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THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING: BEYOND REFORM

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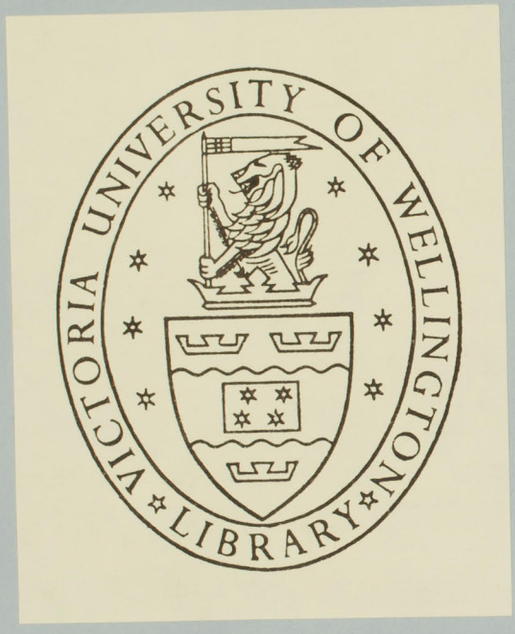
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CONTENTS

The thesis presented in this paper is that the International Whaling Convention for the Regulation of Whaling is not a suitable instrument for the management of whales, and that, following the successful banning of pelagic drift-net fishing, the issue of cetacean protection should be placed before the UN. This paper begins by giving a brief history of whaling, form early times, through to the first attempts at regulation, and the eventual consecration of the ICRW. The performance of the ICRW and it's agency the IWC is then analysed, and several serious weaknesses extrapolated, with the conclusion that significant changes are needed. After further analysis of the substance of the ICRW, the author further concludes that the ICRW itself is beyond reform, and that a new initiative is needed to give cetaceans comprehensive protection. Drawing an analogy with the driftnetting issue, it is suggested that such an initiative could be made successfully at the UN level.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14,500 words.

I INTRODUCTION

The International Convention for the Regulation of Whaling (ICRW)[1] was formed in 1946 by a handful of whaling nations. In the face of decreasing catches following centuries of unregulated whaling, these states sought to conserve whale stocks simply in an effort to keep their industries alive. But despite being a progressive and flexible instrument for its time, the ICRW has proved itself unsuitable for the role of managing cetaceans. Under the ICRW unprecedented numbers of whales have been killed. Successive stocks of great whales were depleted to the point of extinction, so that today the whale is the symbol for endangered species everywhere. Despite placing a moratorium on commercial whaling in 1986, significant numbers of whales are killed each year under various exceptions to the regulations of the International Whaling Commission (IWC), the ICRWs permanent agency. Whaling nations exert a disproportionate amount of influence in the IWC by exploiting these institutional weaknesses of the ICRW. And though the ICRW is the single most important international agreement regulating cetaceans the IWC remains fundamentally divided over its species competence, leaving most cetaceans without international protection.

Despite these flaws, the ICRW has proved resistant to revision. The purpose of this paper is to suggest that the ICRW is beyond reform, and that a new initiative at the United Nations (UN) level is needed if all cetaceans are to have comprehensive protection in line with current attitudes to their status.

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[1] 161 U.N.T.S. 72; T.I.A.S. no 1849; U.K.T.S. no 5 (1949), Cmd 7604; and U.K.T.S. no 68 (1989), Cmd 849.

II BACKGROUND TO THE ICRW

A *Early Whaling*

> "The history of whaling is made up of a number of chapters each covering a few centuries and all more or less repeating the same pattern...Each began with new discovery and hopeful enterprise, passed through a phase of fierce competition and ruthless exploitation with improving techniques and ended at length in diminishing resources, exhaustion and failure"[2]

Whales first became the quarry of humans approximately 4,000 years ago. The first whalers were Norsemen and Polar Eskimo who sought the whale for food and other by-products.[3] In the eleventh or twelfth century the Basques began "modern whaling" by developing an organized whale fishery in the Bay of Biscay. Despite primitive technology, the Basque whalers had so over-exploited their prey, the slow-swimming right whale, that as early as the thirteenth century they were forced to move on to new stocks. By the fifteenth century the Basques were able to catch right whales on the high seas. The era of pelagic whaling had begun.[4]

In the early decades of the seventeenth century other nations began whaling in the north-eastern Atlantic. Dutch, German, British and Danish-Norwegian fleets swarmed the North Atlantic and adjacent areas of the Arctic Sea. They first exterminated the black right whale in the East Atlantic, then pursued its relation the Greenland right whale, or bowhead, at Spitzbergen and East Greenland, until that fishery failed at the end of the seventeenth century. The whaling fleets then

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[2] Quote of F D Ommanney from James E Scarff "The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment" (1977) 6 ELQ 323, 344.

[3] L Kutner "The Genocide of Whales: A Crime against Humanity" (1978) 10 Lawyer of the Americas 784, 788.

[4] See n 2, 344

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moved to Davis Strait and Hudson Bay where the stock of bowhead were severely depleted by the mid-1700s, though the fishery did not finally collapse until the first decade of the twentieth century.[5]

The colonists of north-east America first engaged in shore whaling in the 1600s. By the mid eighteenth century Yankee whalers circumnavigated the globe in whaling voyages that often lasted as long as four years. New stocks of humpback and right whale were exploited, but the sperm whale had become the main target of the industry. At its peak in 1846 the American industry employed 70,000 people, and flagged 729 whaling vessels.[6]

At this stage the whaling industry stalled again. The American Civil War caused a significant cut-back in activities and the discovery of petroleum provided a cheap substitute for whale-oil. But most importantly, the grey, right, bowhead and humpback whales had been severely depleted.[7] The new era of commercial whaling that began in the latter part of the nineteenth century was not due to a recovery in stocks, but to new technology: steam powered catcher boats mounted with harpoon guns. The whalers could not only hunt the remaining right, humpback and sperm whales more efficiently- they could also pursue the fast swimming whales of the genus *Baleanoptera* (the blue, fin, sei, Bryde's and minke whales).[8]

The whale stocks of the North Atlantic were again subjected to intense exploitation. Operations were at first conducted from land stations, but soon pelagic whaling was the common form, using fleets of catcher boats in combination with a factory ship, another recent innovation. Whalers were forced to search

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5 O Hertz and F O Kapel "Commercial and Subsistence Hunting of Marine Mammals" (1986) 15 Ambio 144, 146.

6 See n 2, 345.

7 See n 2, 345.

8 See n 5.

further south into Antarctic waters, where vast new stocks were found. In 1904 the first Antarctic shore station was established on South Georgia Island. A year later the first factory ship entered the Antarctic. By the start of World War One, Norway alone had approximately 60 whaling companies operating 22 shore stations, 31 factory ships, and 145 catcher boats in the Antarctic. Their total catch between 1913-1914 amounted to nearly 15,000 whales- three times the total annual catch of a decade earlier.[9] The halt to this rapid growth caused by World War One proved merely an aberration, and by 1931 the world catch exceeded 43,000 whales.

B *The First Attempts at Regulation*

In the early twentieth century few perceived the need to regulate whaling in order to conserve the stocks on which the industry was based. In 1924 the League of Nations Committee on International Law reasoned that due to the vast amount of capital needed, and the difficulties involved in capturing large numbers of whales, the development of a long-term profitable business capable of threatening the species was not probable.[10] Furthermore the doctrine of freedom of the seas made regulation difficult, as did the absence of the necessary scientific information.[11]

Nevertheless an awareness of the whales plight was developing. At a meeting of the International Commission for the Protection of Wildlife in 1915, attention was drawn to the fact that this "most important source of marine wealth would mathematically be exhausted within a short time."[12] The International Council

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9 See n 2, 347.

10 R J Clement and G M Trevalio "International Protection of Marine Mammals" (1979) 5 CJEL 199,208.

11 P W Birnie "International legal Issues in the Management and Protection of the Whale: A Review of Four Decades" (1989) 29 NRJ 903, 905.

12 P W Birnie *International Regulation of Whaling* (Oceania Publications, New York, 1985) 105.

for the Exploration of the Sea began to press for an international solution, and encouraged the League of Nations to include this issue on the agenda of it's 1930 Conference promoting the rational exploitation of the seas resources.[13] Consequently, a number of concerned nations, under the League's auspices, negotiated a Convention for the Regulation of Whaling in 1931.[14]

The Convention introduced a system of licensing for flag states and prohibited destructive and wasteful methods of whaling. Most significantly, it regulated whaling in all oceans and the territorial waters of contracting countries. It was nonetheless a weak attempt at regulation. It only applied to baleen whales, and no overall quotas were established. Moreover, several whaling countries did not sign and ratify the Convention.[15] Its purpose was essentially that of curtailing competition in the whaling industry.

These weaknesses caused whaling companies to enter into a scheme of self-regulation. Under this arrangement various species of whales were ascribed a blue whale unit (BWU) value. One BWU was the equivalent of one blue whale, or three humpback, or five sei.[16] Each company was then assigned a harvest quota in BWUs. This arrangement only lasted two years however, collapsing when non-member countries began taking whales without a quota.

In 1936 Britain and Norway, who together accounted for 95% of the world catch, reached a bilateral agreement prescribing regulations over the two country's whaling industries.[17] At a conference in 1937 several other nations agreed to be bound by the terms of this agreement, the basis for the Agreement for the

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13 See n 11, 906.

14 24 September 1931, 49 Stat 3079; T.S. No. 880; 155 L.N.T.S 349.

15 Argentina, Chile, Germany, Japan and the USSR.

16 In 1944 it was modified to be one blue whale or two fin or two and a half humpback or six sei. See n 2, 350.

17 See n 3, 350.

Regulation of Whaling.[18] Additional modifications to this Agreement were made at conferences in 1938[19] and 1939, including the setting of quotas and the establishment of sanctuaries in the Atlantic, Pacific and Indian Oceans.[20] Though improved whaling techniques, coupled with refusals by Chile, Japan and the USSR to sign, reduced significantly the conservation value of the Agreement, the precedent of annual international conferences on whale conservation had been set.

Though World War Two interrupted this development, it created a post-war environment in which whale conservation had a greater chance than ever before. The overcapitalisation of the whaling industry in the 1930s had been eradicated during the war.[21] The two countries which had resisted international regulation most adamantly, Germany and Japan, were no longer capable of doing so, while the willingness of other whaling nations to establish international regulatory agencies was at its peak. Against this background, and a disastrous 1945-46 season, the U.S convened an international whaling conference in Washington, DC in 1946. There delegates drafted a convention which only slightly modified a proposal that had been presented by the US. At the close of the conference 14 nations[22] signed and later ratified the ICRW.

III THE ICRW

Though it incorporated many of the provisions of the 1937 Agreement and its protocols, the ICRW nevertheless represented a considerable advance over

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18 8 June 1937, 52 Stat 1460; T.S. no 933;L.N.T.S. 79.

19 Protocol Amending the International Agreement and Final Act, 24 June 1938, 53 Stat 1794; T.S. no 944; L.N.T.S. 131.

20 See n 10, 209.

21 Of 41 ships in the industry in 1940, 27 were lost and 4 converted to other uses. See n 2, 351.

22 Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, USSR, UK, US, and South Africa. Japan did not join until 1951.

previous and contemporary fishery treaties. Its purpose was "to ensure proper and effective conservation and development of whale stocks..."[23] To facilitate this the ICRW incorporated two significant mechanisms: the International Whaling Commission (IWC) and the Schedule to the ICRW.

A *The IWC*

Article III (I) of the ICRW provides that "[t]he contracting governments agree to establish an International Whaling Commission,..." This commission, the IWC, is the permanent agency of the ICRW. It is composed of one voting representative of each contracting government, who may be accompanied by experts and advisers. The ICRW makes no provision for the admission of observers to the IWC meeting, but the IWCs Rules of Procedure allow non-party nations, intergovernmental organisations and non-governmental organisations (NGOs) to be represented by observers.[24] The IWC has three permanent committees which carry out functions to facilitate its decision making capacity: the Scientific Committee (SC), the Technical Committee and the Finance and Administration Committee. The IWC meets annually, usually in June, to amend and adopt regulations contained in the Schedule.

B *The Schedule*

The Schedule is an appendix attached to the ICRW,[25] and contains the detailed regulations governing the protection and exploitation of whales. The IWC has the power to amend the Schedule to fix "(a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of

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23 Preamble to the ICRW.

24 S Lyster *International Wildlife Law* (Crotius Publications, Cambridge 1985) 23. There is no limitation on the purposes of these organisations. The only requirement is that they have offices in more than three countries. Hence the International Organisation of Rabbis has been accorded observer status. See n 11, 924.

25 Article I provides that the "Convention includes the Schedule attached thereto which forms an integral part thereof."

sanctuary areas; (d) size limits of each species; (e) time, methods and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records."[26] Though modifications of the ICRW require unanimous agreement and subsequent ratification of all member states, the Schedule can be amended by a three quarters majority of the IWC.[27]

These two assets imbued the ICRW with considerable flexibility. But despite undeniable improvements over past regulatory efforts, and the stated aim of "conservation" of whale stocks, the ICRW heralded a new era of exploitation of whales.

IV THE MANAGEMENT OF WHALES UNDER THE ICRW

A *BWU, NMP and the Moratorium*

During the 1950s and early 1960s conservation of exploited natural resources, especially fishery resources, became equated with the principle of maintaining populations at that size which theoretically yields the largest harvest indefinitely. This level is known as the "maximum sustainable yield" (MSY) stock level.[28] This concept became widely incorporated into treaties governing the conservation

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[26] Article V (1). Note that it is not the purpose of the he ICRW to ensure "the orderly development of the industry" in the strict sense, but only to provide one of the necessary conditions for that ie whale stocks in an appropriate state. Orderly industrial development is a responsibility of the nations engaged in such industry, individually and collectively. Hence the sharing of the IWC catch limit among whaling nations is arranged by negotiations outside the IWC. Allocation of the catch limit involved an early version of individual transferable quotas (ITQ), quota share being attached to vessels, and being transferrable with the vessel. Hence in 1962, the UK sold a factory vessel to Japan, which Japan scrapped, but used the quota share that went with it.

[27] Article III (2).

[28] "Maximum Sustainable Yield" is based on the theory that populations are most productive at reduced levels. Thus maximum yield can be achieved through maintenance of a population at a reduced level.

of fishery and seal resources.[29] The ICRW was drafted prior to the general acceptance of MSY, and instead referred vaguely to "optimum levels" and "optimum utilisation".[30] The initial goal of the IWC was set as the establishment of whaling quotas on a sustainable yield basis.

The IWC first tried to achieve this, and to ameliorate the effects of intensive whaling, by setting a single maximum catch limit in terms of BWU. The BWU was an unfortunate bequeath of previous regulatory efforts. It was a "plainly illogical"[31] management unit, combining dozens of stocks of several different species, in radically different stages of depletion, into a single category.[32] The initial maximum catch limit was set at 16,000 BWU by the IWC at their first meeting in 1949. However by 1953 only 14,853 BWU could be caught.[33] In 1956, in the face of overwhelming evidence of the decline of whale stocks, the IWC reduced the annual quota to 14,500 BWU. Disenchantment with this saw the quota pushed up again in 1956, followed by three years where no quotas were set at all due to disagreement.[34] When quotas were set for the 1962-63 and 1964-65 Antarctic seasons, they again proved to be far too high.[35]

In 1960 the IWC appointed a committee of three scientists ("The Committee of Three") to make an independent study of stocks upon which BWU quotas could be based. The Committee of Three presented it's final report in 1963, recommending

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29 See n 2, 391.

30 See Preamble of ICRW and article V (2) (a)

31 J L McHugh "The Role and History of the International Whaling Commission" in *The Whale Problem* (Schevill W E ed. Harvard University Press, 1974) 305, 309.

32 BWU was an invention of the whaling companies, designed essentially to maximise yields of oil per whale. See n 12, 120.

33 See n 11, 921. It is important to note that until 1970 quotas were only set for Antarctic whale stocks.

34 See n 31, 311. Norway and the Netherlands withdrew from the IWC in the belief of having an unfair share of the cuts forced upon them.

35 Catch limit set for 1962-63 was 15,000 BWU, but the actual catch was only 11, 306 BWU; for 1963-64 a limit of 10,000 BWU was set, of which only 8,773 was caught. See n 31, 310.

a total ban on the hunting of humpback and blue whales, and joined with the SC in recommending that the BWU be abolished and quotas set on a species-by-species basis.[36] Though the IWC rejected these recommendations, the catch-limit for the 1965-66 Antarctic season was cut drastically to 4,500 BWU.[37]New scientific evidence released in 1968 proved that even this level of exploitation was too high, due to an underestimated age of sexual maturity for several species, and subsequently an overestimation of the recruitment rates. As a result, the Antarctic quota was reduced to below the estimated MSY.

Nevertheless, the large stocks of blue and fin whales that had been found close to the Antarctic pack ice no longer existed. The Antarctic whalers now harvested the smaller inhabitants of the warmer waters- sei, minke and Bryde's.[38] By 1970 Antarctic whale stocks were so depleted that it was estimated it could take 50 years for some species to recover.[39] The industry increasingly shifted it's focus to the North Pacific.[40]

It was at this stage that the few NGOs attending IWC meetings as observers became increasingly critical of the IWCs effectiveness. This criticism was reflected at the United Nations Conference on the Human Environment (UNCHE) at Stockholm in 1972. UNCHE marked a turning point in the attitudes of the world to the environment, but it had particular ramifications for the IWC. At UNCHE the image of the "endangered whale" became a symbol for organisations concerned with environmental protection and animal welfare, while for millions of people saving the whale became "a crucial test of their political ability to halt

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[36] The Committee of Three advocated MSY as the proper management goal. From the mid 1960s the "optimum levels" mentioned in the ICRW were construed to mean MSY levels. However, most IWC members did not undertake the research necessary to achieve this.

[37] This was seen as a "remarkable victory for the [IWC]...". See n 31, 311.

[38] In the 1957- 1958 season, 65% of the Antarctic catch had been taken south of 60 degrees South; by 1969-70, 89% of the catch occurred north of 60 degrees South. See n 2, 366.

[39] See n 11, 923.

[40] Quotas for the North Pacific baleen whales were first set in 1970.

environmental destruction for profit by a few."[41] UNCHE adopted a number of conservation principles, and voted overwhelmingly for a ten year moratorium on commercial whaling.[42] This recommendation was referred by the IWC to the SC at the 1972 meeting. The SC noted that commercial catching operations were the unique source of "certain kinds of information which are essential for continuing assessment of whale stocks...", and agreed with the IWC that "a blanket moratorium cannot be justified scientifically. It is ...an attempt to regulate several stocks as one group whereas prudent management requires regulation of the stocks individually."[43] However, it was recognised that this was the same argument against the BWU quota system, which was finally abandoned in favour of quotas set on a species-by-species basis.

The following year the US presented another proposal to the IWC for a ten year moratorium on commercial whaling. It received a majority of votes, but did not obtain the three quarters majority needed. Several American scientists stressed the biological inadequacies of the current management scheme, and a stock-by-stock approach was advocated by the SC. NGO observers also demanded an ecosystem approach.[44] At the 1974 meeting another moratorium proposal was rejected, but a compromise was effected: a resolution prepared by Australia and Denmark amending the Schedule was passed, and incorporated in at the 1975 meeting. This amendment created a new management system, known as the New Management Procedure (NMP).

The 1974 Resolution recognised that "management...should be based not only on

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41 S Holt "Whale Mining, Whale Saving" (1985) 9 Marine Policy 192, 193.

42 Resolution No. 33 of UNCHE:

> It is recommended that governments agree to strengthen the IWC, to increase international research efforts, and as a matter of urgency to call for an international agreement under the auspices of the IWC and involving all governments concerned for a ten year moratorium on commercial whaling.

43 See n 41.

44 See n 11, 923.

the concepts of maximum sustainable yield in numbers by species, but should also include such considerations as total weight of whales and interactions between species in the marine ecosystem."[45] It also affirmed that "whale stocks are a common concern to mankind," and that there was a need to "preserve and enhance whale stocks as a resource for present and future use..." -subtle expansions of the preamble to the ICRW reflecting a changing of attitudes.[46]

NMP set out new, more precise and more ecologically sound guidelines as a policy framework for the determination of annual harvest quotas. Each identifiable stock of each species was to be classified into one of three categories according to that stock's status in relation to MSY levels.[47] The three categories were: sustained management status (SMS); Initial Management Stocks (IMS); and Protection Stocks (PS). The goal was to manage each stock in such a manner that it eventually could be classified as a SMS. A SMS was to be managed so that it's population would be maintained not more than 10% below or 20% above MYS stock levels. IMS would include those stocks which had not yet been subjected to intense harvesting[48], and which could be harvested at levels above the sustainable yield until populations were reduced to slightly above the MSY stock level. They would then be reclassified as SMS. PS were defined as those stocks below SMS; they would receive complete protection from commercial whaling until they recovered to "near MSY" and could be redefined as SMS.

NMP was the strongest and most specific commitment to conservation that the IWC had to that point undertaken.[49] In 1976, for the first time, quotas were established for minke whales in the North Pacific and for sei and sperm whales

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[45] See n 41, 194.

[46] See n 41, 195.

[47] A factor was included to allow for error due to environmental variables and uncertainties.

[48] ie existed at stock levels 20% above MSY stock levels. Quotas for IMS stock could not exceed 90% of the estimated MSY of that stock.

[49] See n 2, 370.

in the North Atlantic, leaving no stock of commercially hunted whale without its own quota. But NMP was far from flawless. The IWC was required to classify all stocks according to the advice of the SC, and no indeterminate category was provided to cover cases where the SC might be uncertain or even totally ignorant of the status of a stock.[50] Although the SC endeavoured to give the advice required, lack of data and deep flaws in the procedures for modelling stocks, and for estimating values of vital parameters in the models, made it impossible for it to do so.[51] A World Consultation on Marine Mammals at Bergen, Norway in 1976 highlighted the poor status of many stocks and the complexity of whale biology and population dynamics given the ecological interrelationship of stocks within the marine environment as a whole.[52] Thus "catch quotas remained optimistic fantasies, and the populations continued to decline."[53]

Consequently, members of the IWC and the increasingly large numbers of NGOs[54] attending IWC meetings continued to press for a moratorium on commercial whaling. At the 1979 meeting the newly independent Republic of Seychelles joined the IWC. A non-whaling state, it joined as part of a general policy of adhering to all relevant agreements concerned with the protection and management of marine resources. Having consulted other Indian Ocean coastal states previously, the Seychelles proposed that the Indian Ocean be declared a

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50 The biggest problems stemmed from the intensive exploitation of the minke and Bryde's whale, which began in the early 1970s. Historical and biological data which had been available for the larger whales did not exist for these species. Consequently, these stocks were either labelled as unclassified and "provisional" quotas were set on an ad hoc basis, or they were classified as SMS "in the absence of positive evidence that it should otherwise be classified." Unlike quotas based on MSY, no safety factors were applied. The IWC was in the absurd position where when less was known about a stock, the less precautions were taken.

51 See n 41, 196.

52 See n 11, 924.

53 D Day *The Whale War* (Routledge and Kegan, London, 1987) 33.

54 34 NGOs attended the 1979 IWC meeting, as well as 23 IWC members, 20 observer states, and 7 inter governmental organisations.

sanctuary for whales.[55] This proposal was adopted, as was one prohibiting all pelagic whaling operations except those for catching minke,in the face of the defeat of the usual call for a moratorium on all commercial whaling. These amendments signalled the shifting of the balance of power in favour of the anti-whaling lobby represented in the IWC.

Finally, in 1982, the IWC did adopt a proposal by the Seychelles for a moratorium on commercial whaling. But concessions were given to whaling nations in order to facilitate this radical amendment, namely: a three year phase out period, meaning the moratorium was not to be truly effective until the 1986 season; and, though indefinite in duration, the effects of the moratorium were to be subject to a "comprehensive assessment" by 1990 at the latest.[56]

In the mid 1980s the SC began to consider how to conduct this "comprehensive assessment". It was decided to approach the assessment on a stock-by-stock basis, beginning with the southern hemisphere minke, this being the stock the Japanese were most interested in whaling commercially.[57] The consensus is now that this stock numbers approximately 750,000, and as such there is no scientific argument against lifting the moratorium on this stock. It was expected that a quota of one or two thousand would be given at the 1992 IWC meeting.[58] However, the

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[55] As provided for by article V (1) (c).

[56] The amendment to the Schedule, which was adopted with 25 votes in favour, seven against and five abstentions stated:

> [C]atch limits for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific evidence, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

[57] Since then the SC has looked at the North Atlantic stock of minke, the target of the Norwegian industry; Atlantic fin, the target of the Icelandic industry; and the Pacific minke, another stock which the Japanese wish to whale. There remains significant scientific argument over the status of these stocks.

[58] Head of the Japanese Scientific Whaling Programme, Dr Fugasa Ngasaki, interviewed on "Harpooned", *Sixty Minutes*, 24 May 1992, TV3.

imposition of the moratorium had also signalled the abandonment of NMP. The SC was commissioned to develop a Revised Management Procedure (RMP) that would ensure that whale stocks would never again be depleted to levels as dangerously low as in the past. In 1992 a catch-limit algorithm was adopted by the IWC.[59] This is the formula that will be used to fix quotas for the various stocks when the moratorium is lifted. But while whaling nations considered that this alone constituted the RMP, the anti-whaling lobby established that it in fact only represents one component. Before commercial whaling can begin a compliance regime must also be finalised, comprising new reporting, monitoring and enforcement procedures. These should be finalised and approved at the 1993 IWC meeting.

B *The Institutional Weaknesses of the ICRW*

The approval of the moratorium on commercial whaling in 1982 was perceived by many as a demonstration that the IWC could successfully perform the role of managing whales responsibly. However, institutional weaknesses have continued to prove that the IWC is incapable of fulfilling its mandate. Though the moratorium was effectively in force in 1986, whaling has continued under the scientific and aboriginal whaling provisions. The objections clause, which rendered the IWC impotent prior to 1982, has been invoked with increasing frequency, as has the threat of whaling nations to leave the IWC and whale outside of the ICRWs jurisdiction. The ineffectiveness of the IWCs own enforcement powers in these matters have been partially mitigated by the unilateral actions of the U.S. Meanwhile, disagreement within the IWC over its species competence has left dolphins, porpoises and many small whales without effective international protection.

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[59] The catch-limit algorithm works on an abundance estimate plus information about annual takes. New Zealand was the only IWC member not to approve it, objecting to the fact that it requires pristine stocks to be taken down to 72% of their abundance.

1 *The Aboriginal Whaling Exception*

Exceptions for aborigines (indigenous peoples), allowing them to take whales otherwise protected or regulated by the IWC, were not provided for by the ICRW, but from its conception have always been included in the Schedule. The Schedule has regularly provided that notwithstanding any classification of stocks, including a setting of a zero quota, catch limits can be set "for aboriginal subsistence needs."[60] Aboriginal subsistence whaling is described in the Schedule as whaling where "the meat and products of such whales are to be used exclusively for local consumption by the aborigines..."[61] Present aboriginal exceptions cover humpback whales off St Vincent and the Grenadines; fin from the West Greenland stock; minke from the Central North Atlantic stock; and bowhead from the Bering-Chukchi-Beaufort seas.[62] The whaling is not necessarily carried out by technologically "primitive means". Grey whales in the Eastern North Pacific may be caught by "a contracting government on behalf of aboriginals."[63] This refers to catching by the USSR using all the modern facilities such as catcher boats and exploding harpoons.[64] Greenlanders hunt minke with modified motor fishing boats mounted with harpoon guns.

The propriety of the aboriginal exception became a contentious issue in 1977. The bowhead whale had then been one of the most endangered whale species for many years. Commercial harvesting of the bowhead ceased in 1914, yet catch statistics since had shown no significant increase in population.[65] The Alaskan Inuit had

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60 Paragraph 13 (1) of Schedule.

61 Paragraph 13 (1) (b) of Schedule.

62 See Table 1 of Schedule and paragraph 13 (1), (2) and (3).

63 Paragraph 13 (3).

64 The USSR (CIS) are suspected of abusing this right, using whale meat from the aboriginal hunt as feed for a commercial mink farm. See n 53, 74-75.

65 P Michie "Alaskan Natives: Eskimos and Bowhead Whales" (1979) 7 AILR 79, 80.

been hunting the bowhead for some 1,000 years, and it formed a central facet of their subsistence culture.[66] During the first half of this century the Inuit averaged an annual catch of 12 whales. But a growing population and improved technology saw an intensifying of whaling efforts.[67] Between 1971 and 1978 an average of 30 whales were landed.[68] The proportion of struck whales to whales landed also increased significantly.

In 1977, presented by the SC with new estimates as to the size of the stock, the IWC decided to give the bowhead PS status and to delete the exemption clause whereby the aboriginal catch had been allowed.[69] The US was placed in an embarrassing position, being committed on the one hand to the fight for a moratorium on whaling and for more conservationist policies, and on the other to sustaining the cultural rights and traditional subsistence needs of the Inuit. Although it disputed the legality of the IWCs actions, it did not make a formal objection.[70] However, the IWC effected a compromise by adopting an amendment to the Schedule which allowed a limited quota of bowhead for the Inuit in consideration of their nutritional and cultural needs.[71] The Technical Committee of the IWC was commissioned to examine the problem, and in 1980 an ad hoc Working Group was established to develop management principles and guidelines or subsistence catches of whales by aboriginal peoples.[72] The results of the

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66 N Doubleday "Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law" (1989) 17 DJILP 373, 376.

67 The use of modern catch equipment by subsistence hunters is defended as necessary to improve their life conditions, and on the grounds that it may even serve to improve management of the resource eg by reducing the loss rates. See n 5, 151.

68 See n 65, 89.

69 See n 66, 385.

70 Inuit lobby groups sued to compel the US to lodge an objection, but the US courts held that the issue was non-justiciable, being so directly related to the conduct of US foreign relations. See *Hopson v Kreps* 462 F Supp 1374 and K Bliss "IWC Regulations and the Alaskan Eskimo" (1979) 19 NRJ 943, 952.

71 Recent Developments "Aboriginal Exemption to the IWC" (1978) 6 AILR 249.

72 See n 66, 386.

Working Group were incorporated into the Schedule in 1982, and say essentially that such catches may be taken from PS stocks provided that catches "are set at such a level which will allow whale stocks to move to MSY level."[73] For several years this issue continued to impinge on the US in its efforts to secure reductions in quotas for other species, as it found it necessary to make concessions in order to win support for its own proposals for Inuit quotas, quotas which have been consistently raised.[74] In 1992, however, the aboriginal whaling issue has taken a different slant. Conservationists are tired of fighting the US for a handful of whales, when thousands will be at issue if the moratorium is lifted. Moreover, the stock-size of the bowhead has increased to approximately 7,000, with an estimated annual stock increase of 130, whereas only 54 whales are being hit annually. Instead, a new threat is being posed by the commercial whaling nations. Since 1982 the term aboriginal has been subjected to their scrutiny. Japan, Norway and Iceland have argued that certain of their whaling operations should in fact be covered by the aboriginal whaling exception. They are seeking a redefinition of the term, or substitution or inclusion of another term, that would allow small and remote coastal communities with a cultural history of whaling to fall within the scope of the exception, despite having a commercial aspect to their operations. Japan has drawn a direct analogy between it's subsistence whaling operations and those of the Inuit, and has criticised the US for hypocrisy in dealing with this issue.

Requests made by the Japanese since 1988 for an "interim relief allocation" of 50 whales for these communities have been rejected by the IWC, due mainly to the commercial flavour of the operations, and also a belief that the re-definition is simply a means of getting around the moratorium. It is understood that in the long term Japan and Norway want to take 700 whales annually in this manner. The perception is that if the IWC gives away the principle on this issue, it will be constantly pressured to make more and more concessions to the whalers.

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[73] See n 41, 202.

[74] Catch limit in 1980: 18 landed or 24 struck. In 1987: 32 struck; in 1988, 35 struck.

However, it is possible that anti-whaling nations would be prepared to make a trade-off - small scale coastal whaling around Japan, Norway and Iceland, in return for an extension of the commercial whaling moratorium on the high seas,[75] or a whale sanctuary in the Antarctic.[76]

2 *The Scientific Whaling Exception*

According to the ICRW, party states may grant permits to catch "whales for the purpose of scientific research" notwithstanding anything contained within the Convention.[77] As catch quotas declined and more stocks were classified PS in the 1970s, many environmentalists and IWC members became concerned that this exemption was being abused, or could be used to take more whales than was necessary for research.[78] In 1979 the IWC amended the SCs Rules of Procedure and the Schedule to require that proposed permits be submitted to the SC to be reviewed and allow for recommendations to be made. These requirements have been criticised for "possible conflicts with article VIII of the ICRW and the sovereign rights of states",[79] but were justified on the grounds that they simply provided for scientific comment, and did not usurp the right of the issuing state to issue the permit, whatever the SCs recommendations.

Following the adoption of the moratorium, and corresponding proposals by whaling nations for large catches of whales under scientific permits, fears were again raised that the scientific permit would become a form of disguised commercial

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[75] This is a possibility alluded to by Kazuo Sumi. See K Sumi "The "Whale War" Between Japan and the US: Problems and Prospects." (1989) 17 DJILP 317, 363.

[76] France proposed a whale sanctuary for the Antarctic at the 1992 IWC meeting. Such a sanctuary would probably end permanently commercial whaling, at least for Japan. The proposal did not get the necessary three quarters majority needed to amend the Schedule.

[77] Article VIII.

[78] See n 11, 931. An example of the abuse of the scientific permit was the New Zealand government's issuing of a permit in 1963, which allowed harvesting of lactating mothers and calves in a desperate bid to keep the whaling station on Great Barrier Island open.

[79] See n 75, 336.

whaling, or at least enable whaling nations to keep their whaling fleets operational pending the moratoriums review.[80] Many in the SC and IWC were also critical of the scientific permits being issued on the basis that they would generate very little new knowledge for management purposes.[81] In 1985 the SC developed a series of guidelines for review of scientific permits, and the IWC adopted a resolution recommending that those whaling under a scientific permit take account of these guidelines. A further resolution was adopted in 1987, providing more criteria and guidelines, and establishing a mechanism whereby the IWC could recommend that a government not issue a permit that did not meet SC approval.[82]

But though the SC still had no formal means of rejecting permits, the threat of trade sanctions from the US has had an impact on whaling nations who issued permits against the IWCs recommendations. Under pressure from the US, Japan reduced a proposed take of whales under scientific permit from 825 minke and 50 sperm annually to 300 minke annually.[83] In 1988 Norway initiated a five year programme to study minke in the North East Atlantic, which would involve taking up to 70 of the whales. Norway only went ahead after it had cleared the programme with the US.[84]

But as IWC recommendations and resolutions are not binding on members,

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80 Congressional representative Don Barker condemned Japanese and Icelandic research whaling on 27 January 1988, saying " Under the guise of "scientific research", these nations plan to hunt and kill over 400 whales per year. This "research whaling" is, of course, nothing more than a thinly-veiled effort to continue their commercial whaling operations." See n 75, 317.

81 S Andresen "Science and Politics in the International Management of Whales" (1989) 13 Marine Policy 99, 113-114.

82 See n 11, 932.

83 This is the amount the Japanese are currently harvesting in the Antarctic.

84 See n 81, 113. Interest groups have also taken upon themselves the responsibility of policing the scientific permit exception. On November 9, 1986, members of the Sea Shepherd Conservation Society sunk two Icelandic whaling boats in Reykjavik harbour on the grounds that the scientific permits they were operating under had been issued primarily as a means of continuing commercial whaling.

whaling continues under the scientific permit against the wishes of the IWC, and is only significantly contained to the extent that the US is prepared to back up the IWC with its economic strength.

3 *Objection Procedures*

It is the legitimate right of every member nation of the IWC to file an objection to a Schedule amendment. The ICRW provides that if a contracting government formally objects to an amendment to the Schedule within 90 days of a vote, the amendment is not binding on that government.[85] Most whaling countries have used the objective clause at one time or another to escape application of unwanted decisions, and this has had the effect of rendering IWC amendments absolutely ineffectual. As early as 1954 Canada, Japan, the US and the USSR objected to a prohibition on the taking of blue whales in the North Pacific. As they were the only states hunting this stock, the IWCs action, one of its first real conservation initiatives, was ineffective. A similar fate befell the IWC initiative in 1981 to ban the "cold grenade" harpoon as a means of killing minke for commercial purposes, as the principal users of this harpoon all lodged objections.[86]

Four countries- Japan, Norway, Peru and the USSR- lodged formal objections to the 1982 moratorium, claiming it was illegal for lack of scientific basis.[87] However, the unilateral intervention of the US saw Peru withdraw its objection promptly, and Japan agree to withdraw it's in 1988.[88] The USSR and Norway indicated that, though leaving their objections in place, they would abide by the moratorium.

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[85] Article V (3).

[86] See paragraph 6 of Schedule.

[87] See n 41, 207.

[88] See n 11, 925.

4 *Non-membership of the ICRW*

The ICRW applies to "factory ships, land stations and whale watchers under the jurisdiction of the Contracting Governments."[89] Clearly the ICRW cannot apply to non-party states, and this has proved a considerable weakness of the IWC.

Many whaling nations did not join the IWC for years. Peru and Chile operated under the much weaker Permanent Commission for the Exploitation and Conservation of the Marine Resources of the South Pacific, while Spain and South Korea simply operated unregulated whaling operations. IWC regulations were also circumvented by parties to the ICRW registering vessels with non-party states and whaling under "flags of convenience". The IWC has relied mainly on individual countries to curtail such activities,[90] which are now no longer significant.

What has now evolved as a significant problem is the threat of present members of the IWC to leave the Commission and conduct whaling operations outside the ICRWs jurisdiction. Many whaling nations believe that non-whaling nations and NGOs have hijacked and subverted the ICRW. In their eyes the "structural violence" of the majority prevails in the IWC, and the minority view of the whalers is trampled on.[91] This is the result of environmentalists inviting non-whaling nations, who have no interest in the whaling industry, to join the IWC, and whose seats are often occupied by environmentalists of a different nationality.[92] These countries have nothing to lose economically by protecting whales, but can gain

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89 Article I (2).

90 One of the most infamous pirate whalers, the *MV Sierra*, which whaled throughout the Atlantic under various flags in the 1970s, was prosecuted in the Bahamas and South Africa, and was forbidden entry to all UK-controlled ports. In 1980 Eco-guerillas bombed and sunk the *Sierra* in Lisbon harbour. See n 53, 68.

91 See n 75, 328.

92 Between 1981 and 1983, 19 nations joined the IWC; 17 developing nations and only one whaling nation. See n 41, 193 and n 75, 329.

politically by earning an "environmentalist profile".[93]

Adhering to this view, Japan has criticised the "irresponsibility" of many IWC members, and has advocated a "normalization" of the IWC.[94] There is some concern that if the whaling nations perceive that there is no prospect for improvement within the IWC then their only reasonable option will be to withdraw *en masse* and form some sort of mini-regime. Such fears appeared confirmed by the 1992 IWC meeting where Iceland, after giving notice of it's intentions at the 1991 meeting, formally left the IWC on the first day. Shortly after, Norway gave notice that it intends to resume commercial whaling in 1993, whether or not the IWC agreed to quotas. Iceland and Norway, with the support of Denmark, have formed the North Atlantic Marine Mammal Commission (NAMMCO) which will set quotas and attempt to rival the IWC on a regional basis. Japan also gave notice at the 1992 meeting that if no quotas were given in 1993 then it will review its position in the IWC.[95] It has also talked of establishing an organisation similar to NAMMCO in the Pacific Ocean.

It remains to be seen whether the economic gains stemming from these initiatives will outweigh the political costs. Japan, Norway and Iceland all have "fuzzy" environmental images. Norway professes to have a responsible attitude to the environment, but it's tenacious whaling industry serves to weaken it's credibility on this front. Japan is particularly sensitive to adverse opinion, and has been trying desperately in recent years to shake off a bad reputation for it's environmental policies. It is just as likely that the threat to whale outside of the ICRW is simply a bluff designed to scare the IWC into lifting the moratorium. The fact that the IWC appears to have resigned itself to a resumption of whaling under the NMP seems to indicate a weakening of will on the part of the anti-

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93 See n 81, 109.

94 See n 41, 210.

95 The next IWC meeting is in Japan, and the Japanese believe this will strengthen their position.

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whaling fraternity.

5 *Enforcement of the ICRW*

The IWC has no power to impose sanctions for violations of the ICRW provisions. The ICRW is essentially self-regulating, with the IWC performing a monitoring role and relying on members to fulfil their obligations in good faith.[96] Each contracting government is required by the ICRW to punish infractions by persons or vessels under it's jurisdiction, and to report these infractions to the IWC.[97] Since 1949 the Schedule has also stipulated that inspectors should be maintained on each factory ship, and at least one inspector on each catcher boat functioning as a factory ship, to facilitate the reporting of infractions.[98] Inspectors are national enforcement officers, responsible only to their government.

As early as 1955 Norway proposed an additional system of international inspectors. It was not until 1972, however, that a partial *ad hoc* International Observer Scheme was finally inaugurated, and this was not put into practical effect until 1977.[99] This was a relatively weak effort at monitoring, based on the mutual exchange of observers. The USSR and Japan made arrangements to provide each other's fleets with observers in the Antarctic, while Iceland, Norway and Spain reached a similar agreement covering the North Atlantic. The fact that the whaling nations have outfitted each other with observers has given the scheme a dubious quality but it apparently has worked well within it's limits.[100]

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[96] Most parties have limited the exercise of their responsibility to enforce the terms of the ICRW to regulating whaling by vessels in their coastal waters and whaling vessels flying their flag. New Zealand's Marine Mammal Protection Act (MMPA) goes considerably further, prohibiting NZ citizens from taking whales wherever they may be, even if within the coastal waters of another state. See section 1 of MMPA 1978 (Act no 80).

[97] Article IX.

[98] Paragraph 21 (a) of Schedule.

[99] See n 11, 927.

[100] See 24, 32.

However, it is expected that it will break down over the duration of the moratorium.[101]

Recognising this lack of enforcement power, and seeking to mitigate the exploitation of other institutional weaknesses of the IWC, the US has taken upon itself the role of policing the ICRW since the 1970s. Consequently, legislation was enacted, designed to utilise the economic strength of the US to encourage compliance with the goals of the IWC.

In 1971 Congress enacted the Pelly Amendment,[102] an amendment to the 1967 Fishermen's Protective Act (FPA).[103] Under the Pelly Amendment, if the US Secretary of Commerce determines that nationals of a foreign country are conducting fishing operations or taking endangered or threatened species in a manner that "diminishes the effectiveness" of an international conservation program, he or she shall certify such fact to the President. Upon receiving the certification, the President has the discretion to direct the Secretary of Treasury to prohibit the importation of fish or wildlife products from the offending country.[104]

The first certification under the Pelly Amendment was in 1974, when Japan and the USSR objected to the 1973 IWC quota limit on minke. President Ford declined to impose sanctions, citing measures taken by Japan and the USSR to abide by IWC quotas in the future.[105] Peru, Chile and South Korea were

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101 See n 11, 928.

102 22 U.S.C. 1978 (1988).

103 22 U.S.C. 1971-1980 (1988).

104 22 U.S.C. 1978 (a) (4) (1988).

105 T L McDorman "The GATT Consistency of US Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles" (1991) 24 GWJILE 477, 484.

certified in 1978 for whaling outside of the ICRW.[106] Again the President declined to impose sanctions, as the three nations agreed to join the IWC.

The failure of the president to impose trade sanctions in these situations led Congress to review the Pelly Amendment, with special regard to whaling. The result was the 1979 Packwood-Magnusson Amendment[107] to the 1976 Fishing Conservation and Management Act (FCMA).[108] Under this amendment, if the Secretary of Commerce should determine that nations of a foreign country, whether directly or indirectly, are conducting operations that "diminish the effectiveness of the IWC and ICRW, this is deemed to be a certification under the Pelly Amendment. Upon certification the Secretary of State *must* reduce the certified nation's fishing allocation in US waters by not less than 50%.[109] Hence sanctions under the Packwood-Magnuson Amendment were mandatory. However, the sting of this amendment was somewhat weakened by the Supreme Court in *Japan Whaling Association v American Cetacean Society*[110], which held that the Secretary of Commerce was not required to certify a country that harvested whales in excess of the quotas set by the IWC, overturning decisions of the District Court and the Court of Appeal.[111]

In the early 1980s, after being threatened with the Pelly and Packwood-Magnuson Amendments, Spain agreed to abide with IWC quotas; South Korea agreed not to

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[106] D M Wilkinson "The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective" (1989) 17 DJILP 271, 282. These nations had been warned previously that this would happen if they did not join the IWC.

[107] 16 U.S.C. 1821 (e) 2 (1988).

[108] 16 U.S.C. 1801-1882 (1988).

[109] 16 U.S.C. 1821 (e) (2) (A) (i) AND (B) (1988).

[110] 478 us 221 (1986).

[111] This decision was widely criticised for contradicting the clear intent of Congress and undermining international efforts to control whaling. See R J Haskell Jr "Abandoning Whale Conservation Initiatives in *Japan Whaling Association v American Cetacean Society*" (1987) 11 HELR 551 Others have seen merit in the decision in that it provides the executive with the flexibility necessary to conduct foreign affairs.

use the "cold grenade" harpoon banned by the IWC; Taiwan agreed to abide by the IWC moratorium, despite not being an IWC member; and Chile agreed to only modest whaling in it's transition to abiding by the IWC moratorium.[112] The USSR was certified in 1988 for objecting to the moratorium, and exceeding minke quotas in the Antarctic. It's fishery allocation was immediately halved, and fully terminated a year later when the situation was not rectified.[113] But sanctions were not imposed. Norway was also certified for objecting to the moratorium, but had no fishing allocation to lose under the Packwood-Magnuson Amendment. Both were decertified when they announced an intention to cease commercial whaling by 1987.

The threat of certification has also been useful in curtailing perceived abuses of the scientific whaling permit. South Korea dropped a proposed programme after talks with the US. Iceland modified a Programme in the face of US threats of certification.[114] Japan was certified in 1988, when it went ahead with a modified scientific programme after the IWC had passed a resolution rejecting the proposal. However, sanctions were not imposed, and because Japan's fishery allocations were so small the penalty under the Packwood-Magnuson Amendment was insignificant.[115]

Several issues have arisen from these actions by the US. It is noted that the US has been using it's domestic legislation to stop activities that are legal under international law. Those nations certified or threatened with certification for objecting to IWC regulations, or whaling under the scientific whaling exception, or even whaling while not members of the IWC, have been within their rights under the ICRW and international law. Furthermore, these activities have

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[112] See n 105, 488.

[113] But because this allocation had a value of only $US 20 million, this move was seen as insignificant.

[114] See n 105, 490.

[115] The allocation was for 3,000 tons of sea snails and 5,000 tons of Pacific whiting. See n 106, 285.

occurred outside the jurisdiction of the US. Many believe that this type of unilateral action is necessary if abuses of conventions such as the ICRW are to be prevented. But such a course of action is also perceived as cultural imperialism, the imposition of the US values on other nations, as well as "a denial of the existence of international law and a "might is right" approach."[116]

There is also the issue of whether the trade sanctions contemplated by the Pelly Amendment are consistent with the GATT.[117] Import prohibitions are inconsistent with the GATT unless they fit into a recognised exception, which will be narrowly construed.[118] The three primary exceptions are: Article XI (2) (c) (i), which permits import restrictions on fish and fish products if the measure is necessary for the enforcement of a domestic marketing control or supply arrangement; Article XX (g) which permits import prohibitions primarily aimed at the conservation of an exhaustible natural resource; and Article XX (b), which permits import prohibitions necessary to protect animal life.

McDorman believes that the import embargoes contemplated under the Pelly Amendment would fail under Article XI (2) (c) (i) because that exemption allows only for restrictions on imports, not a total prohibition, and the embargoes are not a necessary part of a US marketing control arrangement.[119] The embargoes would also fail under articles XX (b) and (g) because they would constitute arbitrary discrimination based on objectionable characteristics of the foreign country rather than the specific goods being prohibited, and because they are not primarily aimed at the conservation of an exhaustible natural resource or animal life actually in the US.[120]

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[116] See n 75, 365, and "Free trade's greenhurdle" The Economist, 15-16 June 1991 vol 319 No 7711 at 73.

[117] 61 Stat A3; TIAS no 1700; 55 UNTS 194.

[118] See n 105, 524.

[119] See n 105, 524.

[120] See n 105, 524.

Such an interpretation of Articles XX (b) and (g) was made by the GATT panel in finding that the US had contravened the GATT by imposing a trade embargo on yellowfin tuna and tuna fish products from Mexico which had been harvested with purse-seine nets.[121] The US had been relying on powers under the Marine Mammal Protection Act (MMPA) that require the imposition of trade sanctions on tuna harvested in a manner resulting in an unacceptable incidental taking of dolphin.[122] The conclusion that import embargoes under the Pelly Amendment would similarly be found inconsistent with the GATT may explain why they have not yet been actually invoked, despite numerous certifications. Nevertheless, it has been the unilateral initiatives of the US that have given the IWC credibility as a conservatory body over the last decade. If it were not for the threat of certification from the US, it is realistic to assume that the majority of whaling nations would have continued commercial whaling during the moratorium, whether under objections or outside the IWC. Perceived abuses of the scientific whaling permit have also been significantly tempered by the actions of the US.

Yet the dangers of attempting to enforce an international regulatory regime through the unilateral application of domestic legislation have been exposed. Sanctions under the Packwood-Magnuson Amendment are now virtually worthless, as the Americanization of the US Fishery Conservation Zone means there are less and less foreign fishery allocations to be cut. The leverage which the threat of trade sanctions exacted has also been eroded.[123] The US has demonstrated that it is unwilling to face the political and economic ramifications of imposing trade sanctions,[124] let alone the implications under the GATT. Moreover, it appears

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[121] *The US-Mexico Tuna Fish Case;* decision of the GATT Panel 30 ILM 1595 (1991).

[122] 16 USC 1371 (a) (2) (1988)

[123] See n 106, 289.

[124] Sumi sees that anti-sanction sanctions against the US is a possible option for Japan if the US were to carry out its threats. See n 75, 373. This would have a serious economic impact on the US- the US exports $1.5 billion in fish exports to Japan. There is also the cost of friction between two militarily-allied nations. See n 106, 286. Lones sees the US position is simply that of providing protection for cetaceans only so far as the commercial cost is minimal to US interests. See L.Lones "The Marine Mammal Protection Act and

that the US is disheartened by the lack of support for it's initiatives. The US has taken the lead for years now, and no other IWC member has followed suit.[125] It is believed that the US cannot be counted upon in the future to fill so readily the enforcement gap in the ICRW.

6 *Species Competence of the IWC*

An issue which has tested the true flexibility of the ICRW is that of the extent of the IWCs species competence. The text of the ICRW refers only to "whales" without giving a definition. Since the distinction between "whales", "small whales" and "dolphins and porpoises" is ambiguous from a taxonomic point of view, the jurisdiction of the IWC over small cetaceans is unclear.[126]

Because the primary focus of the IWC has been the setting of commercial harvest levels and conservation methods for the "Great Whales" it has been assumed in the past that the IWCs jurisdiction is limited to the regulation of these larger species. Dolphins, porpoises and small whales consequently have no international protection, despite the fact that the number of small cetaceans dying at human hands each year is at least five times the number of great whales killed in any year when whaling was at its peak.[127] Direct fisheries account for tens of thousands of small cetaceans every year. Most of these fisheries are local in nature and small in scale. Others, though, are widespread, and take large

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International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation" (1989) 22 VJTL 997, 1028.

[125] The US noted that no other nation defended the US for its use of sanctions when it was before the GATT panel.

[126] Of the 118 species of marine mammals, 77 belong to the order of Cetacea, which includes whales, dolphins and porpoises. Within the order are two sub-orders - the baleen whales or *mysticetes* (11 species) and the toothed whales or *Odontocetes* (66 species). The order Cetacea can also be divided into large and small cetaceans, a classification system based upon a somewhat arbitrary size distinction resulting from the history of the whaling industry. See M Donoghue and A Wheeler *Save the Dolphins* (David Bateman, Auckland, 1990) 112.

[127] See n 126, 49.

catches. In 1988 alone approximately 39,000 Dall's porpoise were killed off the Japanese coast, from a stock estimated to be no greater than 105,000.[128] In 1985 Peruvian fishermen caught around 10,000 dolphins and porpoises for their local market. A drive for pilot whales annually takes approximately 2,000 small cetaceans in the Faroe Islands. Historically this was a valuable food source for the Faroese Islanders, but today the *grynd* appears to have more significance as a social event.[129] In the Arctic some of the worlds rarest cetaceans, such as the narwhal, beluga and harbour porpoise, are killed in their thousands annually, increasingly for commercial purposes.[130]

However, the incidental catch of small cetaceans is responsible for an even greater level of mortality. It is estimated that up to 40,000 porpoises are killed in the North Pacific by driftnets. Gill nets are responsible for similar losses amongst coastal dolphin and porpoise species. But the purse-seine fishing technique has proved the most lethal.[131] Since the introduction of the technique in the 1950s it is believed to have been responsible for the incidental killing of up to 12 million dolphins and porpoises.[132]

In 1973 the Sub-Committee on Small Cetaceans was established on the SCs recommendation, to clarify small cetacean taxonomy, identify small cetacean research needs, and to assess the status of the world's small-cetacean populations.[133] This committee advised the IWC that it should regulate some species or stocks of small cetaceans threatened by over-exploitation. However, the

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[128] See n 126, 51.

[129] See n 2, 379.

[130] See n 126, 53-54.

[131] In the Eastern Tropical Pacific (ETP) tuna fishery, fishermen have taken advantage of the unexplained association of porpoises and yellowfin tuna, setting their purse-seine nets around schools of porpoises in order to trap the tuna beneath. Large numbers of the porpoises can be killed in this process. See n 2, 379 and n 126, 61-62.

[132] See n 126, 62.

[133] C E Carlson "The International Regulation of Small Cetaceans" (1984) 21 SDLR 577, 586.

IWC has remained profoundly split over it's species competence. Members opposed to bringing small cetaceans under the management of the IWC have relied on the Annex of Nomenclature of Whales, which was attached to the Final Act of the 1946 International Whaling Conference. This annex listed the English, French, Dutch, Russian, Scandinavian, Spanish and scientific names of the twelve species of whales commonly hunted at that time. Whaling nations have argued that this list is definitive of the species to which the ICRW applies. Many other IWC members, however, believe that the Annex was produced by the Secretariat simply to avoid confusion during discussions. It is noted that the Final Act states that the Conference "recommends: that the chart of [n]omenclature of whales annexed to this [f]inal [a]ct be accepted as a guide by the governments represented at the Conference."[134] Moreover, to accept that the Annex limits the application of the ICRW to the species listed on it creates serious anomalies. Minke whales, which have been the mainstay of commercial whaling operations since the depletion of the populations of the larger whales, have been accepted as being subject to the ICRW, despite not being on the Annex. Similarly, the bottlenose whale has also been subject to IWC regulation, and given PS status.[135] Baird's beaked whale, on the other hand, which is larger than the minke, was excluded on the basis of the Japanese argument that it was a "small cetacean" and therefore outside the IWCs competence. The Danish have used the same argument to exclude catches of beluga, narwhal and pilot whales by Greenlander's and the Faroese from IWC regulatory powers.[136]

Other IWC members are concerned that IWC management of small cetaceans will infringe on their own management rights over their Exclusive Economic Zones (EEZs), within which most of the direct and indirect catches of small cetaceans take place. Mexico, Canada and Denmark have argued that small cetaceans are

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[134] See n 11, 911.

[135] The bottlenose whale has also been subject to IWC regulation, and given PS status. N Meith "Saving the Small Cetaceans" (1984) 13 Ambio 2, 8.

[136] See n 41, 204.

not migratory and hence must be treated as falling entirely under extended national jurisdictions. The linking of the issue of the IWCs authority to regulate small cetaceans to the issue of coastal state jurisdiction over the EEZ has successfully complicated the problem so as to make it unresolvable.

Consequently, the Sub-Committee on Small Cetaceans has had only limited impact on the plight of small cetaceans. It is limited in its authority and cannot set quotas or recommend management procedures. The IWC has only been willing to consider proposals within a scientific forum. Hence the adoption of a resolution in 1977 which required members to collect records and information on small-type whaling, direct fisheries for small cetaceans, and fisheries involving incidental taking of small cetaceans.[137] For the last three years the IWC has also passed resolutions, taking into account the various diametrically opposed positions of members, requesting the Sub-Committee to provide status reports on small cetaceans. This information has proved very valuable.

But despite the acknowledgement that the SC has the competence to advise the IWC on the status of small cetaceans, this is all that has been achieved. In 1981, 26 members of the IWC met at Reykjavik and reached a consensus that, because current IWC mechanisms had resulted in significant conservation and management changes since 1970, the "Convention in its present form is flexible enough to provide management of all cetacean populations and that the need for management measures could be considered on a case-by-case basis."[138] Yet in 1992 the unsatisfactory situation still exists that the vast majority of small cetaceans, many of which are endangered species, are without international protection.

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[137] See n 41, 204.

[138] See n 133, 617.

V CAN THE ICRW BE REFORMED?

It is clear that the ICRW is institutionally ill-equipped to prevent over-exploitation of cetaceans. What, then, is the remedy?

The most obvious solution is to revise the ICRW itself. Agitation for revision began in the 1970s, when the IWCs orientation began to shift to conservation. The US argued, in 1974, that the IWC, in a modified form, should continue to have authority over cetaceans "on the grounds that [it] possesses valuable institutional momentum and ...has shown itself responsible to the needs of industry and therefore is more likely to retain the support of whaling nations than a new, more "protectionist" international body"[139] A modified ICRW would need to give the IWC sufficient enforcement powers, and clarify its species competence. If the IWC is to be able to enforce its own rules, two changes in particular are needed: the removal of the objections clause; and the addition of a power to impose fines or sanctions and/or an "arrest or seizure" clause.[140]

However it is unlikely that agreement on proposed revisions would ever be achieved. Three conferences have been held to consider revision of the ICRW, but all failed.[141] Revision is not provided for in the ICRW, and therefore removal of a clause such as the objections provision would require unanimity amongst existing parties. It would be safe to say that this would never be achieved.

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[139] See n 133, 616-617.

[140] E A Wehrmeister "Giving the Cat Claws: Proposed Amendments to the International Whaling Convention" (1989) 11 LLAICLJ 417, 433-436. Wehrmeister gives as an example of a possible "arrest or seizure" clause article X (1) (b) of the 1952 North Pacific Ocean Convention (NPOC), which provides that:

> [I]f a person or a fishing vessel is "actually engaged in violation of the provisions of this Convention, or [if] there is reasonable ground to believe [the person or vessel] was obviously engaged immediately prior to boarding of such vessel by any such official, the latter may arrest or seize such person or vessel."

[141] Conferences were in Copenhagen, 1978; Estoril, 1979; and Reykjavik 1981. A Working Group was also established in 1987 to look at the possibility of revision. See n 11, 919.

Difficulties would also be had in amending the Schedule to provide enforcement provisions or clarify the IWCs species competence. Although this would require only a three quarters majority, the history of the IWC has shown it is profoundly divided on the issue of small cetaceans. The addition of strong enforcement powers is likely to be equally contentious. And none of these solutions can remove the threat of a whaling nation to leave and operate outside the ICRW.

Alternatively, it has been argued that the United Nations Convention on the Law of the Sea (UNCLOS)[142] makes possible a responsible and uniform international regime for the management of whale resources through the ICRW.[143] Article 65 of UNCLOS provides that:

> Nothing in this part restricts the right of a coastal state or the competence of an international organisation, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organisations for their conservation, management and study."

Article 120 provides "[a]rticle 65 also applies to the conservation and management of marine mammals in the high seas." Article 65 has been associated with article 64, appearing as a further qualification of the management regime for highly migratory species set forth in article 64. When read in conjunction, article 65 and article 120 appear to defer to the appropriate international organisations to set minimum conservation and management measures for cetaceans throughout their migratory ranges.[144] The language "the appropriate international organisations" is interpreted as referring to the existing organisation managing the taking of

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[142] UN Doc A/Conf 62/122; 21 ILM 1261 (1982).

[143] K Davis "International Management of Cetaceans Under the New Law of the Sea Convention" (1985) 3 BUILJ 477.

[144] See n 143, 512. This interpretation is reflected in E Hey *The Regime for the Exploitation of Transboundary Marine Fishery Resources* (Martinus Nijhoff, Dordrecht, 1989).

cetacean species, the IWC.[145] It is also inferred that the obligation to "work through" the IWC requires at the very least membership, which would remove the threat of a whaling nation to leave the IWC if it desires to escape its regulation. To give effectiveness to article 65, it is also construed to require that a member of the IWC who wishes to object to an IWC regulation has the burden of showing that the regulation is not needed to meet the minimum conservation standard imposed by that provision.[146] When a dispute arises as to whether a sufficient showing has been made by a state objecting to an IWC regulation that the regulation is not required to conform to the article 65 minimum conservation standard, compulsory dispute resolution procedures under UNCLOS may be invoked.[147]

This interpretation of article 65 would substantially remedy some of the defects of the ICRW. However, it would still leave those cetaceans not presently covered by the IWC without international protection. Nor are appropriate monitoring and enforcement powers provided by UNCLOS. And it remains to be seen whether article 65 will ever become law, whether through the development of customary international law, or through ratification of UNCLOS.[148]

It is submitted, instead, that the ICRW is so fundamentally flawed as to be beyond reform. It's flaws can be traced largely to the philosophical climate in which the ICRW was drafted.[149] Severe limitations were placed on it's negotiation by prevailing legal concepts of the doctrine of freedom of the seas. The entire history

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[145] See n 143, 512; n 144, Hey at 110.

[146] See n 144, Hey at 85. Davis believes this might also work to exclude aboriginal/subsistence whaling. See n 144, 516.

[147] Article XV (2) of UNCLOS.

[148] Sixty ratifications are required for UNCLOS to come into effect. It is difficult to say which elements have become customary international law at this stage. It is clear that considerable disagreement exists over the jurisdiction of the international organisations contemplated in article 65 in coastal state's EEZs.

[149] See n 12, 75.

of whaling operations has been conducted according to this doctrine which treats fish as a common property resource "that no single person has a right to...nor can he prevent others from sharing...".[150] The absence of property rights over these resources is what makes the high seas a classic example of the "global commons" paradigm, where access to the resource is unrestricted, and the share available perceived as unlimited.[151]

> "Regulation of whaling had therefore to be based in international law on participating states voluntary acceptance; a Convention could only contain such provisions as states were willing to accept in pursuance of their national interests as then perceived."[152]

Thus the "shibboleth" of state sovereignty raises its ugly head. The notion of state sovereignty goes to the heart of international law, encompassing ideas of autonomy and independence, and suggests that states must consent before legal obligations can bind them.[153] This need for consent means that the formulation of treaties is forced down to the lowest common denominator in order to attain agreement.[154]The ICRW is a perfect example of a document representing a compromise between diverse interests. Its formulation was sparked by the perceived need to conserve whale resources. Yet the fact cannot be escaped that the ICRW was the creation of a small group of whaling nations who wished to secure the development of their industries.

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[150] See n 12, 78. The doctrine of the freedom of the seas, and within this the freedom of fishing, is based on the conceptual theories of Grotius first elaborated in the seventeenth century, and which remain the basic concept of the law of the sea today. Although UNCLOS reaffirms the principle of freedom of fishing on the high seas (see article 116), it places burdens on those exercising this right, and article 65 significantly alters the right to "fish" cetaceans.

[151] G Hardin "The Tragedy of the Commons" in *Economics, Ecology and Ethics* (Daley Hed, 1973) 100,105.

[152] See n 12, 144.

[153] I Brownlie *Principles of Public International Law* (4 ed, Oxford University Press, England, 1990) 287.

[154] G Palmer "Towards a New World Oceans World Order" Address to Oceans Day at the Global Forum, Rio de Janeiro, 8 June 1992, 13.

The basic conflict is very clear in the Preamble.[155] The Preamble recognises past overexploitation of whales, states that continuation of such practices may endanger the resource, and stresses the need to regulate the catch in various ways; to restore some stock to full biological productivity; and to prevent overfishing of others. Yet it also mentions the need to avoid economic and nutritional distress, and to make possible the orderly development of the whaling industry. This conflict between rational management and economic development comes out clearly in the language of article V, which permits the Commission on the one hand to adopt "regulations with respect to the conservation and utilisation of whale resources",[156] but on the other to "take into consideration the interests of the consumers of whale products and the whaling industry."[157]

The ICRW has also been flawed from its inception by the presumption of its drafters that whales were simply a different type of fish. The peculiar characteristics of whales and their differences to other species were not taken into account.[158] Cetacean management procedures generally rely on the assumption that, once depleted, cetacean populations will replenish themselves so long as a breeding stock remains. However, scientific uncertainties exist as to relationships between structure, complexity, stability and productivity of marine ecosystems such that can effect drastically the accuracy of predictions that cetacean management is based on.[159] These uncertainties are compounded by the fact that cetacean populations grow very slowly. Determination of the response of cetacean populations to exploitation is correspondingly slow and prompt remedial

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[155] See n 31, 317.

[156] Article V (2) (a).

[157] Article V (2) (d).

[158] See n 12, 143.

[159] See n 2, 389.

action is nearly impossible.[160] Article 65 of UNCLOS acknowledges that marine mammals, and especially cetaceans, have to be differentiated from other marine species.

It is submitted, then, that though the "catch limit algorithm" of RMP represents an undeniable improvement over NMP, the management of cetaceans for exploitation, like many other international environmental issues, is a "no technical solution"[161] problem that requires for its solution a change in human values. In fact, this change has already occurred, and lends further weight to the argument that the ICRW cannot be reformed.

When John McHugh, a former US Commissioner to the IWC, warned in 1972 "that overzealous uninformed people will continue to promote the notion that whaling continues unchecked and that a total moratorium is the only answer."[162], his prophecy was not given it's due credit. The Stockholm Declaration that came out of UNCHE marked the beginning of a change in human attitudes to the environment that has crystallised in the IWC as a large world public opinion favouring a permanent ban on any type of commercial whaling.[163]

A considerable amount of this concern for whales stems from human anthropocentrism. The risk of extinction, which first placed whales in the human eye, holds potential costs for our race. Though it is impossible to predict the effects of the loss of biodiversity, we equally cannot predict the needs of future

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[160] "Even ten years is too short a period over which to measure with fair accuracy increased productivity in response to reduction of population level." See n 143, 489. This is the period the whaling nations suggested should be adopted for the purpose of assessing the impact of whaling under the RMP. Other nations called for a five year period.

[161] "A technical solution may be defined as one that requires a change only in the techniques of the natural sciences, demanding little or nothing in the way of change in human values or ideas of morality." See n 151, 100-101.

[162] See n 31, 334-335.

[163] S K Chopra "Whales: Towards A Developing Right of Survival as Part of an Ecosystem" (1989) 17 DJILP 255.

generations. For the present, whales have been recognised to be of considerable value in their non-consumptive capacity.[164] The non-consumptive utilisation of whales through tourism, film-work, recordings and education was already a $US 300 million industry in 1981.[165] A dollar value cannot be attached to the whales scientific value.

But aside from the economic and aesthetic value of whales to humans, anti-whaling sentiment is also based on human altruism. Many people are opposed to whaling for its inhumanity. Commercial operators kill whales by firing a 90mm, 150 pound explosive harpoon into the back of the whale, which can kill it in two minutes, but often takes up to an hour and several harpoons.[166] Methods of taking small cetaceans are often even worse.[167] Given the great range of skin sensations apparently registered by the complex cerebral cortex of cetaceans, D'Amato and Chopra believe that there can be no doubt that they feel pain, and that the real question is in fact "whether they perceive acute pain to an even greater degree than humans".[168] The view also exists that it is morally wrong to kill whales *per se*, no matter how humane the proposed method, nor taking into account their utility to present or future generations of human beings.[169]

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[164] The term "non-consumptive" has come to be applied to any use of a cetacean which does not involve the deliberate killing or critical harming of cetaceans. As applied to whales and other marine mammals the term has been extended to include "low-consumptive" use involving the taking of cetaceans into captivity from wild populations. There are five major areas involving the non-consumptive use of cetaceans: benign research; habitat protection;recreational whale-watching; cetacean captivity and cultural valuation. R Barstow "Non-Consumptive Utilisation of Whales" (1986) 15 Ambio 155, 155-156.

[165] See n 53, 150.

[166] See n 2, 383. The Japanese have also introduced a method of electrocuting a harpooned whale with an electric lance once it has been hauled to the side of the catcher boat. However, it does not appear that this is any more humane than other methods, although it can be faster.

[167] For example, in the Faroese *grynd* the pilot whales and other cetaceans are caught by driving them into bays, gaffing them, and then towing them to the shore to be killed with knives. See n 126, 53.

[168] A D'Amato and S Chopra "Whales: Their Emerging Right to Life" (1991) 85 AJIL 21, 25.

[169] See n 168, 23.

Increased public exposure to cetaceans, combined with an appreciation of their intelligence and other "human" characteristics has caused a dramatic increase since the 1970s in public concern about management in general, and the morality of killing cetaceans in particular.[170]

D'Amato and Chopra believe that a moral claim of whales[171] to life can be made based on their existence as sentient, intelligent beings. But they also believe that their now exists an *opinio juris* in favour of an entitlement of whales to life. In the current stage of evolution of state practice, nearly all states accept the obligation of preservation. "Preservation is transmuted into entitlement when the moratorium [on commercial whaling] becomes permanent..."[172] Because, they believe, this final shift is inevitable, an entitlement to life for whales is already implicit, and will become explicit as the customary law process unfolds.[173] Though D'Amato and Chopra do not state exactly the bounds of this entitlement to life, they are clear that it would not permit any type of whale hunting, including for aboriginal[174] or scientific purposes.

However, as Scarff notes, the arguments for ceasing the killing of cetaceans often depend on the observer's conception of the particular species similarity to human behaviour or capacities, especially intellectual capacities.[175] "If "intelligence" is a widely acceptable moral criteria, then the diversity of cetacean intelligence

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[170] See n 2, 384.

[171] They make the point that they are making a minimalist case, and not excluding that their argument may apply to other species. See n 168, n 34.

[172] See 168, 49.

[173] See n 168, 50 and 62.

[174] D'Amato and Chopra propose that aborigines such as the Inuit be compensated with reparations raised by an environmental tax on nations whose whalers depleted the bowhead whale to the point of extinction. See n 168, 60.

[175] See n 2, n 343. This appears to be the basis for Mary Winters argument that cetaceans be given rights. M Winters "Cetacean Rights Under Human Laws" (1984) 21 SDLR 911.

would probably necessitate a parallel diversity of ethical decisions."[176] Moreover, D'Amato and Chopra may have been premature in predicting the IWC moratorium being made permanent. By endorsing the RMP the IWC is implicitly approving of, or at least foreseeing, a return to commercial whaling.

But this "back-tracking" of the IWC is not necessarily representative of the desires of the IWC members. Rather, it can be seen as another symptom of the ICRWs weakness. IWC members are ready to accept commercial whaling not because that is what they want, but because they perceive that this is what the ICRW is about, and that they must fulfil their legal obligations under it. Hence a small group of whaling nations continues to push the IWC relentlessly back to commercial whaling in the face of the vast majority of opinion against this.

VI A SOLUTION IN THE UN? -THE DRIFTNETTING EXAMPLE

It is apparent that the ICRW can not be reformed to give cetaceans appropriate international protection and management. Where, then, is it going to come from?

The international response to driftnet fishing offers an example of how the global community can react positively to an issue, not unlike that of whaling, and in such a way that promotes conservation and management of living marine resources.

Though the practice of high seas driftnet fishing is not new, in the last decade or so it has increased significantly and employed considerably larger nets.[177] The increase in the South Pacific was particularly noticeable, where "[t]he number of vessels prosecuting the relatively newly-developed high seas driftnet fishery...increased exponentially in the 1988-89 season".[178] In 1989 over one

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[176] See n 2, 343.

[177] W T Burke "Regulation of Driftnet Fishing on the High Seas and the New International Law of the Sea" (1990) 3 TGIELR 265, 267.

[178] J Swan *International Regulation of Driftnet-Fishing Activities*, Oceans Institute of Canada (Halifax, Nova Scotia, 1991) 27.

thousand fishing vessels, mostly older, converted vessels, were using large-scale pelagic driftnets in the Pacific, Atlantic and Indian Oceans, as well as other areas of the high seas. The method of fishing, whereby nets are deployed for several hours at a time to allow fish to become enmeshed, is highly productive and low cost,[179] but can also be a highly indiscriminate and wasteful method of fishing. It is widely considered to threaten the effective conservation of living marine resources, such as highly migratory and anadromous species of fish, birds and marine mammals.[180]

Though the driftnet issue became focused on the North and South Pacific, developments in the South Pacific proved most inspirational internationally. At a consultation in June 1989 between South Pacific Forum (SPF) nations, driftnetting nations[181] and other interested parties, a call was made for a cessation of driftnet fishing in the region until a satisfactory management regime was established. A refusal by driftnetters to agree to this was met by the adoption of the Tarawa Declaration by the SPF, which resolved:[182]

> "...for the sake of (future) generations of Pacific peoples, to seek the establishment of a regime...that would ban driftnet fishing from their region; such a ban might be the first step to a comprehensive ban on such fishing."

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[179] See n 178, 7.

[180] Yap Island in the Federated States of Micronesia experimented with driftnetting in February 1989 prior to considering a Japanese plan to launch a driftnetting venture in it's EEZ. Yap abandoned it after a trial period showed a rapid depletion of tuna and other species, with devastating consequences on it's entire fishery. The experiment used a relatively short net of 15 km, for only 22 nights, yet caused the death of many sea turtles, one great whale, two small whales and 97 dolphins. For every nine tuna caught, one dolphin died. See M Rafrqul Islam "The Proposed "Driftnet -Free Zone" in the South Pacific and the Law of the Sea Convention" (1991) 40 ICLQ 184, 193.

[181] Japan, South Korea and Taiwan.

[182] See n 178, 31. The Tarawa Declaration was supported by, amongst other international organisations, the Commonwealth Heads of Government in the Langkawi Declaration on the Environment in October 1989.

Within four months the Wellington Convention[183] was signed. Under the terms of this treaty states and territories in the region agreed to prohibit their nationals from engaging in driftnetting in the Convention area (which comprised a large part of the South Pacific) and to take such measures as was consistent with international law to prohibit driftnets within the areas of their fisheries jurisdiction.[184]

From here the impetus was carried to the UN General Assembly. In 1989, Resolution 44/225[185] called for a moratorium on driftnet fishing in the North Pacific by 30 June 1992 and a cessation of activities in the South Pacific by 1 July 1991. This was reaffirmed by Resolution 45/197 in 1990. In 1991 Resolution 46/215 called upon members to reduce the effort involved in Large-Scale Pelagic Driftnet Fishing by reducing the numbers of vessels involved; to continue to ensure areas of operation were not expanded; and to ensure a global moratorium was fully implemented on the high seas by 31 December 1992.[186] In February 1990 Taiwan , though not a UN member, announced the phasing out of its driftnetting fleet, and a complete ban of the driftnetting technique from mid-1992.[187] In July of the same year Japan announced an immediate halt to driftnetting in the Pacific until there was an agreement on the appropriate regulations and conservation and management procedures.[188]

The question must now be asked, can such successes be transposed to the whaling issue? Significant analogies can be made between the driftnetting and whaling

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183 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 24 November 1989, 29 ILM 1449 (1990).

184 See n 154, 6.

185 UNGAR Large-Scale Pelagic Driftnet Fishing and it's Impacts on the Living Resources of the World's Oceans and Seas 44/225 (XLVI) 1989.

186 UNGAR Large-Scale Pelagic Driftnet Fishing and it's Impacts on the Living Resources of the World's Oceans and Seas 44/215 (XLVI) 1991, paragraph 3 (a), (b) and (c).

187 *The Dominion*, Wellington, New Zealand, 22 February 1990.

188 *The Dominion*, Wellington, New Zealand, 18 July 1990.

issues: The proponents of bans on both these activities have drawn on arguments which have significant emotional, ethical and moral characteristics; scientific information on the effects of both activities is insufficient, and those who wish to carry out driftnetting and whaling have tried to use this to justify their endeavours;[189] NGOs have played significant roles in raising public consciousness on both issues, and in changing public opinion and influencing political decision-making; and both issues are attractive to both politicians and media.[190] Why, then, has the UN not taken control of the cetacean issue earlier? New Zealand proposed at the Third Preparatory Committee for UNCED for a reaffirmation of Resolution 33 from UNCHE, which called for a ten year moratorium on commercial whaling, and for the convening of an international conference in 1995 to discuss the global conservation of cetaceans. It was unsuccessful. However, the success of such an initiative in the UN is going to be substantially dependent on the support of the US. This support was forthcoming when the driftnetting issue was taken to the General Assembly. The US Congress had already endorsed the Tarawa Declaration, and the US adminstration subsequently put it's weight behind the movement in the UN to secure a resolution on the subject.[191] This vital support stemmed from various factors which made the US particularly sensitive to the driftnet issue. The US claims jurisdiction over anadromous species that originate in US waters, and believed that extensive North Pacific driftnetting was responsible for a decline in salmon and steelhead trout returning to spawn in US waters.[192] Concerns about driftnets prompted the US Congress to enact the Driftnet Impact, Monitoring, Assessment and Control Act of 1987.[193] Given the considerable legislative and

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189 See n 177, 276 and n 55. Would-be driftnetters and whalers argue that in the absence of sufficient information, the practice should continue, in the process of which scientific research can be carried out to permit future rational management.

190 See n 178, 13 and 40.

191 Press statement of Rt Hon Geoffrey Palmer, 6 October 1989.

192 Leslie A Davis "North Pacific Pelagic Driftnetting: Untangling the High Seas Controversy" (1991) 64 SCLR 1057, 1059.

193 16 USC 1822 (1988).

economic support that the US has given to cetaceans, it is not unfeasible that reciprocal support could be cultivated at the UN level. And now that the moratorium is on the eve of being lifted, and that some of the whaling nations have decided to resume whaling outside of the ICRW, the chances of generating such support, both from the US and other nations in the UN, is greater than ever. For the last decade a general perception has pervaded that because a moratorium on commercial whaling was adopted in 1982, the IWC has been successful in protecting cetaceans. If unregulated commercial whaling is recommenced it could put this perception to rest, and provide the media, politicians, NGOs and public of the world with something to focus on that will reignite the issue, and give it the momentum that produced such startling results on the driftnetting issue.

Once in the arena of the General Assembly, the international community can deal with the issue in the manner envisaged by the concept of the Common Heritage of Mankind (CHOM) enunciated at UNCHE.[194] Birnie has warned that the transferring of the cetacean problem to the UN could result in more wide-spread politicisation of the issues.[195] There is no doubt that the concept of CHOM itself has been highly politicised, at least as far as it is applied to the deep sea-bed. Since it's advent in 1967[196] it has epitomised the split between the developed and the developing world in the General Assembly. Developing nations have cherished the concept with its implications of joint management and equitable participation in the exploitation of the deep sea-bed. To industrialised nations, CHOM is imprecise, incapable of being legally defined, and unacceptable as far as

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[194] The notion of the Common Heritage of Mankind has been described as:

> "...the idea that the management, exploitation and distribution of the natural resources...are matters to be decided by the international community...and are not to be left to the initiative of individual states or their nationals."

See n 143, n 23.

[195] See n 12, 646.

[196] See speech of Arvid Pardo to General Assembly, UN Doc 22 GAOR A/6695.

it is interpreted to mean "collective ownership of property"[197] A tenacious Group of 77 ensured that CHOM was adopted as the basis for the deep sea-bed provisions of UNCLOS,[198] resulting in key industrialised nations[199] refusing to ratify the Convention, and thereby effectively sinking it.

However it does not necessarily follow that the cetacean issue would be similarly confounded in the UN by the application of CHOM. Divisions over cetacean issues have never been drawn exclusively between developed and developing nations. Proponents of whaling come from both these camps as do opponents. Nor are vast amounts of wealth at stake, as was perceived to be the case with the exploitation of the deep sea-bed. Rather, I believe that the cetacean issue offers the opportunity for CHOM to be rationalised and applied without generating the emotion and discord of the past. Ideally, it's application would involve the placing of an indefinite moratorium on commercial whaling, as in the driftnetting case, while an international conference establishes an International Cetacean Commission that will provide comprehensive management for all cetaceans.

VII CONCLUSION

The decision of Iceland to leave the ICRW this year, and notice from Norway that it will whale next year regardless of IWC quotas, means that the IWC is stepping into a new era. Now that the US can not be relied upon to make up for the ICRWs inadequacies, it could be that it will be another era of exploitation of cetaceans. Much will depend on the behaviour of Iceland, Norway and Japan in the near future. It could be that they are bluffing, and attempting to hasten the

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[197] Said Mahmoudi *The Law of Deep Sea-Bed Mining* (Almqvist) & Wiksell Intl, Stockholm, 1987) 168.

[198] Part XI and its annexes.

[199] The Federal Republic of Germany, the UK, and US, who between them accounted for more than one third of UN budgetary assessments at the time. M G Schmidt *Common Heritage or Common Burden? The United States Position on the Development of a Regime foe Deep Sea-bed Mining in the Law of the Sea Convention* (Oxford University Press, Oxford, 1989) 307.

lifting of the moratorium and the resumption of whaling under the RMP. However, if they do resume whaling outside of the ICRW, this could have a positive result. Such behaviour could provide the catalyst for raising the issue of cetaceans to such a level that the UN has to take it aboard. Once before the global community, a proper solution to the problems of cetaceans can be developed, without the confines of a forty-year old convention and the unbalanced influence of the whaling industry, and at last provide a comprehensive management institution for all cetaceans.

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