WHY THE PIRATE FLAG IS THE ONLY ONE WORTH FLYING
Direct-action and the enforcement of international marine wildlife conservation laws

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Abstract

The subject of international law is fraught with debate over its legitimacy and efficacy. If laws without enforcement are merely good advice, then how can the environment be meaningfully protected by international legal institutions? This thesis examines this issue in relation to the role the Sea Shepherd Conservation Society ("SSCS") plays as a non-governmental organisation enforcing international marine wildlife conservation laws. In order to do so, this thesis discusses the evolution of international conservation law, through which the failures on the part of nation-states and legal institutions to comply with and enforce them are explored. While nation-states have not proved themselves to be viable environmental actors, this discussion will show that the SSCS has effectively enforced conservation laws in several contexts, through both direct-action and cooperative approaches. This discussion thereby serves to demonstrate that the actions of the SSCS ensure the protection of marine wildlife, and in doing so, strengthen and confer legitimacy to international law.

"There is a story behind the pirate flag:
Its black colour represents the extinction of wildlife,
The human skull, to show that we, as humans, are responsible for it,
The yin-yang symbol of the whale and the dolphin, demonstrating that harmony is found in the ecological balance of the sea,
and finally, the cross trident and shepherd's staff, which together represent the two aspects of aggressive non-violence:
force, and protection."

- Captain Paul Watson, Founder of the Sea Shepherd Conservation Society

For MacDuff, who taught me force, and Allie, who taught me protection.

Acknowledgments

I would like to begin by expressing my deepest gratitude to my supervisor, Dr. Ray Rogers. Before I applied for the joint Juris Doctor and Master of Environmental Studies program, I knew I wanted to write my master's thesis about the Sea Shepherd Conservation Society. Dr. Rogers was indispensable in making this a reality. I first met Dr. Rogers as my professor in the course "Biological Conservation" a little over three years ago. Our class discussions served as a reminder of what was important, affirming my decision to enrol in this program. Dr. Rogers was not only inspiring to me as an educator, but he showed genuine enthusiasm for my research topic since the moment he read my Plan of Study. During our very first conversation about my thesis, he stated plainly that "the pirate flag was the only one worth flying," a sentiment which became the foundation of my research. Since then, he has done nothing but encourage and guide me through uncharted waters.

Dr. Rogers, I cannot thank you enough for both your wisdom and belief in me. In all my life I have never had a mentor who is so supportive and gracious. Without your thought-provoking insights, inimitable sense of humour, and reminders to stay radical in the face of conventionalizing forces, this would have been a challenging and far less meaningful experience. Thank you for never failing to remind me of the importance of taking care of the small things.

I would also like to acknowledge the input of the remaining members of my thesis committee, Dr. Dayna Scott and Dr. Mark Winfield. Dr. Scott, thank you for your considered and detailed feedback on my thesis, particularly on the complex international law concepts that I have grappled with. Your insights on these matters have been especially invaluable, serving to make a notoriously opaque field of law clearer. Dr. Winfield, thank you for your support since I began this journey in your capacity as both my advisor and committee member. I sincerely appreciate the guidance and direction you have provided during this process, and the countless ways in which you have supported me throughout this program.

I would now like to recognize the incredible support of my family, and especially that of my parents, Barbara and Moses. It is not an overstatement to say that you have made it possible for me to accomplish this, and all my goals, in every way possible. Thank you for encouraging me, from a young age, to have a voice, and for empowering me to find it. There are no words to describe how much you mean to me.

I would also be remiss not to thank my partner, Robin. From completing ethics forms in Amsterdam, to conducting interviews in Toronto, to the long nights spent writing in Winnipeg, you were by my side. Thank you for listening to me oscillate between untangling international law to reflecting on the dire state of our oceans, and for finding a way to make me laugh throughout it all.

Now, to those to whom this thesis is dedicated: my first best friend, Allie, and my partner in crime, MacDuff. Thank you for instilling in me a sense of compassion and wonder for the non-human world. You have inspired me since the very beginning.

Finally, I would like to thank you, the reader, for your interest in this thesis. Writing this piece has been exceptionally fulfilling. My hope is that you will find it equally rewarding to read.

From the bottom of my heart, and the ocean, I hope you enjoy the discussion.

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Chapter I
Introduction

Section 1.1: Purpose

1.1.1: Motivation

The nature of the environmental crisis is such that the problems the international community are grappling with, from emissions and climate change, to resource extraction and biodiversity loss, to land use and pollution, all necessarily transcend borders. Although there has been no shortage of dialogue on environmental issues over the last few decades, the rhetoric, summit meetings, and treaties on the subject have not translated into concerted global action. States increasingly have less will, authority, and flexibility to act on environmental matters due to economic interests, multilateral trade agreements, and globalization generally. As such, nation-states are reluctant to implement, comply with, and enforce international environmental laws that do not further these immediate interests, and there is no centralised enforcement mechanism to ensure that they do so. That states must voluntarily comply with and enforce international law is a significant source of debate. Some hold that absent an enforcement mechanism, international law cannot be considered law at all, whereas others hold that it should be considered law insofar as it succeeds in creating norms.[1] This tension will inform this thesis on the subject of the role of non-governmental organisations ("NGOs") in enforcing international environmental laws, and the utility and legitimacy of direct-action in a decentralised legal realm.

This thesis will focus specifically on the history and efficacy of international marine wildlife conservation laws and policies, and the role of the Sea Shepherd Conservation Society

[1] Jana Von Stein. "International Law: Understanding Compliance and Enforcement" in the *International Studies Encyclopedia*. Wiley-Blackwell (2010): 3

("SSCS") in enforcing them. The SSCS is an international NGO dedicated to the conservation of marine wildlife through the use of both direct-action and direct-intervention approaches. The organisation carries out its mission using "aggressive non-violence," meaning that the group actively interferes with the ships carrying poachers that seek to illegally harvest marine wildlife. Because the SSCS undertakes these actions without the explicit jurisdiction to do so in certain cases, the organisation is labeled by some as a pirate or vigilante group. Despite this controversy, the SSCS appeals to international law to justify its use of direct-action tactics, and, increasingly, has undertaken partnerships with governments to enforce conservation laws. The SSCS seeks to fill the gap between law and enforcement resulting from a lack of means, political will, and jurisdiction on the part of the nation-state. For this reason, this thesis will explore where the SSCS fits in to the international marine wildlife conservation law regime.

In order to situate the work that the SSCS does, the evolution of both public international law generally and international marine wildlife conservation law specifically are discussed at length. Through this discussion, the failures on the part of nation-states and legal institutions to effectively and consistently comply with and enforce international law are explored. The work that the SSCS does, which will be highlighted through an exploration of the nature, evolution, and role the organisation in various contexts, serves to demonstrate the group's importance as a conservation organisation, and legitimacy as an international actor. The SSCS holds that because the goals of international marine wildlife conservation law are not being met by state actors, there is a necessary place for them in the international legal realm, conferring legitimacy to their actions. Exploring both the validity of this claim, and the gaps in the enforcement of international conservation laws by states, are the goals of this thesis.

1.1.2: Contribution

This thesis constitutes a novel contribution to scholarship on the implications of the SSCS for international environmental law. Because of the SSCS' status as an NGO, there has been a process of denigration against the group by those whose interests are opposed to their own. This thesis will explore whether such disparagement of the SSCS as a vigilante group is justified, a question which has not been engaged with in a comprehensive manner by scholars who have written on the SSCS in a legal context at this point. This is likely because the actions of the SSCS can be conceptualised in many different ways; depending on the context, their actions can be considered activism, militant direct-action, piracy, vigilantism, terrorism, or eco-defense.[2] This thesis will synthesise each of the perspectives on and roles of the SSCS, ultimately showing that the SSCS is an effective, necessary, and legitimate actor in international marine wildlife conservation. The discussed notion that laws without enforcement are not legitimate, valid, or respected will inform the discussion, and whether the SSCS' actions have had have the effect of legitimising both codified and soft law will be explored.

Section 1.2: Outline

Following the discussion of methodology in this introduction, the first substantive chapter of this thesis, Chapter II, will provide the legal basis for the discussion by providing an overview of the key and relevant principles and concepts of public international law. This chapter will begin with a synthesis of the sources of public international law, and the hierarchy in which they

[2] Deborah Doby. "Whale Wars: How to End the Violence on the High Seas" in Journal of Maritime Law and Commerce. Jefferson Law Book Company (2013): 136

are applied. Therein, the first section of this chapter will discuss and explain treaties, customary international law, and soft law. Then, in the second section, the participants of international law will be discussed, first, through an overview of "traditional" international legal actors, being states and international organisations, and then, through a discussion of non-state actors, with a particular focus on NGOs for the purpose of this thesis. In this section, a definition of NGOs will be provided, and a general discussion of their purpose, efficacy, as well as legal participation and accountability will be explored. Finally, the third section will provide an overview of the challenges unique to public international law, including the complexities with its codification due to fragmentation, and the puzzle of ensuring compliance without a centralised or robust enforcement mechanism. In this way, the principles outlined in this chapter will illuminate the following discussion on international environmental law, which is an arm of public international law, specifically. This Chapter will also serve to frame the entire discussion of this thesis in the context of legal realism and institutionalism, in order to examine the SSCS' role as an NGO enforcing international laws through the lens of the overarching legal debate in international law.

Following this examination of public international law, Chapter III will provide a comprehensive discussion of the specific context of international environmental law. This chapter will focus specifically on the laws and policies relevant to international marine wildlife conservation, and thus, the work the SSCS does. Within this chapter, the first section will focus on the purpose of conservation law in order to demonstrate both the ethical and ecological motivations for acting on conservation. Once the conservation imperative is established, the second section of this chapter will provide an overview of key international environmental legal principles and treaties. In this section, the evolution of international conservation law will be discussed through a discussion of the no-harm principle, the prevention principle, and four key

conservation treaties, in the order in which they emerged. Then, the challenges unique to international conservation law will be discussed, beginning with the problem of the absence of an enforcement mechanism, and then outlining the reasons for the lack of political will to comply with conservation laws, and the issue of the nation-state being the main actor through which to implement them. In this way, an overview of the realities of the international conservation landscape will be outlined, situating the work that the SSCS does.

With the history and nature of international conservation law established, Chapter IV will turn to a discussion of the nature of the SSCS. To begin, this chapter will provide an overview of approaches to environmental advocacy, discussing the implications and limitations of both 'traditional' environmental activism and 'radical' environmentalism. Once the advocacy context is established, the background and approach of the SSCS, and where they fit into this dichotomy, will be discussed. Herein, their ideological basis, in terms of their ecocentric ethic and disdain for passive approaches to advocacy, will be explored. This section will then go on to explore the nature of both the SSCS' direct-action approach to activism which has earned them their "vigilante" label by some, and the direct-interventions through cooperative agreements with nation-states. The third and final section of this chapter will discuss the SSCS' appeal to international law, through the principles of public international law, international marine wildlife conservation laws, and cooperative agreements. The perceptions of the SSCS' legal legitimacy will be discussed, with an exploration of the organisation's appeal to international law, contrasted with their characterization as a vigilante organisation, forming the tension within this discussion. This will serve to highlight the unique and interesting space that the SSCS occupies, as an organisation dedicated to both upholding and subverting the law, depending on the context.

After exploring the way in which the SSCS approaches environmental advocacy and relates to international conservation law, the final substantive chapter of this thesis will explore the role and authority of the SSCS, through a discussion of three case studies. The first case study will highlight an instance where the SSCS acted when a state lacked the resources to do so. This case pertains to illegal shark finning activities in Central America, and will highlight an instance in which the SSCS has functioned as a quasi-state actor in territorial waters. The second case study involves an instance where the SSCS acted when states lacked the political will to do so. This case concerns illegal whaling in the Southern Ocean, and will include a discussion of the enforcement, or lack thereof, of the international ban on whaling in this area, and the way in which the SSCS filled a gap in international law. The final case study will highlight the SSCS' role in an instance where states lacked the jurisdiction to act, and where the SSCS functioned as an international police force. This case concerns illegal toothfish poaching in the Southern Ocean, and the SSCS' pursuit of six wanted fishing vessels in collaboration with INTERPOL. Each of these case studies will serve to demonstrate a gap that the SSCS fills, showing that they succeed where the nation-state fails to ensure conservation within certain fisheries, and are thus a necessary, effective, and legitimate actor in international marine wildlife conservation, capable of strengthening and legitimizing international law.

Following the four chapters that will comprise the content of this thesis, there will be a conclusion provided with a summary of the discussion, and a note on the remaining questions that are relevant to, but could not be comprehensively addressed, within the scope of this thesis. The author's final thoughts on the issues discussed will be offered at the conclusion of the chapter.

Section 1.3: Methodology

This thesis has been conducted using an analytical approach that seeks to examine the necessity, legitimacy, and efficacy of the work that the SSCS does in the international marine wildlife conservation context. The necessity of the work that the SSCS undertakes can be understood in relation to the environmental crisis, in terms of the organization's ability to protect biodiversity and prevent the extinction of marine species. The legitimacy of these actions is discussed in legal terms, implicating international conservation laws and their frameworks. The efficacy of the SSCS' work then, pertains to both their success in protecting marine wildlife, and in doing so, strengthening international law. This analysis is informed by and reliant on primary legal texts, including case law and treaties, and secondary sources such as peer-reviewed literature and news articles from reliable sources. These sources have been supplemented by four key informant interviews. The interviewees consisted of those involved in the SSCS in a professional capacity who wished to discuss both their motivations for joining the organisation, as well as their perception of the organisation's role in the international legal context. I interviewed those who have key leadership roles within different branches of the SSCS, and those who have worked on their campaigns, to provide varied perspectives from within the organisation. For this reason, I chose to interview Captain Paul Watson, the founder of the SSCS, Captain Peter Hammarstedt, Director of Sea Shepherd Global, Ms. Catherine Pruett, the Co-Founder of Sea Shepherd Legal, and Ms. Brigitte Breau, the coordinator of the Sea Shepherd Toronto chapter, who has been involved with direct-action campaigns in both Canada and internationally. By bringing the perspectives of key members of the SSCS into the discussion, I was better able to represent and understand the organisation's perception of its relationship with international law.

In order to obtain approval to conduct these interviews, I complied with both York University's Faculty of Environmental Studies' ("FES") and York University's Faculty of Graduate Studies' ("FGS") research requirements. The FES required an "Application to Conduct Research with Human Participants," and a "Human Participants Research Consent Checklist," to be filled out and submitted internally. The FGS required me to submit the "Research Ethics Protocol Form for Graduate Student Thesis, Dissertation, or Pilot Project," referred to as the "TD-2" form, as well as the required supporting documents, being a sample informed consent form, and a sample of my interview questions. The FGS also required that I complete the "Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans Course on Research Ethics," for which I obtained my certificate on February 28th, 2018.

In the TD-2 form I was required to provide extensive information detailing the nature of my research, including whether it was of minimal risk to participants. I concluded that my research was minimal risk, as it did not involve physical, psychological, or social risks, or present any issues with data security. I indicated that there was no deception involved in my research, and that I would obtain explicit consent from all interviewees. I was also required to provide a project description, information about the participants, the recruitment method I would use to obtain participants, as well as plans for data storage. I indicated that my research would involve professionals working with the SSCS, that I would gather data from them through the use of interviews, and that I would contact them directly to ask if they would be interested in participating. I stated that I would handle the interview data I gathered by storing the interview recordings and notes on an encrypted USB key, and did so throughout the research process.

The corresponding sample informed consent form was submitted alongside the TD-2 form and approved on the same day. This form made clear to participants the purpose of my

research, what they would be asked to do, the benefits and risks of the research, and their right to confidentiality. In this form I stated that the purpose of the research was: "To gain an understanding of how members of the SSCS conceive of their role in an international environmental law context." I explained what the participants would be asked to do, stating that: "Participants will be asked questions about how they view the SSCS' role in the international environmental law context. To this end, generally, they will be asked whether they view the SSCS as a vigilante group or as a legitimate legal actor, how they perceive the group's relationship with the law, and whether they support the SSCS because of, or despite, the organisation's relationship with the law. The interview will take between half an hour to an hour." In terms of the benefits and risks of the research, I stated that that I did not foresee any risks resulting from their participation in the research, and stated that the benefit of the research as that it will serve to "…contribute to scholarship on international marine wildlife protection law, and will constitute a novel contribution to the field as a study focused on the SSCS' role in this context. There are no personal benefits to the participant from taking part in this study." The confidentiality clause states that, unless the participant chooses otherwise, the information they supply will be held in confidence. Each of my interviewees was comfortable waiving their anonymity for the purpose of this research, though, as they are all public figures within the SSCS, and thus espouse their views publicly and vocally on issues surrounding the organisation.

Alongside the TD-2 and sample informed consent forms, I was also required to submit a list of sample interview questions. The interview questions I chose were as follows:

1. *What is your role with the SSCS?*
2. *How long have you been working for the SSCS?*
3. *How long have you been a supporter of the SSCS?*
4. *Why do you support the SSCS?*
5. *Why do you value the work that the SSCS does?*

6. *What do you view as the role of international marine wildlife conservation law/environmental laws?*
7. *How do you perceive the SSCS' relationship with international law?*
8. *Do you support the SSCS because of, or despite, this relationship with the law?*
9. *How do you perceive the SSCS' role in enforcing international marine wildlife law?*
10. *Do you perceive the SSCS as a "vigilante" organisation?*
11. *Do you think that vigilantism has a place in the current international marine wildlife conservation context?*
12. *Do you think that the SSCS fills in gaps in international environmental law?*
13. *Do you think it is important for the SSCS to be perceived as a legitimate legal actor, or does it not matter to the work that the SSCS does?*

These questions thereby provided structure for each of my interviews. The conversations that I had extended beyond the scope of these specific questions at times, though, particularly when the interviewees spoke of their personal experiences, which gave rise to novel questions and unplanned discussion.

I obtained Ethics Approval from the FGS following the submission of the TD-2, sample informed consent, and sample interview questions forms on October 10th, 2018. Following this approval, I conducted each of my interviews in November of 2018. First, I interviewed Pruett over Skype on November 14th. Second, I interview Watson over Skype on November 16th. Then, I interview Breau in person on November 18th. Finally, I interviewed Hammarstedt over Skype on November 27th. I recorded each interview, for which I obtained explicit consent. I also made notes of the important points made by each interviewee during the interview itself. In order to analyse the data afterwards, I went through the interviews and picked out key points that were made about the organisation relevant to the discussion. From there, I decided where their thoughts and perceptions fit best to illuminate the discussion and extracted quotes accordingly. I included either an exact or paraphrased quote in the thesis itself. In this way, I incorporated the voices and perspectives of key members of the SSCS into the following discussion. Overall, I found that the data and information I gathered from these interviews supported the fact that the

SSCS conceives of itself as playing a critical role in the enforcement of international marine wildlife conservation laws. This will be elaborated upon in discussion of the organisation's evolution, efficacy, and legitimacy throughout.

Chapter II
The Nature of Public International Law

This chapter will provide an overview of public international law, being a body of binding rules that confers rights and obligations on nation-states and international actors.[3] What began as a narrow field of law is now inclusive and comprehensive, with the modern public international law regime being comprised of several rules, customs, institutions, and actors. Despite the increase in breadth and depth of international law, the strength, legitimacy, and implications of it are heavily disputed by both scholars and the international community, as several aspects remain elusive and difficult to define.[4] In order to provide a comprehensive summary of the discourse on this subject, this chapter will explore the sources, participants, and challenges of public international law, drawing on several scholarly perspectives to inform the discussion. In this way, this chapter will provide the legal foundation for the following discussion of international wildlife conservation law, which governs the legal frameworks and policies that the SSCS operates within. Furthermore, this chapter will situate the work the SSCS does within realist and institutionalist approaches to international law specifically.

Section 2.1: Sources of International Law

2.1.1: Hierarchy of Sources

There are several sources of public international law which are interrelated and concurrently applicable to a given issue or dispute. Although they are not specified in a single

[3] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 34
[4] Jana Von Stein. "International Law: Understanding Compliance and Enforcement" in *the International Studies Encyclopedia*. Wiley-Blackwell (2010): 1

constitution there are four recognised sources of international law, being: treaties, custom, judicial decisions, and soft law.[5] First, treaties are binding agreements or contracts created between sovereign states, with the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*") defining the protocols for creating and applying them.[6] Second, customary law is defined as normative sources based on state practice, being the words and actions of states, and *opinio juris*, being the sense of legal obligation born from state practice. Third, judicial decisions and the juristic writings of international law scholars are considered a subsidiary source of international law, though they are not considered binding.[7] Finally, soft law refers to quasi-legal authorities, such as codes of conduct and administrative decisions.[8] Both the *Vienna Convention* and the *Statute of the International Court of Justice* outline a suggested order for how to apply these sources, being that: treaties should be applied first, customary law second, general principles of the law third, and judicial decisions fourth.[9] It should be noted that this is not a formal hierarchy, however, and that sources can and do override one another depending on the issue or dispute at hand.

2.1.2: Treaties

As stated, treaties are binding agreements created between sovereign states. Although there are multiple sources of international law, with many of them normative, codified and descriptive law does have a role to play. Treaties are important because they lend legitimacy to commitments made between states, as they highlight the significance of the commitment and

[5] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 34
[6] *Ibid*, p. 34
[7] *Ibid*, p. 34
[8] *Ibid*, p. 41
[9] The United Nations. *Statute of the International Court of Justice*. (1946): Article 38

reinforce its durability.[10] For this reason, some scholars hold that the kinds of problems facing the international community are better dealt with through written commitments, as they provide the opportunity to tailor rights and obligations to complex circumstances and needs.[11] Because there are costs that states must bear for noncompliance with a treaty, they have incentive to fulfil their obligations.[12] The legal consequences of withdrawal from or breach of a treaty are outlined in the *Vienna Convention*, which states that withdrawal must take place consistent with the provisions of the treaty, or at any time with the consent of all parties.[13] In cases of treaties that do not provide for denunciations or withdrawals, withdrawals will not be possible unless the parties intended to allow for it or it is implied in the treaty.[14] In cases of breach, a "material breach" by one party is a violation that goes to the heart of the agreement or its essential purpose, and such a breach of this nature can entitle parties to suspend the treaty or terminate it and seek damages.[15] It should also be noted that in addition to the legal consequences of noncompliance with a treaty, states also risk losing their reputation and trust of the international community when they breach or withdraw from their commitments.[16]

Given that treaties are binding agreements that carry consequences in the event of noncompliance, implicit in the act of participating in multilateral agreements is that states must sacrifice a degree of their sovereignty in favour of upholding international norms. The International Court of Justice ("ICJ") defines sovereignty as entailing "the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also

[10] Charles Lipson. "Why are Some Agreements Informal?" in *International Organisation.* MIT Press (1991): 508
[11] *Ibid*, p. 508
[12] *Ibid*, p. 509
[13] The United Nations. "Vienna Convention on the Law of Treaties" in *Treaty Series 1155* (1969): Article 54
[14] *Ibid*, Article 56
[15] *Ibid*, Article 60
[16] Charles Lipson. "Why are Some Agreements Informal?" in International Organisation. MIT Press (1991): 508

in its relations with other states."[17] Others have argued that sovereignty is the "basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or juridical jurisdiction of a foreign state or to foreign law other than public international law."[18] At the same time, the ICJ has decided that the right to enter into multilateral agreements is an attribute of state sovereignty itself, and as such, the limitations that a state accepts under a treaty cannot later be renounced as impermissible infringements on their sovereignty.[19] Because all treaties curtail sovereignty to varying extents, sovereignty is often invoked to refuse participation in treaty regimes that threaten a real or perceived loss of national decision-making authority. One such way that states may compromise between participating in an international law regime and maintaining sovereignty is by invoking 'reservations' to treaties. A reservation, declaration, or understanding to a treaty indicates a lack of consent to be bound by one or more of its provisions.[20] A state may choose to enact such a measure when they find benefit in most aspects of a treaty, but one or more provisions would compromise or frustrate their interests. The challenge with reservations is that they create a tension between consent to treaty and the stability of treaty, because for a states reservation to be accepted there must be unanimous agreement to it by the other state signatories.[21]

In addition to reservations, another way in which the effect of treaties can be impacted is through the way in which they are interpreted. Although treaties are codified laws, similarly to domestic law, they can be interpreted in several ways depending on the context and the judges. As per the Vienna Convention, treaties are to be interpreted in "good faith" and in keeping with

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[17] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 66
[18] *Ibid*, p. 67
[19] *Ibid*, p. 66
[20] *Ibid*, p. 60
[21] The United Nations. "Vienna Convention on the Law of Treaties" in *Treaty Series 1155* (1969): Article 20

the object and purpose of the treaty itself.[22] Particular aspects of the context in which the treaty is being interpreted are relevant, including: additional agreements and instruments relating to the treaty, subsequent practice in application of a treaty, and the intention of the parties.[23] The priority of these criteria vary greatly depending on the context, though, which complicates this seemingly straightforward area of international law. One such example of a relevant case involving a dispute over treaty interpretation is that of *Whaling in the Antarctic* (*Australia v Japan)*, which concerned the way in which Article VIII of the *International Convention for the Regulation of Whaling* should be understood and applied. This case and its implications for both international law and marine wildlife conservation will be discussed in further detail in Chapter V, section 5.2, 5.2.1, of this thesis.

2.1.3: Customary International Law

Customary laws are normative rules that a state can only opt-out of by objection to the rule as it develops.[24] Once the rule is formed, it is binding on states that did not object, even if there was no opportunity to do so. In this way, the formation of customary laws is based on implicit consent. Some argue that customary law suffers from "legitimacy deficit" for this reason, as it does not allow for countries to provide explicit consent as in the case of treaties.[25] On the other hand, the basis for such norms becoming "law" is grounded in the notion that when the divergent practices of various states converge and achieve a level of "uniformity, consistency, and regularity," it should in turn confer a legal obligation.[26] For this reason,

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[22] *Ibid*, Article 31
[23] *Ibid*, Article 31
[24] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 73
[25] Ben Chigara. *Legitimacy Deficit in Custom: A Deconstructionist Critique*. Ashgate Publishing (2001): 48
[26] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 73

peremptory norms, known as *jus cogens* rules, are considered mandatory norms that bind all states and override all other principles of international law.[27] These norms include, for example: the prohibition on the use of force, international crimes such as genocide and crimes against humanity, and rules prohibiting egregious violations of human rights such as slavery, human trafficking, and torture.[28] Per the *Vienna Convention*, any treaty that conflicts with a *jus cogens* norm will be rendered invalid.[29]

As mentioned, customary laws are based on both state practice, being the words and actions of states, and *opinio juris*, being the sense of legal obligation born from state practice.[30] There are numerous forms of state practice, such as: diplomatic contacts and correspondence, public statements of government officials, legislative and executive acts, and military manuals and actions.[31] What constitutes state practice was decided by the ICJ in the *Fisheries Case* (*United Kingdom v Norway*). In this case, the Court decided that the requirements for an act to be considered state practice are that: it must be constant practice, and have continued for a considerable length of time.[32] This entails that there must be evidence of a general and consistent state custom, however there is no requirement that the practice must be universal.[33] It should also be noted that state practice can include inaction, particularly in cases where a state's failure to object to the actions of another state may imply acceptance of those actions.[34] *Jus ad bellum*, being the law surrounding justification and prevention of war, and *jus in bello*, being the law

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[27] *Ibid*, p. 34
[28] *Ibid*, p. 47
[29] The United Nations. "Vienna Convention on the Law of Treaties" in *Treaty Series 1155* (1969): Article 53
[30] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 73
[31] *Ibid*, p. 73
[32] *Fisheries Case (United Kingdom v Norway);* ICJ Reports 116, ICGJ 196 (ICJ 1951), International Court of Justice (1951)
[33] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 74
[34] *Ibid*, p. 74

surrounding the way in which wars are conducted, are two significant bodies of law that, while codified to some extent, are grounded largely in custom arising from state practice.[35] A further discussion of *jus ad bellum,* or just war theory, in relation to the tactics of the SSCS will be discussed in Chapter IV, section 4.3, 4.3.2. In terms of the *opinio juris* requirement, this entails that there must be a belief that the state has a legal obligation to carry out the practice.[36] While *opinio juris* must be inferred from the nature and circumstances of the practice itself, it is not always necessary to do so. It is sometimes difficult to cleanly separate state practice and *opinio juris*, because the same act could reflect both practice and law, though.[37]

2.1.4: Soft Law

Soft laws are quasi-legal instruments, understood to be standards of conduct that are non-binding by those accepting them.[38] Although soft law is not mentioned in the *Statute of the International Court of Justice*, there has been an increase in the creation of soft law instruments in recent years, and as such they are becoming increasingly relevant, and to some extent, binding, in international lawmaking today.[39] There are three characteristics which make a law binding, being: its precision, authority, and enforcement, but determining the hardness of a legal instrument with respect to these criteria requires an examination of additional criteria, such as: the form, subject matter, and content of a document, as well as the intention of the parties.[40] Applying these characteristics and criteria can be quite challenging in the context of international soft law, because the intention of lawmakers in informal contexts can be ambiguous, and the

[35] *Ibid*, p. 47
[36] *Ibid*, p. 74
[37] *Ibid*, p. 75
[38] *Ibid*, p. 34
[39] *Ibid*, p. 34
[40] *Ibid*, p. 89

legitimacy of the lawmaking process is subjective and relative.[41] Furthermore, while most informal international laws attempt to steer behaviour, their status as guidelines does not preclude them from being binding,[42] but on the other hand, their legal effect does not automatically confer legal status.[43] Due to the ambiguous nature of soft law, then, the question of whether informal international lawmaking should be considered normative or legal is highly complex.

To remedy the ambiguities associated with soft law, some argue that there must be a rigid distinction made between norms that have legal effect and codified law for the sake of clarity.[44] This may be easier said than done, though. In domestic contexts, the Rule of Law requires that the law be clear and precise, but in the international context, this is becoming more difficult as soft law becomes increasingly prominent.[45] Its increasing importance can be attributed to both the growing interdependence of the global community, and the increasingly significant roles of non-state actors, such as the corporations and NGOs to whom soft law is applicable.[46] Soft law is also considered increasingly authoritative in the international sphere, because while treaties can be vague and lack enforcement mechanisms, soft laws are often very precise and even include mechanisms by which to ensure compliance.[47] As such, the differences between codified and soft law are becoming more difficult to decipher, because soft law can both influence codified and customary law, and be considered binding law in and of itself depending on the context.

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[41] Joost Paulwelyn. "Is It International Law or Not, or Does it Even Matter?" in *Informal International Lawmaking*. Oxford UP (2012): 126
[42] *Ibid*, p. 127
[43] *Ibid*, p. 128
[44] *Ibid*, p. 159
[45] *Ibid*, p. 126
[46] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 89
[47] *Ibid*, p. 89

Section 2.2: Participants in International Law

2.2.1: States and international organisations

Traditional international law doctrine regards nation-states and international organisations as the principal actors in international relations. These are the entities that have most commonly been considered to be in possession of a legal personality, which confers to them international rights and obligations.[48] In terms of nation-states, they are defined as organised political communities under one government, however to be considered as such they must meet certain qualifications, as per the *Montevideo Convention on the Rights and Duties of States*. These criteria are that the state must have a permanent population, defined territory, government, and the capacity to enter into relations with the other states.[49] These criteria have been interpreted flexibly, though, and states have rarely lost their legal status by failing to meet one of them.[50] The rights and responsibilities of those recognised as states include the capacity to conclude international agreements, conduct diplomatic relations passively and actively, and bring international claims.[51] With regard to international organisations, they are institutions that were born from a desire by states to engage in institutionalised cooperation, with a proliferation in their creation following the events of the Second World War. International organisations may be global and general institutions such as the United Nations ("UN"), global and specialised institutions such as the World Trade Organisation ("WTO"), regional and general institutions

[48] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "The Traditional Actors: States and International Organisations" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 105
[49] Pan-American Union. Montevideo Convention on the Rights and Duties of States. International Conference of American States (1933): Article 1
[50] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "The Traditional Actors: States and International Organisations" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 106
[51] *Ibid*, p. 105

such as the African Union ("AU"), or regional and specialised institutions such as the European Union "EU."[52] Regardless of their character, though, international organisations can be understood as institutions created by states in possession of limited rights and duties, as their personality is largely dependent on the will of their state participants.[53]

2.2.2: Non-state actors

Although states and their organisations have historically been considered the primary actors in international law, in the modern context, they should be regarded as but one participant in the international legal process rather than the sole subjects. The networks of international law now often extend beyond nation-states, as non-state actors such as multinational corporations, rebel groups, and even individuals have come to play increasingly significant roles in international relations. Multinational corporations possess partial legal personality and are the subject of international disputes; belligerent groups and rebels have the capacity to destabilise the nation-state when they gain territory; and individuals become subjects of international criminal law when responsibility is attributed to them for atrocities such as genocide or crimes against humanity.[54] These are but a few examples that illustrate why a state and state organisation centric approach to international law does not provide a full picture of the subjects and participants in international law, as such a conception does not account for several other actors' interests and actions. In response to the growing influence and presence of NGOs as regulators within the international legal sphere, the field of transnational law has emerged to grapple with this phenomenon specifically. Transnational law is defined as the body of law

[52] *Ibid*, p. 146
[53] *Ibid*, p. 142
[54] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "The Challenge of Non-State Actors" in *International Law: Norms, Actors, Process: A Problem Oriented Approach.* Aspen Publishers (2015): 169

which concerns "…all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories."[55] In this way, the field of transnational law encompasses non-traditional actors and entities in order to reflect their growing importance of in the international legal sphere.

While there are several non-state actors that play critical roles in the international order, for the purpose of this thesis, the non-state actor that will be devoted the most attention is that of the NGO. NGOs are groups of individuals or private entities that organise to advance a cause or implement a program internationally, thereby serving to fill a gap that governments have not been able to.[56] To begin, NGOs can benefit the international community by correcting government interests, and providing a counterpoint to nationalistic priorities.[57] In this way NGOs have the ability to advance goals with a bigger picture, or those that are more future-focused.[58] They also have the ability to do so more quickly and creatively than governments due to the fact that they contend with less bureaucracy, which can have the effect of putting pressure on governments to act.[59] Furthermore, NGOs are more able than governments to address global and transnational issues, such as those affecting global commons like the atmosphere and oceans, for reasons of jurisdiction and ease of decision-making.[60] Unlike states, NGOs can also directly involve themselves in enforcing international laws if individuals acting on behalf of an

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[55] Detlev Vagts. "A Basic Introduction to Transnational Law" in *Transnational Business Problems.* Foundation Press (2014):
[56] Steven Charnovitz. "Two Centuries of Participation: NGOs and International Governance" in *Michigan Journal of International Law*. University of Michigan Law School (1997): 4
[57] Steven Charnovitz. "The Illegitimacy of Preventing NGO Participation." in *Brooklyn Journal of International Law*. Brooklyn Law School (2011): 894
[58] *Ibid*, p. 894
[59] *Ibid*, p. 894
[60] *Ibid*, p. 895

organisation exercise their right to citizen's arrest.[61] Under both codified and customary international law, citizens possess both the right and duty perform a citizen's arrest in contexts where a state fails to enforce laws that they are a party to.[62] This aspect of NGOs, in the particular context of the high seas, will be discussed in further detail in Chapter V, section 5.3, 5.3.1, in discussing the SSCS' response to illegal toothfish poaching in the Southern Ocean. For each of these reasons, NGOs have a distinct role to play in the international order, one which is increasing as the world becomes more interconnected.

Although NGOs have become increasingly visible and relevant, there are no general rules requiring, permitting, or prohibiting NGO participation in either the creation or enforcement of international law.[63] Perhaps because of this ambiguity, their legal role and status has been the subject of much debate by scholars, particularly in the field of transnational law. As mentioned, NGOs have played a key role in creating and shaping soft law, and are often responsible for setting standards both in collaboration with and independently from governments and corporations.[64] They have also been successful in influencing and disrupting both domestic and international lawmaking, because their very existence challenges the legitimacy of government actions.[65] For these reasons, some scholars argue that excluding NGOs from participation in lawmaking, enforcement, and international organisations is an illegitimate act on the part of governments, holding that the modern global governance scheme should no longer be seen as hierarchical with nation-states at the top.[66] Then, some argue that because NGOs are private

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[61] Roberta M. Fay. "Citizen's Arrest: International Environmental Law and Global Climate Change" in *Glendale Law Review.* Glendale University College of Law (1995): 79
[62] *Ibid,* p. 79
[63] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "The Challenge of Non-State Actors" in International Law: Norms, Actors, Process: A Problem Oriented Approach. Aspen Publishers (2015): 171
[64] *Ibid,* p. 176
[65] *Ibid,* p. 175
[66] Steven Charnovitz. "Two Centuries of Participation: NGOs and International Governance" in *Michigan Journal of International Law*. University of Michigan Law School (1997): 4

entities, this makes ensuring accountability, transparency, and fair representation of their interests difficult.[67] In this way, by allowing NGOs, that are unelected, to influence significant international issues, the democratic nature of the international order is undermined.[68] Another criticism of NGOs is that the vast majority of them are from developed or industrialised nations, and thus, they disproportionately advance particular sociocultural ideologies through their actions.[69] In each of these ways, NGOs present unique opportunities and challenges for international law.

Section 2.3: Challenges in International Law

2.3.1: Fragmentation

One of the most significant and apparent challenges in international lawmaking is that of its fragmented structure. International law is, by its nature, disjointed because it is created through a decentralised process, as there is no global government. This structural reality impacts the creation, application, implementation, interpretation, and enforcement of international law. In terms of the creation, application, and implementation of international law, this entails that most sets of international norms are decided in specialised regimes, with each one having their own treaties and institutions designed to achieve a unique set of goals.[70] The effect of this is inconsistency between regimes, which results in a conflict of priorities and values in domestic decision making.[71] States are often in a position where they must decide which laws to prioritise,

[67] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "The Challenge of Non-State Actors" in International Law: Norms, Actors, Process: A Problem Oriented Approach. Aspen Publishers (2015): 177
[68] *Ibid*, p. 178
[69] *Ibid*, p. 178
[70] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 27
[71] *Ibid*, p. 27

which has the effect of governments selecting laws that reflect their own national interests, and rejecting or ignoring those that do not.[72] In terms of the interpretation of international law, the effect of fragmentation is that judiciaries are in a position where they must weigh the goals of one regime against another, which is further complicated by the fact that, as mentioned, there is no strict hierarchy by which to apply international laws.[73] The effects of fragmentation on enforcement will be discussed in the following separate sub-section, as this is regarded by many scholars as the most significant challenge of international law. Each of these tensions caused by the lack of coordination or formal structure in the international legal regime raises the question of whether this order can be thought of as a cohesive system at all.

2.3.2: Compliance and enforcement

International laws and treaties differ from domestic legislation in numerous ways, most significantly due to the lack of a centralised enforcement mechanism. While domestic legislation is enforced with relative consistency through policing and a judiciary, treaties are complied with selectively, largely as a result of custom. As such, the most significant challenge of international law is that of how to get nation-states to comply with international obligations absent an enforcement mechanism to ensure that they do so. For the purpose of this discussion, compliance can be understood as the extent to which a state party to an agreement upholds its commitments, and enforcement as the methods available under an agreement to induce states to both implement and comply with international law in the event of noncompliance.[74] The adage that "laws without enforcement are not worth the paper they are printed on" is of particular salience in this context,

[72] *Ibid*, p. 27
[73] *Ibid*, p. 27
[74] Jana Von Stein. "International Law: Understanding Compliance and Enforcement" in *the International Studies Encyclopedia*. Wiley-Blackwell (2010): 2

because the efficacy of the implementation of norms depends upon who is compliant with international law.[75] The question of how, and whether international law is enforced is an issue that has been debated by several scholars of the subject. Generally, the debate surrounding enforcement is between realist or rationalist scholars, who believe that the enforcement of international law is necessary to its success and legitimacy, and institutionalist or constructivist scholars, who believe that international law is successful given that it codifies norms. These contrasting views will be outlined below, as an understanding of the discourse surrounding international law enforcement is essential to understanding the role that the SSCS should play in enforcing international law.

Realist international law scholars conceive of the nation-state as a strategic actor, acting in their own rational self interest. Such scholars argue that nations comply with international law only when it is in their interest to do so, but when there is a conflict between them and international law, national interest will prevail. Scholars such as Hans Morgenthau posit that international law is a function of international politics, insofar as the distinction between law and politics is artificial.[76] Such scholars hold that international law is, at its core, about politics and ideas; as such, international law should be considered a set of encounters and confrontations between different worldviews about how the world should function.[77] Martti Koskenniemi states that this is the most significant problem with international law; it is too abstract and utopian to be useful in the contexts of power politics and diverging cultures.[78] In this view, as posited by some scholars such as John Austin, a command system or theory of law, relying on forceful

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[75] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "The Challenge of Non-State Actors" in *International Law: Norms, Actors, Process: A Problem Oriented Approach.* Aspen Publishers (2015): 102
[76] Anne-Marie Slaughter Burley. International Law and International Relations Theory: A Dual Agenda in The *American Journal of International Law*. Cambridge University Press (1993): 207
[77] *Ibid*, p. 207
[78] Martti Koskenniemi. "What is International Law for?" in *International Law.* Oxford University Press (2003): 35

mechanisms and sanctions, is the only way in which to ensure that international laws are abided by.[79] Without such a mechanism, the implementation of international law thus depends on the will of powerful states to comply and ensure that less powerful states follow suit.[80] Charles Krauthammer even went so far as to say that to do so is dangerous, because such a conception fails to account for "duplicity, malice, and lawlessness" on the parts of states.[81] As such, holding to legalism, being the idea that the law can regulate international conduct, is naïve and risky, as international law is purely advisory.[82] Such a conception of international law is in line with the direct-action tactics of the SSCS, which will be discussed further throughout this thesis.

Institutionalist legal scholars concede that international law is advisory, insofar as it cannot be enforced to the extent that domestic law can be. Where they depart from realists is that they do not believe the advisory quality of international law diminishes its importance as a legal concept.[83] This is because nations have interests that align with international law, and as such, international regimes can serve as mechanisms for restraining states and achieving common aims.[84] In this view, even though the international legal order lacks a forceful enforcement mechanism, these regimes succeed in promoting compliance through creating norms.[85] Scholars such as HLA Hart posit that, as such, it is overly simplistic to assume that international law is not binding simply because it lacks organised sanctions.[86] Institutionalists thereby reject the notion

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[79] Sandra Raponi. "Is Coercion Necessary for Law? The Role of Coercion in International and Domestic Law" in *Washington University Jurisprudence Review*. Washington University Jurisprudence Review (2015): 37
[80] Martti Koskenniemi. "The Fate of Public International Law: Between Technique and Politics" in *Modern Law Review*. John Wiley & Sons (2007): 9
[81] Charles Krauthammer. "The Curse of Legalism" in *The New Republic*. The New Republic (1989): 50
[82] *Ibid*, p. 44
[83] Sandra Raponi. "Is Coercion Necessary for Law? The Role of Coercion in International and Domestic Law" in *Washington University Jurisprudence Review*. Washington University Jurisprudence Review (2015):
[84] Koh, Harold Hongju. "Why Do Nations Obey International Law?" in *Faculty Scholarship Series*. Yale Law School (1997): 2621
[85] *Ibid*, p. 2622
[86] Sandra Raponi. "Is Coercion Necessary for Law? The Role of Coercion in International and Domestic Law" in *Washington University Jurisprudence Review*. Washington University Jurisprudence Review (2015): 38

that coercion is the sole basis for law's power, and instead hold that individuals comply with law for a variety of reasons.[87] The purpose of law, in their view, is not to prevent individuals from doing what they please, but to codify values and social mores.[88] From this perspective, international law can be considered law, if the purpose of law is to create common standards that are generally upheld. Louis Henkin posits that compliance with norms, while voluntary, is the rule, because most states do not choose to go rogue; while states do act in self-interest, more often than not they adapt their behaviour based on the rules in order to uphold their reputations.[89] Henkin concedes that while states will violate the law when they really need to, this is similar to individuals in a domestic context, and does not indicate a failure of the legal system as a whole.[90] In this way, institutionalists hold that international legal norms have succeeded in influencing the behaviour of nation-states, even absent a systematic enforcement mechanism.

[87] *Ibid*, p. 38
[88] Koh, Harold Hongju. "Why Do Nations Obey International Law?" in *Faculty Scholarship Series*. Yale Law School (1997): 2621
[89] *Ibid*, p. 2599
[90] *Ibid*, p. 2621

Chapter III
The Role and Evolution of International Conservation Law

With the foundations and challenges of public of international law outlined, this chapter will focus on the purpose and development of international environmental law, and marine wildlife conservation law, specifically. The international community has, for some time, recognised the importance of conserving natural resources and preserving species and their habitats. Within recent decades, there has been increasing attempts to mitigate climate change using the law as well. As such, there has been several summits on these issues, resulting in the increased codification of international environmental laws. The resulting frameworks have been relatively ineffective, however, in part because states lack the political will to institutionalise conservation, and there is no enforcement mechanism to ensure their compliance with environmental agreements. In order to provide a comprehensive overview of this subject, the purpose of conservation law, the evolution of international environmental legal frameworks and policies, and the challenges of compliance and enforcement with such frameworks will be discussed. This chapter will thereby explore the "why," "when," "how," and "why not" of international wildlife conservation law. In this way, this chapter will situate the work that the SSCS does within the international marine wildlife conservation law context.

Section 3.1: The Purpose of Wildlife Conservation Law

3.1.1: The ethical imperative

There are several motivations for the creation of international environmental laws, and specifically, for those of wildlife conservation laws. Generally speaking, there has been an

increasing recognition that wildlife and their habitats should be protected for both intrinsic and instrumental reasons. Conservation is the practice of doing so, defined as the act of preserving, protecting, or restoring the natural environment, natural ecosystems, and wildlife. This section will focus on the intrinsic motivations for creating and strengthening conservation law, as such beliefs, values, and ethics shape legal developments, and thus influence the way and to what extent this issue is addressed. The anthropocentric, biocentric, and ecocentric perspectives will be discussed in order to show how differing ethical approaches to conservation can inform and influence laws and policy.

Anthropocentrism is the belief that humans are the most important beings on the planet, placing humans as separate from and superior, rather than a part of and equal to, the natural world.[91] Such an attitude has dominated Western schools of thought, being reinforced for centuries by certain schools of philosophy and Judaeo-Christian religions.[92] From an anthropocentric perspective, conservation is valuable insofar as it benefits and serves humans, however conservation laws and policies that are informed by such a perspective can be considered morally dubious from a deontological perspective, and necessarily limited based on a utilitarian ethic.[93] From a deontological perspective, taking a strictly anthropocentric approach could be considered problematic because it values human life over all other life based on the idea that humans are more rational than other life forms, and therefore worthier.[94] This is an erroneous assumption at best, however, because not all humans are rational, and as such, moral duties should extend not just to humans, but to all those who are "subjects of life."[95] From a

[91] Patrick Curry. *Ecological Ethics.* Polity Press (2011): 54
[92] *Ibid,* p. 55
[93] *Ibid,* p. 54
[94] *Ibid,* p. 39
[95] *Ibid,* p. 40

utilitarian perspective, which builds from the idea that what is morally right is that which ensures the greatest good for greatest number, an anthropocentric ideology is limited, as other species comprise more of the world's population than that of humans.[96] In order to minimise suffering for the greatest number, then, a perspective which shows consideration to a broader group is one that can be considered more ethically sound.[97]

In contrast to anthropocentrism, biocentrism is a perspective based not on the superiority of a single species, but on the notion that all living things should be respected because they hold intrinsic value.[98] The basis of this concept is that all individuals deserve to exist for their own sake, because their existence carries unique and inherent value.[99] Because every creature is unique and rare in and of themselves, their lives are of essential value, conferring their right to exist and be treated with consideration.[100] Preserving and protecting animals, plants, and biodiversity in general is therefore ethically necessary from a biocentric perspective. Furthermore, this ethic is grounded in the notion that the capacity of humans to safeguard wildlife entails a responsibility to do so.[101] This perspective thus considers the moral integrity and basic compassion of a world which does not shape laws and policies to protect animals and nature.[102] Biocentrism thus entails that nature has inherent value and deserves to be protected, and because humans have the capacity to do this, it entails a responsibility to govern accordingly.

Although both biocentrism and ecocentrism oppose the anthropocentric perspective, ecocentrism differs from biocentrism in that it considers the value of not only living organisms,

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[96] *Ibid,* p. 43
[97] *Ibid,* p. 43
[98] *Ibid,* p. 75
[99] *Ibid,* p. 75
[100] *Ibid,* p. 75
[101] *Ibid,* p. 77
[102] Peter Van Heijnsbergen. International Legal Protection of Wild Fauna and Flora. IOS Press. (1997): 71

but the entire ecosystem.[103] This entails that maintaining the integrity of all parts of an ecosystem, from microorganisms, to bodies of water, to the atmosphere, is an ethical imperative.[104] One of the initial expressions of this notion came from conservationist Aldo Leopold, who stated that: "*A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise*."[105] The conservation of wildlife, and the existence of strong environmental laws and policies, are thus important from an ecocentric perspective because of the ecological importance of maintaining ecosystem integrity. Deep ecology is a form of ecocentrism, which considers humans and nature to be interconnected, and as such, humans should identify as being a part of, rather than separate from, nature.[106] A deep ecology ecocentric ethic is the one which informs the ideology of the SSCS, which will be discussed in further detail in Chapter IV, Section 4.2, 4.2.1, of this thesis.

3.1.2: The ecological imperative

From an ethical standpoint, there are several arguments to be made for the intrinsic importance of wildlife conservation from both biocentric and ecocentric perspectives. The ecological imperative provides a different justification; conservation is not important because the natural world has inherent value, but rather, because of its utility and instrumental importance for the survival of humans, animals, and ecosystems alike. While each of the impacts of environmental and climate change are important, for the purposes of this thesis, the consequences of biodiversity loss will be the focus in order to contextualise the work that the SSCS does in protecting marine wildlife. As such, this section will discuss the relationship

[103] Patrick Curry. *Ecological Ethics.* Polity Press (2011): 92
[104] *Ibid*, p. 92
[105] Aldo Leopold. *A Sand County Almanac with Essays on Conservation from Round River.* Oxford UP. (1949): 262
[106] Patrick Curry. *Ecological Ethics.* Polity Press (2011): 101

between biodiversity loss, habitat degradation, and climate change to highlight the imperative of marine wildlife conservation from an ecological perspective.

Conservation is becoming increasingly critical as a result of the numerous ramifications resulting from human induced changes to the environment. Anthropogenic environmental and climate change has affected the physical, chemical, and biological systems of the earth, producing adverse impacts on the planet in several ways.[107] Biodiversity has been impacted, with the resilience, genetic and species diversity, and overall health of ecosystems being compromised.[108] Ecosystem services have been compromised, as the soil, climate, pollination, and chemical cycles of ecosystems are being altered.[109] Such biodiversity loss and changes to ecosystems has resulted in negative effects on human health and wellbeing, impacting food production and security, water availability and quality, and the spread of disease.[110] Abnormal weather patterns and climate events have also resulted in an increase in floods, storms, droughts, and wildfires.[111] Such erratic climate events have had a destabilizing geopolitical impact, creating conflicts resulting in "climate refugees."[112] Each of these impacts demonstrate that anthropogenic changes to the environment and climate do not exist in a vacuum, having had far reaching and significant effects. Such changes have been so significant that the current geological period has been informally termed the "anthropocene," in order to describe the fact

[107] Jay Withgott, Scott Brennan, and Barbara Murck. "Conservation of Species and Habitats" in *Environment: The Science Behind the Story.* Pearson (2013): 259
[108] *Ibid*, p. 260
[109] *Ibid*, p. 260
[110] James Gustave Speth. The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability. Yale UP (2008): 2
[111] *Ibid*, p. 2
[112] Daniel Faber and Christina Schlegel. "Give Me Shelter from the Storm: Framing the Climate Refugee Crisis in the Context of Neoliberal Capitalism" in *Capitalism Nature Socialism*. Routledge (2017): 1

that the planet has entered an era in which humans have become the primary cause of environmental change.[113]

One of the key aspects of the anthropocene is the staggering level of biodiversity loss that has occurred in recent years. Environmental scientists have theorised that biodiversity loss is occurring at such a rate that a sixth mass extinction of species is occurring due to anthropogenic causes. The ecological consequences of failing to curb such an extinction event are vast, for both individual ecosystems and for the climate.[114] In terms of individual ecosystems, when even one keystone or apex species goes extinct, the entire ecosystem suffers.[115] This is because every ecosystem is interconnected, and in terms of marine ecosystems specifically, the species greatest at risk are often the most ecologically critical.[116] In a marine context, this is true of large sharks, who are apex predators that are being hunted in significant numbers due to shark-finning and illegal poaching.[117] The International Union for the Conservation of Nature ("IUCN") estimates that tens of millions of sharks are harvested for their fins and then discarded annually.[118] The result is that regional shark populations have decreased by 90% since the 1980's.[119] Given that sharks are an apex predator, the ecological consequences of overharvesting them have been significant, resulting in disruptions of food chains and thus ecosystem function in general.[120]

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[113] George Wuerthner, Eileen Crist, & Tom Butler. *Keeping The Wild: Against the Domestication of the Earth.* Island Press (2014): 179
[114] Jay Withgott, Scott Brennan, and Barbara Murck. "Conservation of Species and Habitats" in *Environment: The Science Behind the Story.* Pearson (2013): 266
[115] *Ibid*, p. 260
[116] *Ibid*, p. 260
[117] Nicholas Dulvy. *Extinction Risk & Conservation of the World's Sharks and Rays.* International Union for the Conservation of Nature Shark Specialist Group (2014): 2
[118] *Ibid*, p. 260
[119] Michael Heithaus et al. *Predicting ecological consequences of marine top predator declines.* Elsevier Science (2008): 2
[120] *Ibid*, p. 4

The example of shark population declines serves to illustrate the localised ramifications of biodiversity loss for a given ecosystem, but such population declines have ramifications for the global climate as well. If the health of marine ecosystems decline dramatically, this will have a significant impact on the earth's ability to absorb carbon from the atmosphere.[121] The oceanic biological pump is in fact the main mechanism for removing carbon from the atmosphere as it is the largest of the earth's carbon sinks, entailing that it is essential for the regulation of the earth's glacial cycles and climate.[122] The over-exploitation of marine wildlife and resources directly impacts upon the health of a marine ecosystem, and thereby, on the acidification of the ocean and biological pump process.[123] The ramifications of eliminating even a single species from its ecosystem, for both wildlife and humans alike, is thereby significant. Preserving the overall health of the oceans through the protection of marine wildlife is the key motivation for the work the SSCS does in combating illegal fishing; Captain Paul Watson, the founder of the SSCS, summarises the SSCS' mission as such in stating that "if the oceans die, we die."[124] This will be discussed in greater detail in Chapter IV, Section 4.2, 4.2.2.

Section 3.2: The Development of International Conservation Law

This section will provide a discussion of the evolution of international environmental laws, with a specific focus on marine and wildlife conservation laws. As discussed, international environmental law is a sub-set of public international law, as it is primarily about the rights and

[121] Susumu Honjo et al. *Understanding the role of the biological pump in the global carbon cycle: An imperative for ocean science*. Oceanography (2014): 10
[122] *Ibid*, p. 11
[123] *Ibid*, p. 11
[124] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.

duties of states. It derives its legitimacy largely through treaties, when states consent to be bound, rather than through customary law, which, as discussed, requires implicit consent.[125] Its existence challenges the traditional assumptions of public international law, though, as it offers a different perspective on the meaning of national self-interest and security.[126] In this way, it is, by its nature, a body of law that is about the common interests among states.[127] Working towards these common interests has proved to be an uphill battle, though, as will be shown through an overview of the way in which key marine conservation law developments have, and have not been, been codified, implemented, complied with, and enforced.

3.2.1: The No-Harm Principle

Although international environmental law is often thought of as a relatively new body of international law, there were environmental laws developing globally as early as the mid-19th century.[128] These laws were not based on conservation for ethical or ecological reasons, but rather for economic or political ones relating to resource management.[129] As such, initial environmental laws were primarily concerned with managing the exploitation of certain resources, transboundary environmental harm, and the use of shared waterways.[130] A principle of international environmental law was iterated through the resolution of international disputes during this era, this being the "no-harm" principle.[131] The no-harm principle was first explored in the *Trail Smelter* case, a dispute between the United States and Canada in 1929, wherein the

[125] Pierre-Marie Dupuy and Jorge E. Vinuales. *International Environmental Law*. Cambridge University Press (2015): 4
[126] *Ibid*, p. 4
[127] *Ibid*, p. 4
[128] *Ibid*, p. 4
[129] *Ibid*, p. 4
[130] *Ibid*, p. 5
[131] *Ibid*, p. 4

adjudicating Court stated that: "Under the principles of international law, no state has the right to use or permit use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[132] This principle clarifies that while states possess a sovereign right to development, this right only extends insofar as it does not infringe on other states and their interests.[133] In this way, the *Trail Smelter* decision was one of the first that had the effect of limiting the sovereignty of states to protect a natural resource.

Following the decision in the *Trail Smelter* case, the ICJ reinforced the no-harm principle in the *Corfu Channel (United Kingdom v Albania)* case, the first case it ever decided, in 1947. In this case, Albanian authorities did not make the presence of mines in its waters known, resulting in the death of a British naval personnel.[134] The court found for the United Kingdom on the basis that every state has an obligation not to knowingly allow its territory to be used to commit acts contrary to the rights of other states.[135] Although this case was, on the surface, about the law of the sea and the use of force, the Court articulated what has become an essential principle of international environmental law: that states have an obligation to ensure that their territory is not used to commit injurious or illegal acts.[136] This principle has now become one of customary international law, expressed as a general obligation to prevent transboundary harm, as iterated in Principle 2 of the United Nations Conference on Environment and Development ("UNCED")

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[132] *Trail Smelter Arbitration (United States v. Canada)*; Arbitral Tribunal, 3 U.N. Rep. Int'l Arb. Awards 1905 (1941): 1965
[133] Pierre-Marie Dupuy and Jorge E. Vinuales. *International Environmental Law*. Cambridge University Press (2015): 5
[134] *Corfu Channel Case (United Kingdom v. Albania);* Assessment of Compensation, 15 XII 49, International Court of Justice (1949): 6
[135] Pierre-Marie Dupuy and Jorge E. Vinuales. *International Environmental Law*. Cambridge University Press (2015): 5
[136] *Ibid*, p. 5

Rio Declaration of 1992.[137] At the time the *Corfu Channel* decision was handed down, though, the intention of the Court was to set boundaries on economic and political resource use, reflective of the importance of sovereignty at this time.[138] The obligation to prevent transboundary harm explicitly became one of international environmental law in the ICJ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* of 1996, wherein the court confirmed that "the existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or areas beyond national control is now part of the corpus of international law relating to the environment."[139]

3.2.2: The Prevention Principle

An increasing awareness of the adverse impact of human activities on the natural environment began to develop in the 1960's, with environmentalism gaining more and more traction by the end of the decade. The international community responded to this growing sentiment, with the UN convening a Conference on the Human Environment in 1972, referred to as the Stockholm Conference.[140] The Stockholm Conference was considered a significant moment in the development of international environmental law, with one hundred and thirteen states and four hundred NGOs convening to negotiate a declaration, action plan, and program on the human environment.[141] An important implication of these principles was that states retain sovereignty over their environment and natural resources, so long as their actions do not damage

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[137] The United Nations Conference on Environment and Development. *Rio Declaration on Environment and Development.* The United Nations (1992): Principle 2
[138] *Ibid*, p. 7
[139] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (1996): 20
[140] Pierre-Marie Dupuy and Jorge E. Vinuales. *International Environmental Law*. Cambridge University Press (2015): 8
[141] *Ibid*, p. 8

those of other states or environments outside of their jurisdiction.[142] The action plan and program reinforced the goals of the declaration, with the action plan codifying one hundred and nine recommendations for stronger environmental protection, and the United Nations Environment Program ("UNEP") being implemented to promote international cooperation in environmental protection.[143] Neither the declaration nor action plan were designed as legally binding instruments, however there were several agreements drafted following the Stockholm Conference that were binding in nature, dealing with more specific areas of environmental protection such as the protection of certain habitats, migratory species, and endangered species.

The Stockholm Declaration codified twenty-six principles, including what would become a second key principle of international environmental law, being the prevention principle.[144] This principle of prevention of environmental harm states that: "States have…the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction."[145] It was in both the *Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) case and the *Pulp Mills* (*Argentina v Uruguay*) case that the ICJ explicitly clarified that the prevention principle is one of customary international law from an environmental perspective, linking it to both the no-harm principle, and the resulting obligation of due diligence.[146] The prevention principle was explicitly linked to due diligence in a Seabed Chamber of the *International Tribunal of the Law of the Sea* advisory opinion, wherein the court referred to *Pulp Mills* in fleshing out the obligation, stating that the obligation encompasses: the obligation to take appropriate measures to ensure that they are

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[142] *Ibid*, p. 9
[143] *Ibid*, p. 11
[144] The United Nations General Assembly. Declaration of the United Nations Conference on the Human Environment. The United Nations (1972): Principle 21
[145] *Ibid*, principle 24
[146] Pierre-Marie Dupuy and Jorge E. Vinuales. *International Environmental Law*. Cambridge University Press (2015): 47

reasonable enforced, conduct an environmental impact assessment, and apply the precautionary approach.[147] These facets of the obligation were codified in several pieces of subsequent international environmental treaties.[148]

3.2.3: The Convention on International Trade in Endangered Species

Following the Stockholm Conference, several environmental treaties were drafted at the international level. In terms of wildlife conservation, one of the most important was the Convention on International Trade in Endangered Species ("CITES"), which entered into force in 1973.[149] CITES is a treaty which seeks to ensure the protection of endangered wildlife in trade through regulation by its member states. It is one of the most significant environmental treaties, as almost every nation in the world is a state party to it, with one hundred and eighty-three signatories.[150] Those who are party to the treaty are obligated to monitor trade in wildlife within their country, and take legal action in order to bring violators to justice.[151] All such legal actions are to be taken in accordance with the system CITES has lain out, whereby stricter regulations exist depending on the way in which species are categorised.[152] There are two main sections in which species are categorised under CITES, either under the first or second Appendix. Appendix I is the more restrictive of the two lists, since species under this list are considered near extinct and cannot be traded under any circumstances.[153] Species under Appendix II may be traded, but there are strict regulations on the way these species are traded so that it occurs in a responsible

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[147] *Ibid*, p. 48
[148] *Ibid*, p. 48
[149] Willem Wijnstekers. *The Evolution of CITES.* Bernan Press. (2004): 20
[150] Convention on International Trade in Endangered Species. List of Parties to the Convention. CITES. (2018): Web.
[151] Willem Wijnstekers. *The Evolution of Cites.* Bernan Press. (2004): 20
[152] Ginete Hemley. *International Wildlife Trade: A CITES Sourcebook.* Island Press. (1994): 59
[153] *Ibid*, p. 62

and sustainable way.[154] States party to CITES have the responsibility to pass legislation which upholds these standards, and to ensure that wildlife trade is actively monitored and regulated within their country.[155]

CITES was created because the protection of endangered species is a pursuit which requires an international response, and because many endangered species come from countries without the will, mechanisms, or resources available to catch violators.[156] Despite the number of signatories to and legal robustness of CITES, its enforcement was not very successful. While CITES signatories adopted the legal framework of the treaty and passed appropriate legislation, there remained several states which either chose not to or could not prioritise the policing of trade in endangered species and the enforcement of these laws against violators.[157] This is because CITES, like most other international treaties, does not have a mechanism through which to ensure that member states implement and comply with the treaty.[158] Article XIV of CITES deals with non-compliance, but does not specify anything further than it being necessary to "find a solution" with the member state in violation.[159] This aspect of the treaty is vague in terms of what said solution would be, and has not proven not harsh enough to deter countries from violating the treaty. This reality was evidenced by a dispute over the endangered species trade in Bolivia in 1989.[160] In this instance, Bolivia's illegal endangered species trade continued to flourish after repeated warnings from the Secretariat that the Bolivian government must take

[154] *Ibid*, p. 70
[155] *Ibid*, p. 120
[156] Peter Van Heijnsbergen. *International Legal Protection of Wild Fauna and Flora.* IOS Press. (1997): 56
[157] Cymie Payne. *Introductory Note to CITES Compliance Procedures.* American Society of International Law. (2007): Web.
[158] *Ibid*.
[159] Rosalind Reeve. *Policing International Trade in Endangered Species: The CITES Treaty and Compliance*. Royal Institute of International Affairs. (2002): 93
[160] *Ibid*, p. 95

measures to end it.[161] In response to Bolivia's continued violations, the secretariat imposed trade sanctions on Bolivia concerning Article II species.[162] This temporarily halted Bolivia's illegal trade, but once the sanctions were lifted, the illegal activity continued to flourish and no action was taken since.[163] Bolivia's inaction was deemed an 'extreme' violation, and the action taken was ultimately ineffective and little more than a slap on the wrist.[164] This incident demonstrated that the treaty was not being effectively enforced due to a lack of both means and will, compounded with the fact that CITES did, and still does not, have a mechanism to punish member states which do not comply.

3.2.4: The United Nations Convention on the Law of the Sea

In addition to the creation of and attempts to implement CITES, there were several other developments in conservation that occurred following the Stockholm Conference, impacting upon marine wildlife conservation to varying extents. First, the World Charter for Nature was adopted by the UN General Assembly in 1982.[165] Second, the International Whaling Commission ("IWC"), the international body responsible for conserving whales and managing whaling, issued a moratorium on whaling for commercial purposes. This development occurred in 1982 following recommendations from Stockholm to cease whaling for a decade, and reports from CITES that identified several species of whales as being at risk of extinction.[166] The most important development, though, was the creation of the UN Convention on the Law of the Sea

[161] *Ibid*, p. 95
[162] *Ibid*, p. 97
[163] *Ibid*, p. 97
[164] *Ibid*, p. 97
[165] Pierre-Marie Dupuy and Jorge E. Vinuales. *International Environmental Law*. Cambridge University Press (2015): 11
[166] *Ibid*, p. 11

("UNCLOS"), adopted in 1982 at the third conference on the Law of the Sea.[167] Following numerous conferences throughout the 1970's and 80's on the subject, UNCLOS constituted an attempt to reconcile the historic uses of marine areas, being navigation, fisheries, and resource extraction, with the need for environmental protection.[168] There is an entire part of UNCLOS discussing the protection of marine ecosystems, with a general obligation to protect the marine environment articulated in Part XII.[169] Another important development under this part of UNCLOS was the codification of the precautionary principle in the marine context.[170] In this way, the creation of UNCLOS constituted a robust codification of marine conservation laws, and a recognition of the oceanic commons as an environment that requires international cooperation to properly protect.

While UNCLOS successfully codified certain aspects of marine conservation law, there was difficulty achieving consensus on certain issues. Although there were several disparate conferences that attempted to deal with the collapse of the fish stocks and marine resource exploitation, there was significant debate surrounding the delimitation of a state's exclusive economic zone ("EEZ"), being the area wherein coastal states have jurisdiction over exploitation of marine resources.[171] This differs from the territorial sea of a state, which extends twelve nautical miles from the coast, and is subject to the full extent of that state's sovereignty - not just regulation over resources.[172] In 1977, coastal states unilaterally decided to set a two hundred nautical mile limit for the EEZ, in absence of consensus.[173] In some ways, the unilateral decision

[167] *Ibid,* p. 163
[168] *Ibid,* p. 94
[169] Third United Nations Conference on the Law of the Sea. *United Nations Convention on the Law of the Sea.* United Nations (1982): Article 192
[170] *Ibid,* Article 194
[171] *Ibid,* p. 96
[172] *Ibid,* p. 95
[173] *Ibid,* p. 96

of the two hundred-mile limit demonstrated a failure of international legal institutions, because the decision had to be made without regard for consensus, or even existing treaties. Regardless, this decision had the effect of protecting the nation-state's right to their resources within these boundaries, thereby creating larger internalised boundaries not only for the exploitation of marine resources, but for marine conservation as well.[174]

Although the decision to create a two hundred-mile EEZ extended the rights and responsibilities of nation-states in marine environments, there has been difficulty enforcing UNCLOS due to jurisdictional limitations. Outside of these internalised EEZs, states are entitled to freedom on the high seas, subject to certain limitations set out under UNCLOS.[175] There are obligations that states must undertake to suppress illegal activities on the high seas, such as piracy, illegal drug trafficking, and unauthorised broadcasting.[176] In terms of fishing activities, states have a right to fish on the high seas subject to their treaty obligations, and a corresponding responsibility to take conservation measures accordingly.[177] The general provision regarding marine mammal conservation applies to the high seas as well, which states that nations and international organisations can regulate or prohibit the exploitation of marine mammals, and that they should cooperate to conserve and manage cetaceans in particular.[178] All of that being said, there is great difficulty enforcing the provisions limiting activities on the high seas, because no state has jurisdiction over these waters.[179] As discussed, ensuring compliance even with CITES, which involves enforcing national legislation, proved challenging; ensuring compliance where there was no police force or enforcement mechanism whatsoever proved even more so. For this

[174] *Ibid,* p. 97
[175] Third United Nations Conference on the Law of the Sea. *United Nations Convention on the Law of the Sea.* United Nations (1982): Article 87
[176] *Ibid,* Articles 101, 108, 109
[177] *Ibid,* Article 116
[178] *Ibid,* Articles 65, 120
[179] *Ibid,* Article 87

reason, the high seas can be considered a "no man's land" when it comes to the enforcement of marine wildlife conservation law, entailing that outside of the EEZ, marine ecosystems and wildlife are largely unprotected by states. This gap will be discussed in relation to the work the SSCS has undertaken to protect marine wildlife on the high seas in Chapter V, Section 5.3, 5.3.1.

3.2.5: The UN Framework Convention on Climate Change and the Convention on Biological Diversity

The Stockholm Conference and the following wave of international conservation lawmaking that defined the 1970's and 80's was, as shown by the development of CITES and UNCLOS, successful on paper, but less so in practice. This was recognised during the adoption of the Nairobi Declaration in 1982, wherein there was a recognition by the UN that the implementation of the Stockholm Principles had been insufficient.[180] In order to assess the best way to proceed, the Brundtland Commission was created, and the result of this commission was the beginning of the discussion on sustainable development.[181] Sustainable development was therein defined as "meeting the needs of the present without compromising the ability of future generations to meet their own needs," a concept which would become the focus of UNCED, the second international environmental conference to follow the Stockholm Conference.[182] UNCED, also referred to as the Rio Conference, resulted in the adoption of two new conventions: the UN Framework Convention on Climate Change ("UNFCCC") and the Convention on Biodiversity ("CBD").[183] The creation of the UNFCCC constituted a recognition of the atmospheric commons

[180] Pierre-Marie Dupuy and Jorge E. Vinuales. *International Environmental Law*. Cambridge University Press (2015): 12
[181] *Ibid*, p. 12
[182] *Ibid*, p. 12
[183] *Ibid*, p. 13

by the international community, and, similarly to UNCLOS, an understanding of the importance of international cooperation to manage and protect it. The purpose of the CBD was to preserve genetic, species, and ecosystem diversity, thereby unifying prior conventions and treaties on the subject; in this way, the CBD serves a normative basis for other international frameworks that seek to preserve biodiversity.[184]

The evolution of international conservation law throughout the 1990's was informed by a recognition of failure by both states and NGOs, as demonstrated by the rhetoric of the Rio Conference and those that followed. The tone of the Rio Conference was informed by such a sentiment, and, there was, for the first time, a recognition by NGOs of the failure of the international community to meaningfully protect the environment as well.[185] While the codification of conservation laws became more comprehensive at the Rio Conference, similarly to the aftermath of the Stockholm Conference, their implementation and enforcement did not follow with success. The desire for development and environmental protection grew at once, with the latter being sidelined; the result was that international environmental law became at once become more important, and more difficult.[186] At the World Summit on Sustainable Development, held ten years after the Rio Conference, there was a recognition of this fact, and that, despite the robust implementation plan developed at the first Rio Conference, the health of the environment was continuing to decline.[187] At the time that the third Rio Conference was held in 2012, as the global temperature continued to rise and biodiversity steadily declined, nations

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[184] *Ibid*, p. 187
[185] Jennifer Clapp and Peter Dauvergne. *Paths to a Green World: The Political Economy of the Global Environment.* MIT Press (2005): 61
[186] James Gustave Speth. The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability. Yale UP (2008): 99
[187] Pierre-Marie Dupuy and Jorge E. Vinuales. *International Environmental Law*. Cambridge University Press (2015): 16

became more disillusioned, and began to pull out of environmental agreements.[188] The challenges of preserving and protecting marine wildlife through international legal instruments thereby became apparent as the body of law developed, with several reasons for the state inaction in this area.

Section 3.3: The Challenges of International Conservation Law

Climate change, and the conservation of marine wildlife and the oceans, are necessarily borderless issues, requiring a unified international response. As shown, there has been no shortage of dialogue on these issues over the last few decades, however the rhetoric, summit meetings, and treaties have not yet translated into consistent, sufficient action. This is in large part because there is no enforcement mechanism to ensure compliance with international environmental laws. The absence of an enforcement framework in international law entails that states must voluntarily comply with conservation laws, which requires the political will to do so. The reality is that states lack the political will to comply with and enforce conservation laws because they find it both difficult and unprofitable to do so. In this way, states are limited actors in conservation law, requiring the presence of non-state actors in the policy network. This section will engage with each of these challenges associated with ensuring the efficacy international law, thereby exploring the limitations of states in ensuring compliance and promoting enforcement.

[188] *Ibid*, p. 19

3.3.1: The absence of an enforcement mechanism

As shown, effective marine wildlife conservation cannot be achieved through national efforts alone; this is a global issue which crosses many borders, requiring global standards and cooperation. While there has been several attempts to create normative standards for marine conservation, the domestic policies of individual nation-states still clash with these standards, and international laws on the subject are disparate.[189] As a solution, some scholars suggest the development of a single cohesive, comprehensive international environmental agreement - one that would unify the principles of CITES, UNCLOS, UNFCCC, the CBD, and others.[190] Proponents of such a solution argue that a consistent mandate to act on climate change and conservation is necessary at the international level, because domestic laws vary to such a considerable extent already.[191] Legal inconsistency is but one aspect of the issue, though; as demonstrated through the discussion of CITES, even when a treaty has been almost universally adopted and legislated upon, the success of its implementation depends on the will of the state to enforce it. Were such an agreement to be drafted, then, it would need to be robustly structured, implemented, and enforced. Doing so necessitates both international cooperation, and a willingness on the part of nation-states to sacrifice a degree of sovereignty. Although states by and large find the concept of sacrificing sovereignty to achieve transnational goals unsavoury, such sacrifice is necessary in order to achieve the goals of any international environmental agreement.

[189] Michael Bowman, Peter Davies, and Catherine Redgwell. Lyster's International Wildlife Law. Cambridge UP (2010): 78
[190] Pierre-Marie Dupuy and Jorge E. Vinuales. *International Environmental Law*. Cambridge University Press (2015): 271
[191] *Ibid*, p. 271

Because many states are neither willing nor able to comply with treaties on their own, a strong enforcement mechanism, involving consistently applied incentives and punishments, is necessary to confer clout and legitimacy to an international agreement. Enforcement measures for international laws have often been characterised in terms of either being "carrots" or "sticks": these being incentives to facilitate compliance, or punitive measures for non-compliance, respectively.[192] In terms of incentives, some institutions, such as the WTO, have demonstrated that it is possible to effectively utilise tools such as subsidies to encourage compliance.[193] This has proven effective in some cases, entailing that in the context of a new agreement, this measure could be expanded upon for nations that lacked the resources to enforce agreements.[194] Regarding punitive measures, the structural flaws of many international agreements and treaties prevent the governing institution from punishing violators of the treaty, so states fail to enforce them because they do not take seriously threats of consequences. Punitive economic measures, such as sanctions, could play a greater role in ensuring compliance, or a fining system based on the polluter pays principle. Implementing any of these measures cohesively and effectively is easier said than done, though; the question of *who* will enforce international laws is an ongoing puzzle, particularly because states may lack each of the means, will, and jurisdiction to do so depending on the context.

3.3.2: The lack of political will

Because compliance with and enforcement of international conservation laws requires voluntary action on the part of states, meaningful action and frameworks will only be put in

[192] *Ibid*, p. 272
[193] *Ibid*, p. 273
[194] *Ibid*, p. 273

place once nations have economic or political incentive to do so.[195] Given the primacy of national laws, the economic and political reality is that international treaties, especially those concerning marine wildlife, are not a priority.[196] There are several reasons why states lack the will to comply with environmental laws and policies codified at the international level. The first is that there are concerns about scientific uncertainty, which complicates the law and policy making process. The second is neoliberal capitalism; because states prioritise economic growth, and lack jurisdiction over environmental commons, this creates a "tragedy of the commons." Furthermore, states lack the willingness to slow growth and move towards a sustainable development model. Finally, in addition to economic realities, there are political factors, such as re-election, trade agreements, and geopolitical dynamics, which states prioritise over complying with and enforcing conservation laws. Each of these factors, while not exhaustive, will be explored to demonstrate that states lack the incentive to implement and institutionalise conservation.

The first reason why states struggle to comply with international conservation law is because environmental issues are complex and irregular, which produces uncertainty in decision making. As discussed, the dynamic of ecosystems is that they are interconnected, both internally and with one another, involving a complex interaction of physical, biological, and chemical components.[197] The interconnected nature of ecosystems entails that slight environmental changes can lead to large impacts that are non-linear, unpredictable, distant in time or space.[198] Another implication of this interconnectedness is that ecosystems do not exist in equilibrium, but

[195] Mike Hulme. *Why We Disagree About Climate Change: Understanding Controversy, Inaction, and Opportunity.* Cambridge University Press (2009): 23
[196] *Ibid*, p. 23
[197] *Ibid*, p. 72
[198] *Ibid*, p. 73

are changing constantly, making it difficult to create environmental policy within already complex social systems. This entails that there is a degree of uncertainty about natural systems, and the impacts of different policy choices. While the nature of environmental issues being as such may complicate the drafting and enforcement of international law, some argue that there is an "excess of objectivity" required by politicians before they are willing to enact environmental policy.[199] This idea is that absolute scientific evidence that harm is going to occur should not be required, because suggestive evidence that harm may occur is sufficient in the context of environmental policy making.[200] Rather than requiring absolute certainty, then, states should instead adhere to the precautionary principle, which, as discussed, entails that decision makers should anticipate harm before it occurs and act accordingly.[201]

Having reasonable certainty of environmental impacts should be considered sufficient in environmental policy making, however states are reluctant to take a precautionary approach to conservation for economic reasons. One reason why nation-states are reluctant to comply with international environmental laws is because neoliberal capitalism has prevailed over a sustainable development paradigm. Neoliberal capitalism is predicated on two inherently unsustainable notions: that of unbridled economic growth, and the pricing of natural resources below their true environmental costs.[202] Pricing nature at zero has entailed that resources are treated as non-declining, and increasing constantly; the effect is that governments strive for infinite growth on a finite planet.[203] As alluded to, this is exacerbated by the phenomenon of the tragedy of the commons, an economic problem wherein an individual tries to reap the greatest

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[199] Daniel Sarewitz. *Science and Environmental Policy: An Excess of Objectivity*. Prentice Hall. (2000): 84
[200] *Ibid,* p. 84
[201] *Ibid,* p. 84
[202] James Gustave Speth. *The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability.* Yale UP (2008): 47
[203] Herman E. Daly. *Sustainable Development: Definitions, Principles, Policies.* Edward Elgar (2007): 37

benefit from a given resource.[204] The tragedy of the commons entails that any resource that is unowned will be overused and undermaintained.[205] States that overuse a resource obtain short-term benefit with no immediate consequence, entailing that states lack the resolve to act, and free ride on the actions of others.[206] The problem is that, while some resources are renewable, others are over-exploited and unable to replenish quickly enough. The exploitation and pollution of each of the atmospheric, marine, and Antarctic commons, areas unowned and outside of a single nation's jurisdiction, resulting in mass extinction and climate change, is evidence of this phenomenon occurring. The lack of jurisdiction, and therefore interest and incentive, of states over environmental commons is a particular challenge when it comes to marine conservation, as will be shown in each of the case studies in Chapter V, sections 5.2 and 5.3.

An economic model based on endless growth on a finite planet is inherently unsustainable, however the sustainable development model is unlikely to supplant the globalization market paradigm for both economic and political reasons.[207] Economically speaking, a sustainable economic model entails a closed loop, cyclical system of resource management which replaces what it takes from nature at an ecologically viable rate.[208] Therefore, this would require a radical simplification of the economy, a proposal which is considered unpopular, and to some, unequitable.[209] Slowing growth is considered unacceptable due to the fact that growth is a measure of prosperity; nations that want to be viewed with economic respect are encouraged to develop indefinitely, regardless of the social and

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[204] Garett Hardin. The Tragedy of the Commons. American Association for the Advancement of Science (1968): 1243
[205] *Ibid,* p. 1243
[206] *Ibid,* p. 1244
[207] James Gustave Speth. *The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability.* Yale UP (2008): 99
[208] Herman E. Daly. *Sustainable Development: Definitions, Principles, Policies.* Edward Elgar (2007): 41
[209] Richard Heinberg. *Managing Contraction, Redefining Progress.* New Society Publishers (2011): 231

environmental costs.[210] Thus, overconsumption has become the norm in developed nations, and developing nations strive towards the same. Because governments are seeking re-election, they are inherently short-term in their planning and policy-making, and thus unlikely to implement environmental policies that would be unpopular in the short-term.[211] Furthermore, even if states were to desire a simpler economy, nations have less authority and flexibility to act on environmental matters due to globalization and trade agreements.[212] There are thereby both systemic and procedural obstacles to consider as well as economic ones, particularly in cases where states lack the political clout and economic resources to implement and enforce environmental protection measures.[213] States do not see it as worth it to take an economic hit, violate trade agreements, or enforce environmental laws against states with whom they might have trade or military dealings, in order to adhere to international conservation law.[214] In this way, compliance with and enforcement of international conservation laws is heavily influenced by the economic and political interests of states, making it difficult for nation-states to act solely in the interest of the environment.

3.3.3: The nation-state as the main actor

States and their institutions have, at this point, been ineffective at enforcing international environmental law, as they have failed to take collective, global measures to address the

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[210] James Gustave Speth. *The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability.* Yale UP (2008): 166
[211] Annika Brandstrom and Sanneke Kuipers. "From 'Normal Incidents' to Political Crises: Understanding the Selective Politicization of Policy Failures" in *Government Opposition: An International Journal of Comparative Politics*. Wiley-Blackwell (2003): 305
[212] Mike Hulme. *Why We Disagree About Climate Change: Understanding Controversy, Inaction, and Opportunity.* Cambridge University Press (2009): 248
[213] *Ibid*, p. 284
[214] *Ibid*, p. 284

environmental crisis that is inherently transnational in nature.[215] This is not to say that the nation-state has been entirely ineffective at protecting marine wildlife; in the last decade especially, there has been more concerted action to regulate illegal fishing within certain regions. In terms of the fisheries that the SSCS focuses on, though, there has been a lack of concerted action on the part of nation-states. There are several varied and complex reasons why the nation-state has difficulty ensuring marine wildlife conservation, but to begin, it should be noted that environmental crises, such as the extinction of marine wildlife, are necessarily global in nature.[216] The fact that the state is the primary actor in international environmental law is the most significant factor preventing a global response to the crisis, then.[217] As discussed, this is because of the competing priorities they must balance, and the importance placed on economic growth and development over conservation. The response of the nation-state to the environmental crisis has, by and large, been to do the bare minimum, through token gestures and the "greenwashing" of politics.[218] Furthermore, states deflect responsibility for acting on environmental issues, either by emphasizing "downward," to the importance of individual behaviour change, or "upward," to the need for changes in the global political agenda.[219] The result either strategy is a displacement of responsibility, entailing that international environmental lawmaking has been reactive, incremental, and unenforceable. [220] For these reasons, the state-centric framework for environmental responsibility must be rethought.[221]

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[215] Colin Hay. "Environmental Security and State Legitimacy" in *Is Capitalism Sustainable? Political Economy and the Politics of Ecology*. Guilford Press (1994): 217
[216] *Ibid*, p. 228
[217] *Ibid*, p. 218
[218] *Ibid*, p. 227
[219] *Ibid*, p. 221
[220] *Ibid*, p. 217
[221] *Ibid*, p. 217

If the nation-state has not proved itself a viable environmental actor, this raises the question of why do they continue to have a monopoly over environmental decision making and the implementation, compliance with, and enforcement of environmental law? Perhaps on some level, government failure to protect certain types of marine wildlife has become so commonplace that it has become normalised.[222] This is not to say that the nation-state is the sole actor influencing international conservation law, though; as discussed, NGOs have had an increasingly prominent role in the realm of public international law in recent years.[223] That being said, public participation processes involving civil society are not structured to allow for significant participation from NGOs.[224] Under the current regime, NGOs have been offered a seat at the table to make their voices heard, but are often dismissed as extreme or unrealistic in their demands.[225] In this way, the policy network has effectively remained the same, and the balance of power continues to rest with traditional actors.[226] Policy network theory entails that reform occurs when the actors, and therefore interests and priorities, shift.[227] This requires a more horizontal and cooperative, rather than vertical and hierarchical, approach to conservation lawmaking and implementation.[228] The work of the SSCS in enforcing international marine wildlife conservation law constitutes a forced disruption of the policy network, the nature and implications of which will be the focus of the remainder of this thesis.

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[222] Annika Brandstrom and Sanneke Kuipers. "From 'Normal Incidents' to Political Crises: Understanding the Selective Politicization of Policy Failures" in *Government Opposition: An International Journal of Comparative Politics*. Wiley-Blackwell (2003): 281
[223] William Coleman and Anthony Perl. *Internationalized Policy Environments and Policy Network Analysis in Political Studies.* Political Studies Association (1999): 692
[224] R.A.W Rhodes. "Policy Network Analysis" in *The Oxford Handbook of Public Policy*. Oxford University Press (2008): 7
[225] *Ibid*, p. 3
[226] *Ibid*, p. 7
[227] *Ibid*, p. 8
[228] William Coleman and Anthony Perl. *Internationalized Policy Environments and Policy Network Analysis in Political Studies.* Political Studies Association (1999): 691

Chapter IV
The Nature of the Sea Shepherd Conservation Society

With the history and context of the international marine wildlife conservation law regime explored, the discussion will now turn to the focus of this thesis: the SSCS. This chapter will begin by examining different frameworks for environmental advocacy in order to provide an overview of radical environmentalism and provide context for the work that the SSCS does. Then, the approach of the SSCS specifically will be discussed, including an overview of the organisation's structure, ideological basis, and the history and evolution of their direct-action tactics and more recent direct-intervention approach. These actions will then be situated in the international law context, involving a discussion of the international laws pertaining to the SSCS, the organisation's appeal to such authority, and conceptions of the group as a vigilante organisation. This will entail an exploration of the role of non-state actors in enforcing international environmental laws, and the varied ways in which the SSCS has disrupted the policy network of international conservation law. This discussion will thereby include an overview of the legal dimensions of non-state intervention and action on marine wildlife conservation, as pertaining to issues surrounding the jurisdiction and legitimacy of such actions.

Section 4.1: Approaches to Environmental Advocacy

This section will briefly examine and compare traditional, moderate frameworks of environmental advocacy with radical, reactive forms of environmentalism, in order to provide an understanding of why some groups in the environmental movement utilise direct-action, and

what the implications of such an approach are. This will help to situate the work that the SSCS does within the broader context of western environmental advocacy.

4.1.1: Traditional environmentalism

To begin, direct-action conservation must be situated against traditional approaches to environmental advocacy for the sake of comparison and context. Western environmentalism emerged in the 1800's, with the creation of national parks designed to preserve areas of wilderness considered pristine, sublime, or frontier.[229] These concepts of wilderness informed early environmentalism, with environmental organisations working to preserve natural spaces for their intrinsic beauty and for leisure purposes, largely enjoyed by the upper classes.[230] As discussed, it was not until the 1960's and 70's that there began an increasing awareness of the environmental impacts of human activities. As this awareness grew, the environmental movement, based on advocacy and activism, began to form, with several different types of organisations taking diverse approaches for this common cause. Some environmental organisations took the form of charities, focused on devoting resources to preserving at-risk species and ecosystems.[231] Others were more political, organizing to lobby governments and putting in legal efforts to fight environmentally destructive projects in court.[232] Then there were grassroots environmental movements, involving community-based initiatives and in some cases, protests, that sought to raise awareness and make their voices heard.[233] Each of these forms of early environmental advocacy, while unique in their own way, were considered mainstream.[234]

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[229] William Cronon. *The Trouble with Wilderness.* W.W. Norton & Co. (1995): 76
[230] *Ibid,* p. 76
[231] Rebecca Smith. "'Ecoterrorism'? A Critical Analysis of the Vilification of Radical Environmental Activists as Terrorists" in *Environmental Law Review*. Lewis and Clark Law School (2008): 542
[232] *Ibid,* p. 543
[233] *Ibid,* p. 543
[234] *Ibid,* p. 543

Such approaches were characterised by a willingness to compromise, and took a moderate, incremental approach to achieving environmental protection.[235] In this way, these forms of traditional environmentalism were undisruptive, relatively uncontroversial, and necessarily "peaceful" in nature.

4.1.2: Radical environmentalism

In addition to moderate forms of environmental advocacy, radical environmentalism also arose in the 1960's and 70's in response to the observable harm being caused to the environment. In contrast with traditional forms of environmentalism, radical environmentalism is disruptive by nature, involving civil disobedience tactics. Some environmentalists decided to take this approach because, despite the increase in legal action and public participation on environmental issues at this time, they did not perceive meaningful or effective change to be occurring in response.[236] Radical environmentalists did not believe that moderate environmental groups and organisations acted with enough urgency, holding that an incremental approach was not sufficient given the gravity of environmental issues.[237] Greenpeace, an NGO founded in Canada in 1972, began as a protest organisation, but became a radical environmentalist group through its first direct-action to prevent an underground nuclear detonation in Alaska.[238] Other radical environmental groups, such as Earth First! and the Earth Liberation Front formed in the United States in the 1980's and 90's, harnessed illegal tactics such as trespassing, road blockading, and arson in order to get the government and corporations to listen to their concerns.[239] These groups

[235] *Ibid,* p. 543
[236] *Ibid,* p. 544
[237] *Ibid,* p. 544
[238] John Cianchi. *Radical Environmentalism: Nature, Identity, and More-Than-Human Agency.* Palgrave MacMillan (2015): 73
[239] Rebecca Smith. "'Ecoterrorism'? A Critical Analysis of the Vilification of Radical Environmental Activists as Terrorists" in *Environmental Law Review*. Lewis and Clark Law School (2008): 545

were labelled as "ecoterrorists" by the United States government, being considered a threat to the livelihoods of those whose interests they were sabotaging.[240] It should be noted that these groups, while not averse to damaging property, did not employ similarly aggressive or violent tactics towards people, but were considered dangerous to the public at this time because they damaged economic interests.[241]

Section 4.2: The Approach of the Sea Shepherd Conservation Society

This section will explore the conservation approach of the SSCS. The structure, ecocentric ideology of the group, and aggressive non-violent tactics, will be explored, including their implications in relation to other forms of advocacy and vigilantism. Then, the direct-action tactics of the SSCS will be discussed, informed by interviews with SSCS crew members. Finally, the more recent direct-intervention approach of the SSCS will be discussed.

4.2.1: Structure and ideology

To begin, an overview of the SSCS' financial and leadership structures will be provided in order to contextualise the work that the organisation. As mentioned, the SSCS was founded in 1977, though originally under the name the "Earth Force Society," as a tax-exempt charity in under the British Columbia *Societies Act* in Vancouver, and was later registered in Oregon in the United States in 1981.[242] The SSCS' chief financial officer, Nicholas Makhani, has stated that 84% of the organisation's funds are raised through individual donations, and 16% through

[240] *Ibid,* p. 545
[241] *Ibid,* p. 544
[242] Andrew Doby Hobart. "How Sea Shepherd stays afloat." The Sydney Morning Herald (2012): Web.

merchandising sales.[243] The SSCS has been supported by major celebrity donors, some of whom sit on the advisory board, such as Brigitte Bardot, Bob Barker, Sam Simon, and Steve Irwin.[244] The significant donations from donors such as these, coupled with individuals that have pledged monthly donations, are primarily responsible funding the organisation's vessels which campaign globally.[245] The SSCS' operations are governed by a Board of Directors and several distinct Boards of Advisors. The Board of Directors makes all strategic short- and long-term decisions for the organisation, with Watson as the Executive Director, alongside seven other members, and Farley Mowat formerly serving as International Chair.[246] The Board of Advisors gives professional and knowledgeable advice to the organisation in relation to individualised areas of expertise.[247] There are distinct advisory boards, including: the Scientific, Technical, and Conservation Advisory Board, the Legal and Law Enforcement Advisory Board, the Financial and Management Advisory Board, the Photography Advisory Board, the Media and Arts Advisory Board, the Animal Welfare, Humane, and Animal Rights Advisory Board, the Ocean Advocacy Advisory Board, and he Children's Education Advisory Board.[248] The organisation is run on a staff of approximately thirty individuals, and otherwise, through the work of volunteers, some of whom are "crew" and directly involved in campaigns, and others who are "on-shore" volunteers that seek to raise funds and awareness for the group.[249]

Although the SSCS is a registered charity and run as such, they are also considered a radical environmentalist group due to the direct nature of their intervention in marine wildlife

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[243] *Ibid.*
[244] *Ibid.*
[245] *Ibid.*
[246] Sea Shepherd Conservation Society. "Board of Directors." Sea Shepherd Conservation Society (2019): Web.
[247] Sea Shepherd Conservation Society. "Board of Advisors." Sea Shepherd Conservation Society (2019): Web.
[248] *Ibid.*
[249] Sea Shepherd Conservation Society. "Get Involved." Sea Shepherd Conservation Society (2019): Web.

conservation.[250] There are three key elements of the group's radical approach which will be discussed, being: their ecocentric ethic of conservation, belief in direct, rather than submissive, forms of advocacy, and their use of "aggressive non-violence." To begin with the SSCS' conservation ethics, the group can be considered ecocentric, which, as discussed in the previous chapter, entails that the group is concerned with the health of entire ecosystems. This ideology is represented in certain aspects of the organisation's flag; as stated in the opening of this thesis, the black color of the flag represents extinction, the human skull, to show that humans are responsible for it, and the yin-yang of the dolphin and whale, to show that harmony is found in the sea. The flag thereby illustrates the deep ecology, ecocentric ethic of the group, highlighting the interconnected nature of ecosystems, and the notion of humans are a part of, rather than superior to, the natural environment. It is important to note that while the SSCS may appear to be a biocentric organisation given that their work largely involves protecting large marine mammals, this work is done for the purpose of protecting the ecosystem as a whole. As stated, the organisation's call to action is "if the oceans die, we die," indicating a concern for the effect of species extinction on ecosystems generally, rather than individual animals. Furthermore, the SSCS is clear in its mandate that it is not an animal rights group, but rather, a conservation organisation. SSCS ships and events are entirely vegan for environmental, rather than ethical, reasons.

There are several environmental organisations that operate based on an ecocentric ethic, but what sets the SSCS apart is their belief in a direct approach. Watson, who was one of the founding members of Greenpeace, left the organisation because he disagreed with their pacifistic approach to conservation, and founded the SSCS NGO in 1977 instead.[251] As such, the SSCS has

[250] *Ibid*, p. 74
[251] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase*. Zed Books

a clear stance that passive approaches to advocacy commonly employed by other environmental groups, such as protesting, are problematic as well as ineffective at achieving meaningful environmental protection.[252] Watson takes issue with protesting from an ideological perspective, as he feels that it is a submissive act, involving pleading against an inevitable outcome.[253] The concept of bearing witness bothers him for this reason, explaining that he feels "You don't just watch a woman being raped and not intervene, you don't just watch a kitten being stomped to death and not intervene, and you don't stand and watch whales being killed and take their pictures."[254] Furthermore, Watson does not feel that the cost of protesting is worth the minimal gain; government systems have developed tactics for dealing with protesters, and for this reason, they are easy to both ignore and silence.[255] That being said, Watson and the SSCS support all forms of advocacy, provided that they are active in nature; Watson suggests that one of the most effective forms of advocacy can be infiltration, because by getting into politics, law, or business, more can be accomplished.[256] In this way, Watson believes that the "strength of an ecosystem is in diversity," and so litigation, legislation, education, and civil disobedience should be used in tandem to achieve common goals.[257] Such a multi-faceted approach is one which the SSCS has adopted in recent years for such strategic reasons, as will be discussed later in this chapter.

The direct-action approach of the SSCS stands in clear contrast to more moderate forms of environmental advocacy, entailing that this approach is controversial, even among environmentalists. Greenpeace in fact condemns the SSCS' direct-action approach because they

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(2018): 17
[252] Avelie Stuart, Emma F. Thomas, Ngaire Donaghue, and Adam Russell. *We may be pirates, but we are not protesters: Identity in the Sea Shepherd Conservation Society.* Political Psychology (2013): 756
[253] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[254] *Ibid.*
[255] *Ibid.*
[256] *Ibid.*
[257] *Ibid.*

perceive it as too radical.[258] The SSCS is often characterised as violent and dangerous because of their direct approach,[259] but although it is the case that the SSCS' approach to advocacy is direct in nature, their tactics are non-violent. The SSCS enforces existing international marine wildlife law through "non-violent aggressive tactics," as represented by the cross-trident and shepherd cane in the flag to show aggressive non-violence, force and protection.[260] This means that they actively interfere with property, such as poaching vessels, that seek to profit from the illegal exploitation of marine wildlife, but do not cause harm to the individual poachers.[261] In the forty-one years the SSCS has been operating, the organisation has never injured or killed a single individual, and no lives have been lost from the SSCS crew, either.[262] Such an approach is evidenced by the fact that, after the SSCS crew pursued the *Thunder*, an illegal toothfish poaching vessel in Antarctica, they rescued the crew after their vessel sank.[263] In this way, the intention of the SSCS, like the other radical environmentalist groups discussed in this chapter, is not to cause harm to individuals, but to disrupt the efforts, systems, and infrastructures in place that promote, permit, and facilitate illegal and unsustainable activities.

As a result of the SSCS' unorthodox approach, the group has been labeled as both a piracy and ecoterrorist organisation. The SSCS embraces the former characterization, but rejects the latter. In response to the piracy label, Watson explained that this is why the organisation adopted the Jolly Roger in the first place; if the people were going to mark the organisation as

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[258] Deborah Doby. "Whale Wars: How to End the Violence on the High Seas" in Journal of Maritime Law and Commerce. Jefferson Law Book Company (2013): 136
[259] *Ibid*, p. 6
[260] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[261] Avelie Stuart, Emma F. Thomas, Ngaire Donaghue, and Adam Russell. *We may be pirates, but we are not protesters: Identity in the Sea Shepherd Conservation Society.* Political Psychology (2013):757
[262] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[263] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase.* Zed Books (2018): 242

such, he felt the SSCS should reclaim this title as their own.[264] Furthermore, Watson has observed that the SSCS' pirate image has been helpful in scaring poachers away.[265] When the SSCS first made contact with the *Thunder*, the poachers dropped their nets, fled, and ceased poaching in the area, because they knew the SSCS would go after them.[266] In response to the ecoterrorist label, the SSCS is less embracing; Watson responded that "there is nothing more conservative than being a conservationist," and stated that it is in fact the corporations destroying the environment that are the true radicals and ecoterrorists.[267] Although the SSCS is characterised as an ecoterrorist group by some, this title does not deter them from acting. Watson says that he does not care what people think of the SSCS, because the organisation's "clients" live in the ocean.[268] In this way, the SSCS does not believe that they can stand aside and let the oceans be further denigrated until they are deemed legitimate by the entire world. In civil disobedience terms, this perspective can be conceived of as "conscientious wrongdoing," insofar as the SSCS, on some level, believes their cause trumps legal norms in principle.[269] In this way, legality cannot is not conceived as a definitive guide to morality.

4.2.2: Direct-action tactics

The direct-action tactics of the SSCS are what they are most famous for, beginning with their first campaign in 1979-1980. The first SSCS campaign was a pursuit of a whaling vessel, known as the *Sierra*. When it was found, the SSCS punctured a hole in the hull of the ship with

[264] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[265] *Ibid.*
[266] *Ibid.*
[267] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[268] *Ibid.*
[269] John Cianchi. Radical Environmentalism: Nature, Identity, and More-Than-Human Agency. Palgrave MacMillan (2015): 75

the bow of the first Sea Shepherd vessel.[270] Since then, the SSCS has continued to take a militant approach to conservation, by boarding, ramming, and sinking ten whaling ships, and damaging millions of dollars in equipment used to illegally harvest marine wildlife.[271] Watson and the SSCS justify these actions on the basis that "few changes on this planet have taken place solely because of nonviolent action…and to remain nonviolent is to allow the perpetuation of violence against people, animals, and the environment."[272] In this way, the SSCS takes a decidedly realist approach to international law, recognizing that forceful mechanisms are necessary to ensure that the law is abided by. Furthermore, the fact that the SSCS has had to resort to direct-action to effectively enforce law undermines the legitimacy of the legal regime itself, further demonstrating the need for NGO participation, as discussed. Interestingly, this approach, and the SSCS' effective use of direct-action has conferred their legitimacy in recent years. Since the sinking of the *Thunder,* the SSCS has been invited to attend conferences with INTERPOL and various fishing agencies, which will be discussed in greater detail in Chapter V, section 5.3, 5.3.2.[273] The SSCS has thereby successfully forced themselves into the policy network through the use of direct-action, understanding that the network must be destabilised in order for policy to be changed, and existing law to be enforced. In this way, the SSCS has responded to the problem of the stagnant policy network and government inaction on marine wildlife conservation through direct means.

The SSCS acts through direct means in order to both reform policy and fill gaps in government enforcement. Brigitte Breau, the Coordinator of Sea Shepherd Toronto, joined the

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[270] Gerry Nagtzaam. "End of the Line? Paul Watson and the Future of the Sea Shepherd Conservation Society" in *Journal of Arts and Humanities.* LAR Center Press (2014): 12
[271] *Ibid,* p. 9
[272] *Ibid,* p. 9
[273] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase.* Zed Books (2018): 362

SSCS for this very reason.[274] Breau, who grew up on the east coast of Canada, has seen the abundance of marine life she once knew deteriorate, and explains that she was motivated to join the SSCS because of the direct efforts they undertook to stop the Canadian commercial seal hunt.[275] Because of this approach, she viewed the organisation as being one that was in line with her values, and that instilled meaningful change; Breau did not desire to devote her time to what she views as "slacktivist efforts," like posting on social media and "waving around signs."[276] Breau concedes that it is difficult to measure the tangible differences that one can make as an activist, but that, through her work with the SSCS, she feels has seen change occurring, even if it has been gradual.[277] Breau, like many SSCS supporters, attributes the organisation's efficacy to their direct-action approach, and explains that no other group does what the SSCS does, on the scale that the SSCS does it.[278] She pointed to the fact that, when the SSCS scuttled two whaling vessels in Iceland in 1986, although a vigilante act, it had the effect of shutting down whaling in the country for seventeen years.[279] In this way, Breau, and other SSCS supporters, recognise the unique role that the organisation has played through their use of direct-action, compared to both nation-states and even other NGOs.

As evidenced by Watson and Breau's views, the organisation utilises direct-action primarily because it is effective at achieving conservation goals. The efficacy and implications of the SSCS' actions in this way will be elaborated upon through each of the case studies in Chapter V, but this final note on direct-action concerns its ability to raise awareness for the issue of

[274] Brigitte Breau. Chapter Coordinator, Sea Shepherd Conservation Society Toronto Chapter. In discussion with the author, November 2018.
[275] *Ibid.*
[276] *Ibid.*
[277] *Ibid.*
[278] *Ibid.*
[279] Deborah Doby. "Whale Wars: How to End the Violence on the High Seas" in *Journal of Maritime Law and Commerce*. Jefferson Law Book Company (2013): 137

marine wildlife extinction. Watson points out that direct-action tactics are not only necessary to ensuring the immediate protection of species, but to get people to understand that illegal fishing will not be tolerated.[280] Watson believes that a story is necessary to get people to listen, and that the drama that is created through direct-action, whereby volunteers put their body on the line between the poachers and the whales, accomplishes this goal.[281] Watson believes that utilizing the media, and also celebrity, can help to aid in the SSCS' mission, concisely summed up by his thoughts on the SSCS' high profile supporters: "With two James Bonds, Batman, Captain Kirk, and MacGyver on the board, we are invincible."[282] Given that Watson was a student of Marshall McLuhan ("the medium is the message") while studying communications at Simon Fraser University, this belief is hardly surprising, but also demonstrative of the fact that the SSCS is dedicated to achieving their goals through whatever means are most effective.[283]

Section 4.2.3: Direct-intervention approach

Although direct-action tactics, grounded in a realist approach to international law, may be what the SSCS has gained notoriety for, a discussion of these tactics only paints half the picture of the organisation's efforts today. The SSCS is now comprised of several entities with different approaches to achieving the common goal of marine wildlife conservation. These entities include, but are not limited to, Sea Shepherd Science, Sea Shepherd Dive, Sea Shepherd Global, which handles enforcement, and Sea Shepherd Legal, which will be discussed in detail in the next section.[284] The SSCS has expanded and diversified their approach in such a way for tactical

[280] Gerry Nagtzaam. "End of the Line? Paul Watson and the Future of the Sea Shepherd Conservation Society" in *Journal of Arts and Humanities.* LAR Center Press (2014): 11
[281] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[282] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase.* Zed Books (2018): 17
[283] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[284] *Ibid.*

reasons, in recognition of the fact that they can be more effective by taking a broad, and at times institutionalist, approach.[285] It was as early as 2000 that the SSCS began to vary their approach, partnering with domestic governments to enforce conservation laws.[286] The first partnership the SSCS took part in was with the Ecuadorian government and national park police. In this context, the SSCS provided a patrol boat and automatic identification system ("AIS"), covering the range of the park, and identifying vessels that traveled within it.[287] The SSCS also managed a K-9 unit which identified wildlife smuggling, thereby enforcing CITES.[288] The SSCS also tasked lawyers with training prosecutors and judges on environmental law, an effort which has now expanded to several countries through the creation of Sea Shepherd Legal.[289] These partnerships each constitute a form of hands on, direct-intervention on the part of the SSCS in aiding governments in enforcing several international conservation laws.

The SSCS' decision to broaden its approach and focus its efforts in different ways has drawn criticism from some SSCS supporters, who believe that the group is moderating and getting "soft."[290] Breau encounters this kind of criticism in her outreach often, especially since the SSCS decided to end their anti Japanese whaling campaign in the Southern Ocean, which will be discussed in further detail in the case study on the subject in Chapter V, Section 5.2, 5.2.2.[291] Captain Peter Hammarstedt, Director of Ship Operations at Sea Shepherd Global, explained that the SSCS decided to suspend the campaign in part because the Japanese whalers now have military AIS, making it possible for them to evade the SSCS' pursuit, and in part

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[285] *Ibid.*
[286] *Ibid.*
[287] *Ibid.*
[288] *Ibid.*
[289] *Ibid.*
[290] Brigitte Breau. Chapter Coordinator, Sea Shepherd Conservation Society Toronto Chapter. In discussion with the author, November 2018.
[291] *Ibid.*

because the Japanese have lowered their whaling quota so significantly.[292] Still, the decision to end the Southern Ocean campaign did not go over well with some supporters. Breau's response to this is that the decision to end the Japanese whaling campaign was a practical one, and that the SSCS continues to engage in direct-action against illegal fishing in several other contexts. For this reason she would still characterise the work the SSCS does as threatening and disruptive, and therefore realist, in nature.[293] In contexts where the SSCS cooperates with governments, as will be discussed in further detail in the next section, Breau understands that focusing resources on working with governments to be a necessary part of the equation to effect long-term change.[294] Hammarstedt echoes this sentiment, stating that the SSCS takes a cooperative approach in certain contexts in recognition of the fact that lasting change cannot occur in a vacuum, but that at their core, they remain a direct-action organisation.[295]

Section 4.3: The Sea Shepherd Conservation Society's Appeal to International Law

Although the SSCS has been effective in its efforts despite the denigration they have faced by some, the group's status as an NGO raises several questions surrounding their legitimacy to act as an enforcer of international law. It is argued by some that because the SSCS is an NGO, they are a vigilante organisation which does not have the jurisdiction to enforce international law in either territorial waters or on the high seas. The SSCS argues that because the goals of international marine wildlife conservation laws are not being met by state actors,

[292] Peter Hammarstedt. Director of Ship Operations, Sea Shepherd Conservation Society Global. In discussion with the author, November 2018.
[293] Brigitte Breau. Chapter Coordinator, Sea Shepherd Conservation Society Toronto Chapter. In discussion with the author, November 2018.
[294] *Ibid.*
[295] Peter Hammarstedt. Director of Ship Operations, Sea Shepherd Conservation Society Global. In discussion with the author, November 2018.

there is a necessary place for them in the international legal realm, conferring legitimacy to their actions. The SSCS attempts to appeal to international law on each of the bases of the principles of public international law, international marine wildlife conservation authorities, and the cooperative agreements they have with certain states. This is an interesting aspect of the organisation because, as discussed, they are realist in the sense that they believe force is necessary to ensure that laws are abided by, but they also seek to justify their actions in institutionalist terms. Each of their appeals and justifications on these bases will be explored separately herein.

4.3.1: Principles of public international law

> *"Sea Shepherd cooperates fully with all international law enforcement agencies and its enforcement activities complying with standard practices of law."*[296]

To some extent, the SSCS can ground their actions in general public international law doctrine and custom. As mentioned, the realist school of legal thought holds to the notion that law without enforcement can merely be considered good advice. This maxim exists because the law, from a realist perspective, has two central and interrelated functions: the first, to define norms, policies, and principles of liability, and the second, to ensure compliance with said norms, policies, and principles, through fair and effective enforcement.[297] In taking this perspective, if the law is intended to both codify and enforce norms, the international marine

[296] The Sea Shepherd Conservation Society. "Laws and Charters" Sea Shepherd Conservation Society: Web.
[297] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach*. Aspen Publishers (2015): 34

wildlife conservation law regime is not achieving its aims. As discussed, the tragedy of the commons in fisheries, combined with the voluntary nature of compliance with international law, entails that conservation regimes are largely unenforced. The SSCS uses this notion as a primary justification for their actions, to which a few principles of public international law can be applied in support of the fact that the SSCS does comply with standard practices of law.

The first of the principles of public international law which can be applied to the SSCS' actions is the concept of *jus ad bellum* if one considers the SSCS to be fighting a war for the environment.[298] Such a conception of the SSCS has captured the public imagination, as the group is sometimes referred to as "Gaia's Navy."[299] Watson reinforces this notion, stating that the SSCS is governed by *lex natura*, or the laws of nature, thereby conferring their right to act.[300] Furthermore, the principles that have arisen since the *Corfu Channel* case, such as those of no-harm, prevention, due diligence, and precaution, can also justify the SSCS' direct-interventions, insofar as the organisation assists states in adhering to these principles of customary international law. As an NGO, SSCS crew members can issue a citizen's arrest in order to uphold these principles if need be.[301] If a government vessel were to arrest a ship outside the jurisdiction of their EEZ, it could be perceived as an act of military aggression, whereas private citizens can exercise their right to make arrests for crimes of an environmental nature under customary international law without consequence.[302] Finally, the unilateral decision by coastal states to set the EEZ at the 200 nautical mile limit in 1977, while not a rule or principle of international law,

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[298] Gerry Nagtzaam. *From Environmental Action to Ecoterrorism? Towards a Process Theory of Environmental and Animal Rights Oriented Political Violence.* Edward Elgar Publishing (2017): 203
[299] *Ibid,* p. 203
[300] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase.* Zed Books (2018): 18
[301] Roberta M. Fay. "Citizen's Arrest: International Environmental Law and Global Climate Change" in *Glendale Law Review.* Glendale University College of Law (1995): 92
[302] *Ibid,* p. 92.

is an incident which demonstrates the necessity of the SSCS' approach. This instance was one which clearly showed a failure of international legal regimes in achieving their goals, and a precedent, and need, for decisive, unilateral action in international law.

4.3.2: International marine wildlife conservation law

> *"Sea Shepherd campaigns are guided by the United Nations World Charter for Nature. Sea Shepherd Conservation Society respects and acts in accordance with the international treaties, declarations, conventions, and charters."*[303]

While the SSCS can, to some extent, appeal to broad principles of public international law, the organisation finds a more comprehensive legal justification in international conservation laws. The SSCS works to both enforce international conservation laws through direct-action, and to implement them through cooperative means. In terms of the legal basis for the SSCS direct-actions, generally, the SSCS relies on the UN World Charter for Nature to justify their direct enforcement of international conservation laws, as section 21 provides authority for individuals to implement conservation.[304] Section 21 states that *"…to the extent that they are able…individuals, groups, and corporations shall: … (c) Implement the applicable international legal provisions for the conservation of nature and the protection of the environment; (e) Safeguard and conserve nature in areas beyond national jurisdiction*."[305] This provision clearly confers the right to individuals and groups to enforce international conservation law, and to do so

[303] The Sea Shepherd Conservation Society. "Laws and Charters" Sea Shepherd Conservation Society: Web.
[304] *Ibid.*
[305] The United Nations General Assembly. *World Charter for Nature.* The United Nations (1982): Section 21

in environmental commons as well. In terms of the laws that the SSCS is enforcing, the organisation points to several pieces of international conservation law discussed so far to justify their direct actions, including: the Stockholm Declaration, CITES, UNCLOS, The Rio Declaration, UNFCCC, and the CBD. The organisation also appeals to some treaties which have not been covered, such as the Convention of Antarctic Marine Living Resources ("CCAMLR"), which will be discussed in Chapter V, Section 5.3, and the Northwest Atlantic Fisheries Convention ("NAFO") and Convention on the Conservation of Migratory Species ("CCMS") as well. Given the breadth of international conservation laws which inform and guide the SSCS' actions, then, Watson believes that crew members acting in SSCS campaigns cannot be considered to be engaged in criminal activity. Instead, the SSCS should be conceived of as a police force, filling a gap in enforcement by stepping in where states are incapable or unwilling to stop those who are truly in violation of international law.

The SSCS has not suffered any significant legal consequences as a result of their enforcement measures, in part due to their ability to present enough relevant legal authority that allows them to continue with their enforcement activities.[306] Some argue that in doing so, the SSCS is not working within legal structures, but rather, manipulating them, though.[307] The international institutions that have set the laws the SSCS enforces have not given the SSCS explicit permission to do so on their behalf, and as such the SSCS is considered by some to be engaged in "piracy for private ends."[308] In *the Institute of Cetacean Research v Sea Shepherd Conservation Society* case, the United States Court of Appeal for the Ninth Circuit found the

[306] Roeschke, Joseph Elliot. "Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters" in *Villanova Environmental Law Journal.* Villanova Law School (2009): 136
[307] Gerry Nagtzaam. "End of the Line? Paul Watson and the Future of the Sea Shepherd Conservation Society" in *Journal of Arts and Humanities.* LAR Center Press (2014): 13
[308] Whitney Magnuson. Marine Conservation Campaigners as Pirates: The Consequences of Sea Shepherd. Lewis and Clark Law School (2014): 935

SSCS guilty of piracy in their interference with whaling in the Southern Ocean on this basis, overturning the lower court's decision that the SSCS' actions did not constitute those of piracy as defined by UNCLOS.[309] In consideration of the public interest arguments, the Court favoured the arguments regarding safety of maritime navigation over the preservation of marine life, in part because Japan's whaling activities were covered under the IWC at this time.[310] This raises an interesting question surrounding both the definition of piracy, and whether environmental protection should fall under the legal lens of a "private end." It is not entirely accurate to characterise environmental protection in this way, because the preservation of the environment rather serves public good, to the detriment of some private interests.[311] It can thus be argued that the act of piracy for a private end is perpetrated by the illegal poachers, due to the fact that they profit from such action at the expense of the public, rather than by the SSCS, that serves a common good.[312]

The SSCS' enforcement of international marine wildlife conservation law is controversial from a legal standpoint, but Sea Shepherd Legal's efforts are less so. Sea Shepherd Legal, founded in 2014, acts to further the SSCS' mandate through law and policy enhancements focused exclusively on marine species. Catherine Pruett, Co-Founder of Sea Shepherd Legal, believes that the reason why species are not being adequately protected is not because of a lack of codification of conservation laws, but rather, due to the absence of proper implementation.[313]

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[309] Barry Dubner and Claudia Pastorius. "On the Ninth Circuit's New Definition of Piracy: Japanese Whalers v the Sea Shepherd--Who Are the Real 'Pirates' (i.e. Plunderers)?" in *Journal of Maritime Law and Commerce.* Jefferson Law Book Company (2014): 442
[310] *Ibid*, p. 442
[311] Whitney Magnuson. *Marine Conservation Campaigners as Pirates: The Consequences of Sea Shepherd.* Lewis and Clark Law School (2014): 936
[312] Barry Dubner and Claudia Pastorius. "On the Ninth Circuit's New Definition of Piracy: Japanese Whalers v the Sea Shepherd--Who Are the Real 'Pirates' (i.e. Plunderers)?" in *Journal of Maritime Law and Commerce.* Jefferson Law Book Company (2014): 442
[313] Catherine Pruett. Co-Founder, Sea Shepherd Conservation Society Legal. In discussion with the author, November 2018

Pruett holds that international law is significantly "under-utilised, and not properly understood."[314] She explains that, from her perspective, while international law doesn't have a lot of teeth, it offers many tools which can be used to strengthen domestic regulations.[315] Sea Shepherd Legal conducts some of this work through litigation, by intervening in court and partnering with other NGOs in local conservation matters.[316] Another aspect of the legal work they do is the implementation of international conservation laws specifically. Through these efforts, Sea Shepherd Legal is conducting gap analyses, and looking at deficits in the law and how those laws can be reformed. In terms of CITES, for example, Sea Shepherd Legal is pushing for the listing of further species under Appendix I, such as the endangered Mako shark.[317] In terms of the CCMS, they are working with the Secretariat to take concerted action for the protection of marine wildlife, such as whale sharks and the Atlantic humpback dolphin.[318] They have also worked with law enforcement agencies to help to stop unreported illegal fishing, providing INTERPOL with information they can use to prosecute illegal, undocumented, and unreported fishing operations.[319]

4.3.3: Cooperative agreements

"The Sea Shepherd Conservation Society is dedicated to working towards cooperative agreements between nations to protect species and habitats according to the SSCS Mandate."[320]

[314] *Ibid.*
[315] *Ibid.*
[316] *Ibid.*
[317] *Ibid.*
[318] *Ibid.*
[319] *Ibid.*
[320] The Sea Shepherd Conservation Society. "Laws and Charters" Sea Shepherd Conservation Society: Web.

As discussed, the SSCS has expanded their cooperative agreements since they undertook their first effort of that nature in Ecuador in 2000. The SSCS now has cooperative conservation arrangements and agreements with Gabon, Liberia, São Tomé, Tanzania, Peru, Costa Rica, Mexico, and Dominica, and emerging agreements with Mozambique, Somaliland, Kenya, and Nigeria.[321] While the precise efforts of the SSCS in each of these contexts differs, generally, the SSCS provides resources and volunteers, and the governments provide authority for the SSCS' actions.[322] Watson explained that this arrangement works because governments, though lacking in the political and economic motivation to enforce conservation laws, have a monopoly on "violence," or authority, which they confer to the SSCS.[323] With this authority, the SSCS brings the "will" to the table through the passion of volunteers and economic resources.[324] For example, in Gabon, Gabonese marines, fisheries inspectors with the Gabonese Fisheries Enforcement Agency, and rangers with the National Parks Agency of Gabon, each work with SSCS crew to patrol the Gabonese EEZ to stop both illegal fishing of albacore tuna and shark finning.[325] Hammarstedt analogised that in arrangements such as the one in Gabon, the SSCS is functioning as a privateer, rather than a pirate; they can be thought of as having a letter of marquis whereby they are allowed to assist with the enforcement of laws.[326]

The willingness of states to engage with the SSCS in these ways demonstrates that they recognise their own limitations, whether military, economic, or geopolitical, in enforcing

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[321] Peter Hammarstedt. Director of Ship Operations, Sea Shepherd Conservation Society Global. In discussion with the author, November 2018.
[322] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[323] *Ibid.*
[324] *Ibid.*
[325] Sea Shepherd Global. "An ongoing partnership to tackle illegal fishing in Gabon" in *Our Campaigns.* Sea Shepherd Global (2016): Web.
[326] Peter Hammarstedt. Director of Ship Operations, Sea Shepherd Conservation Society Global. In discussion with the author, November 2018.

international marine wildlife conservation law effectively.[327] Hammarstedt highlighted that the importance of the SSCS' help in filling this gap has been acknowledged by developing countries, as these states see the SSCS as equal partners in achieving a common goal.[328] Furthermore, the perception of the SSCS as an illegal or vigilante group has not deterred countries from working with them. Given the gravity and immediacy of the issue, several countries have said that they do not care how the SSCS is perceived; the organisation's efforts are needed, because the livelihoods of their people are at risk.[329] Sea Shepherd Legal plays a critical role in aiding countries in their conservation efforts from the legal side. Pruett explained that this is why Sea Shepherd Legal came to be four years ago; to aid in long-term policy implementation, application, and deterrents in countries that lacked the resources to instrumentalise on their own.[330] To this end, Sea Shepherd Legal offers workshops that train judges and enforcement officers on how to effectively enforce their own domestic and criminal laws, as well as international regimes such as CITES.[331] Sea Shepherd Legal also assists in implementing CITES listings through the strengthening of domestic trade law, working with countries on the importing end to ensure that export permits are legitimate.[332]

Pruett explained that the goal of each of these efforts is to provide governments with the tools necessary to be effective in conservation; in this way, the purpose of these efforts is not to tell governments what to do, but to assist them in implementing existing conservation laws, and drafting new ones where there are gaps.[333] She explained that the SSCS' two approaches go

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[327] *Ibid.*
[328] *Ibid.*
[329] *Ibid.*
[330] *Ibid.*
[331] Catherine Pruett. Co-Founder, Sea Shepherd Conservation Society Legal. In discussion with the author, November 2018
[332] *Ibid.*
[333] *Ibid.*

hand-in-hand; the direct-action efforts ensure that international laws are enforced in the short-term, but the direct-intervention programs ensure that their efforts are productive in the long-term through policy change.[334] Pruett believes that the SSCS is more effective, and legitimate, for this dual approach, and for having the opportunity to work with law enforcement agencies.[335] By that same token, there is still a sentiment within the SSCS that they must be cautious in their dealings with government. Breau describes the SSCS' cooperative approach as, in some cases, being a "dance with the devil," which constitutes a recognition of the fact the SSCS is agreeing to play by institutionalist terms in certain contexts to achieve its goals.[336] This demonstrates that the SSCS' evolution towards working with governments has occurred for practical and strategic reasons, rather than ideological ones.

[334] *Ibid.*
[335] *Ibid.*
[336] *Ibid.*

Chapter V
The Role and Authority of the Sea Shepherd Conservation Society

Now that the SSCS has been situated within both the public international law and international conservation law contexts, and their approaches to advocacy contextualised and discussed, the role and evolution of the organisation will be explored through three case studies. The first case study will involve a discussion of an incident wherein the SSCS stepped in on behalf of a nation-state that lacked the means and resources to enforce international conservation law, thereby functioning as a quasi-state actor in territorial waters. The second case study will explore an instance where the SSCS enforced international law when states lacked the political will to do so, thereby acting as an enforcer of an international court ruling. The final case study will explore a situation wherein the SSCS acted to enforce law where nation-states lacked the jurisdiction to do so, thereby serving as an international police force. Each of these case studies will demonstrate that, for various reasons, nation-states have failed to institutionalise and act on marine wildlife conservation obligations, and that in such circumstances, the SSCS fills an essential gap as an NGO. Here it will be shown that, when enforced, international conservation laws can be meaningful and robust. In this way, the efficacy of the SSCS demonstrates not only their importance as a conservation actor, but as a legal one as well.

Section 5.1: Acting When States Lack Means

There have been several instances where the SSCS has been requested to act on behalf of a nation-state. This case study will explore one of these situations, looking at the context and implications of the SSCS' direct-action conservation mission to stop shark-finning by Costa

Rican fishers off the coast of Guatemala. In this situation the SSCS was operating legally as an agent of the Guatemalan state, and Costa Rican fishers were operating illegally by poaching sharks in Guatemalan waters.

5.1.1: Illegal shark finning in Central America and Sea Shepherd as a quasi-state actor in territorial waters

In 2002, the SSCS undertook a direct-action conservation mission to stop illegal shark-finning by Costa Rican fishers off the coast of Guatemala, known as "Operation Sharkwater." The SSCS was acting at the request of the Guatemalan government, as the nation did not possess the means, neither the military ability nor economic resources, to intercept the Costa Rican vessels on their own. An incident occurred when the SSCS vessel, the *Farley Mowat*, confronted a Costa Rican fishing vessel, the *Varadero*, which was carrying out an illegal shark-finning operation in Guatemalan territorial waters.[337] The *Farley Mowat* was not only carrying Sea Shepherd crew members at the time, but Canadian filmmaker Rob Stewart and his crew as well.[338] They were on board shooting a documentary titled "Sharkwater," entailing that all of the events which transpired between the SSCS and the *Varadero* were documented.[339] The footage shows the SSCS crew spraying those on board the Costa Rican vessel with fire hoses in an attempt to get them to cease their shark-finning activities.[340] This tactic, along with the use of flares, was successful, and the fishers retreated. It was when the *Varadero* tried to make its

[337] David Boddiger. Costa Rica seeks arrest, extradition from US of Sea Shepherd's Paul Watson. The Tico Times News (2013): Web.
[338] Lindsay Fendt. Sea Shepherd's Paul Watson files human rights lawsuit against Costa Rica. *The Tico Times News* (2015): Web.
[339] *Ibid.*
[340] *Ibid.*

escape that it came into contact with the *Farley Mowat*, causing damage to the ship.[341] As such, although Watson was arrested in Costa Rica on eight counts of attempted murder, the charges were ultimately dismissed because the Sharkwater footage showed that the actions taken by the SSCS crew were intended non-violently.[342] The footage showed that neither the crew members nor the fishing vessel suffered any lasting harm, and that the actions of the SSCS were only intended to impede their activities rather than damage the ship.

Though the charges at the time of the incident were dismissed in court, Watson was later arrested in Germany in 2012 on charges of "shipwreck endangerment," issued by the Costa Rican government. The Costa Rican government issued these charges on the basis that the actions taken by the SSCS placed the crew members and vessel at risk, and could have damaged to the vessel to a degree where it may have been shipwrecked.[343] This led to the government issuing a call for Watson's extradition, and they successfully campaigned to have him placed on the INTERPOL Red List.[344] The Costa Rican government made their claims against Watson on the basis that the SSCS was operating illegally in the context of Costa Rican law, while the SSCS maintained that the event took place in Guatemalan waters.[345] If it was the case that the confrontation between the *Farley Mowat* and the *Varadero* took place in either Guatemalan or international waters, Watson and the SSCS would not be subject to Costa Rican laws. The SSCS' stance on this incident is corroborated by the Guatemalan authorities, and the coordinates of the SSCS' action. The Guatemalan government maintains that the SSCS was acting at their request,

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[341] David Boddiger. Costa Rica seeks arrest, extradition from US of Sea Shepherd's Paul Watson. The Tico Times News (2013): Web.
[342] Lindsay Fendt. Sea Shepherd's Paul Watson files human rights lawsuit against Costa Rica. The Tico Times News (2015): Web.
[343] David Boddiger. Costa Rica seeks arrest, extradition from US of Sea Shepherd's Paul Watson. The Tico Times News (2013): Web.
[344] *Ibid.*
[345] *Ibid.*

and that their actions were legal given that the incident took place in EEZ.[346] The Costa Rican government responded with the argument that the SSCS, as a non-state actor, did not have the authority to act.

The Costa Rican government argued that, although shark-finning is illegal in the territorial waters of both Costa Rica and Guatemala, because the SSCS is an NGO, they were acting as vigilantes by confronting a Costa Rican vessel.[347] The SSCS dismissed these claims on the basis that they were acting at the request of the Guatemalan government, entailing that they were acting as legitimate agents of the state.[348] This being the case, it could entail that it was in fact the Costa Rican fishers who were operating illegally. This is where the issue of enforcement of conservation laws becomes relevant: if the SSCS had not intervened and enforced the regional shark finning laws, who would have? While some argue that the Guatemalan navy would have interfered were they to have the means, as a state actor, the political ramifications of interfering with a vessel in the manner which the SSCS did may have been too great. As a non-state actor acting at the request of a government, however, the SSCS falls into a unique category wherein they are not politically accountable in the same way that state may be, yet they are not necessarily vigilantes, either. As mentioned, there is a legal argument that the SSCS operates as protectors of a public good, with the support of a nation-state, this reinforces the legitimacy of their actions.[349] In these contexts, as an NGO, the SSCS operates, as Hammarstedt suggested, as a privateer, under a unique status as an enforcer of marine mammal conservation laws, without the obligations of a nation-state. The case of Operation Sharkwater thereby demonstrates that in

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[346] David Boddiger. Sea Shepherd's Paul Watson back on Interpol website as Costa Rica fugitive. The Tico Times News (2014): Web.
[347] Sea Shepherd Conservation Society News. Captain Paul Watson Files Petition Against Costa Rica For Violating His Rights. Sea Shepherd Conservation Society (2015): Web.
[348] *Ibid.*
[349] Whitney Magnuson. *Marine Conservation Campaigners as Pirates: The Consequences of Sea Shepherd.* Lewis and Clark Law School (2014): 935

cases where nation-states desire to uphold conservation laws, but lack the ability and resources to do so, the SSCS fills a critical gap.

5.1.2: Implications

The Guatemalan navy and the SSCS have been jointly patrolling the Pacific for poachers since the time of the incident with the *Varadero,* but the landscape of Costa Rican shark finning and conservation has changed significantly in recent months. As discussed in Chapter III, shark-finning has become a critical conservation issue internationally. In recent years, the Costa Rican government has come under fire for not doing enough to prevent shark-finning.[350] Costa Rica has historically been one of the leading shark fin exporters in the international market. The trade is largely controlled by the Taiwanese mafia, who have a high stake in shark-fin exports to East Asia.[351] Despite the fact that the practice of shark-finning has been illegal to varying extents for almost two decades, the industry has continued to contribute immensely to the Costa Rican economy.[352] Since the 1990's, the Costa Rican government has attempted to crack down on shark-finning, passing legislation stating that those caught shark-finning could face imprisonment for up to two years. The laws against shark-finning have undergone various changes over the years, with the government strengthening laws again in the early 2000's, although they went largely unenforced.[353]

Prior to the confrontation with the Varadero in 2002, the SSCS had been in talks with the Costa Rican government to sign a joint patrol agreement for the Cocos Island to stop shark

[350] Lindsay Fendt. Costa Rica's shark conservation record is a 'mixed bag,' observers say. The Tico Times News (2016): Web.
[351] David Boddiger. Sharks Pay Price As Fin Trade Prospers. EcoAmericas (2003): 2
[352] *Ibid,* p. 1
[353] Steven Ercolani. Costa Rica Bans Shark-Finning. The Tico Times News (2012): Web.

finning.[354] This agreement did not go forward due to the legal battle between the SSCS and the Costa Rican government. At this point, though, the Costa Rican government has taken down the INTERPOL notice for Watson's arrest, due to a change in government that is more amenable to conservation efforts; the new Minister of the Environment describes Watson as a "hero."[355] This demonstrates the political nature of conservation efforts; Watson was told by the Costa Rican government for years that the conviction could not be taken down, but with the change of government a few months ago, it was removed.[356] It is now within the realm of possibility that the SSCS may reach a similar agreement with Costa Rica to the one the they have with Guatemala in due time. With the legal battle between Costa Rica and Watson resolved, if the government desires to take meaningful steps towards ending shark-finning in their waters, the SSCS and Costa Rica could resume talks to jointly patrol the Cocos Islands as they had in 2002.

Section 5.2: Acting When States Lack Political Will

There have been several instances where the SSCS has acted to enforce conservation laws codified through international treaties and court rulings. This case study will explore one of these situations, looking at the context and implications of the SSCS' long-running direct-action conservation mission to stop illegal whaling by the Japanese. Here the SSCS was operating as an enforcer of international conservation laws where states lacked the will to do so.

[354] *Ibid.*
[355] Sea Shepherd Conservation Society News. Costa Rican Minister of Environment Declares Paul Watson a Hero. Sea Shepherd Conservation Society (2018): Web.
[356] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.

5.2.1: Illegal whaling in the Southern Ocean and Sea Shepherd as an enforcer of international conservation laws

In 2005, the SSCS began what would be one of their most controversial direct-actions, being the anti-whaling campaign in the Southern Ocean targeting Japanese whalers. As discussed, the IWC placed a moratorium on whaling in 1986, with exception granted to those countries, like Japan, that obtained a license for scientific whaling programs. In 1999, the Australian government established a whale sanctuary in their EEZ, entailing that within the sanctuary it would be considered an Australian offence to kill cetaceans, regardless of the purpose of the whaling activity.[357] The government was only guarding three nautical miles of the area, though, so the Japanese engaged in whaling activities in the unpatrolled parts of the Southern Ocean sanctuary.[358] As such, the SSCS took it upon themselves to protect the minke whales within this sanctuary and other parts of the Southern Ocean, launching their vessels from Australia. In these campaigns, the SSCS would attempt to hinder Japanese whaling activities by cutting fishing nets, fouling propellers, and ramming their ships.[359] In 2005, the SSCS successfully "arrested" a Japanese whaling vessel after fouling one of their propellers.[360] The organisation requested assistance from Australia and New Zealand to detain the boat, as both countries were vocal against whaling in the Southern Ocean, and Australia had explicit laws

[357] Department of Environment, Water, Heritage, and the Arts. "Australian Whale Sanctuary." Australian Government (2007): Web
[358] *Ibid.*
[359] Deborah Doby. "Whale Wars: How to End the Violence on the High Seas" in *Journal of Maritime Law and Commerce*. Jefferson Law Book Company (2013): 138
[360] *Ibid,* p. 139

against it.[361] Both refused to aid the SSCS in the detention of the *Kaiko Maru*, though, denouncing the actions of the SSCS as dangerous.[362]

In response to the SSCS' sabotaging of their efforts, Japan strongly condemned their actions, labeling their approaches as "acts of piracy" and "ecoterrorism" under the regulations of the IWC and UNCLOS.[363] With regard to the IWC regulations, at the 66th Annual IWC Meeting, the IWC adopted resolution 2011-2, which noted reports of dangerous actions by the SSCS, and condemned their actions as being "a risk to human life and property in relation to the activities of vessels at sea."[364] The SSCS defended its actions against claims such as these under the UN World Charter for Nature, CITES, and federal Australian case law.[365] As discussed, the World Charter for Nature states that individuals can take it upon themselves to enforce conservation law.[366] CITES also prohibits the commercial trade of whales, and the SSCS argued that Japan's whaling activities were commercial, rather than scientific, in nature, given the presence of whale meat on the market in Japan.[367] Under Australian case law, in 2008 the Federal Court ruled that Japan's whaling within the Southern Ocean sanctuary was illegal, but recognised the limited mechanisms through which to ensure Japan's compliance with the ruling.[368]

Then, in terms of UNCLOS, as alluded to in the previous chapter, there has been scholarly and legal debate over whether the SSCS' actions constitute piracy. As discussed, some scholars make the argument that, according to the definition of piracy under UNCLOS, the SSCS

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[361] *Ibid*, p. 139
[362] *Ibid*, p. 139
[363] *Ibid*, p. 139
[364] *Whaling in the Antarctic* (Australia v Japan: New Zealand intervening), Judgment, I.C.J. Reports (2014): At para 206
[365] The Sea Shepherd Conservation Society. "Laws and Charters" Sea Shepherd Conservation Society: Web.
[366] The United Nations General Assembly. *World Charter for Nature*. The United Nations (1982): Section 21
[367] The Sea Shepherd Conservation Society. "Laws and Charters" Sea Shepherd Conservation Society: Web.
[368] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*. [2008] FCA 3; 165 FCR 510, Federal Court of Australia 3 (2008)

cannot be considered pirates given that they do not act for private ends.[369] Others argue that UNCLOS is too narrow, siding with the decision by the United States Court of Appeal for the Ninth Circuit, that the SSCS' actions should be considered piracy given their aggressive nature.[370] Despite these controversies, the SSCS was undeterred and continued to disrupt Japanese whaling.

As stated, the Japanese claim that their whaling efforts were scientific in nature was questionable, given the commercial sale of whale products in the country. In light of this, Australia took Japan to the ICJ in the *Whaling in the Antarctic* case for noncompliance with Article 8 of the *International Convention for the Regulation of Whaling* created by the IWC out of general concern about declining whale population in 1946.[371] Australia argued that Japan was exploiting the scientific whaling provision, as it was apparent that they were whaling for non-scientific purposes. They argued that Article 8's meaning needed to be determined in an objective context, because what constitutes "scientific research" is not subjective, whereas Japan argued that it should be allowed to determine its own compliance.[372] The ICJ rejected both positions - the restrictive reading of the Article by Australia, and the expansive reading by Japan - holding that provisions must be interpreted with regard for the purpose of the treaty.[373] By interpreting the knowledge provision against the purpose of regulating whaling, then, the Court decided against Japan. The ICJ ruled that Japan's "scientific" whaling program was not scientific in nature, and ordered Japan to recall their fleet. Furthermore, the ruling stated that they did not

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[369] Whitney Magnuson. *Marine Conservation Campaigners as Pirates: The Consequences of Sea Shepherd.* Lewis and Clark Law School (2014): 935
[370] Deborah Doby. "Whale Wars: How to End the Violence on the High Seas" in *Journal of Maritime Law and Commerce*. Jefferson Law Book Company (2013): 138
[371] Jeffrey Dunoff, Steven R Ratner, & David Wippman. "Making Law in a Decentralised System" in *International Law: Norms, Actors, Process: A Problem Oriented Approach.* Aspen Publishers (2015): 66
[372] *Ibid,* p. 66. You should be citing to the primary source. ICJ ruling.
[373] *Ibid,* p. 66

believe it was necessary for Japan to kill whales in order to study them.[374] Although the ICJ sent a clear message that Japan was violating the convention by whaling commercially instead of conducting research, the Japanese continued to whale in the Southern Ocean.[375] This defiance of international law once again lends credibility to a realist perspective of international law because, despite the fact that Japan has been treated as a pariah for these actions, this did not deter them from whaling illegally,

5.2.2: Implications

Despite the fact that Japan was told to halt Antarctic whaling by the ICJ, Japan continued whaling in the Southern Ocean, and did so until very recently.[376] Australia had repeatedly fined Japan for their actions since then, but they have not actively prevented Japan from whaling, even within their EEZ.[377] This further demonstrates that the use of force is often necessary to stop illegal activity; soft measures, such as fines and sanctions, can be easily dismissed. This inaction demonstrates that, even when states have jurisdiction and legal grounds, there is limited will on the part of nation-states to ensure compliance with international conservation laws through forceful means. In light of this reality, the SSCS continued to combat illegal Japanese whaling in the Southern Ocean until recently, citing the ICJ ruling in *Whaling in the Antarctic* to justify their actions from a legal standpoint. As mentioned, the Southern Ocean campaign was put on hold as of last year for technical reasons.[378] The Japanese's utilization of satellite military technology had allowed them to stay steps ahead of the SSCS, enabling them to evade the

[374] *Whaling in the Antarctic* (Australia v Japan: New Zealand intervening), Judgment, I.C.J. Reports (2014): At para 206. OK good, move this up.
[375] Ben Doherty. "Sea Shepherd Says It Will Abandon Pursuit of Japanese Whalers." The Guardian (2017): Web.
[376] *Ibid.*
[377] *Ibid.*
[378] *Ibid.*

organisation's radar.[379] As such, the SSCS believes that pursuing the Japanese in the Southern Ocean under these circumstances would be a wasteful campaign, and thus, the organisation's limited funds can be used more effectively.[380] The SSCS has not given up on this issue, though, as they, alongside the Australian government, are attacking Japan legally through the IWC.[381]

Although the Japanese continued to whale in the Southern Ocean until recently, the SSCS' efforts against their whaling campaign were effective in several ways. In *Whaling in the Antarctic*, the ICJ stated that the sabotage activities of the SSCS contributed to the lower catches of minke whales in certain seasons.[382] In 2011, this was certainly the case, as Japan ended its whale hunt in the Southern Ocean early following confrontations with the SSCS.[383] The SSCS' conservation efforts did not just have the immediate effect of protecting whales in seasons where the SSCS was on the seas, but have had a longer term effect as well. The SSCS' actions have drawn international attention to Japanese whaling, in part through the Animal Planet documentary show "Whale Wars," stigmatizing the Japanese's efforts.[384] Perhaps due to a combination of the public pressure, legal rulings, direct-actions of the SSCS, and expense of using technology to avoid SSCS fleets, Japan announced that it would end its whaling campaign in the Southern Ocean permanently as of December 2018.[385] Japan also announced that it would be pulling out of the IWC, though, and would resume commercial whaling within its EEZ next

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[379] *Ibid.*
[380] Peter Hammarstedt. Director of Ship Operations, Sea Shepherd Conservation Society Global. In discussion with the author, November 2018.
[381] *Ibid.*
[382] *Whaling in the Antarctic* (Australia v Japan: New Zealand intervening), Judgment, I.C.J. Reports (2014): At para 206
[383] Deborah Doby. "Whale Wars: How to End the Violence on the High Seas" in *Journal of Maritime Law and Commerce*. Jefferson Law Book Company (2013): 133
[384] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[385] Justin McCurry and Matthew Weaver. "Japan confirms it will quit IWC to resume commercial whaling" in The Guardian (2018): Web.

season.[386] In doing so Japan will now join Norway and Iceland as a rogue whaling nation in violation of international law.[387] Watson welcomes the fact that Japan will no longer continue whaling under the guise of the law, stating that: "Whaling as a 'legal' industry has ended. All that remains is to mop up the pirates."[388] Thus, while the SSCS accomplished its goal of contributing to the end of whaling in the Southern Ocean sanctuary, they will now be faced with the perhaps even more difficult task of combating whaling within Japan's territorial waters.

Section 5.3: Acting When States Lack Jurisdiction

The final case study that will be explored is one in which the SSCS acted to enforce conservation laws in conjunction with INTERPOL. This case study will explore Operation Icefish, a campaign wherein the SSCS efforts to end illegal toothfish poaching activities were directly supported by an international law enforcement body. In this context the SSCS was operating as an international police force in a context where both states and international organisations lacked the jurisdiction to do so.

5.3.1: Illegal toothfish poaching in the Southern Ocean and Sea Shepherd as an international police force

In 2006, the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR"), the body that regulates fishing in the Southern Ocean, issued a prohibition on the fishing of the Patagonian toothfish, in the Southern Ocean, as the species was becoming

[386] *Ibid.*
[387] *Ibid.*
[388] Sea Shepherd Conservation Society News. "Sea Shepherd Welcomes the end of Whaling in the Southern Ocean." In Sea Shepherd Conservation Society (2018): Web.

endangered due to overfishing.[389] This is because the toothfish, referred to colloquially as the Chilean seabass, is considered a delicacy, and can be as profitable as narcotic and human trafficking.[390] The CCAMLR also banned the use of gillnets in an attempt to combat overfishing and reduce bycatch. Despite these prohibitions, six vessels, known as the *Thunder, Viking, Kunlun, Yongding, Songhua,* and *Perlon*, sometimes referred to as the "Bandit 6," continued to poach toothfish through the use of gillnets.[391] As such, they were blacklisted by the CCAMLR for their illegal, unreported, and undocumented fishing activities. The *Viking* and the *Thunder* were wanted by INTERPOL as well, with Purple Notices out for their arrest and detention.[392] Finding the *Thunder* was of particular concern due to the amount of illegal fishing this vessel was engaged in, and due to its ties to the Spanish mafia.[393]

The Southern Ocean is, with the exception of a few countries' territorial waters and EEZ's, considered the high seas. As discussed, this entails that it is a commons, outside of any particular state's jurisdiction. Although every state has the authority to seize a pirate ship on the high seas, if a ship is seized on suspicion of piracy and it cannot be proven, the state that made the arrest can be liable to the flag state of the vessel.[394] Even though UNCLOS requires that nations hold vessels flying their flags accountable for illegal activities, states rarely patrol international waters in this pursuit.[395] Furthermore, the only way to detain and prosecute a boat for illegal fishing on the high seas is to prove that its owner is from a country signed up to

[389] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase.* Zed Books (2018): 3
[390] *Ibid,* p. 3
[391] *Ibid,* p. 5
[392] *Ibid,* p. 5
[393] *Ibid,* p. 6
[394] Third United Nations Conference on the Law of the Sea. *United Nations Convention on the Law of the Sea.* United Nations (1982): Article 105 & 106
[395] Ian Urbina. "A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes" New York Times (2015): Web.

CCAMLR.[396] As such, illegal fishing boats fly fake flags, because if the ship cannot be tied to a state, prosecution of their activities is almost impossible.[397] These factors significantly limit the ability of a state to lawfully detain a vessel on the high seas, creating an easily exploited loophole in international law. Despite the presence of international laws governing fishing in the Southern Ocean, then, the reality is that the law is vague and easily manipulated, making state enforcement is difficult and underprioritised.[398]

The *Thunder* utilised the tactics discussed, changing its name and flag constantly, docking in countries that would turn a blind eye to their presence, such as North Korea and Sierra Leone, and using false registries and documentation.[399] The *Thunder* thereby operated in what Hammarstedt refers to as the "Shadowlands," making it difficult for states and international organisations to stop them.[400] It is for this reason that INTERPOL had been unsuccessful in catching the *Thunder*, despite monitoring the various port authorities in the Southern Ocean for ten years.[401] The SSCS' status as an NGO is in part why INTERPOL enlisted their help in pursuing the *Thunder*. First, the organisation could provide real time intel to law enforcement, which states were unwilling to do.[402] Second, as mentioned, SSCS crew members could issue a citizen's arrest if need be, which states have immense difficulty doing for the reasons discussed.[403] In this way, as an NGO, the SSCS is not politically or legally bound to the extent that a state is, yet they are still acting with legal authority. As was the case in Operation

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[396] *Ibid.*
[397] *Ibid.*
[398] *Ibid.*
[399] *Ibid.*
[400] Peter Hammarstedt. Director of Ship Operations, Sea Shepherd Conservation Society Global. In discussion with the author, November 2018.
[401] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase.* Zed Books (2018): 26
[402] Ian Urbina. "A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes" New York Times (2015): Web.
[403] Roberta M. Fay. "Citizen's Arrest: International Environmental Law and Global Climate Change" in *Glendale Law Review.* Glendale University College of Law (1995): 73

Sharkwater, the SSCS was exceptionally placed to enforce international conservation laws in this context, as evidenced by their success in doing so.

The SSCS vessels the *Bob Barker* and *Sam Simon* departed Australia and New Zealand in pursuit of the *Thunder* at the beginning of December, 2014.[404] A couple of weeks later, on December 17th, the *Bob Barker* intercepted the *Thunder* for the first time in Antarctica; upon encountering the SSCS, the vessel fled, leaving 72 kilometers of illegal gillnet behind, as mentioned in the previous chapter.[405] While retrieving what the *Thunder* left behind, the *Sam Simon* returned 1400 fish to the ocean.[406] A couple of months later, the SSCS handed over evidence of the *Thunder*'s illegal activities in Mauritius.[407] The SSCS continued to chase the *Thunder* until, on April 6th, 2015, off the coast of São Tomé, the *Thunder* began to sink.[408] The SSCS was not responsible for sinking the *Thunder*, though; there is speculation that the crew of the *Thunder*, realizing they were going to be caught, did so by their own hand in order to destroy evidence.[409] As they sunk, the *Thunder* issued a distress signal, and the SSCS rescued the crew and turned them into police custody in São Tomé.[410] With that, the one hundred and ten day pursuit, the longest in maritime history, came to an end, with the SSCS accomplishing in just over three months what INTERPOL could not in a decade.

[404] Ian Urbina. "A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes" New York Times (2015): Web.
[405] *Ibid.*
[406] *Ibid.*
[407] *Ibid.*
[408] *Ibid.*
[409] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase.* Zed Books (2018): 289
[410] Ian Urbina. "A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes" New York Times (2015): Web.

Section 5.2.3: Implications

Following the detention of the crew of the *Thunder*, the SSCS turned over all remaining evidence to the authorities at INTERPOL, including the confiscated gillnet. With this evidence, the Supreme Court of São Tomé and Principe found the Captain, Chief Engineer, and Chief Mechanic of the *Thunder* guilty of several charges, including forgery, pollution, damage to the environment, and recklessness.[411] They were each sentenced to between thirty-two to thirty-six months in jail, and collectively fined fifteen-million Euros.[412] As for the other vessels, the *Viking* was sunk one year later due to SSCS efforts, the *Perlon* was sold for scrap metal, and the *Kunlun, Songhua,* and *Yongding* were detained by authorities, thus entailing the end of the Bandit 6.[413]

The SSCS' success in catching the *Thunder* has entailed that almost all illegal toothfish poaching has ceased in the Southern Ocean, because new vessels are deterred by the real risk of being caught. In this way, the SSCS, an organisation criticised for subverting international law, has, ironically, legitimised it by forcing it to be taken seriously. This demonstrates the importance of a robust enforcement mechanism to the success of international conservation laws. Compliance, particularly in the context of the oceanic commons, will only occur when there is a real threat of consequence, states are unwilling and unable to ensure that there are ramifications for illegal actions on the high seas. This reality was clearly evidenced by the fact that, during the SSCS' pursuit of the *Thunder*, in February of 2015, Australian authorities boarded the *Kunlun*, but did not have the jurisdiction to detain it.[414] This was a pirate vessel they had been trying to

[411] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase.* Zed Books (2018): 290
[412] *Ibid*, p. 290
[413] *Ibid*, p. 364
[414]

stop for two decades, but they were forced to let the vessel sail on because the ship had not been fishing in Australian waters, nor did it have Australian citizens on board.[415] The SSCS' status as an NGO should be thought of as a necessary strength in the context of enforcing law on the high seas, then, as they are not bound by the same rules and accountability that a state is, entailing that they can be more effective and efficient in protecting the oceans.

The SSCS' efficacy in catching the *Thunder* has at once conferred their legitimacy to the international community, and demonstrated that international law can have teeth. Hammarstedt describes the success of Operation Icefish as a turning point for the organisation.[416] Although the SSCS' legal authority is an ongoing source of debate among legal scholars, law enforcement officials feel differently about the organisation due to their efficacy. "They're maritime skip tracers…and they're getting results," said one INTERPOL official, for example.[417] The SSCS' handling of Operation Icefish, and the way in which they turned evidence over to authorities, was lauded not only by INTERPOL, but also by Australian, New Zealander, and Norwegian authorities.[418] This constitutes quite a shift, given Australia and New Zealand's prior condemnation of the SSCS for their efforts in stopping Japanese whaling, and in light of the fact that Norway is one of three countries still engaged in whaling today.[419] As a result of this shift, as discussed in the previous chapter, the SSCS is now invited to international conferences on the subject of whaling, thus being offered seat at the table.[420] The same organizations that denigrated the SSCS as pirates and ecoterrorists now consider them critical to catching poachers and pirates,

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[415] *Ibid,* p.152
[416] Peter Hammarstedt. Director of Ship Operations, Sea Shepherd Conservation Society Global. In discussion with the author, November 2018.
[417] Ian Urbina. "A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes" New York Times (2015): Web.
[418] Peter Hammarstedt. Director of Ship Operations, Sea Shepherd Conservation Society Global. In discussion with the author, November 2018.
[419] *Ibid.*
[420] Eskil Engdal and Kjetil Sæter. *Catching Thunder: The Story of the World's Longest Sea Chase.* Zed Books (2018): 362

demonstrating, again, that the SSCS has successfully forced themselves within to the policy network.[421] For this reason, the SSCS has joked that their efforts are effective because of, rather than despite, their pirate flag; "It takes a pirate to catch a pirate."[422] In this way, the way in which governments, international organisations, and the commercial fishing industry is reacting with the SSCS is changing. The organisation's actions seem to have spoken for themselves.

[421] *Ibid*, p. 362
[422] Ian Urbina. "A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes" New York Times (2015): Web.

Chapter VI
Conclusion

Section 6.1: Summary

6.1.1: Chapter summary

In order to provide context for this discussion on the role of direct-action in enforcing international marine wildlife conservation law, the first substantive chapter of this thesis grappled with the framework of international law generally. This chapter provided the background for the rest of the discussion by outlining the sources, participants, and challenges of public international law. There are numerous challenges associated with making and enforcing law in a decentralised international system. There are two main challenges that international law faces today, being: fragmentation and regime interaction, and the puzzle of compliance and enforcement. Each of these challenges arise, generally speaking, from the tension between the traditional world order which placed great emphasis on state sovereignty, and the modern reality of increased global interdependence which requires international cooperation to solve transnational problems. In general, there is a tendency towards conceptualising international relations in broad strokes, as an all or nothing game. Either attempts at developing an international order are regarded as utterly futile, as held by some realists, or international law is hailed as the only way to bring cohesiveness to a fragmented world, as held by some institutionalists. The answer, as with most complex dilemmas, is somewhere in between. Although international law succeeds in producing normative standards for international conduct, the realist perspective of international law was demonstrated throughout this thesis, showing the necessity of the use of force to ensure compliance in several contexts. This chapter laid the

foundation to discuss the necessity of the SSCS' realist approach, and their shift towards institutionalist strategies, explored throughout the discussion.

With the public international law foundations laid out, the second substantive chapter of this thesis turned to the more specific discussion of international environmental laws through an exploration of the conservation imperative, the evolution of relevant legal principles and treaties, and a discussion of the challenges specific to international conservation law. It was shown that the destruction of the environment has resulted in a growing crisis of species endangerment and biodiversity loss, one which will continue to worsen unless there is a fundamental shift in ethics, and thus, policy. In order to sufficiently address the issue of endangered species and biodiversity protection both ethically and ecologically, an ecocentric ethical value system, which informs the work of the SSCS, should play a greater role in government decision making. It was shown that, when it comes to laws surrounding the protection of marine wildlife, oftentimes the domestic policies of individual nation-states clash, and because of jurisdictional issues, this prevents enforcement of protection laws across borders. Furthermore, international laws established through treaties remain unenforced due to the absence of a formal compliance procedure. Therefore, the biggest hurdle to overcome in enforcing marine wildlife protection laws on an international scale is that of political will, as governments are currently failing to take meaningful action on these issues for both economic and political reasons. Without an effective enforcement mechanism for such laws, this leaves approaches to conservation disparate and therefore ineffective. It was thereby shown that by and large, there is a failure on the part of individual nation-states to both comply with and enforce existing marine protection laws given jurisdictional, legal, political, and economic factors. For these reasons, it was shown that the nation-state should not be the sole actor in international environmental law.

Having provided a discussion of the international conservation law regime, the third substantive chapter of this thesis turned to the SSCS specifically. This chapter explored the nature of the SSCS by situating their approach to advocacy in the context of other forms of environmentalism, then discussing their structure, ideology, tactics, and approaches, and finally, their appeals to international law on several bases. Herein it was shown that what the SSCS represents can be understood in formal conservation as well as legal terms. Although the SSCS flies the pirate flag, their acts do not fall under the scope of piracy as defined by UNCLOS, because they are not acting for private ends. Furthermore, the perception of the SSCS as a vigilante group is becoming less relevant because of the changing nature of the work the SSCS does. The SSCS was perceived as a vigilante group when pirate whaling was at an all-time high, but today, there are only three nations engaging in such whaling activities. As such, there is not as much of a need for the SSCS to work in the same way, so the organisation is shifting to an approach which utilises governmental tools in combination with ongoing direct-action efforts to end the illegal fishing that continues. In this way, the SSCS remains a direct-action, realist organisation in certain contexts, but they also work within institutionalist frameworks in others for strategic reasons.

The fourth and final substantive chapter of this thesis explored the role and authority of the SSCS through three case studies, each serving to highlight a distinct context in which the SSCS filled a gap in international law enforcement. In doing so, this chapter highlighted the limitations of the state in enforcing international marine wildlife conservation laws, due to issues of means, political will, and jurisdiction. Through a discussion of Operation Sharkwater in Guatemala, the SSCS' effort to sabotage Japanese whaling in the Southern Ocean Sanctuary, and the recent effort of Operation Icefish in the Southern Ocean, it was shown that the SSCS

harnesses legal authority to act where states are limited, and that they are effective in doing so. The final case study in particular demonstrates that sometimes it takes lawlessness to arrest lawlessness, and that in doing so, a "lawless" actor can confer legitimacy to international law and cause it to be taken seriously. In this way, this chapter demonstrated that the SSCS' efficacy confers their legitimacy, not only to themselves as an organisation, but to both NGOs and international law generally. As a result, the SSCS is now considered a critical stakeholder, the result of which is that now, those who take issue with the SSCS are most often the ones acting illegally and against the public good.

6.1.2: Summary of conclusions

Although the trident and shepherd staff of the SSCS Jolly Roger flag together represent aggressive non-violence, there has been a greater focus on the trident, representing the SSCS' use of force, than on the shepherd staff, which represents protection. The SSCS of today is equally focused on the shepherd's staff as well as the trident, given their evolution towards a dual direct-action and direct-intervention approach. The SSCS began as a direct-action organisation, dedicated to enforcing international conservation law by disrupting the illegal actions of poachers through the ramming and sinking of their ships. Even when the SSCS undertook such actions more regularly, branding them as a terrorist or pirate organisation was an inaccurate attempt to delegitimise and disparage them by their detractors. Over time, though, this label has become more untenable, as the SSCS has evolved to work with governments where possible to achieve their goals. The organisation operates on the basis that not all laws are comprehensive and sustainable, but where they are, they will work within structures to enforce

them, and where they are not, they will use force to strengthen and change them.[423] In this way, the SSCS is trying to occupy both a realist and institutionalist sphere of international law. Part of the organisation is trying to normalise itself in order to be more effective, and the other remains radical or direct in their approach in contexts where the use of force is the only tactic that illegal fishers will respond to.

In taking a dual approach to enforcing international marine wildlife conservation law, the SSCS has disrupted the policy network even more than they were capable of when utilising direct-action tactics alone. Such a move is critical in the current landscape, as the efficacy of international environmental law has at once become more important, and more difficult ensure. While the destruction of the natural environment is increasing, the will and authority of states to act to protect it has decreased.[424] The nation-state has consistently failed to respond to the extinction crisis and institutionalise conservation, and states continue to displace responsibility for environmental issues in favour of short-term economic priorities. In this way, it is counterintuitive that solutions to the problem of wildlife extinction are state-centric, when states are so ill-equipped to resolve them, and the nature of environmental problems is such that they are global.[425] NGOs exist because of this negative reality; their existence is a response to government failure. This discussion ultimately demonstrates that nation-states are necessarily limited in their ability to comply with and enforce international law in certain spheres, whereas the SSCS, as an NGO utilising direct-action and direct-intervention approaches, has conferred legitimacy to both itself and the international conservation law regime by effectively enforcing it.

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[423] Brigitte Breau. Chapter Coordinator, Sea Shepherd Conservation Society Toronto Chapter. In discussion with the author, November 2018.
[424] James Gustave Speth. *The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability.* Yale UP (2008): 99
[425] Colin Hay. "Environmental Security and State Legitimacy" in *Is Capitalism Sustainable? Political Economy and the Politics of Ecology*. Guilford Press (1994): 228

As an NGO that grounds their actions in international law, the SSCS falls into a unique category wherein they are not politically accountable in the same way that state may be, yet they are not necessarily vigilantes, either. The SSCS has been successful where no other actor has, in at once strengthening marine wildlife protection, the role of NGOs, and the international law regime. For each these reasons, the SSCS' Jolly Roger flag is the only one worth flying.

Section 6.2: Remaining Questions

The issue at the heart of this discussion is how best to ensure that the normative standards of international law are complied with, and who should enforce them. The curious thing about international law is that it is regarded as illegitimate by so many, even by many of its scholars, but despite these criticisms, both state and non-state actors appeal to it as a source of authority for justifying their actions, the SSCS included. This raises the question of what the role of international law ought to be conceived as in the modern context. This is a significant question which international law scholars have grappled with since its inception, and thus cannot be resolved, or even covered fully, in this discussion. This question gives rise to the additional quandary of whether the responsibility of environmental protection should be conceived of as a shared one. As stated, the SSCS has cited Article 21 of the UN World Charter for Nature to justify their actions, insofar as the Charter grants authority to an individual to implement conservation laws. This justification has been dismissed by some legal scholars, but there is an inherent logic to this provision of the Charter, particularly in regard to the marine commons: if the seas belong to all, does that not entail that the responsibility to preserve it falls on all in turn? Perhaps there is truth in Watson's words, that, "while you can stop an individual, and you can

stop a country, you cannot stop a movement."[426] This justification, coupled with the failure of the nation-state to institutionalise conservation, entails that environmental protection must necessarily be a shared and collective pursuit. The question that remains is how this goal could be feasibly achieved in a decentralised, fragmented global system.

Section 6.3: Final Thoughts

One of the reasons why I chose to explore this topic was because I wanted to situate the work that the SSCS does within the international marine wildlife conservation law framework that the organisation often appeals to. In turn, this would confer the legitimacy to their actions that are so often undermined by their detractors on a legal basis, and demonstrate that the SSCS is critical in ensuring that international law actually has clout. Interestingly, while Breau, Hammarstedt, and Pruett seemed concerned with this issue of whether the SSCS was perceived as legally legitimate, Watson did not care much about how the public perceived them.[427] Whether the SSCS was labelled as "pirates," "vigilantes," and "terrorists," justified as "privateers," "quasi-state actors," and "police forces," or revered as "Neptune's navy," "earth defenders," or "heroes," it did not matter to him. His conviction for this cause is based not on popularity, or perceived legal legitimacy, but rather, results. And regardless of how one feels about whether the SSCS has technical legal authority to act as an enforcer of conservation laws in certain contexts, their efficacy is undeniable. Irrespective of whether the law was explicitly on their side, the potential for consequences, or enormity of the environmental crisis, the SSCS has

[426] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[427] *Ibid.*

carried out their work unapologetically and resolutely, achieving what governments and institutions have failed to over decades.

The SSCS never needed permission to act, but through the creative use of international law, and effectively achieving their goals, they got it. As shown by Operation Icefish, we are living in a world where those labeled as vigilantes are chasing pirates, and even law enforcement agencies approve, because governments are not able to cooperate to enforce the laws that they themselves have created.[428] In this way, strangely, the SSCS' pirate-flag has become a symbol of international law enforcement in many contexts. Through their direct-actions, the SSCS has legitimised international law by actually enforcing it, entailing that in certain contexts, it now carries a degree of weight. Through their cooperative agreements with certain states, the organisation is evolving and adapting to be more broadly effective and have lasting impact, while remaining direct in their approach. The evolution of the SSCS in this direction, from this author's perspective, does not indicate that they are compromising their ideologies or beliefs; rather, it is a tactical choice that is very much in line with their values. In this way, the organisation remains dedicated to effectively enforcing marine wildlife conservation laws in the same way they always have: by any means necessary.

Interestingly, the SSCS does not believe that it *should* be the role of volunteers and NGOs to enforce international law. Breau told me that she considers it a shame that an organisation like the SSCS is necessary to enforce marine conservation laws, but recognises that this the reality, and as such they have a responsibility to protect marine wildlife in whatever ways they can as a single organisation.[429] As demonstrated by this discussion, their impact

[428] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[429] Brigitte Breau. Chapter Coordinator, Sea Shepherd Conservation Society Toronto Chapter. In discussion with the author, November 2018.

should not be understated. In the context of Japanese whaling, the SSCS successfully protected thousands of whales during the years they were actively combating illegal whaling in the Southern Ocean, contributing to the ultimate end of Japan's whaling activities in the region. That being said, Watson does not seem to harbour any illusions about the dire state of marine wildlife conservation, and the sixth mass extinction we are facing. He recognises the limited ability of the SSCS, as one organisation, to affect change, when nation-states continue to disregard international law, and most of the world remains passive.[430] But the SSCS does not exist because they think their efforts alone can rescue and redeem a world in crisis. Watson explained to me that, while working as a medic at Wounded Knee in 1977, he learned an important lesson from his mentor Russel Means, an Oglala Lakota activist and actor.[431] Watson, confused as to why their side was keeping up the fight in the face of imminent defeat, began to lose his resolve, until Means explained to him the real point of it all:

> *We are not concerned about winning or losing; the odds are against us, but we are here because it's the right thing to do, and this is right place and right time to do it. For that reason, what we do will define the future."*[432]

The Sea Shepherd Conservation Society has steadfastly embraced and implemented this way of thinking in their work to protect what marine wildlife remains in the oceans. It is this author's hope that they will continue to do so, proudly flying their pirate flag, come hell or high water.

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[430] Paul Watson. Founder, Sea Shepherd Conservation Society. In discussion with the author, November 2018.
[431] *Ibid.*
[432] *Ibid.*

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