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WORLD MARITIME UNIVERSITY
Malmö, Sweden



An analysis of protests carried out by ships (PCS)
Should PCS be regulated by a new IMO instrument?

By
Waldemar A. Wichmann
Argentina

A dissertation submitted to the World Maritime University in partial fulfilment of the
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In
MARITIME AFFAIRS

MARITIME SAFETY & ENVIRONMENTAL ADMINISTRATION

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DECLARATION

I certify that all material in this dissertation that is not my own has been identify, and that no material is included for which a degree has previously been conferred on me.

The content of this dissertation reflects my own personal views, and are not necessarily endorsed by the University.

.....

.....

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*I keep six honest serving-men
(They taught me all I knew);
their names are What and Why and When
and How and Where and Who.
Rudyard Kipling*

ABSTRACT

This paper attempts to analyze protests¹ carried out by ships as acts of objection in the exercise of the human right to protest. The purpose of the analysis is to find out whether protests carried out by ships have recognition and legitimation in the maritime industry. Also, considering the one proposal to regulate this maritime activity at the International Maritime Organization (IMO), the analysis attempts to find out whether a new maritime instrument such a Code of Conduct is necessary.

This academic exercise takes the reader from the analysis of the reasons why people protest and the right to protest as a human right and its recognition by the international law in general and the IMO in particular to the analysis of the reasons why ships are used to protest, the actors in protests and the most important protest groups currently owning and operating protest ships.

In addition, a few cases of protest carried out by ships in maritime zones defined according to the United Nations Convention on the Law of the Sea (UNCLOS), in which the law was breached are analyzed, with the objective to find out what the law of application was and how it was enforced.

The conclusions drawn are based on the analytical evidence that protests carried out by ships are legitimate and recognized internationally but hardly accepted by the maritime community due to a distorted perception of the right to protest and due to the weak implementation and enforcement of maritime law in particular on the high seas. Therefore, a Code of Conduct telling protesters not to break the law seems redundant.

However, the analysis concludes that risk assessments should be compulsory, not only for protest ships but also for protest targets when protest activities are imminent, especially for direct actions protests; that protest target should learn how to deal with protests through proper guidelines and, finally, that maritime safety and pollution

¹ "Protest" as general for demonstrations, direct actions, confrontations, et cetera. Do not confuse with "sea protest".

prevention during protests carried out by ships could be improved making compulsory for non-commercial vessels the application of the International Convention for the Safety of Life at Sea (SOLAS), 1974 as amended, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) as amended, the Maritime Labour Convention (MLC), 2006 and the International Convention on Load Lines (LL), 1966.

Further research might explore how to develop guidelines for risk assessments to deal with protests carried out by ships and address the security issue during protests on the high seas.-

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ABBREVIATIONS

AMSA	Australian Maritime safety Authority
CHS	Geneva Convention on the High Seas, 1958
COLREG	Convention on the International Regulations for Preventing Collisions at Sea, 1972
DNV	Det Norske Veritas
ECHR	European Convention on Human Rights
EEZ	Exclusive Economic Zone
FGM	Free Gaza Movement
FSI	Flag State Implementation
GL	Germanischer Lloyds
IBAMA	Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis - Brazilian Institute of Environment and Renewable Natural Resources
ICCPR	International Covenant on Civil and Political Rights, 1966
IMO	International Maritime Organization
ISM	International Safety Management
ITF	International Transport Workers' Federation
IWC	International Whaling Commission
LC	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972
LL	International Convention on Load Lines, 1966
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973
MLC	Maritime Labour Convention, 2006
MSC	Maritime Safety Committee
PNTL	Pacific Nuclear Transport Limited
PCS	Protests carried out by ships
SAR	Search and rescue

SGC	Stichting Greenpeace Council
SOLAS	International Convention for the Safety of Life at Sea, 1974, and amendments
SSCS	Sea Shepherd Conservation Society
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 and amendments
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988
UDHR	Universal Declaration of Human Rights, 1948
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
USA	United States of America
VCPA	Vienna Convention and Programme Action
VIMSAS	Voluntary IMO Member State Audit Scheme

1 Introduction

This paper is an attempt to make an analysis of protests² carried out by ships (PCS). Alternatively, the research seeks to find out whether or not PCS should be regulated or whether or not the existing international law is sufficient to ensure the safety of the crew, passengers and activists of protest and target ships and the protection and pollution prevention of the marine environment.

The idea of analyzing this topic is propelled by academic curiosity aroused by the "Proposal for Development of a Code of Conduct for Assurance of the Safety of Crew and Maritime Navigation during Demonstrations/Campaigns Against Ships on The High Seas"³ in 2006, the draft⁴ of such proposed code in 2008 and the International Maritime Organization's (IMO) Maritime Safety Committee's resolution on "Assuring Safety during Demonstrations, Protest or Confrontations on the High Seas"⁵. So far, there are no further developments for the adoption of the proposed code.

In addition, there is a need to discuss if PCS are indeed part of the maritime business, and not only a nuisance to commercial enterprises.

In the new global economy, protesting has become a central issue for pressing social matters in which human rights and environmental campaigners have become tactically more aggressive. This tactical adaptation has been transferred to PCS in which maritime activists have become more daring and willing to take more risks, which is an attitude that can be detrimental to maritime safety, security and environmental protection.

Only few writers have been able to draw on any structured research into the legitimization of PCS, most of which are reactive papers analyzing the lawfulness of

² "Protest" as general for demonstrations, direct actions, confrontations, et cetera. Do not confuse with "sea protest".

³ Submitted by Japan to the IMO Maritime Safety Committee, MSC 82/21/8

⁴ Submitted by Japan to the IMO Sub-committee on Safety of Navigation, NAV 54/10/1

⁵ MSC.303(87), adopted 17 May 2010

PCS, analysis which were made after sonorous "direct action" protests such as the anti-whaling in the Southern Oceans or the anti-dumping in the North Atlantic.

In contrast, it seems that little has been done to analyze PCS as part of the maritime routine and reality. It could be assumed that there are more PCS happening around the world than major oil spills, so there is a deficit in understanding them and probably in accepting them as part of the maritime community, despite the fact that, for instance, the protest organization Greenpeace is a non-governmental organization with consultative status with the IMO.

When questioning whether or not a new IMO instrument is needed to regulate PCS, it is important to consider whether or not PCS are legitimate. Legitimation is mostly based on values, philosophy and practices, not necessarily implicating only subordination to current regulations. This value-based legitimation may give room for advocacy creative measures to improve or even change legislation. While lobbying, a legitimate industry practice unregulated in many countries seems to be a two-edge sword, PCS appear to be clear-cut, unambiguous stands.

Most maritime experts agree that the adoption of maritime regulations are usually reactive, because very often they come into force after accident occurrences, for instance the International Convention for the Safety of Life at Sea (SOLAS) after the *Titanic* tragedy⁶ or the International Convention for the Prevention of Pollution from Ships, (MARPOL), after the *Torrey Canyon* disaster⁷.

Although PCS might have been judged subversive, in particular under the perception of the targets of protests, they have had a proactive influence in maritime legislation or at least in its implementation and enforcement. For instance, starting in the early 1970s and over the following three decades, PCS targeted ships dumping radioactive

⁶ A brief history of SOLAs can be found at the IMO web site, [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx)

⁷ The background of MARPOL can be found at the IMO website, <http://www.imo.org/OurWork/Environment/PollutionPrevention/OilPollution/Pages/Background.aspx#1>

wastes at sea which forced the revision of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), 1972, and the adoption of its 1996 Protocol⁸. One of the most sonorous protest on this issue is the confrontation between the Greenpeace ship *Rainbow Warrior* and the British ship *Gem* chartered by the United Kingdom Atomic Energy Authority to dump radioactive wastes at sea⁹.

The above protest was carried out on the high seas. Therefore, one of the main factors to be considered for a proper analysis of PCS is the location of the protest. In other words, a protest on the high seas represents not only greater risks but a different legal jurisdiction from those done in the territorial or internal waters where the protest target could not only be another ship but also a port facility or nuclear plant for instance.

Finally, the analysis cannot resist the exclusion of at least the examination of cases in which relevant international laws and customs are applied; however, it is beyond the scope of this study to do an exhaustive legal examination. The analysis of commercial obligations is excluded since PCS are not a business enterprise although protest ships most of the time interfere with commercial activities.

⁸ Check a good review written by Rémi Parmentier, “Greenpeace and the Dumping of Waste at Sea: A Case of Non-State Actors' Intervention in International Affairs.” *International Negotiation. Volume 4. Issue 3* (1999): 435-457.

⁹ Read account in Glen Plant, “Civilian Protest Vessels and the Law of the Sea.” *Netherlands Yearbook of International Law. Volume XIV*, (1983): 155.

1.1 Methodology

This paper is a qualitative research.

In order to better understand the research topic it was vital to break it up in smaller fragments asking direct questions. Consequently, the *Five Ws* technique was chosen because each question requires a factual answer; therefore, it is harder to fall in the temptation to give opinion. The *Five Ws* technique is used in qualitative research to find factual answers to the following questions: "what, why, who, where and why", it also may include "how". This technique is applied to every topic through all the chapters. For instance, *what is a protest, who does protest, why people protest, how do people protest, where are protests carried out?* The questions are not necessarily always in this sequence and they are not written in the text.

However, all analysis cannot resist subjectivity and personal conclusions.

This paper starts analyzing the reasons why people protest and the fundamental human rights of expression, opinion and association in an attempt to uncover whether the right of protest is legitimate and whether it is recognized not only by the current international and national legal systems in general but also by the International Maritime Organization (IMO) in particular.

The analysis cannot overlook the comparison and contrasting between piracy and protests carried out by ship on the high seas. However, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), 1988, and protocol, has been left out of the analysis because it requires a larger and more exhaustive legal study, perhaps a topic for further research and individual paper.

In chapter 3, there is an elaborated analysis of the reason to use ships for protest and the actors involved in a maritime protest.

In chapter 4, there is a description of the most distinguished protest organizations: Greenpeace, the Sea Shepherd Conservation Society (SSCS) and the Free Gaza Movement (FGM).

Finally, the analysis of protest cases, in which the international or domestic law was applied, is based in three basic questions: What happened? Why did it happen? What is the applicable law? The answers to these questions are followed by brief conclusions.

In the final chapter, the conclusions and recommendations drawn from the analysis are presented.

With the aim to reach a wider audience the writing style is as simple as possible and straight to the point.

For easier allusion and with no intention to discriminate, the Master is referred to as "him" for practical reasons. Although seafaring has been a predominant male activity females are also now involved in it from the lowest to the highest ranks.

For references and citation the chosen style is *Chicago Manual of Style*.

1.2 Literature review

The literature review sought three main purposes: seeking, gathering and critically value relevant information.

The analysis is based on the review of significant literature, articles in periodicals and journals, online sources, international instruments, experts' opinions and court decisions, some of which are primary sources and others secondary ones. In addition, video clips are used as image evidence and a source of illustration.

The data collection was primarily focused on PCS cases and scholarship but it seems that the dissertation topic has not been widely addressed; therefore, availability of literature is scarce; only few experts have analyzed the lawfulness of "direct actions" by ships.

This situation allowed identifying a gap in the literature.

The value of the gathered data is mostly supported by the author's experience and knowledge based on more than 10 years working on protest ships and 6 years of commanding them around the world in a variety of campaigns.

In order to follow the chosen logical path, from the general to the particular, it is imperative to start with the analysis of the reasons for people to protest and their right to do it.

2 Why do people protest?

According to the online Oxford dictionary a protest is,

"A statement or action expressing disapproval of or objection to something."

People seem to protest when they reach an intolerable level of injustice. In this context, protesting is a kind of confrontation with the aim to object. A person or a group of individuals react, sooner or later, towards an injustice depending on the degree of tolerance set, most likely, by cultural and social moral values.

The injustice, legal or illegal, seems to break the balance of fairness tilting the scale towards the "wrong" where burdens surpass rewards undeservedly. Therefore, there is a reaction towards the restitution of balance which might vary in place and time due to the relative nature of morality. For instance, slavery was legal not so long ago as well as nuclear waste dumping at sea; occupational sexism is currently not illegal

in many countries as well as child labour, however all of them equally morally unjust and matter of objection.

Perhaps the most important ingredient to spark objection is awareness. As long as people are unaware of the injustice holding over them, they would not move out from their comfort zone to become confrontational, to fight back. Furthermore, if the injustice is accepted for social, cultural or religious reasons people would not protest, they would subordinate to the injustice perhaps by the promise of future rewards or convenient trade-offs; however, subordination seems to have a limit. Still the question is: can awareness be manipulated?

Some contemporary unfair situations that people currently protest about are lack of equal opportunities, gender discrimination, restriction of freedoms, and restriction of rights. For instance, there is a systematic violation by industrial malpractices to "the right to a safe, healthy and ecologically-balanced environment" according to the United Nations Environment Programme (UNEP), part of the so-called Third Generation of Human Rights¹⁰.

A recent interesting example of protest is the Occupy Movement¹¹, started with the "occupation" of Wall Street seeking for social justice and equality, inspired by the Arab Spring¹² in 2010. The movement expanded first in the United States of America and later over hundreds of cities around the world.

¹⁰ See interesting argument by Jennifer A. Downs, "A Healthy and Ecologically Balanced Environment: an Argument for a Third Generation Right", *Duke Journal of Comparative & International Law* 3:351,(1993): 351-385

¹¹ According to its website, "The #occupy movement is an international movement driven by individuals like you. All of us have many different backgrounds and political beliefs but feel that, since we can no longer trust our elected officials to represent anyone other than their wealthiest donors, we need real people to create real change from the bottom up. Organized in over 100 cities in the United States, #occupy aims to fight back against the system that has allowed the rich to get richer and the poor to get poorer. We no longer want the wealthiest to hold all the power, to write the rules governing an unbalanced and inequitable global economy, and thus foreclosing on our future", "Background and timeline", Occupy Movement, <http://www.occupytogether.org/aboutoccupy/> (accessed 12 September 2012)

¹² See Garry Blight, Sheila Pulham, and Paul Torpey, "Arab spring: an interactive timeline of Middle East protests", [guardian.co.uk](http://www.guardian.co.uk), 5 January 2012, <http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline>

Of course, a protest is a very conspicuous expression of objection, generally public, but it might not be the first action carried out by the objector; it could be the last resource due to perhaps fear to scrutiny and consequently retaliation. The exposition nature of a protest generates a great risk to the protester who becomes a threat to the interests of those who are the protest target. It is therefore likely that the objector would be subjected to reprisal. As a result, the reaction to a protest is often disproportionate especially if the protest is unlawfully done and the target of the protest is powerful.

In contrast, protests can also be disproportionate. A recent controversial case is the Muslim protest over an anti-Islam movie, a reaction which has been argued as out of proportions and contradictory to the right and freedom of expression.

Protests seem to be a natural human behaviour so the next research question is whether they are legitimate or not. Consequently, an analysis of human rights from the protest perspective is a must.

2.1 Is the right to protest a recognized human right?

The United Nations adopted in 1948 the non-binding Universal Declaration of Human Rights (UDHR), soon after World War II, especially in consideration to the Nazi's genocide. Its preamble and 30 articles do not mention specifically the right to protest. However Article 19 states,

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

In addition, Article 20 of the declaration says,

(1) Everyone has the right to freedom of peaceful assembly and association.

Within this context the right to protest seems to be implied in the rights to opinion, expression, assembly and association.

In 1966 the United Nations (UN) adopted the International Covenant on Civil and Political Rights (ICCPR), an international treaty rooted in the UDHR. Articles 19, 20 and 22 of the ICCPR are in accordance with the freedoms stated in the Articles 19 and 20 of the UDHR but recognize that those freedoms are not absolute carrying certain limitations and restrictions such as national security and public order among others.

Following the political changes of the post World War II, the Council of Europe was created in 1949, which in 1950 adopted the European Convention on Human Rights (ECHR)¹³. The Freedom of Expression is stated in Article 10 emphasizing the inherent duties and responsibilities attached to it in paragraph 2,

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In Article 11 paragraph 2, Freedom of Assembly and Association, restrictions prescribed by law are also stressed,

¹³ Its formal name is Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The limitation to the right of expression can be illustrated briefly by the recent prosecution and conviction for hooliganism motivated by religious hatred of three members of the Russian punk-band *Pussy Riot*, who protested against President Putin in the Cathedral of Christ the Saviour in Moscow¹⁴. Nevertheless, Amnesty International has stated that they were "wrongfully prosecuted for a legitimate protest action"¹⁵ and the Russian Human Rights Ombudsman believes that the prison sentence is excessive¹⁶.

Another example of the limitation of the right to protests is the arrest of Paul Watson, head of Sea Shepherd Conservation Society, in Germany in May 2012. Costa Rica has issued an extradition warrant against him due to an incident during a protest against a Costa Rican fishing boat in 2006. Watson skipped bail, left Germany and went into hiding in order to avoid extradition and possible criminal charges¹⁷.

New developments on human rights have broadened the scope of them. The Vienna Convention and Programme Action (VDPA) which was adopted in the World

¹⁴ See Timothy Heritage and Maria Tsvetkova, "Russia's female punk band protesters jailed for two years", *Reuters.com*, 17 August 2012, <http://www.reuters.com/article/2012/08/17/us-russia-pussyriot-idUSBRE87F1E520120817>

¹⁵ See "Russian Court Jails Pussy Riot for Two Years", Amnesty International, News, <http://www.amnesty.org/en/news/russian-court-jails-pussy-riot-2012-08-17> (accessed 30 August 2012)

¹⁶ See article in Russia Beyond the Headlines "Pussy Riot sentence raises some questions-presidential human right council", *rbth.ru*, 24 August 2012, http://rbth.ru/articles/2012/08/24/pussy_riot_sentence_raises_some_questions_-_presidential_human_right_17649.html (accessed 26 Aug 2012)

¹⁷ See Shiv Malik, "Paul Watson, anti-whaling campaigner, held in Germany over 2002 incident", *Guardian.co.uk*, 14 May 2012, <http://www.guardian.co.uk/environment/2012/may/14/paul-watson-arrested-germany-sea-shepherd>

Conference on Human Rights in 1993, not only reaffirms the UDHR but also stresses that all human, civil, political, economical, social and cultural rights "are universal, indivisible and interdependent and interrelated". All these rights have been subjected to protest when not recognized.

In the UN special report "Commentary UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1998" the right to protest is implied in Articles 5 and 6 of the Declaration, and among other relevant international and regional instruments¹⁸.

The protection of the right to protest lies in the recognition and protection of a set of rights that includes freedom of expression and opinion, freedom of association, freedom of peaceful assembly and trade union rights, including the right to strike (A/62/225, para. 12). For the specific provisions concerning freedom of expression and opinion, freedom of association and freedom of peaceful assembly see the relevant sections. The right to protest also encompasses the right to strike, which is recognized under several international and regional instruments, including:

- The International Covenant on Economic, Social and Cultural Rights (Article 8),
- The Inter-American Charter of Social Guarantees of 1948, Article 27,
- The European Social Charter of 1961, Article 6 (4),
- The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988, Article 8 (1)(b),

¹⁸ See Chapter VI - The Right to Protest, UN Office of the High Commissioner for Human Rights, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental*, (Geneva: OHCHR, 2011)

- The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) of the International Labour Organization (the right to strike is considered an intrinsic corollary of the right to organize protected under article 11 of this convention), and
- The Declaration on Human Rights Defenders, Article 5(a).

Moreover, the right to peacefully protests on the high seas is affirmed in the joint statement¹⁹ by Australia, New Zealand, the Netherlands and the USA, released in 2011, condemning the dangerous confrontation in the Southern Ocean between the Japanese Whaling Fleet and the conservation group Sea Shepherd²⁰. These countries demand the actors to comply with the relevant international and domestic laws, in particular with the instruments regarding safety of life at sea. This confrontation will be analyzed in chapter 5.

The evidence affirms that there is a recognized universal human right to protest and it must be protected and guaranteed by the States. The exercise of the right to protest is not absolute and it is restricted by national and international law. Further limitations may seem detrimental to the exercise of the human rights and freedoms.

Now the analysis leads to the question if the IMO has taken into consideration the right to protest.

2.2 Does the IMO recognize the right to protest?

One of the traditional definitions of International Law was set by Hans Kelsen²¹,

¹⁹ See press release "Joint Statement on Whaling and Safety at Sea from the Governments of Australia, the Netherlands, New Zealand, and the United State: Call for Responsible Behaviour in the Southern Ocean Whale Sanctuary", U.S. Department of State, Diplomacy in Action, 31 December 2011, <http://www.state.gov/r/pa/prs/ps/2011/12/178704.htm> (accessed 31 July 2012)

²⁰ See "Sea Shepherd Ships Complete Operations in Southern Ocean for 2010", Sea Shepherd, <http://www.seashepherd.org/news-and-media/2010/02/25/sea-shepherd-ships-complete-operations-in-southern-ocean-for-2010-224> (accessed 2 August 2012)

²¹ See Hans Kelsen. *Principles of International Law*. (New York: Rinehart & Company Inc, 1952), 3.

International Law or the Law of Nations is the name of the body of rules which -according to the usual definition- regulates the conduct of states in the intercourse with one another.

Nonetheless, according to an overview by the Legal Information Institute of the Cornell University Law School²² the modern view of International Law has widened to relations among States, individuals and international organizations; however, individuals and international organizations seem to lack power to implement or enforce international law²³, a view that seems to be in line with the opinions of current legal experts.

Consequently, the IMO relates with all the actors mentioned above in accordance to international law, hence human rights should be recognized by default. A closer look into the IMO instruments, human rights seem to be implicit in the regulations regarding safety, security, training and education, fatigue and pollution prevention. Furthermore, the IMO Assembly resolution A.850 (20), "Human Element. Vision, Principles and Goals for the Organization", seems to place the human as the gravitational centre of the maritime enterprise.

On the right to protest, the IMO Maritime Safety Committee's resolution MSC.303 (87), adopted on 17 May 2010, on "Assuring Safety during Demonstrations, Protests or Confrontation on the High Seas" affirms the rights and obligation relating to legitimate protest,

AFFIRMING the right and obligations relating to legitimate and peaceful forms of demonstration, protest or confrontation and noting that there are international instruments that may be relevant to those rights and obligations.

In conclusion, the evidence suggests that there is an undeniable IMO humanitarian approach to shipping as well as the promotion to subordinate to the international law.

²² See "International Law: an overview", Legal Information Institute, Cornell University Law School, http://www.law.cornell.edu/wex/international_law (accessed 10 August 2012).

²³ See Jane Stratton, "Enforcement of International Law", *Hot Topics - Legal Issues in Plain Language*, no. 69 (2009): 29-39

Now, considering the application of the international law on the high seas, there have been particular attempts to apply the piracy rules to direct-action protests by ships; therefore it is important to analyze and contrast similarities and differences between piracy and protest.

2.3 The piracy issue

Environmental protests carried out by ships have been associated to piracy in legal battles and law experts' interpretations. Therefore, it is important to dedicate some attention to this issue.

In international law one of the most recognized definition of piracy is stated in United Nations Convention on the Law of the Sea (UNCLOS) Article 101, "Definition of piracy",

Piracy consists of any of the following acts:

- (a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

This definition was adopted from the Article 15 of the Geneva Convention on the High Seas 1958 (CHS), which was a reflection of customary international law of that time. Articles 16 to 22 of the Convention have further prescription in piracy.

Dissecting them with the "Five Ws" method it is found that piracy is as follows,

Table 1. Dissection of the definition of piracy

WHAT IS PIRACY?	Illegal act of...
	1. Violence
	2. Detention
	3. Predation
WHY?	Private ends
WHERE?	High Seas
By WHOM?	Crew or passengers of a private ship
Against WHO?	Another ship, persons or property

All these elements have been material of numerous studies and debate by legal experts because they are loaded with problems regarding background, meaning, interpretation and jurisdiction, and it is not the intention of this paper to do similar work.

However, a quick analysis based on exemplary cases may help in understanding why PSC might fall under the categorization of piracy. For instance, the ramming, and later sinking, of the whaling vessel *Sierra* in 1979 by the SSCS²⁴ could be classified

²⁴ See Sea Shepherd, "The *Sierra* Campaign", <http://www.seashepherd.org/who-we-are/the-sea-shepherd.html>, (accessed 3 August 2012) and watch video clip Sea Shepherd, "Paul Watson. Sinking of the *Sierra*", <http://www.youtube.com/watch?v=8nPOcTchamk>, (accessed 4 August 2012)

as an *illegal act of violence*; or the lockdown by Greenpeace to the drilling ship *Stena Carron* in Lerwick in 2010 by rigging a "survival pod" with activists to her anchor chain²⁵ could be interpreted as an *illegal act of detention*.

Moreover, a good number of PCS are against another ship, private or state owned such military ships or ships chartered by governments²⁶ fulfilling the *two-ship requisite*. In addition, the *voluntary participation, incitation and facilitation* elements might be present on board protest ships.

In addition, the most controversial element, the *private ends*, is a component full of vagueness or ambiguity. Menefee (1993) asserts that, under the traditional notion of piracy, "committed for private ends" means actions with the purpose of a gain or with *animo furandis*²⁷. "Private" could seem as contrary to "public" therefore perhaps not committed by State-own ships or ships under its authority. In addition, recalling the *Santa Maria*²⁸ case, a political motivated act cannot be framed as piracy²⁹, an element present in many PCS.

²⁵ Watch video clip "Greenpeace on drill ship off Shetland for a month", BBC News, 22 September 2010, <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-11388460>

And watch video clip "Chevron-operated drilling ship *Stena Carron*", <http://www.youtube.com/watch?v=Eocfz-AULng>

Also check Greenpeace USA, "Stopping Chevron Deepwater Drilling Activists occupy ship's anchor chain off the Shetland Islands", News, <http://www.greenpeace.org/usa/en/news-and-blogs/news/chevron-shetland-stopped210910/> (accessed 04 August 2012)

²⁶ PNTL ships carrying MOX for Japan and France have been the target of many protests by Greenpeace. See PNTL, "About PNTL", <http://www.pntl.co.uk/about-pntl/default.asp>, (accessed 3 August 2012). Also watch video clip Greenpeace, "Aerial of Flotilla and Pacific Pintail", Greenpeace Media,

<http://photo.greenpeace.org/C.aspx?VP3=ViewBox&VBID=27MZV84MXJWG&VBIDL=&SMLS=1#> (accessed 4 August 2012)

²⁷ *Animus furandi* is a Latin term which means the 'intention to steal.' In order to constitute a crime of larceny, the thief must take the property *animo furandi*. When the taking of property is lawful, although it may afterwards be converted *animo furandi* to the taker's use, it is not larceny, but may be conversion if retained unlawfully. According to US Legal at <http://definitions.uslegal.com/a/animus-furandi/>

²⁸ Explanation of the *Santa Maria* case can be found at "The *Santa Maria* Case", HeinOnline 56 Nw. U. L. Rev. 168 1961-1962, <http://heinonline.org> (accessed on 31 August 2012)

²⁹ Ferenc A. Váli, 171

In *Castle John And Nederlandse Stichting Sirius V. Nv Mabveco And Nv Parfin*³⁰, Menefee interprets the Antwerp Court of Appeal ruling stating that, "The actions in question were committed for personal ends, in furtherance of ... [their] objects.", maintaining that this PCS was done for *private ends*³¹.

Furthermore, the Sea Shepherd's founder and president proclaimed that he is proud to be a modern pirate³² putting his name along with LaFitte, Drake and Raleigh and hoisting in Sea Shepherd's ships a kind of pirate flag.

It is important to remark that piracy is mostly regulated by domestic law³³. For instance, recently the Japan Self-Defense Force has implemented on 24 July 2009 the "Laws on Punishment of and Measures against Act of Piracy" in which Japan can ensure the safe passage of any ship regardless nationality outside any State's jurisdiction³⁴.

To sum up, piracy and direct actions carried out by ships seem to have some common elements but yet differ in mainly their objectives. While piracy is a ship-to-ship illegal operation for financial gains, a PCS is a legitimate act with a more altruistic goal, for instance the protection of the marine environment, and not always involving two ships. Nevertheless, it seems there is no consensus among legal experts that the difference between them is clear-cut.

Having explored the reasons to protest, established the legitimation of the right to protest and analyzed the piracy issue, the use of ships as protest tool requires examination.

³⁰ The background of the case can be found in a paper by Samuel Pyeatt Menefee, "The Case of the Castle John, or Greenbeard the Pirate? Environmentalism, Piracy and the Development of International Law", California Western International Journal, Volume 24, Number 1 (1993): 10.

³¹ Menefee, 13.

³² See Paul Watson, "I'm proud to be a pirate", guardian.uk.co, 23 January 2008, <http://www.guardian.co.uk/commentisfree/2008/jan/23/japan.australia>

³³ See "National Legislation on Piracy", Division for Ocean Affairs and the Law of the Sea, Oceans and Law of the Sea, United Nations, updated 26 October 2011, http://www.un.org/Depts/los/piracy/piracy_national_legislation.htm (accessed 10 September 2012)

³⁴ This might be a controversial issue since this law seems to regard the high sea or the EEZ as "nobody's jurisdiction" but what about on board a ship which flag is other than the Japanese's? Perhaps this is a topic for another dissertation.

3 Why do people carry out protests by ships?

The use of ships to carry out protest has its very good advantages such as mobility, reach and carrying capacity.

Although ships need fuel and provisions, they are self-sufficient floating crafts which can navigate the world's waters. This quality gives ships the capability to not only reach but also remain in many places including the ones that are not easily accessible such as the Arctic or Antarctica, and to carry to those places people and equipment.



Figure 1. The Greenpeace ship *Arctic Sunrise* in Greenland, 2009. Source: Greenpeace

A good example is the recent Senkaku/ Diaoyu Islands protest. In July 2012 Chinese activists from the *World Chinese Alliance in Defence of the Diaoyu Islands* sailed on a Taiwanese fishing boat escorted by five Taiwanese Coast Guard vessels to the islands and displayed the Popular Republic of China's flag on land³⁵. Activists could have not carried out this kind of protest without ships.

³⁵ See Takio Murakami, "Now it is Taiwan that is taking a hard-line stance on Senkaku issue", *The Asahi Shimbun*, 5 July 2012, http://ajw.asahi.com/article/behind_news/politics/AJ201207050078 and watch video clip *China Protest to Japan on Diaoyu Islands*, CCTV News, 7 July 2012, http://www.youtube.com/watch?v=Oau6R_A68UE

As any maritime adventure, protests carried out by ships have different degrees of risk according to the type of protest, for instance a "direct action"³⁶ involves greater risks than just a "bear witness"³⁷ activity.

Perhaps the first most well-documented bear-witness protest carried out by a ship is the earliest Greenpeace protest against the nuclear bomb testing by the USA in Amchitka, Alaska in 1971³⁸. According to the organizers, the *Don't Make the Wave Committee*, the fishing vessel carrying the activists would sail inside the nuclear testing site. The protest group was part of the "pacifism" of the 60s-70s therefore opposed to war and violence, with strong links to the environmental movement thus also feared that a giant wave produced by the nuclear explosion could have devastating consequences in the regional ecosystem. For the next 25 years various other PCS against nuclear testing were done contributing to the adoption in 1996 of the UN Comprehensive Nuclear-Test-Ban Treaty.

Rapidly, Greenpeace and other protest groups realized that ships were giving access to remote places where detrimental activities to the marine ecosystem were happening. Greenpeace, in its websites³⁹ states,

Our ships are used at the forefront of Greenpeace campaigning, often sailing to remote areas to bear witness and take action against environmental destruction.

Sea Shepherd's fleet, called by themselves Neptune's Navy, exists "to protect and defend the world's marine life" as declared in its website⁴⁰.

³⁶ Direct actions are usually associated with civil disobedience, actions such as occupations, blockades, sit-ins, property destruction, and sabotage among others.

³⁷ "Bear witness" is a tradition from the Quakers adopted by many protest groups, consisting in protesting by simply observing in site.

³⁸ See "Amchitka, the Founding Voyage", Greenpeace International, <http://www.greenpeace.org/international/en/about/history/amchitka-hunter/> (accessed 2 July 2012)

³⁹ See "Our Ships", Greenpeace International, <http://www.greenpeace.org/international/en/about/ships/> (accessed on 2 July 2012).

⁴⁰ See "Neptune's Fleet", Sea Shepherd Conservation Society, <http://www.seashepherd.org/who-we-are/the-fleet.html> (accessed on 2 July 2012).

In the 1970s and 1980s, these protest groups incorporated to the anti-nuclear movement several environmental campaigns such as anti-whaling and anti-seal hunting. In the late 80s and 90s Greenpeace challenged the toxic waste dumping at sea and campaigns in favour of the ban of mineral exploitation in Antarctica and the use of it for scientific and peaceful purposes. The incipient overfishing campaign evolves from the 90s to present. The deforestation and agriculture (against genetically modified crops) campaigns have taken Greenpeace ships to sail well in the Amazon, Paraná and Congo rivers among others. In the early 2000s, protests against the war in Iraq were carried against military ships and facilities. The latest confrontations at sea have to do with Climate Change, Greenpeace ships have protested against deep-water drilling in particularly in the Arctic blocking and occupying oil exploration platforms, drill ships and other servicing ships⁴¹. Sea Shepherd campaigns now extensively not only to protect whales and seals but also other marine creatures such tuna, dolphins and sharks, and assisting the Galapagos National Marine Park with actions and resources. Perhaps none of this campaign protest could have been done without ships.

Moreover, using ships to protest have gone beyond the scope of environmentalism and pacifism. Recently, ships have been used to protest in humanitarian and even territorial disputes between States. To illustrate, The Free Gaza Movement (FGM), a human rights organization, has tried numerous times to break Israel's blockade to Gaza; some of these attempts were successful but others were not with the consequence of loss of life⁴².

Another example is the already mentioned confrontation between Japan and China over the sovereignty of the Senkaku /Diaoyu Islands in the East China Sea. The dispute has recently been exacerbated by not only quarrels among Chinese and Japanese fishermen and the Chinese and Japanese Coast Guard vessels but also by

⁴¹ Watch video clip "Climbers in survival pod stop Arctic oil rig", *Greenpeace*, 29 May 2011, <http://www.youtube.com/watch?v=pUF3JTPgkoM&NR=1&feature=endscreen>

⁴² See "The Free Gaza Movement's home page", The Gaza Free Movement, <http://www.freegaza.org/> (accessed on 3 July 2012)

Taiwanese protesters on ships in 2008, and by two flotillas, one with State-supported activists from Hong Kong⁴³ and another one a few days later by Japanese activists from the Ganbare Nippon right-wing group⁴⁴.



Figure 2. Japanese activists hold the national flag Uotsuri Island, one of the disputed islands of Senkaku in Japanese and Diaoyu in Chinese, in the East China Sea. Source: AP

For further illustration, one of the latest protests carried out by ships is the Kudankulam protest. On 22 September 2012, thousands of fishing vessels blocked the port of Tuticorin in India objecting the completion of the Kudankulam nuclear plant⁴⁵.

⁴³ Watch video clip "Diaoyu Islands: Japan Arrests 14 Hong Kong Activists", *NTDTV News*, 17 august 2012, <http://www.youtube.com/watch?v=oK3gIhYHGKE&feature=related>

⁴⁴ Watch video clip "Japan Activists land on disputed island amid China row", *BBC News Asia*, 19 August 2012, <http://www.bbc.co.uk/news/world-asia-china-19303931>

⁴⁵ Watch the fishermen's blockade at <http://www.youtube.com/watch?v=eQxtOI88Xjk&feature=relmfu>



Figure 3. Indian fishermen in more than 2,000 boats blocked the channel of the Tuticorin port. Source: Parivartan

The above facts demonstrate that ships are now widely used to carry out protest at sea in any jurisdiction, not only for peace or environmental issues but also for political ones such as human rights and sovereignty. Consequently, protest players have essential roles worth being investigated.

3.1 Who are the actors of a protest carried out by ships?

The obvious protagonists in any PCS are the protest ship and the target of the protest; however, there are other actors with different degrees of involvement. As a result of the confrontation, Flag States of both vessels are necessarily involved as well as Coastal States in case the protest is done within their jurisdiction. In addition, the protest ship Master's and activists' countries of origin play a role in case of their detention or arrest outside their jurisdiction.

During a PCS all these parties are legally involved in one way or the other in which rights and obligations are at stake.

A brief analysis of the PCS' players follows.

3.1.1 The Typical Protest Ship

Generally, the typical protest ship is a civilian, non-commercial vessel owned and/or operated by a non-governmental organization whose purpose is to carry out protests at sea or at any location reached by navigating waters. Usually, they are registered as "yacht" due to the lack of categorization in any of the Flag States. Therefore, a number of international maritime conventions do not apply to them such as the International Convention for the Safety of Life at Sea (SOLAS)⁴⁶, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)⁴⁷, Maritime Labour Convention (MLC)⁴⁸ and International Convention on Load Lines (LL)⁴⁹. Perhaps, this situation identifies a loophole in the law that might need to be closed.

However, UNCLOS Article 94, Duties of the Flag State, states a prescription about safety at sea,

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to: (a) the construction, equipment and seaworthiness of ships; (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments; (c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure: (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a

⁴⁶ SOLAS Part A, Regulation 3, Exceptions. (a) The present regulations, unless expressly provided otherwise, do not apply to: (v) pleasure yachts not engaged in trade"

⁴⁷ STCW Article III, Application. "The Convention shall apply to seafarers serving on board seagoing ships entitled to fly the flag of a Party except to those serving on board: (c) pleasure yachts not engaged in trade;"

⁴⁸ MLC 2006. Article II, paragraph 4, "Except as expressly provided otherwise, this Conventions applies to all ships, whether publicly or privately own, ordinarily engaged in commercial activities..."

⁴⁹ ICLL 69, "applicable for all vessels engaged in international trade, with the following exceptions: ships of war; ships of less than 24 meters in length; pleasure yachts not engaged in trade; fishing vessel".

qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship; (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship; (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accept international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

Alternatively, any ship can act as a protest ships. The Free Gaza Flotilla has counted with sailing boats, passenger ships and cargo ships, some of which owned by this organization, attempting to reach the Gaza Strip in defiance to the Israeli blockade. The protesters at the Senkaku/Diaoyu Islands have used fishing and recreational boats.

Nevertheless, protest ships are owned and operated by mainly two international organizations: Greenpeace and Sea Shepherd. These protest ships can carry a variety of gear and equipment from helicopters and fast boats to climbing, boating and diving gear. Also communication equipment is quite advanced in order to transmit footage, press releases and scientific data from anywhere in the world. Sometimes the usage of protest ships goes beyond the oceans; they are also used as platforms for

land-based protests or scientific research in cooperation with scientific institutions such as research groups⁵⁰ and universities⁵¹.

Having examined the protest ships, it is necessary to learn about their targets.

3.1.2 The targets of protests carried out by ships

The targets of protests carried out by ships are usually companies or States which are considered wrong-doers by the protesters. The wrong-doings usually have something to do not only with environmental issues but also political issues. For instance, Greenpeace has confronted the Pacific Nuclear Transport Limited (PNTL) opposing the shipping of nuclear cargoes; the Free Gaza Movement has been protesting the Israeli blockade to Gaza.

Counteracting, the targets of protests try to stop the protest taking a variety of *ad hoc* measures, from *in situ* actions such as persuasion and violence to legal actions in court.

It has been evident that most of the targets of protests have been unable to deal with protests carried out by ships properly perhaps due to ignorance and poor understanding on what a protest is. Their perception seems to be that any protest is unrightful, unjust or unlawful impeding the acceptance that protests are a reality and that proper procedures should be established to deal with them.

Consequently, this unpreparedness results in inadequate management and containment of the protest resulting in an immediate public victory by the protesters.

⁵⁰ For instance see cooperation between Greenpeace and the Scottish Association for Marine Science (SAMS) in 2005, "SAMS and Greenpeace exploration of Scotland Coral Reef", Scottish Association for Marine Science, <http://www.sams.ac.uk/news-room/archive/archive-2005/sams-and-greenpeace-exploration-of-scotlands-coral-reef> (accessed on 4 July 2012); and watch video clip "Ocean acidification research in Svalbard", Greenpeace and German research institute IFM-GEOMAR, 2 June 2012, <http://www.youtube.com/watch?v=phyqIbBsUP4>

⁵¹ Watch video clip "Greenpeace investigates Petermann Glacier", Greenpeace Video, 20 July 2009, <http://www.youtube.com/watch?v=Vjde-umTbbU>

As a result, the public perceives protesters as "the good ones", "the righteous ones", the David and Goliath's story, the triumph of the "little man" against the establishment. Such is the case of the *Brent Spar* case between Greenpeace and Shell in 1995. Greenpeace managed to win the public sympathy when occupying Shell's oil storage which was going to be disposed at sea. Shell was unable to manage the media even when some Greenpeace's technical information was not completely accurate. The emotional crowd took the Greenpeace side disregarding evidence due to mainly Shell's incapability to deal with the protest⁵².

Moreover, the protest target's lack of preparedness often put in danger the lives of activists taking aggressive and violent counter-protest measures, which are overlooked by authorities⁵³.

When the target of the PCS is a ship, then the Flag States of the target of the protest have a vital role to play.

3.1.3 The Flag State

The Flag State is the country in which the vessel is registered. The Flag State has the obligation to implement and enforce its domestic and international law to the ship. All States are granted right of navigation in the high seas according to UNCLOS Article 87 "Freedom of the High Seas" and Article 90 "Right of Navigation". In addition Flag States have the freedom to regulate their registration granted by UNCLOS Article 91 "Nationality of Ships".

Duties of the Flag State are stated in UNCLOS Article 94 "Duties of the Flag State" regarding safety, technical, administrative and crew affairs. UNCLOS Article 217

⁵² See Tony Rice and Paula Owen, *Decommissioning the Brent Spar* (London: Spon Press, 1999), 141-152

⁵³ Watch the reaction to a protest at sea and communication between ships target of a Greenpeace protest in the Arctic, "Boarding Pirazlomnaya (2012)", <http://www.youtube.com/watch?v=VBqRO3PV5Q0&feature=youtu.be>

"Enforcement by Flag States" stipulates the duties of the Flag States to enforce the control, reduction and prevention of marine pollution.

This law indicates that Flag States must take full legal responsibility for their ships. However, and considering that ships are sailing the world's oceans most of the time away from their home ports, Flag States' supervision is not very efficient therefore Port States have the duty to verify compliance with the relevant laws. According to UNCLOS Article 94 (6),

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

Also UNCLOS Article 217, "Enforcement by Flag States", prescribes the mechanisms to investigate and report in case of clear grounds or violation of the rules and standards.

For instance, despite the motivation and legitimization of the anti-whaling protest and the whaling research, all ships are obliged to comply with the law, in collision cases according to UNCLOS Article 97, *Penal jurisdiction in matters of collision or any other incident of navigation*, Flag States have effective jurisdiction therefore the obligation to act.

The supervision of the Flag States has been strengthening with the establishment of the IMO Sub-Committee on Flag State Implementation (FSI) in 1992⁵⁴. The FSI has adopted numerous resolutions to assist Member States such as the unsuccessful self-assessment guidelines of Flag States performance and the successful Voluntary IMO Member State Audit Scheme (VIMSAS) adopted by the IMO Assembly in A.946 (23) in 2003. VIMSAS is planned to be mandatory by 2015.

⁵⁴ See Heike Hoppe, "The Work of the Sub-committee on Flag State Implementation", *IMO News No. 4*, 1999: 21-27.

Needless to say that protest ships must be registered; therefore, they must be in compliance with the law. Violations committed by protest ships have been reported to their Flag States and on many occasions those States imposed sanctions to the protest ships, to the extent of de-flagging.

Sea Shepherd's ships have been de-flagged on various occasions after serious violations to the COLREGs and complaints from the protest target ship's State to the protest ship's Flag State. For instance, the *Robert Hunter* (renamed *Steve Irwin* in 2007) was registered in the United Kingdom. After a confrontation with the Japanese whaling fleet in the Southern Ocean in 2007, Japan made a formal complaint to the British authorities. The *Robert Hunter* was struck off the British Ship Register but Maritime Coastguard Agency insisted that it was not under the Japanese government pressure but due to inconsistencies between the "pleasure yacht" registration and the ship's activity⁵⁵.



Figure 4. Video clip on "Sea Shepherd attacks Japanese whaling fleet".

Source: <http://www.youtube.com/watch?v=KDsZcLVXyn8&feature=related>

⁵⁵ See David Osler, "Anti-whaling ship kicked off UK flag", *Lloyd's List*, 5 February 2007, <http://www.lloydlist.com/ll/sector/ship-operations/article52542.ece>

On the one hand Flag States have the obligation to implement and enforce the law in their own jurisdiction; on the other hand they are obliged to guarantee the human rights and freedoms however with the restriction prescribed by law.

3.1.4 The Coastal State

Coastal States are countries that have a coastline. Under UNCLOS, Coastal States enjoy sovereign rights in the internal waters, territorial waters and economic exclusive zone in contrast with the high sea. In addition to these rights, Coastal States have duties according to international law and domestic law.

On the EEZ, Coastal States have rights and duties prescribed by several UNCLOS Articles such as Article 56 "Rights, jurisdiction and duties of the coastal State in the exclusive economic zone", Article 60 "Artificial islands, installations and structures in the exclusive economic zone" and Article 73 "Enforcement of laws and regulations of the coastal State". Coastal States are directly involved in PCS when those protests are directed towards ships and facilities that are exploring, exploiting, conserving or managing living resources such as fish and mammals or non-living resources such as oil and gas. Also, Coastal States might have Search and Rescue (SAR) obligations even beyond the EEZ in accordance with the International Convention on Maritime Search and Rescue 1979.

For instance, the Australian government investigated the collision between the Sea Shepherd's ship *Ady Gil* and the Japanese whaler *Shonan Maru* No. 2 which occurred in the Southern Oceans⁵⁶, in accordance with its SAR duty regulated by the Australian Maritime Safety Authority Act 1990.

According to UNCLOS Article 2, the Coastal State's sovereignty in land and internal waters is extended to its territorial waters. However, this sovereignty is not absolute

⁵⁶ See Australian Maritime Safety Authority. *Fact finding report into the reported collision involving the New Zealand registered craft Ady Gil and the Japanese registered whaling ship Shonan Maru No. 2 in the Southern Ocean on 6 January 2010*, (Canberra: AMSA, 2010).

since it is limited by the right of innocent passage stipulated in UNCLOS Section 3, "Innocent Passage in the Territorial Sea"⁵⁷.

Internal Waters is defined in UNCLOS Article 8 "Internal Waters",

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

Coastal States also have full jurisdiction and absolute sovereignty in its internal waters, so domestic penal and civil law is applied to foreign vessels without discrimination⁵⁸.

To illustrate, after a protest against single-hull tankers in the Gibraltar/Algeciras Bay, Greenpeace's boat drivers were arrested and prosecuted for obstructing police, property damage, smuggling and reckless navigation according to Gibraltar's law⁵⁹.

Flag States, Coastal States and now activists' own countries are added to the protest arena to demonstrate the legal complexity of protests carried out by ships.

3.1.5 The Activists

Usually protest ships are crewed by a mix of professional and non-professional seafarers. Those crews are generally multi-cultural, multi-national without discrimination of gender, with the aim to represent the universality of human beings.

⁵⁷ See Anne Bardin, "Coastal State Jurisdiction over Foreign Vessels", *Pace International Law Review*, Paper 192, (2002): 33

⁵⁸ Ibid., 30-31

⁵⁹ *Regina v. Alfredo Waldemar Wichmann & others*, Magistrates' Court of Gibraltar, 22 October 2003.

However, protest crews can also be of the same nationality, for instance the Indian fishermen in the Kundankulam protests.

Along with the crew, there are other members on board executing campaign and protest management tasks such as campaign co-coordinators, media officers, web editors, logistics managers and activists with various skills and expertise.

Protest ships have multinational crews to show the multicultural nature of the protest. In addition, there are a large percentage of females to remark gender equality.

Most of the crew joining protest ships become activists. Activists are individuals who are devoted to some moral cause due to a certain sense of environmental or political indignation. They are volunteers from different nationalities so their countries are indirect actors in the protest. Often, maritime activists come with certain skills needed to protest such as navigation, boat driving, scuba diving and climbing.

Recently and most likely after the September 11th, 2001 attacks, there was an attempt to compare activists with terrorists. This attempt is probably a political move to stop the inconveniences provoked by activists to political/business agendas. Some countries have even put known activists in watch lists.

On 21 June 2010, Greenpeace International published on its website an interesting article named "Activism is not a Crime"⁶⁰ co-written by Dirk Voorhoof, professor of Media Law and Freedom of Expression at Ghent University, Belgium and Copenhagen University and Serge Gutwirth, professor of Human Right at the University of Brussels. The article recreates several examples of unjustified State's intimidation and harsh treatment to activists.

The Master of a protest ship can also be considered an activist. However, he is perhaps the most conspicuous figure on board due to the nature of his position and his part as tactical decision maker in the protest.

⁶⁰ Dirk Voorhoof and Serge Gutwirth, "Activism is not a crime", *Greenpeace International News*, 21 June 2010, <http://www.greenpeace.org/international/en/news/features/Activism-is-not-a-crime210610/>

3.1.6 The Master of the protest ship

The Captain, called Shipmaster or just Master, is a mariner who is in ultimate command of a vessel and represents the ship's owner/operator on board. Nowadays, the merchant marine Captain must hold a certificate of competency and other certificates in accordance to the STCW.

He⁶¹ is not only responsible for the seaworthiness, cargo-worthiness, safe navigation, sanitation, crew welfare of his ship but also for the compliance of the company's policy, the Flag State's law, Coastal State's law and the relevant international law. This responsibility is carried out to the best of his knowledge and with due diligence⁶².

The skills of the captain of a protest ships are unusual since protest ship's equipment and gear made them sophisticated and not easy to operate (fast boats, helicopters, research gear, special communication gear and others). In addition, protest ships are capable to operate in all waters such as oceans, rivers and icy waters.

Undoubtedly, the captain of a protest ship is subjected to external and internal pressures. If the captain is competent and experienced, the pressure coming from external factors are mere fulfilment of the known obligations and responsibilities. Internal pressures originated by the goals and objectives of the protest campaign are usually the heaviest burden to the Master of the protest ship. When the protest ship is utilized as a "direct action tool" the Master is often informally or implicitly requested to, for instance, to navigate without a pilot or navigate uncharted or prohibited waters in order to deploy equipment or personnel, or carry on a blockade, or documents an

⁶¹ For the purpose of simplifying the Captain is referred as "he", however it is a position which is no longer held by men only.

⁶² Tuuli Messer (2001) *Master's Handbook on Ship's Business* and the *Nautical Institute on Command, a practical guide* (2000) are an excellent source of information on the role and responsibilities of the captain.

illegal activity. Obviously, these are not instructions to the Master but they usually come with the assumption that the Master is actually in command of a protest ship to take voluntary risks as part of his commitment to the cause.

In short, although protest captain's skills may differ from those necessary to command commercial vessels, his responsibilities are not any different; the analysis of cases reveals this affirmation.

The strategy and tactics of any PCS are based on campaign objectives usually developed by campaigning organizations. Hence, it is important to describe some of these organizations.

4 The most prominent protesting groups with ships

The most conspicuous maritime protest groups are Greenpeace, the Sea Shepherd and the Free Gaza Movement, depicted in this chapter. In addition, there are other smaller incipient organizations such as the People's Navy and the Black Fish.

4.1 Greenpeace

According to its website⁶³,

Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace.

Greenpeace is a non-governmental organization with presence in 40 countries and around 3 million supporters or individual donors worldwide. Its headquarters, Greenpeace International, is in Amsterdam, the Netherlands, and it is registered as a

⁶³ See "40 Year of Inspiring Actions, About Greenpeace", Greenpeace International, <http://www.greenpeace.org/international/en/about/> (accessed on 5 July 2012)

foundation called Stichting Greenpeace Council (SGC). SGC manages not only the global campaign strategy but also the Greenpeace ships⁶⁴.

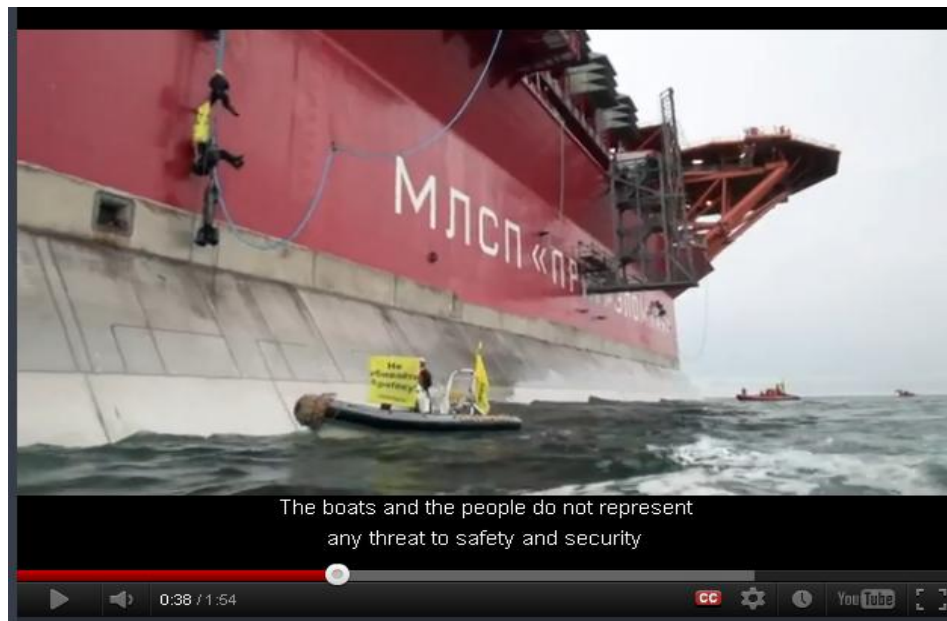


Figure 5. Video clip of occupation of Gazprom oil platform Pirazlomnaya in August 2012. Source: <http://www.greenpeace.org/international/en/multimedia/videos/Up-Against-Gazprom/>

Greenpeace was founded in 1971 in Vancouver, Canada, by a group of peace activists who sailed to Amchitka, Alaska, to protest against the US nuclear bomb testing. Those activists set sail to the testing site on an old fishing boat called *Phyllis Cormack* commanded by Capt. John Cormack⁶⁵.

⁶⁴See "Greenpeace Structure & Organization", Greenpeace International, <http://www.greenpeace.org/international/en/about/how-is-greenpeace-structured/> (accessed on 5 July 2012)

⁶⁵See "The Founders of Greenpeace", Greenpeace International, <http://www.greenpeace.org/international/en/about/history/founders/> (accessed on 22 June 2012): "The group organised a boat, the *Phyllis Cormack*, and set sail to Amchitka to "bear witness" (a Quaker tradition of silent protest) to the nuclear test. On board were: Captain John Cormack, boat's owner..."



Figure 6. The *Phyllis Cormack* and her crew before departure. Source: Greenpeace

Greenpeace's ships are managed and operated by Stichting Greenpeace Council (*Stichting* means foundation in Dutch - SGC) with address in Amsterdam, the Netherlands. Currently SGC manages and operates three ships: the *Esperanza*, the *Arctic Sunrise* and the *Rainbow Warrior III*. However, the owners of the vessels are different foundations. For the *Esperanza* and the *Arctic Sunrise* the owner is Stichting Phoenix and for the *Rainbow Warrior III* is Stichting Iris, both owners with address in Amsterdam.

All three vessels are under a bareboat charter agreement. SGC, through its Ships Unit, has total control of the operation, maintenance and crewing of the vessels.

The three Greenpeace vessels are registered as "yacht" by the Kingdom of the Netherlands. However, at request of Greenpeace, Det Norske Veritas (DNV) and Germanischer Lloyd (GL) have issued Statements of Voluntary Compliance for Safety Equipment, Safety Construction, Safety Cargo and International Safety Management (ISM) certificates (Document of Compliance and Safety Management Certificate) as well as Load lines. Greenpeace opted to comply to show due diligence and to give example of "corporate responsibility".



Figure 7. The *Arctic Sunrise* and the *Esperanza*. Source: Greenpeace



Figure 8. The *Rainbow Warrior III*. Source: Oliver Tjaden/Greenpeace

DNV classifies the *Esperanza* and the *Arctic Sunrise* as ice-class vessels⁶⁶. And GL classifies the *Rainbow Warrior* as 100 A5 Motor Sailing Vessel.

The crew of the Greenpeace ships is under a Collective Bargaining Agreement (CBA) between Stichting Greenpeace Council and Nautilus International as crew representative. According to the Safety Management System all crew member must

⁶⁶ The *Esperanza* is 1A1 Ice-1A* HELDK EO Clean and the *Arctic Sunrise* is an Icebreaker 1A1, EO. DNV Class Notations can be found at <http://exchange.dnv.com/Exchange/en/MainClass.html>,

be qualified according to the International Convention on Standard of Training, Certification and Watchkeeping for Seafarers (STCW)⁶⁷.

Greenpeace is a non-governmental international organization with consultative status with IMO. In addition, Greenpeace and International Transport Workers' Federation (ITF) are partners in campaigning against flag of convenience.

4.2 Sea Shepherd

The Sea Shepherd Conservation Society (SSCS) is a charitable organization dedicated to protect marine wildlife.

In 1977 Paul Watson founded the Earth Force Society in Vancouver, the previous organization to Sea Shepherd which started operation in the USA in the early eighties⁶⁸.

The Sea Shepherd Conservation Society's mission statement⁶⁹ says,

Sea Shepherd uses innovative direct-action tactics to investigate, document, and take action when necessary to expose and confront illegal activities on the high seas. By safeguarding the biodiversity of our delicately-balanced ocean ecosystems, Sea Shepherd works to ensure their survival for future generations.

The Sea Shepherd's international headquarter is in Friday Harbour, Washington, USA⁷⁰.

⁶⁷ According to the Stichting Greenpeace Council's Safety Management System Manual, Chapter 6, Resource and Personnel, 6.2 Shipboard Personnel.

⁶⁸ See "The History of Sea Shepherd", Sea Shepherd Conservation Society, <http://www.seashepherd.org/who-we-are/our-history.html> (accessed on 6 July 2012)

⁶⁹ See "Who We Are. Sea Shepherd's Mission Statement", Sea Shepherd Conservation Society, <http://www.seashepherd.org/who-we-are/> (accessed 6 July 2012)

⁷⁰ See "Contact Us", Sea Shepherd Conservation Society, <http://www.seashepherd.org/contact/general-public.html> (accessed on 6 July 2012)

At present, SSCS operates 3 ships: the *Bob Barker*, and the *Steve Irwin* and the *Brigitte Bardot*.



Figure 9. The *Bob Barker* and the *Steve Irwin*. Source: Sea Shepherd



Figure 10. The *Yoksha* and the *Brigitte Bardot*. Source: Sea Shepherd

According to Lloyd's List Intelligence the *Bob Baker* is registered in The Netherlands as "research" but a confidential source confirmed that she and the *Steve Irwin* are registered as "yacht" in Rotterdam.

SSCS had other ships in the past years. The *Yoshka*, former *Sirenian*, was donated to the Galapagos National Park; the *Farley Mowat* was seized by the Canadian Department of Fisheries and Oceans in 2008 and sold by court order in 2009⁷¹; and the *Ady Gil* sunk in Antarctic water after a collision with the whaling ship *Shonan Maru No. 2* in 2010.

⁷¹ *Her Majesty The Queen v. The Ship "M.V. Farley Mowat" et al*, 812 Montréal Court Registrar pages 238-240, Court Number T-1863-08 (Federal Court, Canada 2009-11-09)

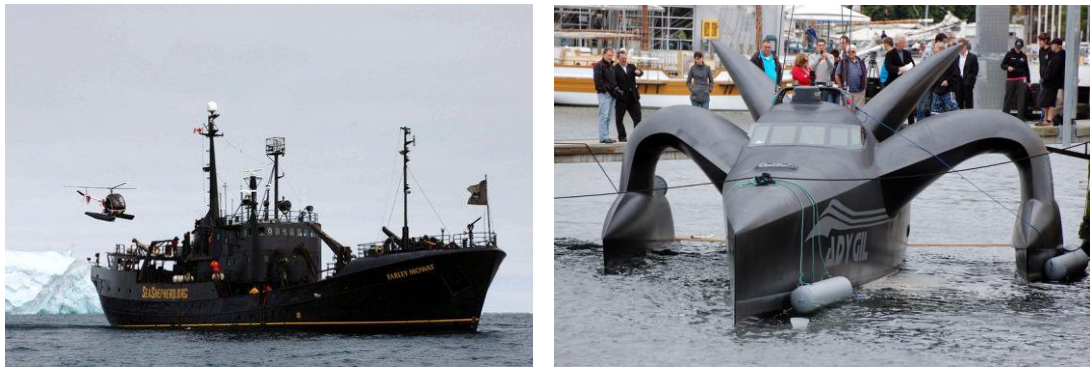


Figure 11. The *Farley Mowat* and the *Ady Gil*. Source: Sea Shepherd & ABC News/ Jayne Landsberg

The Sea Shepherd claims to be a "law enforcement" organization based on its interpretation of articles 21 and 24 of the United Nations World Charter for Nature⁷². This interpretation has been a matter of debate among international law experts. However, there is consensus that private individuals or groups cannot take the law into their own hands. Furthermore, the World Charter for Nature is a non-binding instrument.



Figure 12. Video clip on "law enforcement" action by Sea Shepherd against the *Nisshin Maru*. Source: <http://www.youtube.com/watch?v=dcVNOOnRLVzY&feature=relmfu>

⁷² See articles 21 and 24 at United Nations, *World Charter for Nature*, 28 October 1982, <http://www.un.org/documents/ga/res/37/a37r007.htm>

It is worth mentioning that Greenpeace and Sea Shepherd do not cooperate with each other since both have different protest strategies and tactics, sometimes completely opposite. Sea Shepherd uses more active methods and aggressive tactics against ships such as harassment, ramming and sinking⁷³ of ships, engage with the target ship's crew, and others.

Greenpeace, on the other hand, uses non-violent confrontations mostly passive such as bear-witness lockdowns, occupations, human shield (on boats or swimmers), banner hanging, blockades, and non-violent resistance among others. Greenpeace's principles are inspired by the Quakers' founding fathers' philosophy.

4.3 The Free Gaza Movement

The Free Gaza Movement (FGM) claims to be a human-rights group which has made several attempts to break the Israeli-Egyptian blockade of the Gaza Strip in Palestine.

According to its website⁷⁴,

We want to break the siege of Gaza. We want to raise international awareness about the prison-like closure of the Gaza Strip and pressure the international community to review its sanctions policy and end its support for continued Israeli occupation. We want to uphold Palestine's right to welcome internationals as visitors, human rights observers, humanitarian aid workers, journalists, or otherwise. We have not and will not ask for Israel's permission. It is our intent to overcome this brutal siege through civil

⁷³ On April 28th, the whaling ships *Ibsa I* and *Ibsa II* are sunk in Vigo, Spain. SSCS claims to have sunk also the *Sierra*, *Susan*, *Theresa*, *Hvalur 6*, *Hvalur 7*, *Senet*, *Nybraena*, and *Morild*. See the "History of Sea Shepherd Conservation Society and Whaling", Sea Shepherd, <http://www.seashepherd.org/whales/sea-shepherd-history.html> (accessed on 05 July 2012)

⁷⁴ See "Our Mission", The Free Gaza Movement, <http://www.freegaza.org/en/about-us/mission> (accessed on 5 July 2012)

resistance and non-violent direct action, and establish a permanent sea lane between Gaza and the rest of the world.

FGM claims to have successfully broken the blockade eight times since 2008.

On 31 May 2010, the Gaza Freedom Flotilla organized by FGM and the Turkish Foundation for Human Rights and Freedoms and Humanitarian Relief (IHH), attempted to deliver humanitarian aid to Gaza. The flotilla, consisting of 6 vessels, was intercepted by the Israeli Defence Forces in international waters. Nine activists were killed and several Israeli soldiers wounded⁷⁵.

The vessels of the flotilla were the passenger ship *Mavi Marmara*, currently registered in Turkey, owned and operated by IHH; the general cargo ship *Eleftheri Mesogeios* registered in Greece and owned by Eleftheri Mesogeios Shipping, abandoned in Haifa in March 2011⁷⁶; the general cargo ship *Gazze* registered in Sierra Leone, to be broken up in India in 2011; the bulk/container carrier *Defne Y*, registered in Sierra Leone, to be broken up in Pakistan by 2011; the bulk/container carrier Rachel Corrie, registered in Cambodia, owned and operated by the Free Gaza Movement; the vessel is currently seized by the Israeli Government⁷⁷. In addition, other smaller passenger boats: the *Challenger I*, the *Challenger II* and the *Sfendoni*.

⁷⁵ See United Nations, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011,

http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf

⁷⁶ See State of Israel, Ministry of Transport, Notice of Vessel Removal - "*Eleftheris Mesogeios*", 02 March 2011, http://en.mot.gov.il/index.php?option=com_content&view=article&id=227:notice-of-vessel-removal-qeleftheri-mesogeiosq&catid=44:port-regulations-c&Itemid=102

⁷⁷ All registered ships' data are from Vessel Report by Lloyd's List Intelligence, only available to subscribers <<http://www.lloydslistintelligence.com/lint/index.htm>>



Figure 13. From top to bottom and left to right, the *Rachel Corrie*, the *Mavi Marmara*, the *Gazze* and the *Defne Y*. Source: Free Gaza Movement

5 Analysis of cases of protests carried out by ships

As stated in the introduction, the case analysis is based on three basic questions: What happened? Why did it happen? What is the applicable law? Followed by conclusions and lessons learnt.

The protest cases chosen for the purposes of the analysis are protests in which illegal acts were committed.

The cases are grouped in three different zones in accordance with UNCLOS, commencing with PCS cases on the high seas, continuing with the EEZ and territorial waters, to finalize with internal waters.

5.1 High Seas.

5.1.1 Collision between the *Arctic Sunrise* and the *Nisshin Maru*⁷⁸ during an anti-whaling protest in the Southern Ocean, 2006

What happened?

The Dutch-registered Greenpeace *Arctic Sunrise* and the Japanese-registered whaling factory ship *Nisshin Maru* collided on January 8th 2006 in the Southern Ocean, during an anti-whaling protest carried out by Greenpeace⁷⁹. Both vessels resulted with minor damages so seaworthiness was not compromised; also there was no loss of life.



Figure 14. The *Arctic Sunrise* and the *Nisshin Maru* moments before the collision. Source: Greenpeace / Kate Davison.

⁷⁸ Check *Nisshin Maru*'s data at, <http://www.lloydslistintelligence.com/lint/vessels/overview.htm?vesselId=211576>

⁷⁹ Watch video clips of the collision between the *Nisshin Maru* and the *Arctic Sunrise* at "Arctic Sunrise ramming the", http://www.youtube.com/watch?v=DECyR7gzV_g, and "Greenpeace whaling collision", http://www.youtube.com/watch?v=XCS_M2dSJpI

Why did it happen?

According to witnesses the *Nisshin Maru* was manoeuvring after refuelling at sea from the motor tanker *Oriental Blue Bird*. The manoeuvre generated a crossing situation that was mismanaged by both vessels.

What is the applicable law?

Prima facie, both ships seemed to be in clear violation of the COLREG, Rule 2, "Responsibility",

(a) Nothing in these rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these rules or of the neglect of any precautions which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(b) In construing and complying with these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these rules necessary to avoid immediate danger.

The *Nisshin Maru* seemed to be in violation of COLREGs Rule 15, "Crossing situations",

When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.

And also Rule 16, "Action by give-way vessel",

Every vessel which is directed to keep out of the way of another vessel shall, as far as possible, take early and substantial action to keep well clear.

However, the *Arctic Sunrise* presumably did not comply with COLREGs Rule 17, "Action by Stand-on Vessel", when the collision became apparent,

(a) (i) Where one of two vessels is to keep out of the way the other shall keep her course and speed.

(ii) The latter vessel may however take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules.

b) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision.

Under UNCLOS, Flag States have jurisdiction on their vessels on the high seas and the obligation to conduct investigation on marine casualties in which ships flying their flags are involved⁸⁰. In addition, other international maritime instruments have provisions on conducting casualty investigations such as SOLAS⁸¹, MARPOL (but marine pollution was not an issue) and Load Lines (might not be applicable for the case).

Moreover, ships might not have complied with the Company's Standing Orders described in the Safety Management System on "safe distance" and "safe speed", resulting in major non-conformities. Those instructions are usually stated in the Master's Standing Orders at the captain's discretion.

⁸⁰ UNCLOS Article 94. Duties of the Flag States. Item 7. *"Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation"*

⁸¹ See SOLAS Chapter I, General Provisions, Regulation 21, Casualties and Chapter XI-1 Regulation 6 but the Casualty Investigation Code, A.849(20), was not yet in force in 2006, entry into force in 1 January 2010, MSC.255(84)

Conclusions and lessons learnt

Both parties blame each other for the incident.

The Netherlands and Japan have the obligation to conduct casualty investigations according to UNCLOS Article 94 and SOLAS Regulation 21. The Japanese Government made an official complaint to the Ministry of Foreign Affairs of the Netherlands; however, both governments eventually dropped the decision to further investigate⁸² presumably because they might have considered that the collision did not end up in loss of life or marine pollution, and the structural damages did not affect the seaworthiness of both ships or cause important financial burdens.

Remarkably, the International Whaling Commission (IWC), through its resolution 2006-2 on *Safety of Vessels Engaged in Whaling and Whale Research-related Activities*, stated support to the right to legitimate and peaceful forms of protests and demonstrations but do not condone actions which pose a risk to human life and property⁸³. Furthermore, in this resolution the IWC recalled the COLREGs and the IMO Casualty Investigation Guidelines.

5.1.2 Collision between the *Shōnan Maru 2* and the *Ady Gil* during an anti-whaling protest in the Southern Oceans, 2010

What happened?

On January 6th 2012, the Japanese-flagged whaling ship *Shōnan Maru 2* and the New Zealand-flagged *Ady Gil* collided in the Southern Ocean during an anti-whaling

⁸² Jasper Teuling. "Peaceful Protests Against Whaling on the High Seas – a Human Rights-Based Approach ." *Selected Contemporary Issue in the Law of the Sea*, 2011: 228

⁸³ International Whaling Commission, *Resolutions 2006*, <http://iwcoffice.org/cache/downloads/ypi47gupnsgo0o8ggsg80o4g/Resolution%202006.pdf>

campaign protest carried out by the Sea Shepherd Conservation Society⁸⁴. The *Ady Gil* resulted in major damage and sunk after an attempt to tow her back to port. There were no injuries or loss of life.

Why did it happen?

The *Ady Gil* was low in fuel steaming at slow speed after a series of interfering manoeuvres against whaling. The *Shonan Maru 2* approached the *Ady Gil* on her port side at higher speed in a crossing situation. Safe distance from each other was not kept and the *Shonan Maru 2* did not attempt to manoeuvre according to the collision regulations as give-way vessels.

What is the applicable law?

Similar analysis to the collision *Arctic Sunrise / Nisshin Maru* incident is applicable to this case; both parties blame each other for the collision. Again the maritime international law of application is the International Regulations for Preventing Collisions at Sea 1972 (COLREG), Rule 2 "Responsibility", is the first rule to take into consideration.

In addition, the evidence suggests that both vessels might have violated Rule 5 "Lookout", Rule 6 "Safe Speed", Rule 7 "Risk of Collision" and Rule 8 "Action to Avoid a Collision".

The *Shōnan Maru 2* presumably failed to keep clear from the *Ady Gil* violating Rule 13 "Overtaking", Rule 15 "Crossing Situations", and Rule 16 "Action by give-way vessel". And the *Ady Gil* failed to comply with Rule 17 "Action by Stand-on vessel".

The references to the domestic law applicable to the *Ady Gil* are stated in the Maritime New Zealand's investigation report⁸⁵.

⁸⁴ Watch video clip of the collision "*Ady Gil* collision 3-way split screen" at <http://www.youtube.com/watch?v=xLdUISE3e8c>

The incident took place in the high seas where Flag States, Japan and New Zealand in this case, have jurisdiction over their ships according to UNCLOS⁸⁶. Therefore their national laws apply to their ships on the high sea. On collision matters UNCLOS is clear in its Article 97⁸⁷. However, Australia has Search and Rescue (SAR) jurisdiction in that specific area.



Figure 15. The Sea Shepherd's ship *Ady Gil* after it was hit by Japanese whaling vessel *Shonan Maru* in Antarctic waters. Source: The Guardian / Joanne McArthur/AFP/Getty Images

⁸⁵ Maritime New Zealand, *Investigation Report: Ady Gil and Shonan Maru No. 2. Collision on 6 January 2010*, (Wellington: Maritime New Zealand, 2010), 25.

⁸⁶ See UNCLOS Articles 92, 94

⁸⁷ UNCLOS Article 97, Penal jurisdiction in matters of collision or any other incident of navigation, 1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship; 2. No penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. 2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them. 3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

Conclusions and lessons learnt

In addition to the conclusions made for the *Arctic Sunrise / Nisshin Maru* case, the Australian Maritime Safety Authority (AMSA) warned the Sea Shepherd crew and the Japanese fleet on the risks and dangers of possible collision during the protests⁸⁸.

Accordingly, it is the obligation of all shipmasters to exercise due diligence to ensure the safety of people and property at sea. On the high Seas, all ships are entitled to the freedoms⁸⁹ and the rights set in UNCLOS Part VII "High Seas". However, those freedoms are rights⁹⁰ are accompanied by duties⁹¹ and obligations prescribed by international law and Flag States' law.

Till present, there have been no sanctions against any of the two vessels by their Flag States.

5.2 Exclusive Economic Zone

5.2.1 *Brent Spar's* occupation by Greenpeace activists, 1995

What happened?

In 1995, Greenpeace activists occupied the *Brent Spar*⁹², Shell's oil storage facility located in the Brent oil field⁹³. The protesters occupied the *Brent Spar* to express opposition to the disposal and dumping of it at sea, legally approved by the British government⁹⁴.

⁸⁸ Australian Maritime Safety Authority, *Fact finding report into the reported collision involving the New Zealand registered craft *Ady Gil* and the Japanese registered whaling ship *Shonan Maru No. 2* in the Southern Ocean on 6 January 2010* (Canberra: AMSA, 2010), 14.

⁸⁹ See UNCLOS Article 87, Freedom of the High Seas.

⁹⁰ For instance UNCLOS Article 90, Right of Navigation.

⁹¹ See UNCLOS Article 94, Duties of the Flag State.

⁹² Watch video clip *Brent Spar Greenpeace vs. Shell*, <http://www.youtube.com/watch?v=NnItN6ovasp>

⁹³ The Brent field is located at the East Shetland basin, about 100 nautical miles north east of Lerwick

⁹⁴ For further information it is recommended a book by Tony Rice and Paula Owen, *Decommissioning the Brent Spar* (London: Spon Press, 1999)



Figure 16. The Greenpeace vessel *Moby Dick* stood by as a safety vessel at the *Brent Spar*. 30/04/1995. Source: Greenpeace / John Sauch

Why did it happen?

Greenpeace considered harmful for the marine environment the disposal of the *Brent Spar* at sea. There were concerns not only on the quantity and quality of toxics inside the *Brent Spar* but also about the environmental impact of the dumping over the marine ecosystem. Activists and equipment were transported to the site by ships and rubber boats.

What is the applicable law?

The British Government issued legal permits to dispose the *Brent Spar* at the North Feni Ridge⁹⁵. The occupation by the activists was unlawful; the protesters were charged with trespassing, removed and arrested by the Grampian Police with jurisdiction in the North Sea oil exploration area. The activists did not comply with the with UNCLOS Article 60,

⁹⁵ The North Feni Ridge is located around 150 nm NW of the Hebrides.

5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 meters around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

Conclusions and lessons learnt

Domestic and international law were enforced accordingly. It seems that there were no violation of any of the relevant maritime instruments such as the Collisions Regulations, MARPOL or SOLAS for instance or at least charges were not pressed.

Facing public pressure and opposition from several European countries, Shell decided to abandon the dumping in favour of a disposal ashore. The Greenpeace's success blocked the path to set precedent to future disposals of oil installations at sea.

In conclusion, the Brent Spar case seems to be a good example of the application and enforcement of the law by the Coastal State in the Exclusive Economic Zone.

5.2.2 Protest carried out by the Greenpeace ship *Esperanza* against the oil exploration rig *Stena Don*, 2010

What happened?

In September 2010, a small number of activists from the Greenpeace's ship *Esperanza* climbed and occupied the oil exploration rig *Stena Don* off the west coast of Greenland for a couple of days until they desisted due to adverse weather conditions.



Figure 17. From left to right, the *Esperanza*, the Greenland Police patrol boat, the *Stena Don* and the Danish Navy vessel *F359* off Greenland. Source: Greenpeace / Will Rose.

Why did it happen?

The Greenpeace's ship *Esperanza* was at the location to protest against oil exploration in the Arctic. The target was the oil exploration rig *Stena Don* operated by Cairn Energy. For weeks the *Esperanza* witnessed the operations of the *Stena Don* and the drillship *Stena Forth*. The *Esperanza* was constantly shadowed by the

Danish Navy and Greenland police vessels. In a diversion done by the *Esperanza*, her inflatable boats were deployed and activists delivered to the *Stena Don*.

What is the applicable law?

The Danish Navy vessel *Vædderen* (F359) and Greenland police boats gave notice and enforced the 500-m safety zone around the oil exploration rig *Stena Don* during a PCS done by the Greenpeace ship *Esperanza*, in accordance with UNCLOS article 60.

When the *Esperanza's* fast boats carrying activists entered the 500-m safety zone the *Vædderen* called the *Esperanza* over the VHF radio to inform about the possible consequences of the breach.



Figure 18. Watch video clip of the VHF radio communication between the Danish Navy vessel *Vædderen* (F359) and the *Esperanza*.

Source: <http://www.youtube.com/watch?v=mEWEODX4syU>

The activists who boarded the *Stena Don* were eventually arrested by Greenland police, charged with trespassing after breaching the 500-m safety zone, taken ashore in Disko Bay and flown to Denmark to be later deported to their home countries⁹⁶.

Conclusions and lessons learnt

The Greenland police enforced the domestic law, hence international law (UNCLOS Art. 60) arresting and charging the activists with trespassing. Subsequently, the activists were deported to their home countries. No charges were pressed against the Master of the *Esperanza*.

5.3 Territorial Waters. Protest against the MT *Kapitan Kuroptev* by the Greenpeace ship *Esperanza*, 2010

What happened?

Activists from the Greenpeace vessel *Esperanza* failed in an attempt to board the nuclear waste carrier *Kapitan Kuroptev* in the vicinity of Cherbourg, France, resulting in an injunction against Greenpeace to deter further direct action protests.

Why did it happen?

The Greenpeace ship *Esperanza* was campaigning against the transport of nuclear waste from France to Russia. The cargo ship *Kapitan Kuroptev*, operated by JSC Tenex, was regularly shipping nuclear wastes belonged to the French company Areva to Saint Petersburg for further disposal in the Russian interior.

In her way into the port of Cherbourg, France, the *Kapitan Kuroptev* was followed by Greenpeace speed boats with activists who tried to board the vessels as part of a

⁹⁶ "Oil rig spidermen deported from Greenland", *Ice News. News from the Nordics*.08 September 2010, <http://www.icenews.is/index.php/2010/09/08/oil-rig-spidermen-deported-from-greenland/>

direct action protest. The boarding was repelled by the crew and the *Kapitan Kuroptev* went into port to load her cargo.



Figure 19. Greenpeace activists protest with banners reading 'Russia is not a nuclear dump' alongside the Russian transport ship *Kapitan Kuroptev* which is carrying radioactive waste from France to Russia. Source: Greenpeace / Pierre Gleizes

What is the applicable law?

Areva was granted an injunction by the French authorities against Greenpeace in order to deter further protests. Police and security personnel boarded the *Kapitan Kuroptev* before departure in Cherbourg and remained on board until the vessel left French territorial waters where the injunction could not be enforced. The *Esperanza* escorted the *Kapitan Kuroptev* until Saint Petersburg carrying out direct actions all along the way through different territorial waters.



Figure 20. Rough video on French security personnel disembarking just before the *Kapitan Kuroptev* leaves French territorial waters, the *Esperanza* escorting the *Kapitan Kuroptev* and further actions.

Source: http://www.youtube.com/watch?v=dsw1fzGdIfE&feature=player_embedded

Conclusions and lessons learnt

The domestic French law was enforced until the exit of territorial waters. From France to Russia, the protest was carried out in different territorial waters in Europe all the way to Saint Petersburg.

This example indicates the application of the national law in the territorial waters. Needless to say that enforcement of the law is responsibility of the Coastal State.

5.4 Internal waters. Protest carried out by the Greenpeace ship Arctic Sunrise against the illegal Cargill's grain terminal in Santarem, Brazil, 2007

What happened?

On 16 May 2006, the Greenpeace ship *Arctic Sunrise* carrying activists made an attempt to make a non-violent occupation and blockade of the Cargill's grain terminal. Protestors and Cargill's workers had a confrontation that escalated with the arrival of Cargill's contracted farmers' supporters by boats⁹⁷. Brazilian Navy and Federal Police intervened arresting a large group of activists including the captain of the *Arctic Sunrise*.

Santarem lies in at the Tapajós River and the Amazon River confluence; it is a city part of the state of Pará in Brazil.



Figure 21. Full view of the Cargill factory from above and the *Arctic sunrise*. Source: Greenpeace / Daniel Beltrá

Why did it happen?

In 2003, the US Company Cargill built a grain terminal for the transport of soybeans in Santarem, Brazil, but failed to comply with Brazilian Federal Law to operate it.

⁹⁷ Watch video clip "Greenpeace activists receive abuse from Cargill staff" at, <http://www.youtube.com/watch?v=yVFzcxy8RuM>

Several law suits were filled not only by Cargill to keep the facility open but also to shut it down by the Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (IBAMA)⁹⁸. IBAMA is the Brazilian Ministry of Environment enforcement agency.



Figure 22. The *Arctic Sunrise* blocking the path of a smaller Cargill ship containing Amazonian soya. Source: Greenpeace / Daniel Beltrá

What is the applicable law?

Captains and skippers of all vessels involved in the protests were pressed with several charges by the Brazilian Navy contemplated in the domestic law. However The Tribunal Marítimo (Brazilian Maritime Court) dropped all charges but one, finding all the mariners guilty of "intentionally and negligently committed all navigational acts that harm or endanger the safety and security of the vessel, the lives

⁹⁸ Helena Palmquist, "Terminal graneleiro da Cargill em Santarém é embargado pelo Ibama", Notícias, Ministério Público Federal, Procuradoria Geral da República (News, Federal Public Ministry, General Attorney Office of the Republic), 24 March 2007, http://noticias.pgr.mpf.gov.br/noticias/noticias-do-site/copy_of_meio-ambiente-e-patrimonio-cultural/terminal-graneleiro-da-cargill-em-santarem-e-embargado-pelo-ibama

and properties of board" according to Article 15.e of the "LEI Nº 2.180, DE 5 DE FEVEREIRO DE 1954"⁹⁹.

The captain of the *Arctic Sunrise* was convicted to 3 months suspension of his license in Brazil and a fine of R\$ 1,000 while the others got fined with R\$ 500¹⁰⁰.

Conclusions and lessons learnt

A good example of the application of the domestic law is that the court did not take into consideration any international instruments due to the fact that the incident took place in internal waters under full jurisdiction of the Brazilian Navy Court.

The Article 1 of the Brazilian Federal Law 2180/54¹⁰¹ states,

The Maritime Court, with jurisdiction throughout the national territory, national, autonomous, assist the Judiciary, under the Ministry of the Navy with regard to providing military personnel and budgetary resources for personnel and supplies for the operation, has responsibility to judge the facts of the accident and maritime, fluvial and lacustrine and related issues such activity specified in this Law (Wording of Law No. 5056, of JUNE 29, 1966)

The violent detractors of the protest could have been charged and prosecuted according to the domestic criminal law.

⁹⁹ See Lei Nº 2.180, de 5 de Fevereiro de 1954. Art 15. Consideram-se fatos da navegação: e) todos os fatos que prejudiquem ou ponham em risco a incolumidade e segurança da embarcação, as vidas e fazendas de bord, <http://www.jurisway.org.br/v2/bancolegisl.asp?idmodelo=2593>

¹⁰⁰ See Tribunal Marítimo, "Ata da 6540ª Sessão Ordinária do Tribunal", *Diário de Justiça da União DJU*, 27 April 2010, <http://www.jusbrasil.com.br/diarios/7566418/dju-03-05-2010-pg-40>

¹⁰¹ Art. 1º O Tribunal Marítimo, com jurisdição em todo o território nacional, órgão, autônomo, auxiliar do Poder Judiciário, vinculado ao Ministério da Marinha no que se refere ao provimento de pessoal militar e de recursos orçamentários para pessoal e material destinados ao seu funcionamento, tem como atribuições julgar os acidentes e fatos da navegação marítima, fluvial e lacustre e as questões relacionadas com tal atividade, especificadas nesta Lei. (Redação da Lei Nº 5.056, de 29 de Junho de 1966)

In summary, all the above analyzed PCS cases are samples of the application of the law in the different UNCLOS jurisdictions. The final chapter will provide conclusions and recommendations.

7 Summary and Conclusions

This dissertation was set to determine if protest carried out by ships are legitimate and recognized by international law in general and the maritime industry in particular, as well as whether there is a need to come up with a new IMO international instrument to regulate them. The research started basically looking into publications on this topic in which a gap in the literature was found.

After the examination of the gathered information two main questions become the centre of the academic curiosity, namely why people protest and why protests are carried out using ship. In order to answer these two simple questions, the method of the Five W's was applied: what, why (or how), when, where and who.

During the analysis it was necessary to review some international instruments on human rights such as the UDHR and the ECHR among others, maritime conventions such as the COLREG, SOLAS and MARPOL among others, and UNCLOS.

On the first question -Why people protest? - the finding indicates that people protest when there is a perception of lack of justice aroused by a rise in awareness about unfairness in a committed act or a state of affairs. This situation drives and boosts people to act and react to confront that inequity or wrong-doing to restore balance.

The inquiry led to explore the human rights in general and the right to protest in particular which enhanced the understanding of the nature of human rights and how the international law currently treats them.

The right to protest was not found among the stated human rights in the instruments of study; however it is implicitly contained and protected in the right to freedom of opinion and expression, the right to freedom of movement and the right freedom of peaceful assembly. These freedoms have been definitely exercised by people but with restrictions usually regulated by domestic law in national jurisdictions and international law on the high seas. These restrictions are generally enforced when safety, security or public order could be compromised. For instance, the right to transit international waters is restricted by a 500-m safety zone around exploration/exploitation facilities in the EEZ. Another example is the restriction to the right of innocent passage where navigation with pilot is compulsory for safety reasons. Further restrictions seem to be prejudicial to rights and freedoms.

One of the most significant findings is that the right to freedom of opinion and expression, and association is not only recognized but also assured by the IMO. Furthermore, the finding suggest that IMO and environmental NGOs who usually carry protests at sea may differ in opinion about the methods to exercise those freedoms but they seem to fully agree in having "safe, secure, efficient shipping and clean oceans"¹⁰².

Another finding suggests that there are a number of important differences between piracy and protests on the high seas; however, they seem to contain similarities. One of the most important differences is their objectives; while the goal of piracy is a financial private gain, the goal of a protest is an altruistic objection. Nevertheless, the research shows that some protest on the high seas have been committed with violence, or turned violent, with complete disregard for the lives of seafarers, for property or for the environment. The perpetrators of these acts justified themselves alleging "law enforcement", and such is the case of the Sea Shepherd "enforcing" the UN World Charter for Nature and the government of Israel enforcing the Palestine blockade on the fleet of the Free Gaza Movement. The issue of violence has been

¹⁰² See "What exactly is IMO?", Frequently asked Questions, International Maritime Organization, <http://www.imo.org/About/Pages/FAQs.aspx> (accessed on 02 September 2012)

properly addressed by Japan on many occasions, in particular with a proposal of a Code of Conduct to the IMO, and also by other IMO and UN Member States.

On the second research question, why people carried out protest with ships, the analysis suggests that ships are used to protest due to their versatility. Ships can travel around the world and operate effectively in remote places. Although protest ships could be considered "specialized vessels" protest can be done utilizing any kind of ships in any jurisdiction. On whether or not protest ships operate under maritime safety and environmental protection regulations, this current study found that most of the typical protest ships are registered as "yacht"; therefore, they are exempted from the application of some of the IMO Conventions. Nevertheless, UNCLOS states a prescription about safety and pollution prevention at sea.

Consequently, it could be interpreted that Flag States¹⁰³ must enforce compliance of the relevant maritime safety instruments to all ships including yachts since there is no discrimination between commercial and non-commercial vessels. For this case, the notion of "no favourable treatment" could apply. With regards to the protection of the environment, the International Convention for the Prevention of Pollution from Ships (MARPOL) applies to all ships¹⁰⁴.

From the analysis of cases, it can be concluded that the domestic law is able to deal effectively with any unlawful act committed during PCS in the territorial and internal waters. Undoubtedly, on the high seas the business is different. In fact, Flag States' law is applicable on the ships sailing in international waters, including the EEZ. Consequently, the implementation and enforcement of the law is difficult. Therefore, any PCS which violates any international instruments seems to be an abuse of the right to protest. Unfortunately, the results of this study suggest that Flag States have

¹⁰³ See list of signatory countries to UNCLOS at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm

¹⁰⁴ MARPOL, Article 3, Application, (1) *"The present Convention shall apply to: (a) ships entitled to fly the flag of a Party to the Convention; and (b) ships not entitled to fly the flag of a Party but in which operate under the authority of a Party"*

been lazy or uninterested to react to international and national law violations on the high seas.

As a result, the Japanese government proposed a good initiative to IMO to regulate PCS, the *Code of Conduct for Assurance of the Safety of Crew and Maritime Navigation during Demonstrations/Campaigns against Ships on the High Seas*. However, the analysis of the evidence presented in this paper suggests that somehow a Code of Conduct would be redundant and contradictory to the effectiveness of the existing international maritime instruments, for instance the Convention on the International Regulations for Preventing Collisions at Sea (COLREG), implying that this Convention is insufficient to ensure safety of navigation¹⁰⁵. A Code of Conduct would seem like "a law telling not to break the law". Furthermore, the proposed Code of Conduct will most likely be a non-binding instrument, mere guidelines which will be most certainly be breached by the protesters who are already willing to break the law to achieve their campaign objectives¹⁰⁶. Undoubtedly, a Code of Conduct will not stop the protesters.

Another important finding is that protests carried out by ships are a reality and they are here to stay because despite certain random opposition and detraction from some protest target such as States, corporations and institutions, protest groups have a very important social role. Therefore, it would be wise for the maritime industry to come into terms with them and embrace them as part of the maritime community. In the last four decades, protests carried out by ships have contributed and usually led to improving, changing and creating legislation. For instance, after a persistent campaign started in the late 1970s and recurrent direct actions¹⁰⁷ at sea for more than a decade against ocean dumping, the dumping of radioactive and industrial waste

¹⁰⁵ Greenpeace presented some interesting considerations on existing instruments in its "Reflections on a proposal for a code of conduct during demonstrations/campaigns against ships on the high seas" submitted to the IMO Sub-committee on Safety of Navigation, NAV 54/10.

¹⁰⁶ Watch Rainbow Warrior's captain stating "breaking the law when necessary", video clip "Stories from the Rainbow Warrior: the captain's perspective" at <http://www.youtube.com/watch?v=61s8rKHxrIU>

¹⁰⁷ Watch the report *Dumping Radioactive Waste at Sea- Radiation Legacy*, by Report Mainz on the current situation of the radioactive wastes dumped in the North Sea before the moratorium and ban, <http://www.youtube.com/watch?v=EKS1Tw9-fOM>

was first stopped by a moratorium and later banned in the 1990s¹⁰⁸. It is also worth mentioning that PCS have been vital contributors to the adoption or improvement of the following international instruments: the UN Comprehensive Nuclear-Test-Ban Treaty 1996 (CTBT), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Kyoto Protocol, the Protocol on Environmental Protection to the Antarctic Treaty 1998 (the Madrid Protocol), International Whaling Commission's Moratorium on Commercial Whaling 1986, and the recent The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention) among others.

To conclude, the analysis of all the evidence in this dissertation allows making the following recommendations:

- 1- Protest ships are registered as "yacht" due to the lack of categorization in any of the Flag States. Perhaps, this situation identifies a loophole in the law that needs to be closed. Therefore, SOLAS, STCW, MLC 2006 and LL should be of compulsory application to non-commercial vessels and protest ships in order to improve maritime safety.
- 2- Protest targets should learn how to deal with PCS through proper guidelines.
- 3- Risk assessment should be a must not only for protest ships but also for protest targets in case of protest activities, especially for direct actions protests.

Finally, this paper has exposed many questions that might need further investigation such as guidelines for risk assessments in addition to the security issue on the high seas.

¹⁰⁸ Protocol 1996 to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972

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