

# THE AUSTRALIAN NATIONAL UNIVERSITY



## ANU COLLEGE OF LAW

Social Science Research Network  
Legal Scholarship Network

ANU College of Law Research Paper No. 10-08

Donald K Anton

Protecting Whales by Hue and Cry – Is there a Role  
for Non-State Actors in the Enforcement of  
International Law?

<http://ssrn.com/AuthorID=371838>  
<http://ssrn.com/abstract=1593305>

**Protecting Whales by Hue and Cry:  
Is There a Role for Non-State Actors in the Enforcement of International Law?**

*Donald K. Anton*  
The Australian National University College of Law

Paper presented on 15 April 2010 at the ANU College of Law Conference on  
*Pirates of the Southern Ocean?*

Last month, when I accepted the invitation to speak today I may have been channeling Sir Wilfred Jenks. Jenks famously invoked Proverbs 29:18 in arguing for idealism in international law -- “where there is no vision, people perish”, he insisted.<sup>1</sup> When I heard that my assignment for today was to consider whether there is a role for the sort non-state *posse comitatus* enforcement of international law envisioned by Paul Watson and Sea Shepherd, I suspect I may have been subconsciously thinking, “where there is no vision, whales perish”. It will become apparent that much vision is required here because the law is not favourable to Watson.

I. THE CLAIM TO NON-STATE ENFORCEMENT AND ITS REJECTION

I first saw the case for the legality of Sea Shepherd enforcement of international law raised in a 2007 profile article about Watson I read in the New Yorker.<sup>2</sup> The article recounted that:

[i]n the early nineties, . . . Watson began to assert legal authority for his actions [in sinking and harassing whalers]. For this, he cited primarily the . . . World Charter for Nature, . . . which [according to Watson] allows for private citizens to [enforce law to] “safeguard and conserve nature in areas beyond national jurisdiction.”<sup>3</sup>

The same claim can still be found on the Sea Shepherd website today.<sup>4</sup> In addition, Watson claims he is exercising a right of “citizen’s arrest” because of the failure of states to stop illegal whaling by Japan.

---

<sup>1</sup> C. Wilfred Jenks, *Idealism in International Law*, in ESSAYS ON INTERNATIONAL LAW 39 (M.K. Nawaz, ed., 1976).

<sup>2</sup> Raffi Khatchadourian, *Neptune’s Navy*, The New Yorker, Nov. 5, 2007, p 56.

<sup>3</sup> *Id.*, p 66. This is a quote from paragraph 21(e) of the World Charter for Nature, which says absolute nothing about enforcement, much less empowering enforcement by non-state actors. To me the strongest provisions that might, but do not, support Watson and Sea Shepard are paras. 21(c) and 24.

<sup>4</sup> See <http://www.seashepherd.org/whales/>

If you are an international lawyer, you may understandably reject these claims out of hand. For instance, my colleague, Don Rothwell, was quoted in *The Australian* in January as saying an attempt by Sea Shepherd to make a citizen's arrest on the high seas is "completely nonsense, it has no basis [in] international law . . .".<sup>5</sup> Natalie Klein too has rejected Watson's claims. As she wrote in her February op/ed piece in the *Australian*:

What is clear, legally, is that Sea Shepherd does not have policing powers. . . . Sea Shepherd members are not entitled to conduct what is known as a right of visit to deliver protest letters . . . or for a citizen's arrest.<sup>6</sup>

Likewise, the author of the *New Yorker* article wrote that when he:

described Watson's use of the [WCN] to David Caron, the co-director of the Law of the Sea Institute, at the University of California at Berkeley, [Caron merely] said, "Clearly wrong. There is no ambiguity."<sup>7</sup>

## II. JUSTIFYING PRIVATE ENFORCEMENT OF INTERNATIONAL LAW

Given these pronouncements, can the so-called enforcement actions of Watson and Sea Shepherd be justified?

### A. *Law reform proposals*

Well, we might begin by looking at proposals that have been put in favour of enforcement by non-state actors. For instance, Chris Stone has long advocated for a system of environmental guardianship, in which non-state actors would be designated as conservators to serve as the legal voice for non-humans, including whales, and endowed with standing to initiate legal action on their behalf.<sup>8</sup> Even earlier (1969), four Nordic U.N. Associations came together and declared that each individual has a right to live in a clean environment and ought to, on this account, have the right to enforce agreements for limiting pollution.<sup>9</sup> In the event these proposals became law, Watson and Sea Shepherd would be in a much stronger position, but their ability to physically restrain and arrest to enforce law would still be doubtful.

---

<sup>5</sup> Peter Alford & Debbie Guest, Japanese Spout Whale Hunting, *The Australian*, Jan. 12, 2010, available at: <http://www.theaustralian.com.au/news/japanese-spout-whale-hunting/story-e6frg6n6-1225818218764>

<sup>6</sup> Natalie Klein, Whaling Protesters are Behaving Like Pirates, *The Australia*, February 18, 2010, available at: <http://www.theaustralian.com.au/news/opinion/whaling-protesters-are-behaving-like-pirates/story-e6frg6zo-1225831542623>

<sup>7</sup> Raffi Khatchadourian, *Neptune's Navy*, *The New Yorker*, Nov. 5, 2007, at 66.

<sup>8</sup> Christopher D. Stone, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM 45-48 (1987)

<sup>9</sup> Lynton Caldwell, IN DEFENSE OF EARTH: INTERNATIONAL PROTECTION OF THE BIOSPHERE 122-23 (1972)

## *B. Policy considerations*

Beyond these proposals, on a policy level, I admit there is, for me, a sort of attraction to the possibility of private enforcement in the international legal system, where enforcement of any sort remains deficient. To study Pollack and Maitland's romantic account of ancient outlawry in England is to see some reason for private enforcement where the power of a central legal authority is weak. In 11<sup>th</sup> and 12<sup>th</sup> Century England royal courts were still largely ineffectual criminal law enforcers. As a result outlawry developed and made "it every ones's duty to capture" the outlaw.<sup>10</sup> The related process of hue and cry facilitated the capture. Pollack and Maitland explain that "when a felony is committed, the hue and cry should be raised" and "neighbours should turn out" with "bows, arrows and knives" in order to capture the felon.<sup>11</sup> By the 13<sup>th</sup> Century royal judges are increasing their control, but the role of the private person in the apprehension of alleged criminals is retained and remains to this day. It ultimately becomes defined by the law of citizen's arrest, to which we will return in a bit.

The point I want to make here, though, is that the need to maintain peace and security within a community for the common good – a first object of all legal systems – may open legitimate opportunities for individual enforcement when official means to coerce obedience are anemic.

However, the international legal context raises, in my view, insurmountable difficulties for this sort of private non-state enforcement. Despite its initial attraction as municipal law analogue, it is almost certainly unworkable at international law. First of all, clear chaos would follow the allowance of the sort of private enforcement envisioned by Watson and Sea Shepherd, especially in a legal system where it is difficult to obtain authoritative determinations of violations of international law. Permitting the private enforcement of law in the international legal system would mean allowing non-state actors to make their own assessments about legality and allowing private violence by those with the will and means to exercise it. It exacerbates the likelihood of violence, instead of reducing it because it is likely to be met with counterforce. Additionally, most violations in the international legal system arise because a *state* itself breaches an international obligation. Affecting some sort of "citizen's arrest" of the state construct (or its instrumentalities and officers) is virtually impossible outside of international criminal law because of barriers presented by sovereignty, immunity, jurisdiction and so forth.

---

<sup>10</sup> Frederick Pollack and Frederic W. Maitland, 1 *The History of English Law*, 477 (2d ed., 1898)

<sup>11</sup> *Id.* vol. 2 at 578-79.

### III. APPLYING RELEVANT INTERNATIONAL LAW

We might end our enquiry here on the policy considerations against private enforcement, but what about the law? Does either international law or the Australian implementation of international law support enforcement claims by Watson and Sea Shepherd?

Looking at international law first, Watson has at least one person in his legal corner. A few weeks ago I was provided a copy of a student article, recently published in the Villanova Environmental Law Journal, making the case for Watson.<sup>12</sup> Hardly a counter-weight to Don, Natelie and David Caron, I know, but I thought it might provide some “vision.” Unfortunately, it does not.

The crux of the piece, cites the World Charter for Nature, the Australian case of *Humane Society International v. Kyodo Senpaku Kaisha Ltd*, and unspecified articles of UNCLOS, as somehow combining to “give[] Paul Watson and Sea Shepherd enough authority to act on behalf of and enforce” what the article calls “international conservation law” in “neutral coastal waters” -- a reference to a humanitarian law concept misused to mean “areas beyond national jurisdiction.” The article also states that “the recent Australian decision in *Humane Society* and the increased public ire of the global community over Japan’s whaling, together, lend increased weight to Sea Shepherd’s authority”. You might wonder how a General Assembly Resolution, a single Australian Federal Court decision, and an irked global public can combine to confer legal authority on Sea Shepherd. I am still wondering.

Obviously, making the case for Sea Shepherd requires clearing a number of large hurdles, but none is perhaps bigger than first identifying at least one international legal norm, binding on Japan as the relevant flag state, that has been breached by the Japanese whalers in the Southern Ocean. The strongest arguments, perhaps, have been detailed in legal opinions by the Sydney Panel of Independent Experts. As the Chair of the Panel summarised, “[a]t the core of these legal opinions [is] that Japan’s interpretation of the 1946 [Whaling Convention] allowing for ‘special permit’ scientific research whaling [is] an abuse of right and inconsistent with Article 8 of the Convention.”<sup>13</sup> Recently, the re-branded Canberra Panel opined that the legality of Japanese Whaling might be challenged as a violation of the Madrid Protocol’s requirements on environmental impact assessment.<sup>14</sup>

---

<sup>12</sup> JE Roeschke, *Eco-terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International*, XX VILLANOVA ENVIRONMENTAL LAW JOURNAL 99 (2009)

<sup>13</sup> Jurist Website <http://jurist.law.pitt.edu/forumy/2010/03/japanese-whaling-when-diplomacy-fails.php>. See also Dylan A. MacLeod, *International Consequences of Norway's Decision to Allow the Resumption of Limited Commercial Whaling*, Dalhousie Law Journal, Vol. 17, Issue 1 (Spring 1994), 83, 100.

<sup>14</sup> See [http://www.ifaw.org/assets/Media\\_Center/Press\\_Releases/asset\\_upload\\_file545\\_51771.pdf](http://www.ifaw.org/assets/Media_Center/Press_Releases/asset_upload_file545_51771.pdf)

No authoritative determination by an international tribunal has confirmed these claims. But let's assume that the Experts are right and Japan is abusing its rights under the ICRW and has breached the Madrid Protocol. In these circumstances, can Watson and Sea Shepherd act to physically stop these international law violations? In order to answer this question we need to distinguish between whaling taking place on the high seas and whaling taking place in the EEZ Australia has proclaimed adjacent to the Australian Antarctic Territory.

#### A. *High Seas Enforcement*

Turning to the high seas first, let us consider Watson's enforcement claims in their strongest possible light by treating Sea Shepherd as if it were a state. If a state is not permitted to enforce by seizure and arrest, then absent some form of consent by states, Sea Shepherd will not possess enforcement power. In this posture our starting position should be that enforcement is permissible unless a positive rule of international law otherwise establishes a prohibition. This takes us immediately to the United Nations Convention on the Law of the Sea and positive rules of prohibition.

##### 1. *UNCLOS*

Because the high seas are involved, Part VII of the Convention comes into play. The analysis is simple and straight forward. Under Article 92, all ships are subject to the exclusive jurisdiction of the flag state on the high seas. Absent exception, no other state, can exercise enforcement jurisdiction. Under Article 110, only a *warship* may exercise the right of visit on the high seas in five narrow situations – none of which are relevant here.<sup>15</sup> Under Articles 105 and 107, it is only in the case of piracy that a ship may be seized and persons on board arrested; and it is only a *warship or ships clearly indentified as being in government service* that can seize a ship for piracy. Of course, Japan's whaling does not fall within the definition of piracy under Article 101.<sup>16</sup> Accordingly, no state (much less Sea Shepherd) has the power to seize and arrest Japanese Whalers on the high Seas in the Southern Ocean.

This means that Watson and Sea Shepherd must point to a rule of international law that explicitly authorizes private enforcement.<sup>17</sup> To do this Watson points to the World Charter for Nature.

---

<sup>15</sup> Visit is possible where there are reasonable grounds to suspect piracy, slave trade, unauthorized broadcasting, or that the ship may not have a nationality or is of the same nationality as the warship.

<sup>16</sup> But see some of the claims in the turbo dispute between Canada and Spain in the *Estai* case.

<sup>17</sup> H. Lauterpacht, *The Subjects of the Law of Nations*, 63 *LAW QUARTERLY REV.* 438, 439 (1947).

## 2. WCN

Reliance on the Charter is quickly dispatched. Nothing in it authorizes the actions of Watson and Sea Shepherd. The WCN is a Resolution of the U.N. General Assembly. And, while it was adopted with a near universal majority, it is not legally binding and states have not treated it as such. It is couched in precatory generalities, which belie any sort of fundamental norm creating character. Indeed, the travaux indicates the drafters were of the view that “by its very nature, the Charter [can]not have any binding force, nor have any regime of sanctions attached to it”.<sup>18</sup>

But even if the WCN was possessed of legal normativity of the hardest variety, nothing in it confers authority on non-state actors to enforce international law in the self-help, physical way asserted by Watson and Sea Shepherd. At most the WCN recognizes that “each person shall strive to ensure that the objectives and requirements of the present Charter are met.” This striving is, of course, subject to lawful avenues of action. One cannot bootstrap private enforcement to this striving if it cannot be located elsewhere in the law.

## 3. *Citizen’s arrest as a general principle of law*

The only other source of authority that I have been able to think of is the possibility that the “citizen’s arrest” might be a “general principle of law recognized by civilized nations” *a la* Art. 38(1)(c) of the ICJ Statute. The International Court of Justice has periodically recognized normative procedures as general principles of law when they are widely reflected across the world’s principal legal systems.<sup>19</sup> A citizen’s arrest is a criminal process which allows private persons to apprehend and detain a suspect of a crime in defined circumstances.<sup>20</sup> A very cursory and preliminary search of municipal legal systems demonstrates that citizen’s arrest is provided for in the laws of at least 21 countries, including Australia, the United States, the United Kingdom, Germany, France, Brazil, India, Pakistan, Malaysia, Hong Kong, and Mexico. It is true that great caution needs to be exercised when transposing a widely recognized municipal law procedure (assuming citizen’s arrest is) into the international legal system because of their different natures, but with more research a citizen’s arrest might qualify as such a normative procedure.

Of course, I should stress here that the attendant difficulties of private enforcement in the international system that I’ve related already will militate against finding citizen’s arrest to be a general principle outside of the municipal law context.

---

<sup>18</sup> Report of the Ad hoc Group Meeting on the Draft World Charter for Nature, U.N. Doc. A/539 (1981).

<sup>19</sup> See e.g., Jonathan I. Charney, *Is International Law Threatened by Multiple Tribunals?* 271 *Rec. des Cours* 101, 115, 190, 196, 200-10 (1998).

<sup>20</sup> See generally Comment, *The Law of Citizen’s Arrest*, 65 *COLUM. L. REV.* 502 (1965)

## B. EEZ Enforcement

Be that as it may, if we now assume that the Japanese Whaling being challenged is taking place within the EEZ Australia has proclaimed in Antarctica, we need to consider Part V of UNCLOS in assessing the enforcement claims. We quickly find that nothing in Part V empowers non-state actors to take enforcement action in the EEZ. But that does not yet end the matter because we also need to consider whether Watson and Sea Shepherd have enforcement authority under Australian law.

### IV. ACTION UNDER AUSTRALIAN IMPLEMENTATION OF INTERNATIONAL LAW

In my view, the Australian proclamation of an Antarctic EEZ presents Watson and Sea Shepherd with their strongest opportunity to claim private enforcement powers – despite the difficult international legal and political ramifications that would surely follow.

On July 26, 1994, Australia proclaimed an EEZ adjacent to its territorial claim in Antarctica. In 1999, the Commonwealth Parliament enacted the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)(EPBC Act)*. The Australian Whale Sanctuary (AWS) is established under section 225 of the Act. By virtue of sections 5(1), 5(4), and 5(5) of the *EPBC Act*, section 8 of the *Australian Antarctic Territory Act 1954 (Cth)*, section 10 of the *Seas and Submerged Lands Act 1973 (Cth)* and the 1994 Proclamation,<sup>21</sup> the Australian Whale Sanctuary applies to the EEZ in Antarctica.

Under the *EPBC Act* it is an offence to kill, injure, take, interfere with, treat or possess whales, without an Australian permit, within the AWS.<sup>22</sup> The offence provisions expressly apply to both Australian nationals and non-nationals (ie Japanese Whalers) within the AWS.<sup>23</sup> Under sections 229, 229B, 229D, 230, killing, treating and possessing whales are offences punishable by up to two years in prison (and a fine not exceeding 1000 penalty units).

On January 15, 2008, in the case of *HSI v. Kyodo*, the Federal Court of Australia issued declaratory relief and issued an injunction against Kyodo for operating in the Antarctic AWS. The court declared that Kyodo had breached sections 229—232 and 238 of the *EPBC Act* by killing, treating and possessing whales in the Australia Antarctic

---

<sup>21</sup> *Seas and Submerged Lands Act 1973 Proclamation*, COMMONWEALTH OF AUSTRALIA GAZETTE (SPECIAL), No. S 290, Friday, 29 July 1994 (1994).

<sup>22</sup> Under section 7 of the *EPBC Act*, Chapter 2 of the *Criminal Code (Cth)*, with the exception of Part 2.5, applies to all offences against the Act.

<sup>23</sup> *EPBC Act*, ss 224(2) and 5(3).



Whale Sanctuary.<sup>24</sup> The judgment, however, remains unenforced by the Federal government to this day.

If Japanese whaling continues in Australia's Antarctic EEZ, Watson and Sea Shepherd's strongest enforcement arguments arise under section 3Z of the Commonwealth *Crimes Act* 1914. Section 3Z provides:

- (1) A person who is not a constable may, without warrant, arrest another person if he or she believes on reasonable grounds that:
  - (a) the other person is committing or has just committed an indictable offence; and
  - (b) proceedings by summons against the other person would not achieve [a number of things, the most relevant being, either:
    - (i) the appearance of the person before a court in respect of the offence; or
    - (ii) preventing a repetition or continuation of the offence . . . ;

There are five points to note about section 3Z.

First, it appears that "any person" who is not a constable may make a citizen's arrest. Nationality does not appear to be a restriction.

Second, s.3Z applies in Australia's EEZ by virtue of s3A of the Crimes Act. See *R v. Disun*, 2003 WASCA 47 (7 Feb).

Third, a Commonwealth indictable offence is defined under Crimes Act section 4G as an offence that is punishable by imprisonment for a period exceeding 12 months. Clearly a number of EPBC whaling offences are indictable offences. They are punishable by imprisonment for up to 24 months.

Fourth, as the *Kyodo* case demonstrates, it seems certain that proceedings by summons against Japanese Whalers will neither prevent a repetition of the offence nor result in an appearance in court for trial.

Fifth, provided Watson and Sea Shepherd deliver any person arrested or property seized to a constable as soon as practicable after the arrest, such an arrest appears lawful under Commonwealth law.

Accordingly, Watson and Sea Shepherd seem to have a legitimate avenue to exercise citizen's arrest under Australian law, despite the fact that Japan will vociferously protest this assertion of Australian jurisdiction.

---

<sup>24</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, [2008] FCA 3 (15 January 2008).

## V. CONCLUSION

If you were a lawyer advising Watson and Sea Shepherd, your first point of counsel might be to explain that their reliance on international law as authority to “enforce” perceived breaches by Japanese whalers in the Southern Ocean is misplaced. No such authority exists and Sea Shepherd’s harassment and boarding actions on the high seas contravene international law. Moreover, as Natalie Klein suggested, you would point out that it is good policy to obey the law yourself, if you want others to do the same.

Secondly, you might highlight that the situation changes in the Antarctic EEZ claimed by Australia off the Australian Antarctic Territory. It would be important to highlight that the vast majority of the world has not recognized the claim, but under Australian law, a right to citizen’s arrest for indictable offences under the EPBC Act is available. You might highlight that the *HSI v. Kyodo* case confirms the offences, but that the Commonwealth government has not yet moved to enforce the decision. While a citizen’s arrest by Watson and Sea Shepherd might not prompt a Commonwealth prosecution, it would serve to highlight the unsatisfactory state of affairs with respect to Australian legal action and bring more pressure to bear on achieving a resolution of the intractable impasse in the International Whaling Commission.