THE JAPANESE INSTITUTE FOR CETACEAN RESEARCH

The Institute for Cetacean Research is the Japanese government’s research institute specializing in the biological and social sciences related to whales.<sup>9</sup> It was created after the IWC’s commercial whaling moratorium began in the 1980s.<sup>10</sup> Controversially, it conducts an annual hunt off Antarctica for Minke and Fin whales under a special permit issued by the Government of Japan.<sup>11</sup> This permit falls under an explicit exception to the IWC’s whaling moratorium and the Japanese maintain that their hunt is perfectly legal.<sup>12</sup> However, many question Japan’s true motives. In 2008, Australia officially declared the Japanese whale hunt to be illegal.<sup>13</sup> Naturally, animal rights organizations such as Greenpeace have also been very critical of Japan.<sup>14</sup> Despite these international criticisms, the Japanese government remains steadfast in its commitment to whaling.

#### C. ANIMAL PLANET

These two viewpoints, diametrically opposed, make for thrilling television on Animal Planet’s *Whale Wars*. The first season of the show depicted Sea Shepherd’s efforts to stop the Japanese whale hunt—from hostage situations, South Sea

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8. Richard Spilman, *Whale Wars – Eco-Terrorism as Reality TV*, HUFFINGTON POST, June 5, 2009, [http://www.huffingtonpost.com/richard-spilman/whale-wars---eco-terroris\\_b\\_211993.html](http://www.huffingtonpost.com/richard-spilman/whale-wars---eco-terroris_b_211993.html).

9. Institute for Cetacean Research, About ICR, <http://www.icrwhale.org/abouticr.htm> (last visited Jan. 18, 2010).

10. *Id.*

11. *Id.*

12. “In 1986, the International Whaling Commission (IWC) imposed a moratorium on commercial whaling to allow stocks to replenish. However, this ongoing ban allows member nations to grant themselves special permits to kill whales for scientific research, with the proviso that the whale meat is utilized following data collection.” Nichola Raihani & Tim Clutton-Brock, *Why Japan’s Whaling Activities Are Not Research*, NEW SCIENTIST, June 17, 2009, available at <http://www.newscientist.com/article/mg20227136.100-why-japans-whaling-activities-are-not-research.html>.

13. See *Humane Soc’y Int’l, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, (2008) 165 F.C.R. 510 (Austl.).

14. See, e.g., Greenpeace International, *Japanese Whaling Ship Outlawed*, GREENPEACE NEWS, Oct. 28, 2008, <http://www.greenpeace.org/international/news/japanese-whaling-ship-outlawed281008>.

storms, and gunfire, to speed boats, attempted destruction of whaling boats, and smoke bomb charges—the show has a lot to keep audiences entertained. Season two offered even more excitement. The Sea Shepherd's rag-tag crew buzzed, harassed, and circled the Japanese boats. It threw bottles of noxious chemicals and flash bang grenades on the decks of the ships to sicken workers and spoil whale meat.<sup>15</sup> In one such incident, acid was allegedly squirted into a Japanese sailor's eyes.<sup>16</sup> Most importantly, on February 6, 2009 the crew of the *Steve Irwin* used cables to attempt to disable the ships and actually rammed a whaling vessel.<sup>17</sup>

Animal Planet loves this drama. One executive claims, “we’re not looking to be a natural history channel. We’re looking to be an entertainment destination.”<sup>18</sup> Up until a few years ago, Animal Planet was known mainly for cute and cuddly shows like *Puppy Bowl*.<sup>19</sup> This made the network very popular among the very young and the old, but that is not where the marketing money is in television.<sup>20</sup> In the late 2000's, Animal Planet began attempting to go after the lucrative young adult viewer by “promising ‘gripping entertainment’ and . . . new series that ‘bring out the raw, visceral emotion in the animal kingdom.’”<sup>21</sup> Charlie Foley, the network's Vice-President of Development, describes *Whale Wars* as a “giant game of Battleship” and Animal Planet's relationship to this game as telling “the story of what motivates these people who are trying to stop the whaling.”<sup>22</sup>

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15. *Whale Wars: Flashbang Grenades* (Animal Planet Online Video posted June 4, 2009), <http://animal.discovery.com/videos/whale-wars-flashbang-grenades.html>; *Whale Wars: Butyric Acid (Stink Bombs)* (Animal Planet Online Video posted June 4, 2009), <http://animal.discovery.com/videos/whale-wars-butyric-acid-stink-bombs.html>.

16. Richard Shears, Antarctic Whale War Continues as Protesters Bombard Harpoon Ship with ‘Stink Bombs,’ MAIL ONLINE, Mar. 3, 2008, <http://www.dailymail.co.uk/news/article-524648/Antarctic-whale-war-continues-protesters-bombard-harpoon-ship-stink-bombs.html>.

17. Press Release, Institute for Cetacean Research, Sea Shepherd Commits Further Criminal Acts at Sea (Feb. 6, 2009), available at <http://www.icrwhale.org/pdf/090206Release.pdf>.

18. Brian Stelter, *After Ratings Slip, Animal Planet Turns to its Wilder Side*, N.Y. TIMES, Jan. 14, 2008, at C4.

19. David Bauder, *Animal Planet on Risky Seas*, L.A. TIMES, Mar. 24, 2008, at E11.

20. *Id.*

21. *Id.*

22. *Id.*

## II. BACKGROUND ON THE RELEVANT LAW

The drama that plays out on *Whale Wars* does not happen in a legal vacuum. U.S., EU, Dutch, and international laws are implicated by the conflict because the Sea Shepherd is an American corporation, the main vessel used by the organization flies under the Dutch flag, and the conflict occurs in international waters.

### A. TERRORISM UNDER CUSTOMARY INTERNATIONAL LAW

There is no unified definition of terrorism in international law, but its illegality is customary since the international community uniformly decries the offense of terrorism and most attempts at a unified definition of terrorism have at least three elements in common. Essentially, terrorism on an international stage requires (1) a criminal act that causes death or serious injury or serious damage to property (2) conducted against civilians (3) with the purpose of compelling a government to do or refrain from doing something.<sup>23</sup>

### B. CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION (SUA)

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) is the U.N.'s attempt to criminalize unlawful acts on the high seas.<sup>24</sup> It criminalizes acts or attempts at acts which destroy or cause damage to a ship and are likely to endanger the safe navigation of that ship.<sup>25</sup> If these acts are committed in international waters, the SUA applies.<sup>26</sup>

### C. EUROPEAN UNION TERRORISM LEGISLATION

The European Union's stance on terrorism is set out in its *Framework Decision on Combating Terrorism*.<sup>27</sup> This framework

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23. See, e.g., G.A. Res. 51/210, ¶ 2, U.N. Doc. A/RES/51/210 (Jan. 16, 1997); Convention for the Prevention and Punishment of Terrorism, 19 League of Nations O.J. 23 (1938), League of Nations Doc. C.546(I).M.383(I).1937.V (Nov. 16, 1937).

24. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221.

25. *Id.* art. 3(1)(c).

26. *Id.* art. 4.

27. Council Framework Decision of 13 June 2002 on Combating Terrorism, 2002 O.J. (L 164/3).

was adopted by the Netherlands.<sup>28</sup> It defines terrorism as “attacks upon a person’s life which may cause death,”<sup>29</sup> “[attacks] causing extensive destruction to . . . a public place or private property likely to endanger human life or result in major economic loss,”<sup>30</sup> or “threatening to commit any of [these] acts.”<sup>31</sup> These crimes can be committed by anyone. However, due to the structured nature of many terrorist organizations, Article Two describes and criminalizes directing and participating in a structured terrorist group.<sup>32</sup> “Participating in” is broadly defined as “supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.”<sup>33</sup> Article Four makes it a crime to aid or abet an individual or terrorist group to commit one of the delineated offenses.<sup>34</sup> Importantly, Article Nine describes the jurisdictional reach of the offenses.<sup>35</sup> A member state has jurisdiction over these offenses if “the offense is committed on board a vessel flying its flag or . . . [if] the offender is one of its nationals or residents.”<sup>36</sup>

#### D. AMERICAN TERRORISM LEGISLATION

##### *i. International Terrorism on the High Seas*

By far the most litigated and important of the United States’ anti-terrorism statutes is 18 U.S.C. § 2331 which defines international terrorism as activities that:

[I]nvolve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States . . . appear to be

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28. See Act to Amend and Supplement the Penal Code and Some Other Laws in Connection with Terrorist Crimes, Parliamentary Paper 28 463 (Aug. 2004) (Neth.); Eur. Consult. Ass., Committee of Experts on Terrorism [CODEXTER], *Profiles on Counter-Terrorist Capacity: Netherlands* (2008), available at [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/fight\\_against\\_terrorism/4\\_theme\\_files/apologie\\_-\\_incitement/CODEXTER%20Profile%20%282008%29%20NETHERLANDS.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/4_theme_files/apologie_-_incitement/CODEXTER%20Profile%20%282008%29%20NETHERLANDS.pdf).

29. Council Framework Decision of 13 June 2002 on Combating Terrorism, art. 1(1)(a), 2002 O.J. (L 164) 3.

30. *Id.* art. 1(1)(d).

31. *Id.* art. 1(1)(i).

32. *Id.* art. 2.

33. *Id.*

34. *Id.* art. 4.

35. *Id.* art. 9.

36. *Id.*

intended to intimidate or coerce a civilian population; or to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.<sup>37</sup>

This statute has several noteworthy features. By criminalizing “violent acts or acts dangerous to human life” the statute allows for terrorist prosecution of offenses against property. The statute is quite broad because it places few limits on the types of criminal activities that could be considered terrorism.<sup>38</sup> Further, the statute does not just criminalize the intent to influence the United States government; it criminalizes the intent to influence any government.<sup>39</sup> Finally, the statute is clearly meant to be extraterritorial in its reach by giving jurisdiction only when the crimes occurred “outside the territorial jurisdiction of the United States.”<sup>40</sup> Without a limiting statute, § 2331 could be seen as so broad as to give any victim of terrorism, anywhere in the world, a cause of action in the U.S. However, 18 U.S.C. § 2333 limits claims to those brought by United States nationals.<sup>41</sup> This makes it difficult, but not impossible, for foreigners to reach American courts.

Since *Whale Wars* takes place in international waters, the Violence Against Maritime Navigation Act may also be applicable.<sup>42</sup> In relevant portions, the Act criminalizes any intentional acts “of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship,”<sup>43</sup> that “destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship,”<sup>44</sup> or

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37. 18 U.S.C. § 2331 (2004).

38. This may be limited by the 18 U.S.C. § 2332b(a)(1) list of terrorism offenses. *See id.* § 2332b. However, the Seventh Circuit stated that this is not an exhaustive list of offenses. *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F. 3d 1000, 1012 n.10 (7th. Cir. 2002).

39. *Id.* § 2331(1).

40. *Id.* § 2331(1)(C).

41. 18 U.S.C. § 2333(a) (2006) (“Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”).

42. *See* Violence Against Maritime Navigation Act, 18 U.S.C. § 2280 (2006).

43. *Id.* § 2280(a)(1)(B).

44. *Id.* § 2280(a)(1)(C).

attempting to do any of these acts.<sup>45</sup> This law gives the United States jurisdiction if the action is committed against or on board a ship flying the flag of the United States, or by a national of the United States.<sup>46</sup>

*ii. Support of International Terrorism*

The United States (and the international community) has not been blind to the fact that conducting terrorist operations requires material support. The United States' law prohibiting terrorist support is codified as 18 U.S.C. § 2339A:

Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section . . . [18 U.S.C. Section] 2280 . . . or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.<sup>47</sup>

Since the terrorist attacks on the World Trade Center in 2001, this statute has seen much litigation.<sup>48</sup> One of the most important decisions determining its scope is *Boim v. Quranic Literacy Institute & Holy Land Foundation for Relief & Development*.<sup>49</sup> The Boims, survivors of a Jewish student murdered by Hamas in Israel, claimed that the Quranic Literacy Institute (QLI) was funding terrorism.<sup>50</sup> The Boims' three major contentions were: (1) providing material support to a terrorist organization was itself an act of international terrorism under 18 U.S.C. § 2331; (2) QLI could be held civilly liable for violating 18 U.S.C. § 2339A; and (3) QLI could be held civilly liable for aiding and abetting terrorism under 18

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45. *Id.* § 2280(a)(1)(G)–(H).

46. *See id.* § 2280(b).

47. 18 U.S.C.A. § 2339A (West 2000).

48. Not surprisingly, terrorists are often difficult to identify, track down, gain jurisdiction over, or enforce judgments against. Obviously, the deeper pockets of terrorist supporters are enticing litigation targets. *See generally* Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L.J. 1, 3 (2002). *See also* Holder v. Humanitarian Law Project, 552 F.3d 916 (9th Cir. 2009), *cert. granted*, 78 U.S.L.W. 1123 (U.S. Sept. 30, 2009) (No. 08-1498) (challenging the constitutionality of 18 U.S.C. § 2339B(a)(1)).

49. *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1009 (7th Cir. 2002) (“No court has yet considered the meaning or scope of sections 2331 and 2333, and so we write upon a tabula rasa.”).

50. *Id.* at 1001–03.

U.S.C. § 2333.<sup>51</sup>

The court did not agree with the Boims' first argument and held that while the statute "is clearly meant to reach beyond those persons who themselves commit the violent act that directly causes the injury," this theory of liability "is insufficient because it sets too vague a standard . . . and does not require a showing of proximate cause."<sup>52</sup> Providing material support to a terrorist organization is not an act of terrorism. The Boims' second argument was accepted by the court—providing material support to a terrorist act can create civil liability for the supporter.<sup>53</sup> The court, after partaking in a detailed analysis of the statute's legislative history, declared that "that history, in combination with the language of the statute itself, evidences intent by Congress to codify general common law tort principles and to extend civil liability for acts of international terrorism to the full reaches of traditional tort law."<sup>54</sup> Thus it is clear that, at least in the Seventh Circuit, one can be held civilly liable for supporting terrorism.<sup>55</sup>

### III. ANALYSIS OF SEA SHEPHERD'S LIABILITY

#### A. SEA SHEPHERD'S LEGAL ARGUMENT IS INCORRECT

Sea Shepherd claims to be acting under the auspices of the 1982 World Charter for Nature which calls on "States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations [to]: . . . Safeguard and conserve nature in areas beyond national jurisdiction."<sup>56</sup> Sea Shepherd claims that it is a corporation acting under the U.N.'s blessing and that it is acting rightfully

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51. *See id.* at 1005.

52. *Id.* at 1011–12. *But see* United States v. Haouari, No. S400CR.15(JFK), 2001 WL 1154714, at 2 (S.D.N.Y. Sept. 28, 2001) (holding that the evidence that defendant deliberately closed his eyes to the fact that a terrorist intended to destroy property was sufficient for the lower court to find a defendant liable under 18 U.S.C. § 371).

53. *See Boim*, 291 F. 3d at 1016 ("The Boims may thus show that QLI and HLF committed an act of international terrorism subject to civil liability under section 2333 by proving that QLI and HLF provided material support to terrorist organizations.").

54. *Id.* at 1010.

55. The court also accepted the Boims' third argument, but it has little relevance to this article. *Id.* at 1016–21.

56. World Charter for Nature, G.A. Res. 37/7, *supra* note 3, ¶ 21, (e).

as the police of the sea, “physically and aggressively” stopping illegal whaling.<sup>57</sup> However, this argument is incorrect. Despite Sea Shepherd’s ardent conviction, the U.N.’s World Charter for Nature does not give them the right to police the seas because it is a non-binding, non-use-of-force General Assembly Resolution.<sup>58</sup> The U.N. rarely authorizes the use of force and has never authorized it for an individual state, let alone an individual corporation.

Further, Sea Shepherd is on notice its actions are illegal. In 1995, Paul Watson was put on trial before the Newfoundland Supreme Court for crimes in relation to incidents on the Grand Banks in 1993.<sup>59</sup> At the trial, Watson claimed the World Charter for Nature as his authority to intervene and was acquitted on a theory of “colour of right,” a concept used in the United Kingdom and other Commonwealth countries protecting individuals who honestly thought they had a legal right to do something, but do not in actuality have such a right. The Newfoundland Supreme Court defined the defense as “an honest belief in a state of facts which, if it existed, would be a legal justification or excuse”<sup>60</sup> and found that “as a matter of law – the World Charter for Nature did not constitute legal justification or excuse [to the crimes committed].”<sup>61</sup> Despite the acquittal, the decision put Paul Watson on notice that his actions, as they pertain to interference with fishing vessels, were not legal.

## B. SEA SHEPHERD IS ENGAGING IN TERRORISM

### *i. Customary International Law*

Sea Shepherd is violating a customary international law ban on terrorism by attempting to ram Japanese ships and using fouling lines to damage their propellers.<sup>62</sup> Ramming a

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57. Spilman, *supra* note 8.

58. See U.N. Charter preamble, art. 25, art. 42. The U.N. was founded for the general purpose of limiting unilateral uses of force. As such, the document makes it very difficult for the U.N. to authorize the use of force. Only Chapter VII resolutions, passed by the Security Council, can provide prior legal authorization for the use of force.

59. Sea Shepherd Conservation Society, *supra* note 1.

60. R. v. Watson, [1999] 176 Nfld. & P.E.I.R. 263, 274 (Can.).

61. *Id.* (quoting the jury instruction given by the trial judge on the matter, while affirming the judgment).

62. See Institute for Cetacean Research, *supra* note 17 (describing attempts to ram vessel and disable its propeller).

ship is an effective way to sink it.<sup>63</sup> Further, Captain John Carroll, the federal master of the Company of Master Mariners of Australia, explains “[t]here is always a weak point built into a ship’s drive shafts for safety reasons and you can actually pull the propeller shaft, or shafts, right off. . . . If that happened, it is probable the ship would sink.”<sup>64</sup> Thus, at least some of Sea Shepherd’s actions may have been intended to seriously damage the ships or cause injury to the Japanese crews. These acts are criminal and violent and are committed against civilian non-combatants with an aim to end Japanese whaling—a government-sponsored program. Thus, Sea Shepherd is in violation of the three pronged test for international terrorism.<sup>65</sup>

*ii. European Union*

The European Union considers attacks, or the threat of attacks, against people which *may* cause death as well as attacks that cause extensive damage to private property that are likely to endanger human life, to be terrorist acts.<sup>66</sup> Further, the European Union’s jurisdictional reach includes offenses that that are committed on board a vessel flying a European Union flag or if the acts are committed by a national of the European Union.

The *Steve Irwin*, the boat used by Sea Shepherd on *Whale Wars*, flies under a Dutch flag.<sup>67</sup> Laurens de Groot, a crew member of the *Steve Irwin*, is a Dutch national.<sup>68</sup> The European Union has jurisdiction over the vessel and, for the same reasons it is violating customary international law and the SUA, Sea Shepherd is committing acts of terrorism under the European Union’s definition.

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63. As Paul Watson knows well. He has personally used this tactic to sink whaling vessels in the past. Sea Shepherd Conservation Society, *supra* note 1.

64. Institute for Cetacean Research, *supra* note 17.

65. It is also violating the SUA since Paul Watson and his crew know that the ramming of a ship can sink it. See Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *supra* note 24, art. 3(e).

66. Council Framework Decision of 13 June 2002, *supra* note 27, art. 1.

67. The ship is registered in the Netherlands. Willemien Groot, *Sea Shepherd could lose Dutch Flag*, Radio Neth. Worldwide, <http://www.rnw.nl/english/article/sea-shepherd-could-lose-dutch-flag>.

68. Animal Planet, *Whale Wars: Meet the Crew*, <http://animal.discovery.com/tv/whale-wars/meet-the-crew/> (last visited Jan. 18, 2010).

*iii. United States*

The United States' main international terrorism statute defines the offense in three elements: (1) Violent criminal acts or acts dangerous to human life (2) that are intended to influence a population or government by intimidation or coercion (3) occurring outside the United States.<sup>69</sup> As discussed above, Sea Shepherd uses violent acts of physical force (entangling devices and ramming) that are clearly intended to injure or abuse the Japanese whaling vessels.<sup>70</sup> This is more than enough to satisfy the first element because, regardless of whether they actually cause harm to individuals, attacks against property satisfy the statute.<sup>71</sup> The second and third elements are also easily met. Sea Shepherd's intent is to coerce and intimidate the Japanese government into halting its whaling program by making life difficult for the whalers—and it is quite obvious that their actions occur “primarily outside the territorial jurisdiction of the United States.”<sup>72</sup>

Sea Shepherd is also violating the Violence Against Maritime Navigation Act. This act criminalizes intentional acts, or attempts, to “destroy[ ] a ship or cause[ ] damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship.”<sup>73</sup> Since the statute gives the United States jurisdiction over its nationals who commit these acts it applies to Sea Shepherd because *Steve Irwin* crewmembers Jane Taylor, Luke Van Horn, and C. Aultman are all nationals of the United States.<sup>74</sup>

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69. See 18 U.S.C. § 2331 (2004).

70. Under the American statute, “intention” is not required. All that is required is a criminal act that is violent or dangerous to human life. Thus, even if Sea Shepherd merely “knew” that its acts were violent or dangerous, the acts would satisfy this element. The case could even be made that acts which are “reckless” or “negligent” would satisfy subsection (A) of § 2331. Of course even if the first element is easily met, a mens rea of intent is required for element two, which would prove very difficult to show if an actor merely committed a criminal act negligently or recklessly.

71. 18 U.S.C. § 2331 (2004); see also *id.* § 2333 (creating a cause of action for nationals of the United States who have suffered property damage as a result of international terrorism).

72. *Id.* § 2331.

73. *Id.* § 2280(a)(1)(C), (H).

74. *Whale Wars: Meet the Crew*, *supra* note 68.

*iv. Summary*

Sea Shepherd is violating customary international law forbidding terrorism, the SUA, the European Union's Framework Decision on Combating Terrorism,<sup>75</sup> the United States' international terrorism statute, and the United States' Violence against Maritime Navigation statute.<sup>76</sup> Because Sea Shepherd is violating international and domestic terrorism laws it is engaging in terrorist activity.

## IV. ANALYSIS: ANIMAL PLANET'S LIABILITY

Animal Planet may be liable for supporting terrorist activities. This section will consider potential liability under American and Dutch law. In doing so, three routes will be considered: criminal liability in the Netherlands; criminal and civil liability in the United States under 18 U.S.C. § 2339A; and civil liability in the United States under the Alien Tort Statute.

## A. CRIMINAL LIABILITY IN THE NETHERLANDS

The Committee of Experts on Terrorism (CODEXTER) states that "the Netherlands takes a broad-based approach [to combating terrorism], addressing not only the acts of violence themselves, but also the chain of events that precedes them."<sup>77</sup> The European Union's Framework Decision on Combating Terrorism of 13 June 2002 was implemented, essentially in full, into Dutch law by the Crimes of Terrorism Act of August 10, 2004.<sup>78</sup> The Netherlands has also implemented the International Convention for the Suppression of the Financing of Terrorism.<sup>79</sup> Dutch law now makes criminal proceedings possible where "the offender is a Dutch national and terrorism

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75. For a discussion of the Dutch application of this framework, see *infra* Section IV.

76. Note that these are the only statutes (and norms) that this Note considered. It is possible, and indeed likely, that Sea Shepherd is violating other anti-terrorism laws. However, since the primary purpose of this Note is deciding if, how, and where Animal Planet can be held liable for Sea Shepherd's actions, other nations laws were not researched nor considered.

77. CODEXTER, *supra* note 28, at National Policy.

78. *Id.* at Penal law.

79. See *id.* at 2 (explaining how the Act codifies into Dutch law the Convention's definition of financing terrorism).

has been financed abroad.”<sup>80</sup>

Where does this place Animal Planet? First, Sea Shepherd is engaged in terrorist activity under European Union law. Because the Netherlands has adopted the same terrorist definition as the European Union, Sea Shepherd is also violating Dutch law.<sup>81</sup> Second, the Netherlands has jurisdiction over all of the actions that Sea Shepherd has committed on *Whale Wars* because (1) the *Steve Irwin* is a Dutch vessel and (2) one of the crew members engaged in the terrorist activity is a Dutch national.

Controversially, the Netherlands also has jurisdiction over Animal Planet if it has financed a Dutch national in committing terrorism.<sup>82</sup> The critical issue, therefore, is whether Animal Planet has “financed” Sea Shepherd within the scope of that term as it is used in the International Convention on the Suppression of Terrorism. The Convention defines financing as “directly or indirectly, unlawfully and wilfully, provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out,” any terrorist offense.<sup>83</sup> The Convention goes on to describe funds as:

assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.<sup>84</sup>

The question is a deeply factual one,<sup>85</sup> and barring a suit against Animal Planet it will be difficult to know if Animal Planet has provided Sea Shepherd with funds of any kind.<sup>86</sup>

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80. *Id.*

81. The Sea Shepherd is also violating the terrorism law of any nation that has adopted the European Union definition.

82. CODEXTER, *supra* note 28, at 2 (“Criminal proceedings are also possible if the offender is a Dutch national and the terrorist act has been financed from abroad.”).

83. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, art. 2(1), U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

84. *Id.* art. 1(1).

85. The question also goes beyond the scope of this Note. Barring an actual investigation into how *Whale Wars* is produced and what the structure of the contracts are between Animal Planet and Sea Shepherd, it will be impossible to decipher whether any intangible assets were transferred from Animal Planet to Sea Shepherd.

86. Has Animal Planet entered into a revenue sharing agreement with Sea

Assuming that it has provided funds to Sea Shepherd, Animal Planet's actions would satisfy prong one for Dutch criminal liability.

Dutch law also requires either the intent that the funds be used in carrying out a terrorist act or "knowledge that they are to be used" in carrying out such an act. Animal Planet had actual and constructive knowledge of the illegality of Sea Shepherd's actions. Animal Planet knew what the law of terrorism was when it began producing the show. A summary research of Animal Planet's *Whale Wars* website shows that Animal Planet had strong reason to believe that the show it was funding might be depicting and glamorizing illegal activity.<sup>87</sup> It had constructive knowledge because knowledge of the law can be imputed to it.<sup>88</sup> And, because the knowledge of terrorism law is imputed to Animal Planet, it should have known that the illegal activities it was glamorizing were terroristic in nature. Yet, Animal Planet continued its relationship with Sea Shepherd in order to deliver "gripping entertainment."<sup>89</sup>

Thus, Animal Planet is likely funding terrorism under Dutch law. However, the Netherlands does not currently allow civil remedies for terrorism offenses.<sup>90</sup> Japan would have to convince

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Shepherd? Does the contract between Sea Shepherd and Animal Planet constitute an asset? Did Animal Planet provide Sea Shepherd with any assistance in piloting the vessel in the Southern Ocean? Did Animal Planet provide any fuel to Sea Shepherd? Did Animal Planet's production of the show indirectly cause Sea Shepherd to receive more funding from private donors? If any of these questions are answered affirmatively then Animal Planet has provided funds to Sea Shepherd.

87. See generally *Whale Wars: Legal Debate*, The Sea Shepherd's Legal Authority, <http://animal.discovery.com/tv/whale-wars/legal-debate/sea-shepherd-legal-authority.html> (last visited Feb. 25, 2010) (generalizing the legal justification put forth by Sea Shepherd as untenable by quoting lawyers and scholars such as Dr. David Caron who states that, "The charter talks about duties on states. It does not say anything about who may enforce them."); see also *Whale Wars: Legal Debate*, Law of the Sea, <http://animal.discovery.com/tv/whale-wars/legal-debate/law-of-the-sea.html> (last visited Feb. 25, 2010) (discussing the illegality of the Sea Shepherd's violent tactics, including Dr. Timothy Stephens's assertion that current maritime laws prohibit one from "intentionally ram[ing] or damag[ing] another vessel on the high seas").

88. See generally Hans Lensing, *Introduction to NETHERLANDS, THE DUTCH PENAL CODE 25* (Louise Rayar & Stafford Wadsworth trans., 1997) (summarizing the few exceptions to the generally unrecognized defense of ignorance of law or fact).

89. See Bauder, *supra* note 19 (arguing that Animal Planet's desire for higher ratings has put its reputation at stake because of the channel's affiliation with an organization known for aggressive techniques).

90. See CODEXTER, *supra* note 28, at 1-3 (describing all the legal remedies for terrorism in the Dutch legal system and noting that it does not have a civil liability statute for terroristic acts).

the Dutch government to bring a criminal case against a foreign national in its courts in what would likely be a highly controversial affair. Although such action is possible, the resources and political capital that would be expended in this effort make this route complicated, especially considering the difficulty of determining the core “funding” issue. These factors make suggest that a successful liability claim is more likely to be found in the United States.

## B. LIABILITY IN THE UNITED STATES

Animal Planet is a United States company owned by Discovery Communications based in Silver Spring, Maryland.<sup>91</sup> It is broadcast in every state in the United States, which likely allows for a civil suit to be brought against it under federal jurisdiction.<sup>92</sup>

### *i. Liability for Funding Terrorism under 18 U.S.C. § 2339A*

Criminal and civil penalties can be levied against those who fund or support terrorism in the United States.<sup>93</sup> To be found liable in tort or criminally, an individual or organization must at least (1) provide material support (2) with knowledge that it is to be used (3) in a defined terrorist offence.<sup>94</sup> In any potential case against Animal Planet, the first element would prove the most difficult.

Clearly, Sea Shepherd is violating one of the defined offenses: the Violence against Maritime Navigation Act.<sup>95</sup> If Animal Planet is providing material support to Sea Shepherd, it is doing so knowingly. First, there is very strong evidence that Animal Planet actually knew that the Sea Shepherd would engage in violent tactics based on Paul Watson and the Sea

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91. *A World of Discovery: Facts & Figures*, GLOBE: A Q. NEWSL. FROM DISCOVERY COMM. (Discovery Comm'ns, Silver Spring, Md.), Feb. 2010, at 11-12, available at <http://corporate.discovery.com/media/uploads/pdf/GLOBE-newsletter-4Q09.pdf>.

92. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (finding that to have jurisdiction over a defendant that defendant must have “minimum contacts” with that jurisdiction).

93. See 18 U.S.C. § 2339A (2004); see also *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000 (7th Cir. 2002).

94. See 18 U.S.C. § 2339A (2004).

95. *Id.* § 2339A (listing the Act, codified at 18 U.S.C. § 2280, as a terrorism offense).

Shepherd's past. Even if Animal Planet did not actually know that the Sea Shepherd would engage in this illegal conduct, cursory research into its past would have revealed the high likelihood that it would. Case law suggests that "deliberately closing [its] eyes" or sticking its head in the sand is not a defense to the knowledge requirement of § 2339A.<sup>96</sup> The only real question is whether Animal Planet provided material support to Sea Shepherd.

Title 18 U.S.C. § 2339A defines material support as:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>97</sup>

This statute is quite broad, and Animal Planet may have provided material support under it in any number of ways. The contract between Animal Planet and Sea Shepherd to film and develop *Whale Wars* is personal property; the show itself gives Sea Shepherd an excellent forum to espouse its philosophy and may be construed as a service; Sea Shepherd has likely been paid by Animal Planet for the rights to film their mission; and the network has definitely provided Sea Shepherd with "communication equipment"—namely a film crew with high-definition video cameras. If any of these materials made it more likely that Sea Shepherd would violate terrorism law, then Animal Planet has funded terrorism.<sup>98</sup>

Unfortunately for the ICR, any speculation about a civil suit under § 2339A is purely academic. The civil remedy for a violation of § 2339A is found under 18 U.S.C. § 2333. Section 2333 very clearly limits the bringing of claims to "[a]ny national of the United States."<sup>99</sup> The Japanese whalers are not Americans.<sup>100</sup> Despite Sea Shepherd's illegal activity, and

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96. See *United States v. Haouari*, No. S400CR.15(JFK), 2001 WL 1154714, at 2 (S.D.N.Y. Sept. 8, 2001).

97. 18 U.S.C. § 2339A(b)(1) (2004).

98. Of course, some of this "support" is just conjecture from the author. It is unlikely that, barring a criminal or civil suit, the contract between Sea Shepherd and Animal Planet would become publicly available. Thus, nothing more than conjecture can be said about it.

99. 18 U.S.C. § 2333(a) (2004).

100. This would change if the whalers hired American crew members. If the ICR had American employees on their whaling boats, they would be able to bring a claim

despite their potential funding by an American company, American courts are closed to the Japanese under these laws.

*ii. Liability for Funding Terrorism Under the Alien Tort Statute*

Could the Japanese have recourse against Animal Planet under the Alien Tort Statute? Title 28 U.S.C. § 1350 provides that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>101</sup> The history and case law around this statute is complex and outside the scope of this Note. Suffice it to say, there is debate about the extent to which the statute is simply a jurisdictional grant and the extent to which it contains causes of action.<sup>102</sup> In general, the statute is read as allowing for suits under treaties only in so far as they claim an individual cause of action and under well established norms of customary international law.<sup>103</sup>

The United States has signed the SUA and enacted it through 18 U.S.C. § 2280. Unfortunately for the Japanese whalers, this is a criminal statute. It does not authorize civil suits by individuals. Because the Court is very wary of creating a cause of action where the legislature has not, any Alien Tort Statute claim under the SUA would likely be futile.<sup>104</sup>

## V. CONCLUSION

There is no doubt that *Whale Wars* has spiked American interest in the whaling industry and glamorized those who wish to stop it. It also has been a boost to Animal Planet by helping to bring in a younger, more profitable audience. Perhaps this will put pressure on the Japanese to stop their annual hunt and perhaps that is a good result.<sup>105</sup> Regardless, the means used to pressure the Japanese must be scrutinized. To allow, and indeed celebrate, the tactics that Sea Shepherd engages in could set a

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under this statute.

101. Alien's Action for Tort, 28 U.S.C. § 1350 (2004).

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

103. *Id.* at 724–25.

104. See *id.* (opining that the Court is reluctant to create new causes of action when not given a legislative mandate).

105. This Note does not wish to draw any conclusions as to the morality of whaling. It merely offers a legal discussion of environmental and maritime terrorism and the various international and national attempts to stifle it.

dangerous precedent. The success of *Whale Wars* may incentivize other groups to take measures into their own hands and resort to vigilante justice or outright terrorism. Sea Shepherd is engaged in terrorist activities on the high seas and Animal Planet is using it for commercial gain. These activities should be condemned and the perpetrators should be held liable for them. However, jurisdictional limitations make this nearly impossible. Unless something drastic changes in the American or Dutch legal system, Sea Shepherd and Animal Planet will continue acting with impunity.