

The Implications of the International Convention for the Regulation of Whaling: An International Law Perspective

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Chapter One

Introduction

“... now penetrating even through Behring’s straits, and into the remotest secret drawers and lockers of the world; and the thousand harpoons and lances darted along all continental coasts; the moot point is, whether [whales] can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff”.

*from Herman Melville’s Moby Dick*¹

Whales are the largest living creatures on Earth and their protection and preservation remains a controversial and challenging international problem.² Herman Melville’s sentiments in the above extract still ring true today: as one area of the ocean becomes depleted, whalers move on to the next in their relentless pursuit of whale products.³ Pro-whaling states have justified this pursuit of whale products under the Grotian principle of ‘freedom of the seas’, while anti-whaling and non-whaling states have highlighted the need for a precautionary and preservationist approach when dealing with these sentient mammals.⁴

Added to the opposing viewpoints of whaling and non-whaling states, is the somewhat conflicting object and purpose of the International Convention for the Regulation of Whaling (‘ICRW’ or the ‘Whaling Convention’), an international convention designed specifically to regulate whales and whaling. The object and purpose of the ICRW are two-fold and are expressed in the last paragraph of the Preamble, which states that the Whaling Convention was concluded ‘to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry’.⁵ An interpretation of this provision would seem to highlight that the Whaling Convention sees the taking and

¹ Melville *Moby Dick; or The Whale* (1851) 845.

² Birnie ‘The international organization of whales’ 1984 *Denver Journal of International Law and Policy* 309.

³ Simpson ‘The International Convention for the Regulation of Whaling, 1946: A legal and ethical analysis’ (DPhil Thesis University of Nottingham 2004) 105.

⁴ D’Amato & Chopra ‘Whales: Their emerging right to life’ 2010 Northwestern University School of Law: Faculty working papers Paper 63 [Online] available from: <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/63/> (accessed 2015-03-30).

⁵ Aron, Burke & Freeman 2000 ‘The whaling issue’ *Marine Policy* 181.

conserving of whales as compatible rather than conflicting objectives.⁶ However, despite the proposed intention of the ICRW to provide for compatibility between the killing and conservation of whales, the emergence and development of international environmental laws have led many states to adopt a precautionary and more environmentally-friendly approach towards the exploitation of the ocean's natural resources. The inherent tension between ensuring the whaling industry's 'orderly development', on the one hand, and the more modern goal of preserving and protecting whales, on the other, has generated controversial and often hostile debate among many states.⁷

These hostile debates are further complicated by emotional, scientific and political arguments that often influence the international laws that regulate whaling. This hostile environment is succinctly captured by Holly Doremus who explains that these value-laden conflicts:

[M]ake it easy for the contesting sides to demonize each other, and hard for them to find common ground. They tend to encourage both sides to look for alternative 'objective' grounds for decisions. Yet they make that search more difficult, by encouraging people to cling tenaciously to any evidence that supports their view, by making it difficult for people to communicate with one another, and by frustrating the search for a common measure of value.⁸

In searching for such a 'common ground', the purpose of the dissertation is not to 'cling tenaciously to any [specific] evidence', but to approach the current issue from an objective and holistic perspective. In doing so, account will be taken of the fact that although moral, scientific and/or political arguments may influence the debate, identifying the currently relevant and legally applicable international laws regulating the exploitation of marine mammals is of fundamental importance.⁹

In determining the current laws applicable to marine mammals (and whales in particular), the dissertation is divided into four substantive chapters. An introduction to the legal problem (contained in this chapter) is followed by chapter two which starts with a brief history of whaling as an illustration of the need to regulate whaling. Chapter two further

⁶ *Ibid.*

⁷ Babcock 'Putting a price on whales to save them: What do morals have to do with it?' 2013 *Environmental Law* 5.

⁸ Doremus 'Constitutive Law and Environmental Policy' 2003 *Stanford Environmental Law Journal* 321.

⁹ Mitchell 'Discourse and sovereignty: Interests, science, and morality in the regulation of whaling' 1998 *Global Governance* 290.

highlights the current international framework which has been designed to specifically manage whales and whaling. This analysis includes, first, a discussion of the fundamental goal of the International Whaling Commission ('IWC' or the 'Commission'), the provisions of the ICRW, as well as the way in which modern technologies and the contemporary practice of states have altered or unequivocally affected the interpretation and application of the ICRW. Second, chapter two investigates the various provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) that find direct applicability to the existing legal issue. Chapter two concludes that, although attempts have been made to establish the ICRW as the nominal treaty responsible for conserving whales, the ICRW is neither the only nor arguably the most appropriate international law instrument to protect whales.¹⁰

Chapter three draws upon the conclusions reached in chapter two by evaluating other general international environmental law principles applicable in the context of the marine environment, possible customary international laws, as well as the practice of states regarding the hunting and killing of whales. Alan Boyle and Catherine Redgwell correctly point out that it is no longer 'necessary to squeeze every drop of life out of the immortal trio of arbitrations – *Bering Sea Fur Seals*, *Trail Smelter* and *Lac Lanoux* – which have sustained international environmental law throughout most of its existence'.¹¹ This quotation emphasises the emergence of contemporary environmental law principles that may find either direct or indirect applicability in the context of whaling. Chapter three further highlights the fact that since the 1972 United Nations Conference on the Human Environment, the policies of the IWC, its membership, as well as its regulatory techniques have greatly changed due to the 'tightening circle of [other applicable] international conventions'.¹² In light of the possible difference in applicability between the special rules governing whale management under the ICRW and the general international rules highlighted in chapter three, this chapter makes reference to the fact that, although the ICRW is often seen as being more appropriate to regulate the point at hand, the general legal principles governing whales cannot be disposed of.¹³ It will be emphasised that all rules

¹⁰ Birnie *supra* n 2 at 332.

¹¹ Birnie, Boyle & Redgwell *International law and the environment* (2009) preface v.

¹² Birnie *supra* n 2 at 332.

¹³ Koskeniemi 'Fragmentation of international law' 2003 *International Law Commission: Study Group on Fragmentation* [Online] available from: http://legal.un.org/ilc/sessions/55/fragmentation_outline.pdf (accessed 2015-06-03).

of international law are ‘applicable against the background of more or less visible principles of general international law’.¹⁴ However special an international rule may seem, such a rule does not operate within a normative vacuum, but will always have to be applied and interpreted by a number of general principles of international law.¹⁵

Chapter four takes note of the fact that there may be a multiplicity of regulations applicable to whaling and that complex arguments about which regulations to apply are inevitable.¹⁶ These complex arguments often give rise to more conflicts than are solved by the creation of any new legal framework.¹⁷ Due to this ‘fragmentation’, the dissertation concludes by stating that the issues surrounding whaling are nuanced and that there is no single international law that will find direct applicability. Despite the creation of international laws specifically applicable to whales and whaling (such as the ICRW), other international laws may still find application and the enforcement and adherence of these additional rules will be vital for the survival of many whale species. Chapter four concludes with reference to article 197 of UNCLOS, emphasising the need for global cooperation amongst all states regarding the preservation and protection of the marine environment. Inherent differences in opinion should be set aside and states should confront the whaling issue from a new, holistic perspective; a perspective that reflects the sovereign rights of all states but which at the same time acknowledges the grim and inevitable extinction of what truly is one of Earth’s greatest and most specialised creatures.¹⁸

¹⁴ *Idem* 7.

¹⁵ *Ibid.*

¹⁶ Hafner ‘Pros and cons ensuing from fragmentation of international law’ 2004 *Michigan Journal of International Law* 856.

¹⁷ *Ibid.*

¹⁸ Nishi ‘Dolphins, whales, and the future of the International Whaling Commission’ 2010 *Hastings International & Comparative Law Review* 306.

Chapter Two

The History and Subsequent Need to Regulate Whaling

Whales have an evolutionary history that dates back more than 55 million years, but this evolutionary history has not helped them escape their systematic slaughter. Richard Girling comments that 'no creature has ever been hunted more cruelly than the whale'.¹⁹ Whaling is not a new phenomenon, with illustrations of rock paintings from the Stone Age in South Korea depicting men on boats spearing whales.²⁰ These rock paintings date back to 6000 BC and exemplify the exploitation of whales in some form or another for at least the last 8000 years.²¹ It is well-recognised that the Basques (often referred to as the 'fathers of whaling') began the first commercial whaling operations as far back as the ninth and tenth centuries, with the Flemish, Normans, Dutch and British setting up their own whaling operations shortly thereafter.²² Given the increased value placed not only on the meat of whales, but also on the oil produced from their blubber, many states soon realised the profits to be gained from whaling and the industry began to expand rapidly.²³ However, this rapid expansion did not take account of the fact that whales reproduce slowly, reach maturity late, travel in small pods and are found mostly on the High Seas (which were, and still are, largely unregulated).²⁴ Coupled with the characteristics inherent in whales, the emergence of more efficient and lethal hunting methods (such as the exploding harpoon and factory ships) exacerbated the hunting pressures on whale populations; consequently, by the mid-1960s many whale species were commercially extinct.²⁵ The unorganised exploitation of whales at the international level resulted in an estimated depletion of whale stocks from 3 035 000 (before intensive whaling began) to little over 1 953 000 individuals by 1977.²⁶ This long history of overexploitation left whale populations in a severely depleted state and

¹⁹ Girling 'Deep impact' *The Sunday Times Magazine* (London, 5 December 2010) available from: <http://www.thesundaytimes.co.uk/sto/Magazine/Features/article461159.ece>

²⁰ Lee 'The history and effectiveness of the legal regime governing whaling, the problems faced by the International Whaling Commission and its future, focussing on recent IWC proposals' 2011 *Dublin Legal Review Quarterly* 38.

²¹ *Ibid.*

²² Simpson *supra* n 3 at 105.

²³ Nishi *supra* n 18 at 287.

²⁴ Babcock *supra* n 7 at 5.

²⁵ *Ibid.*

²⁶ Birnie *International regulation of whaling: From conservation of whaling to conservation of whales and regulation of whale-watching* (1985) 635.

the need for regulation to prevent further exploitation, and in many cases even the extinction of several species, became increasingly clear.²⁷ Environmentalists, alarmed by the systematic decrease in whale numbers, and whalers, concerned with the threat to the whaling industry, provided for a powerful convergence of interests.²⁸

Initial attempts at regulation were done on a regional or national basis with most whaling nations doing so in order to sustain the whaling industry and not to conserve whales themselves.²⁹ However, given that whales traverse various areas of the ocean, never remain in one area and are unaffected by the maritime boundaries drawn by humans,³⁰ it was inevitable that national regulations were destined to fail in the conservation of whales as well as the orderly development of the whaling industry.³¹ In order to confront an international problem, an international approach had to be adopted. On the basis of the International Council for the Exploration of the Seas' argument that there was a 'real risk of [whale] stocks ... being so reduced as to cause serious detriment to the industry'³² and the failed activities of the League of Nations in the 1930s,³³ the International Convention for the Regulation of Whaling ('ICRW') finally established the International Whaling Commission ('IWC') in 1948.³⁴ Despite being the oldest surviving environmental convention, the question remains whether the framework established by the ICRW is sufficient to deal with the current stalemate between whaling and non-whaling nations regarding their stark – and often hostile – differences in opinion?³⁵ In other words, is the Whaling Convention, nominally concerned with the conservation of whales, appropriately specific enough to deal with the current threats to the conservation and preservation of our marine resources?³⁶ In answering these questions, account will have to be taken of the provisions of the Whaling

²⁷ IWC 'Proposed consensus decision to improve the conservation of whales from the Chair and Vice-chair of the Commission' 2010 [Online] available from: <https://iwc.int/index.php?CID=49&cType=document> (accessed 2015-09-03) 4.

²⁸ Nagtzaam 'The International Whaling Commission and the elusive great white whale of preservation' 2009 *William and Mary Environmental Law Policy Review* 397.

²⁹ Simpson *supra* n 3 at 117.

³⁰ Gardner 'Swimming through a sea of sovereign states: A look at the whale's dilemma' 1996 *Ocean Yearbook Online* 61.

³¹ Lee *supra* n 20 at 40.

³² Gillespie *Whaling Diplomacy: Defining issues of international environmental law* (2005) 4.

³³ The League of Nations established the Convention for the Regulation of Whaling in 1931 but due to the fact that five of the largest whaling nations (including Russia and Japan) did not sign the Convention, large scale whaling activities were largely unaffected.

³⁴ Birnie *supra* n 2 at 309.

³⁵ IWC *supra* n 27 at 4.

³⁶ Birnie *supra* n 2 at 332.

Convention and how such provisions have been affected by their altering and varied application by states within the context of the more modern goals of both the United Nations Convention on the Law of the Sea (UNCLOS) as well as other international laws.

International Convention for the Regulation of Whaling

Competencies and Inadequacies of the Whaling Convention

The Preamble of the Whaling Convention highlights the concern of all member states regarding the history of overexploitation of whales and recognises ‘the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks’. In search of a regime that would allow whaling nations to exploit those species capable of sustaining exploitation, the Preamble further sets out that the intention of member states is to ‘provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry’.³⁷ This final sentence of the Preamble has led to acrimonious debate amongst whaling and non-whaling nations with the general consensus being that the Whaling Convention was originally established for economic interests.³⁸ The conservation regime envisaged by the ICRW was mainly, and perhaps even exclusively, done for the purpose of ensuring that the exploitation of whales remained profitable, with Vogler arguing that whilst the Preamble may have mentioned conservation, it was ‘essentially an agreement between states with an interest in commercially exploiting whales’.³⁹ Ensuring this commercial interest meant that all early attempts at conservation were largely ineffective in slowing the slaughter of whales and whale numbers continued to decrease to such an extent that more than half of the thirteen great species of whales are today classified as ‘commercially extinct’, compared with only three species before the drafting of the ICRW.⁴⁰ The lack of conservation measures and the inability to effectively regulate the overexploitation of whales have led some to characterise

³⁷ Freeland & Drysdale ‘Co-operation or chaos? - Article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission’ 2005 *Macquarie Journal of International and Comparative Environmental Law* 5-6.

³⁸ Birnie *supra* n 2 at 320.

³⁹ Maffei ‘The International Convention for the Regulation of Whaling’ 1997 *The International Journal of Marine and Coastal Law* 288; Vogler *The global commons: Environmental and Technological governance* (2000) 50.

⁴⁰ Freeland & Drysdale *supra* n 37 at 2; World Wildlife Fund ‘Giants of the ocean: Whale facts’ 2015 [Online] available from: <http://www.worldwildlife.org/species/whale> (accessed 2015-09-01).

the commission set up by the ICRW as a 'whalers' club' whose original focus was on short-term profits rather than on any long-term benefits.⁴¹

As is the case with almost every environmental law problem, the pursuit of economic interests has to be sought in line with the need to strike a balance between such economic concerns and the legitimate concerns surrounding the protection of the environment.⁴² Central to the establishment of the ICRW, therefore, was an understanding that whales are a global resource and should be appreciated as such.⁴³ This understanding was concisely encapsulated by the United States' Secretary of State, Dean Acheson, when he stated that the 'world's whale stocks are a truly international resource in that they belong to no one single nation, nor to a group of nations, but rather they are wards of the entire world'.⁴⁴ At its conclusion in December 1946, the ICRW was heralded as being a ground-breaking treaty that took account of the much-needed development and regulation of one of the ocean's greatest natural resources.⁴⁵ States were finally brought together under an international treaty that appeared to provide a broad framework for further discussions regarding the development of a permanent body tasked with supervising and regulating the whaling industry.⁴⁶ Pursuant to article III, this permanent body was established and in 1948 the IWC began the mammoth task of regulating whaling in all waters of the world by publishing and stimulating scientific research surrounding whales so as to allow for the orderly development of the whaling industry.⁴⁷

The duties of the IWC are various with the most important being to annually update the schedule to the Whaling Convention which, according to article V, includes fixing:

- (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and

⁴¹ Maffei *supra* n 39 at 289.

⁴² Sand 'Endangered species, international protection' 2011 *Max Planck Encyclopaedia of Public International Law* 2.

⁴³ Nagtzaam *supra* 28 at 397.

⁴⁴ Stoett *The international politics of whaling* (1997) 48.

⁴⁵ Birnie & Boyle *Basic documents on international law and the environment* (1996) 586.

⁴⁶ Birnie 'Marine mammals: Exploring the ambiguities of article 65 of the Convention on the Law of the Sea and related provisions: Practice under the International Convention for the Regulation of Whaling' in Freestone, Barnes & Ong (eds) *The law of the sea: Progress and prospects* (2006) 270.

⁴⁷ Bowman "'Normalizing the International Convention for the Regulation of Whaling' 2008 *Michigan Journal of International Law* 294; see also the IWC's website <https://iwc.int/history-and-purpose> (accessed 2015-09-01).

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 appliance which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.⁴⁸

What seems to be a wide array of competencies at the disposal of the IWC is unfortunately hindered by several other provisions within the ICRW itself. These hindering provisions are briefly discussed below in order to illustrate the legal problems that have come about regarding the interpretation of certain provisions of the ICRW.⁴⁹ The chosen examples serve to highlight the inadequacies and varied interpretations of several ICRW provisions, but it must be noted that there is scope for more detailed research on these examples and the account below is only a brief analysis.

Firstly, any amendment to the schedule can only be approved if agreed to by a three-quarters majority as required by article III(2).⁵⁰ In recent years, both pro-whaling and non-whaling states have attempted to attract new members to support their respective goals. Japan has targeted poorer states, such as Mali and Kiribati, with the promise of foreign aid; and anti-whaling states have 'recruited' states such as the Czech Republic and Slovakia to strengthen their preservationist objectives.⁵¹ Given the even balance of opposing views, the achievement of a three-quarter majority seems unlikely anywhere in the foreseeable future.⁵² The urgency surrounding the preservation of certain whale stocks highlights the inherent weakness in having to obtain a three-quarters majority. While some states are said to be 'buying favour', certain species of whales continue to decline rapidly and the requirement of a three-quarters majority seems to prevent any real step towards reconciling the opposing sides.

Secondly, the existence of objection procedures (article V(3)) allows states to lodge an objection to any amendment to the schedule and, if lodged within the required ninety-day period, the amendment in question will not bind the objecting state.⁵³ Given the economic interests that often surround the whaling issue, the ability to object to certain amendments

⁴⁸ Maffei *supra* n 39 at 291.

⁴⁹ Birnie 'Are twentieth-century marine conservation conventions adaptable to twenty first century goals and principles?: Part II' 1997 *The International Journal of Marine and Coastal Law* 493.

⁵⁰ Van Drimmelen 'The international mismanagement of whaling' 1991 *Pacific Basin Law Review* 242.

⁵¹ Nagtzaam *supra* n 28 at 445.

⁵² *Ibid.*

⁵³ Maffei *supra* n 39 at 291.

means that these amendments ‘do not bind precisely those parties to which they should particularly apply’.⁵⁴ Article V(3), therefore, allows a large margin of variation for those whaling states who wish to evade directives and regulations of the IWC.⁵⁵ Such objection procedures have resulted in the influence of the IWC being severely restricted and this has had an adverse impact on the credibility of the IWC itself.⁵⁶ The ability to object allows whaling states to act in direct defiance of any conservation measures that may be adopted by the IWC.⁵⁷

Thirdly, and most controversially, article VIII of the ICRW allows for states to invoke ‘scientific research’ as a means of exempting themselves from the regulations of the IWC. It has been stated that whaling under scientific auspices is ‘one of the foremost debates that has dogged the IWC for a number of years, under which legal rights have directly conflicted with ethical considerations’.⁵⁸ Article VIII provides that:

Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention.

It should be noted from the outset that this provision makes it clear that the special permits required to conduct scientific research are issued by the individual nations rather than by the IWC. With the introduction of the moratorium on commercial whaling (see the next section) states began to use the scientific research exemption with far greater vigour and, in the first season after the moratorium had taken effect, more whales were killed under scientific auspices than under commercial whaling activities in the previous whaling season.⁵⁹

⁵⁴ *Idem* 292.

⁵⁵ Nagtzaam *supra* n 28 at 399.

⁵⁶ Simpson *supra* n 3 at 144.

⁵⁷ Berger-Eforo ‘Sanctuary for whales: Will this be the demise of the International Whaling Commission or a viable strategy for the twenty-first century’ 1996 *Pace International Law Review* 440.

⁵⁸ Gillespie *supra* n 32 at 109.

⁵⁹ Day *The whale war* (1992) 123-124.

The use of the scientific research provision has led to accusations that pro-whaling states are 'prostituting science to protect their commercial whaling interests'.⁶⁰ The inherent danger in article VIII is its susceptibility to abuse, with whaling for scientific research being treated as the rule rather than the exception.⁶¹ The International Court of Justice ('ICJ') has recently given judgment in the *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* case,⁶² finding that the special permits issued by Japan to its nationals were *not* for the purposes of scientific research and that, deprived of the article VIII exception, Japan had breached its international law obligations.⁶³ However, the ICJ ruled only on Japan's current whaling programme, referred to as JARPA II, and did not rule out the possibility of Japan being able to legally conduct scientific research under a new or revised programme. Whilst the reasoning of the ICJ is not the topic of the current discussion, it is important to highlight that although an exception to the rule, states cannot be prohibited from taking whales if for the purposes of scientific research as required by article VIII.⁶⁴ Seemingly then, article VIII is an open-ended power that, if acted upon in bad faith, serves as a major loophole and an inherent weakness to the effectiveness of the IWC.⁶⁵ The question then remains whether taking whales for scientific research (a right bestowed on all members of the IWC) could potentially limit or be in conflict with other contemporary international law principles.⁶⁶

Lastly, and perhaps the single greatest weakness of the Commission as well as many other international regulatory bodies, is its inability to enforce regulations and punish states for violations of its provisions.⁶⁷ In terms of article IX (4), each member of the IWC shall report to the Commission:

⁶⁰ Wehrmeister 'Giving the cat claws: Proposed amendments to the International Whaling Commission' 1989 *Loyola of Los Angeles International and Comparative Law Review* 425.

⁶¹ Zemantauski 'Has the Law of the Sea Convention Strengthened the conservation ability of the International Whaling Commission?' 2012 *Inter-American Law Review* 330.

⁶² *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) Judgement* (2014) ICJ Reports.

⁶³ Payne 'Australia v Japan: ICJ halts Antarctic whaling' 2014 *American Society of International Law* [Online] available from: <http://www.asil.org/insights/volume/18/issue/9/australia-v-japan-icj-halts-antarctic-whaling> (accessed 2015-08-25).

⁶⁴ Maffei *supra* n 39 at 295.

⁶⁵ Lee *supra* n 20 at 48.

⁶⁶ This question will be further analysed in chapter three but is mentioned here for the purpose of highlighting the potential conflicts that may arise in the application of the scientific research provision.

⁶⁷ Van Drimmelen *supra* n 50 at 242; Zemantauski *supra* n 61 at 331; see for example the Commission's finding that both Iceland and South Korea were in violation of their duties under the Whaling Convention regarding

full details of each infraction of the provisions of [the] Convention by persons or vessels under the jurisdiction of that Government as reported by its inspectors ... information shall include a statement of measures taken for dealing with the infraction and of penalties imposed.

It is clear then that enforcement is left to the individual states with the IWC, itself, having no power to enforce any of its regulations.⁶⁸ Unsurprisingly this has led to a lack of uniformity with some states enforcing measures more or less than others.⁶⁹ Lacking the authority to punish contraventions, the IWC can rely only on individual member states to punish the infringements of their nationals and vessels within their jurisdiction.⁷⁰ The inability of the IWC to enforce amendments could have a number of consequences, some of which may yet not even be known, including the impairment of any protective or conservation measures taken by the IWC.⁷¹

The problems analysed above highlight the ability of states to 'cherry-pick' the phrases and words within the Preamble and provisions of the ICRW that suit their immediate needs.⁷² Objection procedures, the inability to enforce regulations and exceptions that have been applied as the rule have led many states, non-governmental organisations and individuals to draw the conclusion that the IWC has achieved 'too little, too late'.⁷³ Bonner summarises the history of the IWC as follows:

The whole story is a sad one. The body set up to protect whale stocks failed to do so ... although the actions it took certainly retarded the slaughter. But it is difficult to see what other course of action the IWC could have taken ... Unpopular proposals were received with threats to withdraw from the Convention and these threats were put into effect on more than one occasion. Compromise was the price paid for whaling to continue ... even if it was recognized that the limits were too broad.⁷⁴

While understanding the somewhat dismal picture painted above, the present author agrees with the statements of several other authors that the IWC, despite its inadequacies, still managed to bring the plight of whales to the attention of the world.⁷⁵ This invariably

the issuing of scientific research permits, but their lack of authority to punish/end the illegal 'research' activities of these two states.

⁶⁸ Lee *supra* n 20 at 52.

⁶⁹ *Ibid.*

⁷⁰ Zemantauski *supra* n 61 at 332.

⁷¹ Maffei *supra* n 39 at 299.

⁷² Bowman *supra* n 47 at 383.

⁷³ Van Drimmelen *supra* n 50 at 245.

⁷⁴ Bonner *Whales* (1980) 247.

⁷⁵ Zemantauski *supra* n 61 at 326; Maffei *supra* n 39 at 291.

leads one to the conclusion that the IWC, like all multilateral treaties, is an imperfect document 'since, in essence, [it] represents a compromise between diverse interests'.⁷⁶ That being said, the IWC should still be viewed as a vital international organ concerning the conservation of whales but that its effectiveness depends largely on the good will of its members, rather than on the good drafting of its provisions.⁷⁷

The question is then, how have members of the IWC used such 'good will' in the interpretation and application of the Whaling Convention itself? How has state practice, taking into account contemporary goals of international environmental law as well as the Vienna Convention on the Law of Treaties of 1969 ('Vienna Convention'), been used to affect and perhaps even alter the application of the ICRW?

Influence of State Practice on the Operation of the Whaling Convention

The emphasis of most environmentalists today that whales are 'unique components of the global ecosystem' was not the motivation in 1946 when the ICRW was being drafted.⁷⁸ Although the establishment of the ICRW saw the development of the whaling industry and the conservation of whales as two simultaneously achievable aims, the history of the IWC is akin to a seesaw with one aim always prevailing over another at any given point in time.⁷⁹ The interests of whaling states and the whaling industry may have prevailed over conservation efforts in earlier years, but given recent IWC amendments, the opinions and arguments of the large number of non-whaling states, and the consistent and relentless work of non-governmental organisations, the IWC appears to be shifting its once economic interest to an interest that is clearly dominated by protection and preservation.⁸⁰ In light of the fact that the early practice of the IWC clearly highlights the intense economic interests of the whaling industry, it is important to consider whether this new era of protection and

⁷⁶ Lee *supra* n 20 at 54.

⁷⁷ *Ibid.*

⁷⁸ Birnie 'The role of developing countries in nudging the International Whaling Commission from regulating whaling to encouraging nonconsumptive uses of whales' 1985 *Ecology Law Quarterly* 938.

⁷⁹ Maffei *supra* n 39 at 293.

⁸⁰ *Ibid.*; Ishii & Okubo 'An alternative explanation of Japan's whaling diplomacy in the post-moratorium era' 2007 *Journal of International Wildlife Law and Policy* 59.

preservation casts any doubt on the fact that there truly has been an ‘abandonment’ of the economic interests involved in whaling and, if so, to what extent.⁸¹

The movement from sustainable use to protection and preservation has been captured concisely by Stoett who asserts that:

the relatively swift ascent of the whale as an environmental symbol, combined with the harsh economic realities inherent in hunting a vanishing population, conspired to produce what must be described as one of the more remarkable international regime transitions in ecopolitical history.⁸²

Perhaps the first indications of an international anti-whaling movement, as well as a movement to protect the environment in general, came about in the 1970s.⁸³ 1972 saw the conclusion of the United Nations Conference on the Human Environment (‘UNCHE’) which is undoubtedly one of the most signifying moments in establishing a global shift from economic to conservation interests. After the conference recognised that certain environmental matters are the common concern of humanity as a whole, governments were given the recommendation, according to Recommendation 33 of the Action Plan for the Human Environment, to institute a ten year moratorium on all commercial whaling.⁸⁴ Although not implemented immediately, the recommendation for a moratorium successfully brought the conservation failures of the IWC to the attention of many non-whaling states and in the years immediately after the recommendation, several non-whaling states joined the IWC with the goal of ensuring that their voices regarding conservation be heard.⁸⁵ Added to the sudden influx of non-whaling states at the annual IWC meetings, the increased presence and pressure of international and non-governmental organisations also ‘contributed to a change in atmosphere’.⁸⁶ As telecommunications technology developed, public opinion regarding the ‘save the whale’ campaign increased dramatically and support for a moratorium on commercial whaling was exponentially amplified.⁸⁷ With scientific uncertainty regarding whale populations still prevalent by 1979, the Scientific Committee of the IWC itself noted that ‘the degree of scientific uncertainty is so widespread and ... so

⁸¹ Bowman *supra* n 47 at 432.

⁸² Stoett *supra* n 44 at preface vii.

⁸³ Lee *supra* n 20 at 55.

⁸⁴ Birnie *supra* n 49 at 491; Maffei *supra* n 39 at 289.

⁸⁵ Bowman *supra* n 47 at 433.

⁸⁶ Simpson *supra* n 3 at 192.

⁸⁷ Lee *supra* n 20 at 56.

completely unresolved that the only way to assure that stocks are not over-exploited is through a moratorium'.⁸⁸ In the same year, the IWC, pursuant to article V(1)(c), set up the first whale sanctuary in the Indian Ocean and all pelagic whaling in this area was banned.⁸⁹

Finally, the three-quarters majority needed to amend the schedule was achieved at the 34th IWC meeting in 1982, and the IWC historically galvanized and redirected the evolution of whaling by adopting a moratorium on all commercial whaling.⁹⁰ In the space of ten years, the IWC had transformed itself from a 'whaler's club' into an 'environmental watchdog group'.⁹¹ This swift transformation was to become both more evident and rapid in coming years. The IWC was fast becoming the platform through which states could voice their concerns over the genuine threat of extinction that many whale species were facing. Entrenching their conservation interests, non-whaling members of the IWC ensured that the Indian Ocean sanctuary was renewed for a further ten years and that an additional sanctuary in the Southern Ocean was established in 1994.⁹²

The practice of states concerning this new-found protectionist attitude is perhaps no more evident than in the subsequent debates between member states surrounding the continued application of the moratorium on commercial whaling. The moratorium (which was to be re-evaluated in 1990) has been reviewed at every IWC meeting since its adoption in 1982 and, despite stiff opposition from states such as Iceland, Norway and Japan, the non-whaling members of the IWC have maintained both their protectionist attitude as well as the moratorium.⁹³ Added to state practice (shifting the development of the whaling industry to the preservation of natural resources) are the adoption of several resolutions by the IWC, itself, specifically calling for the non-lethal exploitation of whales, with Resolution 2007-3 specifically stating that 'member States [are] to work constructively towards the incorporation of the needs of non-lethal uses of whale resources in any future decisions and agreements'.⁹⁴ These resolutions have opened the door for activities such as whale watching and highlight the fact that the grounds for species conservation have changed;

⁸⁸ Taylor & Dunstone *The exploitation of mammal populations* (1996) 104.

⁸⁹ Hirata 'Why Japan supports whaling' 2005 *Journal of International Wildlife Law and Policy* 130.

⁹⁰ Bowman *supra* n 47 at 294; Maffei *supra* n 39 at 293; Lee *supra* n 20 at 57.

⁹¹ Berger-Eforo *supra* n 57 at 441.

⁹² Birnie *supra* n 49 at 510.

⁹³ Gilders *Reflections of a whale watcher* (1995) 202.

⁹⁴ Bowman *supra* n 47 at 465; IWC Resolution 2007-3 available from: https://iwc.int/document_234 (accessed 2015-09-09).

whaling is no longer the profitable activity it once was with the commodities derived from whales, such as oil, now available through other non-lethal means.⁹⁵

Public opinion also greatly altered the perception of whales and although not relevant in a legal sense, moral and ethical arguments have been made by several states with Australia concluding that ‘there is simply no humane (and thus potentially acceptable) way of killing whales’.⁹⁶ Ecological concerns have become blurred by the moral arguments made by such states and several articles have been published regarding the inherent right to life that whales now have under customary international law.⁹⁷ An analysis of such claims is outside the ambit of the present dissertation, but the idea that whales have a right to life, by itself, is indicative of how far environmental ethics and the moral perceptions of the global public have transformed state practice surrounding the application of the ICRW. Together with the events and circumstances highlighted above, the proliferation of international environmental agreements and treaties has also contributed towards an unambiguous shift in the original aim of the ICRW by adopting a far more protectionist stance regarding the possible extinction or dangerous depletion of living resources, including whales.⁹⁸

Given this backdrop, it would seem that everything surrounding the whaling issue has changed drastically since the inception of the ICRW; that is to say, everything except the provisions of the ICRW itself.⁹⁹ It has been argued that ‘as a treaty establishing permanent institutional arrangements, the ICRW necessarily requires a progressive, evolutionary interpretation to enable it to keep pace with current needs and the unfolding development of the wider international legal system’.¹⁰⁰ The question, then, is whether the circumstances surrounding the whaling issue, highlighted above, have given rise to the right of states to invoke an evolutionary interpretation of the ICRW. If it exists, does such an evolutionary interpretation now see the protection and preservation of whales as the ultimate and, perhaps, only goal?

⁹⁵ Maffei *supra* n 39 at 301.

⁹⁶ Davis ‘The whaling dispute in the South Pacific: An Australian perspective’ 2011 *Journal of East Asia and International Law* 427.

⁹⁷ See in general D’Amato & Chopra *supra* n 4.

⁹⁸ Such international agreements include, *inter alia*, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1979 Convention on the Conservation of Migratory Species of Wild Animals and the 1992 Convention on Biological Diversity; Maffei *supra* n 39 at 301.

⁹⁹ Maffei *supra* n 39 at 301.

¹⁰⁰ Bowman ‘Business as normal or as “normalized”? The future of the International Whaling Commission’ 2010 *Journal of Animal Welfare Law* 23.

An Evolutionary Interpretation of the Whaling Convention

It has been stated on more than one occasion that international agreements should be treated as ‘living instruments’ and that:

it is a grave mistake to perceive the treaty as some kind of fossil that must be extracted intact from the sedimentary strata of jurisprudential history and viewed essentially as an intriguing relic of a bygone era. Rather, treaties must be envisaged as living instruments engaged in a continuous process of evolution and development, constantly interacting with other such entities, and constructing an adaptive niche for themselves in the wider juridical environment.¹⁰¹

This statement is supported by several high profile decisions of the ICJ, including the *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* case, where the Court held that a ‘treaty is not static and is open to adapt to [the] emerging norms of international law’.¹⁰² Additionally, the ICJ also declared in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that ‘the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn’.¹⁰³ Such statements by the ICJ are important for advocates of whale preservation as anti-whaling individuals, states and non-governmental organisations move to secure the standpoint that state practice, along with contemporary principles of international law, is evolving in a manner that could reinvent the application of the ICRW.

International environmental law treaties such as the ICRW may have had a slow beginning, but this body of law has proven that it is not only highly adaptable but has grown vigorously.¹⁰⁴ The last 30 years have seen a sharp increase in environmental law instruments, whilst at the same time signifying a dramatic evolution in the status of whales with preservation very much at the top of the whaling agenda.¹⁰⁵ Given the circumstances highlighted above – the backdrop through which the implementation of the ICRW has been effected in recent years and the contemporary environmental principles that have

¹⁰¹ Bowman *supra* n 47 at 333-334.

¹⁰² *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) Judgement* (1997) ICJ Reports at par 112.

¹⁰³ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Reports at par 29.

¹⁰⁴ Birnie, Boyle & Redgwell *supra* n 11 at preface v.

¹⁰⁵ Schiffman ‘The protection of whales in international law: A perspective for the next century’ 1996 *Brooklyn Journal of International Law* 333.

developed – does the change in the status of whales warrant an evolutionary interpretation of the ICRW?

The need to interpret international instruments in an evolutionary manner is clearly necessary if the object and purpose of a treaty are not to be defeated.¹⁰⁶ However, in a treaty such as the ICRW where the object and purpose have been conflicted throughout history, the perpetuation of the original object and purpose is increasingly problematic. If it is accepted that both the orderly development of the whaling industry as well as the conservation of whale stocks are the object of the ICRW, with no one aim being more important than the other, it would seem that the only way of ensuring the continuation of these aims is to apply them in a manner that is compatible with the original intention of the drafters. In accordance with article 31(3)(b) of the Vienna Convention, it is generally accepted that state practice may retrospectively shed light on the original intention of the parties, given that as times change so does the implementation of an international agreement.¹⁰⁷ Another widely accepted point is that despite the orderly development of whaling being seen as the ‘primary’ aim, placing the conservation of whales lower on the agenda, the conservation of whale stocks was still an undeniable goal when the ICRW was drafted.¹⁰⁸ Such an interpretation leads to the conclusion that the main object and purpose of the ICRW are to establish a forum through which order may be imposed on the whaling industry and not as a way in which to advance the development of the industry *per se*.¹⁰⁹ Does this undeniable goal of conservation then justify the current preservationist stance of anti-whaling states? In other words, has conservation, primarily concerned with elevating whale stocks to numbers that will allow sustainable exploitation, been set aside by preservation and the idea that whales should not be exploited, sustainably or otherwise?

It is clear from the above analysis that an evolutionary interpretation of international agreements is both acceptable and desirable in order to meet contemporary needs.¹¹⁰ However, what is of utmost importance in this regard is that any evolutionary interpretation must be in compliance with article 31(1) of the Vienna Convention in that any interpretation

¹⁰⁶ Bowman *supra* n 47 at 333-334.

¹⁰⁷ *Idem* 432.

¹⁰⁸ Birnie *supra* n 49 at 509.

¹⁰⁹ Bowman *supra* n 100 at 23.

¹¹⁰ Bowman *supra* n 47 at 335.

(evolutionary or otherwise) must be done in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. There have been several international, regional and national decisions regarding the principle of good faith, including the Advisory Opinion given by the ICJ in its *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, where the Court emphasised that the provisions of an international agreement entail 'an obligation to act in good faith and have *reasonable regard to the interests of the other [parties]* to a treaty' (emphasis added).¹¹¹ The need to give reasonable regard to the interests of other members of an international agreement is of particular importance in the context of the ICRW, where there is a harsh dichotomy in the opinions and practice of member states. Despite the general rule that state practice may then evolve the interpretation and, ultimately, the application of an international treaty, such practice should take into account both the object and purpose of the convention as well as the intention of the drafters.

The view that the ICRW has evolved into a convention for the preservation and protection of whales, as opposed to a convention on whaling, effectively involves altering the rules of the game while the game is still on-going. Burke comments that:

Where the fundamental goal of the initial treaty was to conserve whales in order to permit a sustainable harvest, the purpose would now be to protect whales against any harvest. Optimum utilization, reasonably understood by the parties to mean actual harvest at a conservative level, would now mean no harvest ever.¹¹²

Environmental ethics and the moral concerns surrounding the killing of whales do, indeed, have an influence on the present debate. However, the opinion of Norway that 'arbitrary cultural attitudes and preferences – as regards the animals to be hunted and killed – must be kept outside the IWC' are relevant given that the IWC is an international regulatory body that should act legally and scientifically rather than emotionally.¹¹³ Japan has also made several statements to the effect that 'many of the actions and decisions of [the] majority [of

¹¹¹ Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt* (1980) ICJ Reports at par 47.

¹¹² Maffei *supra* n 39 at 302; Burke 'Memorandum of opinion on the legality of the designation of the Southern Ocean Sanctuary by the IWC' 1996 *Ocean Development and International Law* 315; Bowman *supra* n 47 at 466.

¹¹³ Maffei *supra* n 39 at 301; see the Opening Statement of Norway at the 48th meeting of the IWC.

the IWC] subvert the intent of the Convention'.¹¹⁴ If anti-whaling and non-whaling members of the IWC were to adopt amendments to the schedule at their (now) biennial meetings that were based largely on emotional arguments, ignoring 'scientific findings', they would be introducing a sort of 'creeping amendment' that could essentially defeat the object and purpose of the ICRW.¹¹⁵ Such 'creeping amendments', although legally passed in accordance with the provisions of the ICRW, could result in what was described in the *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* case by the ICJ as actions which defeat the object and purpose of a treaty, despite no infringement of any particular provision being identifiable.¹¹⁶

As has been highlighted above, it is true that international agreements have to be 'interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation',¹¹⁷ but the present author agrees with the conclusion that neither the change in attitude of the IWC members, nor the change in status of whales has reached such a level so as to allow for an evolutionary interpretation.¹¹⁸ This, however, does not mean that the unrestrained slaughter of whales for immediate profits, as was experienced in the early years of the IWC's existence, is in any way consistent with the objectives of the Whaling Convention.¹¹⁹ Rather, if anti-whaling states are to enforce their preservationist and protectionist point of view, they will have to do so in a manner that involves emphasising other rules of international environmental law. It may be possible for the orderly development of the whaling industry to take place while at the same time undertaking vigorous conservation measures to ensure the preservation of the largest creatures on Earth for future generations, but within the divergent framework that whales currently find themselves under the IWC this does not seem likely in the near future.¹²⁰

¹¹⁴ Lino & Goodman 'Japan's position in the International Whaling Commission' in Burke & Gillespie (eds) *The future of cetaceans in a changing world* (2003) 26.

¹¹⁵ Maffei *supra* n 39 at 302.

¹¹⁶ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA) Merits* (1986) ICJ Reports at par 273, 276 & 279.

¹¹⁷ Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (1971) ICJ Reports at par 53.

¹¹⁸ Maffei *supra* n 39 at 302.

¹¹⁹ Bowman *supra* n 47 at 432.

¹²⁰ *Idem* 497.

There is little doubt that the ICRW, along with the IWC, have made their best effort to conserve the leviathans of the ocean.¹²¹ That being said, the inadequacies of the ICRW as well as the permanent regulatory body which it established, have been highlighted and have made clear that the IWC is perhaps not well-designed to regulate the present situation.¹²² However, a revision of the ICRW or the establishment of a new convention could have the negative impact of intensifying the already stark divide between whaling and non-whaling states.¹²³ What options, then, are left to those individuals and states who wish to preserve and protect the gentle giants of the sea? Before answering this question with relation to the general principles and treaties of international environmental law that may find application, the final section of this chapter will analyse the influence, if any, that UNCLOS has had on the conservation and/or protection of whales. Having a large number of state parties and containing a comprehensive framework through which to manage and regulate all ocean-related problems, UNCLOS constitutes a necessary step in attempting to reconcile the opposing standpoints of IWC members.

Whaling and the United Nations Convention on the Law of the Sea

UNCLOS came into operation in 1994, almost 50 years after the ICRW took effect, and at present there are 167 state parties.¹²⁴ UNCLOS has been described on more than one occasion as being a ‘constitution’ for the oceans, capable of establishing a framework through which to address all ocean-related problems, including the management of marine resources.¹²⁵ The comprehensive nature of UNCLOS would seem to ensure that any action taken by a state which is in conflict with the provisions of the ICRW (as an international instrument regulating a matter relevant to the law of the sea) may fall within the wide-ranging framework established by UNCLOS.¹²⁶ Adding weight to the framework established by UNCLOS is the fact that many of the provisions contained within UNCLOS have been described by some governments, private experts as well as the ICJ as evidence of customary

¹²¹ Zemantauski *supra* n 61 at 334.

¹²² Maffei *supra* n 39 at 305.

¹²³ *Ibid.*

¹²⁴ UNCLOS ‘Chronological lists of ratification of accessions and successions to the conventions and the related Agreements as at 03 October 2014’ available from: http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (accessed 2015-09-11).

¹²⁵ Tladi ‘Oceans governance: A regulatory framework’ in Jacquet, Pachauri & Tubiana (eds) in *Oceans: The new frontier* (2011) 99; Freeland & Drysdale *supra* n 37 at 17.

¹²⁶ Schiffman *supra* n 105 at 345.

international law which is applicable to all states.¹²⁷ In order to establish the relevance of UNCLOS to the current legal issue, several substantive provisions of UNCLOS which are relevant to whaling are highlighted in the paragraphs below.

Articles 65 and 120 of UNCLOS are of particular importance with regards to the management of whales and, therefore, have significant implications for both the ICRW and the IWC.¹²⁸ These two articles are perhaps the most relevant UNCLOS provisions regarding marine mammals with article 65 stating that:

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and *in the case of cetaceans shall in particular work through the appropriate international organizations* for their conservation, management and study [emphasis added].

Although article 65 is contained in Part V of UNCLOS relating to the exclusive economic zone, article 120 extends the application of article 65 to the conservation and management of marine mammals on the High Seas. A full discussion of the regulatory framework established for whales under the exclusive economic zone ('EEZ') is not possible here, given that the current analysis is focussed on whaling activities on the High Seas. Be that as it may, it is important to note that coastal states are entitled to regulate whaling activities more strictly (than is provided for by the IWC) in their EEZ, or even to prohibit it entirely.¹²⁹ Another provision which is of particular relevance in the present situation is article 192 which places an obligation on states to both protect and preserve the marine environment. Finally, article 87 which recognises the freedom of all states to fish on the High Seas is qualified by article 87(2), which affirms that the exercise of such freedoms must be done 'with due regard for the interests of other states'.

The brief mention of the above provisions of UNCLOS regarding marine mammals, the preservation of the marine environment and the qualification placed on the High Seas freedoms of states, seems to favour an overarching policy for the preservation of

¹²⁷ Sohn & Noyes *Cases and materials on the law of the sea* (2004) 6.

¹²⁸ Freeland & Drysdale *supra* n 37 at 17.

¹²⁹ Bowman *supra* n 47 at 446.

cetaceans.¹³⁰ Given the widespread acceptance of a policy of whale preservation emphasised above, could the provisions in UNCLOS be used as an alternate forum (to the forum currently established under the ICRW) for preventing whaling states from hunting and killing whales and thus protect and preserve whales?¹³¹

Before answering this question it is important to note that the provisions contained in UNCLOS are illustrative of the many compromises that were reached concerning both commercial and environmental issues.¹³² This ‘consensus’ driven approach invariably means that many provisions in UNCLOS, including those concerning the marine environment and marine mammals, contain vague and often imprecise language.¹³³ Additionally, the Preamble of UNCLOS mentions that state parties recognise the need to promote ‘the equitable and efficient utilization of their [the seas’] resources, the conservation of their living resources, and the study, protection and preservation of the marine environment’. The reference to efficient utilization of resources as well as the preservation of the marine environment, pertains directly to the conflict that whaling and non-whaling states have in interpreting the object and purpose of the ICRW. It is against this backdrop that the relevant provisions of UNCLOS regarding whales should be carefully examined.

In this regard, the wording of article 65 is of particular interest. Pertaining also to the High Seas, article 65 obligates states to cooperate with regards to the conservation of marine mammals and seeks to establish a regime for the international management of marine mammals.¹³⁴ However, the use of the word ‘organizations’ in the plural has presented varied interpretations. Some states have argued that, since the IWC was the only organisation tasked with the regulation of whaling at the time of drafting, all members of UNCLOS (even those not members of the IWC) would be bound by regulations that were made by the IWC in connection with the regulation of whaling and whale preservation.¹³⁵ Alternatively, however, some states such as Canada have upheld the argument that the use of the word ‘organizations’ in the plural means that there is more than one competent body

¹³⁰ Schiffman *supra* n 105 at 347.

¹³¹ *Idem* 348.

¹³² Birnie in Freestone, Barnes & Ong (eds) *supra* n 46 at 261; see also Freeland & Drysdale *supra* n 37 at 17.

¹³³ *Ibid.*

¹³⁴ Freeland & Drysdale *supra* n 37 at 18.

¹³⁵ *Idem* 19.

capable of fulfilling the terms of article 65.¹³⁶ Canada's argument is supported by the Office of the Legal Affairs of the United Nations that has stated that both the Food and Agriculture Organisation ('FAO') as well as the United Nations Environment Programme ('UNEP') are 'competent or relevant international organizations' as required by article 65.¹³⁷ The FAO deals largely with the eradication of hunger and the elimination of poverty whilst UNEP largely encourages partnership in caring for the environment.¹³⁸ There is no doubt that these are two hugely influential and powerful organisations, but whether they are specific enough (given the broad range of their activities) to deal with the whaling issue remains to be seen. In addition to this, there is also the issue of which other bodies may, at a later stage, be characterised as appropriate organisations.¹³⁹ The contention that there may be other competent organisations to deal with the whaling issue opens up the door for states such as Japan, Norway and Iceland to leave the ICRW and establish their own 'competent' organisations.¹⁴⁰

Brief reference should also be made to the uncertainty surrounding the use of the words 'work through'. Several states have contended that 'work through' simply means to consult with the appropriate or relevant organisation or scientific body whilst states on the other end of the argument see these words as meaning that all states (whaling or non-whaling) should yield to the regulations of the IWC, regardless of whether or not such states are party to the ICRW.¹⁴¹ Given the possible establishment of other appropriate organisations, the issue of whether or not it will be possible to work through only one organisation or whether states are required to work through multiple organisations is also problematic.¹⁴²

As is the case with many ICRW provisions, the generality and ambiguity in the wording of article 65 puts the management of whales, under UNCLOS, at risk. That being said, however, UNCLOS, unlike the ICRW, does go a long way in making reference to the preservation of the

¹³⁶ *Ibid.*

¹³⁷ *Idem* 20; Division for Ocean Affairs and the Law of the Sea (1996) 31 *Law of the Sea Bulletin* 79.

¹³⁸ Food and Agriculture Organization of the United Nations 'About FAO' 2015 [Online] available from: <http://www.fao.org/about/en/> (accessed 2015-09-10); United Nations Environment Programme 'About UNEP' 2015 [Online] available from: <http://www.unep.org/About/> (accessed 2015-09-10).

¹³⁹ Freeland & Drysdale *supra* n 37 at 20.

¹⁴⁰ In this regard, see the establishment of the North Atlantic Marine Mammal Commission (NAMMCO) in which the Faroe Islands, Greenland, Iceland and Norway have agreed to the sustainable utilization of marine mammals.

¹⁴¹ Lyster *International wildlife law* (1985) 36.

¹⁴² Freeland & Drysdale *supra* n 37 at 21.

whales' habitat by placing obligations on member states to 'protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species'.¹⁴³ Unfortunately, the preservation of such natural habitat will be in vain should the creatures who live in these habitats be hunted to extinction.

Despite perhaps not providing the framework through which to prevent whaling and exclusively preserve and protect whales, UNCLOS is still undoubtedly an authoritative international convention that has both strengthened the corpus of environmental law as well as the IWC itself. Nevertheless, the broad terms contained in UNCLOS along with the goals of state parties to efficiently utilise as well as preserve the marine environment have led Bowman to conclude that 'these failures, of course, mirror those of the IWC itself in its early years ... and carry important lessons which are to be borne in mind'.¹⁴⁴ As comprehensive as UNCLOS is in managing several areas and problems regarding the law of the sea, the brief analysis above emphasises that UNCLOS, perhaps, is not the ideal framework through which anti-whaling states may establish their goal of preserving, rather than efficiently utilising, whales. It is appropriate then, in the next chapter, to turn towards other established or generally accepted principles or institutions of international law that may offer more influential and conclusive guidance for ICRW state parties.¹⁴⁵

¹⁴³ Article 194(5) of UNCLOS; see also Birnie *supra* n 49 at 491.

¹⁴⁴ Bowman *supra* n 47 at 448.

¹⁴⁵ *Ibid.*

Chapter Three

Principles of International Environmental Law and the Preservationist Goal

The Preamble of the 1992 Convention on Biological Diversity begins by stating that the contracting parties are:

Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.

Conscious also of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere

The Preamble of this convention clearly demonstrates the intricate mixture of objectives that have become characteristic of modern international environmental law.¹⁴⁶ The international community has rapidly become sensitised to the plight of the environment and it should, therefore, come as no surprise that recent years have seen a proliferation in international environmental law instruments.¹⁴⁷ The multiplicity of international agreements that could find relevance to the present legal issue include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'); the 1992 Convention on Biological Diversity; the 1979 Convention on the Conservation of Migratory Species of Wild Animals; the 1979 Convention on the Conservation of European Wildlife and Natural Habitats; the 1991 Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas; as well as the 1991 Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean and Contiguous Atlantic Area.¹⁴⁸

Apart from the development of international environmental law reflected in international agreements, there are several principles and rules that have evolved through state practice and declarations that are not only relevant but which find direct application in the current context. With regards to the problem of sustainably utilising whales or indefinitely preserving them, three widely-accepted principles require further analysis – the principle of

¹⁴⁶ Birnie, Boyle & Redgwell *supra* n 11 at 8.

¹⁴⁷ *Gabčíkovo-Nagymaros Project (Hungry v Slovakia)* *supra* n 102 (separate opinion of Judge Weeramantry) at 90.

¹⁴⁸ Freeland & Drysdale *supra* n 37 at 30.

sustainable development, the precautionary principle, as well as the emergence of the obligation to conduct environmental impact assessments.¹⁴⁹ The pressing question for the remainder of the chapter will revolve around whether, and to what extent, these three principles provide viable alternatives for anti-whaling states to assert their preservationist agendas. It is beyond the scope of this dissertation to systematically trace the history and progressive development of these principles, but the sections that follow will highlight the interpretation and definition of these principles generally, in order to examine their relevance within the whaling issue. Before discussing these general principles it is necessary to stress the point made at the start of this dissertation that, although the ICRW (and possibly UNCLOS) are designed specifically to deal with whales, these special rules will not operate within a normative vacuum, but will have to be applied and interpreted together with a number of general principles of international law.¹⁵⁰

Sustainable Development

The concept of 'sustainable development' was first characterised in the 1987 Brundtland Report as being a process that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.¹⁵¹ Sustainable development is reflected in the 1992 Rio Declaration on Environment and Development ('Rio Declaration')¹⁵² as well as in Chapter 17 of Agenda 21¹⁵³ which calls for the 'sustainable use and conservation' of all marine living resources both within and beyond the national jurisdictions of states.¹⁵⁴ In his separate opinion in the *Gabčíkovo-Nagymaros Project (Hungry v Slovakia)* case, Judge Weeramantry states that sustainable development is more than a 'mere concept' but is rather:

¹⁴⁹ *Idem* 31.

¹⁵⁰ Hafner *supra* n 16 at 856.

¹⁵¹ Brundtland *et al* *Our common future ('Brundtland Report')* (1987) at 43; Sands *Principles of international environmental law* (2003) 252; Birnie, Boyle & Redgwell *supra* n 11 at 54.

¹⁵² Declaration of the United Nations Conference on Environment and Development, UN Doc A/CONF.151/26 (vol I)/31 ILM 874 (1992); see principles 1, 4, 5, 7, 8, 9, 20, 21, 22, 24 & 27.

¹⁵³ *Agenda 21: Programme for Action for Sustainable Development* UN GAOR 46th session UN Doc A/Conf.151/26 (1992) is a non-binding blueprint that was adopted by the United Nations Conference on Environment and Development for a global partnership for sustainable development.

¹⁵⁴ Freeland & Drysdale *supra* n 37 at 31.

a principle fundamental to the determination of the competing considerations in [environmental law] cases, and... although it has attracted attention only recently in the literature of international law, it is likely to play a major role in determining important environmental disputes of the future.¹⁵⁵

Judge Weeramantry goes further to state that:

Whether in the field of multilateral treaties, international declarations; the foundation documents of international organizations; the practices of international financial institutions; regional declarations and planning documents; or State practice, there is a wide and general recognition of [sustainable development].¹⁵⁶

Sustainable development firmly maintains a state's sovereignty to exploit the natural resources of the earth, including those found within the ocean, but affirms that such exploitation must be done in a manner that preserves and protects the environment.¹⁵⁷ It becomes apparent, therefore, that the concept of sustainable development entails a *compromise* between environmental preservation and the economic growth of states.¹⁵⁸ The ICRW arguably acknowledged this concept when it stated in the Preamble that the contracting parties recognise 'the interest of the nations of the world in safeguarding the future generations of the great natural resources represented by the whale stocks' and that there is a need for proper conservation and regulation so as to 'permit increase in the number of whales which may be captured without endangering these natural resources'.¹⁵⁹ At first glance then, the notion of sustainable development seems to suggest that whaling nations may continue whaling and increase their economic growth if they take the environment into consideration. This position is evidenced by several arguments made at IWC meetings by whaling states that they wish to exploit whales on the basis of sustainable use.¹⁶⁰ However, the sustainable use of whales must be viewed in light of the compromise mentioned above and upon closer inspection, the very little economic gain recently associated with whaling does not appear to be in harmonisation with the damage caused by killing certain whale species, with Stoett stating that:

¹⁵⁵ *Gabčíkovo-Nagymaros Project (Hungry v Slovakia) supra* n 102 (separate opinion of Judge Weeramantry) at 85.

¹⁵⁶ *Idem* 90.

¹⁵⁷ Sohn & Noyes *supra* n 127 at 671.

¹⁵⁸ *Ibid.*

¹⁵⁹ Freeland & Drysdale *supra* n 37 at 33.

¹⁶⁰ *Idem* 32; see for example the 55th Report of the IWC of 2003 in which Japan proposed that it be allowed to commence whaling operations due to a 'scientific basis [that] complie[d] with the principle of sustainable use'.

there is a very limited market for whale meat (and it would not make economic sense to hunt whales for their blubber or other properties which were substituted by modern products many decades ago). In short, there would be very little profit motive to rekindle what was already a heavily subsidized industry when it started dying off in the 1960s and 1970s.¹⁶¹

If the above quote is examined within the context that ‘sustainable development is not exclusively concerned with narrow economic needs, but encompasses a broader environmental perspective’, it would become evident that the need to develop a whaling industry, having very little, if any, impact on the economic growth of a state would be in contravention of the need to preserve the environment.¹⁶² There appears to be no evidence to support the fact that whaling nations are so dependent on their whaling industries so as to allow sustainable use in a manner that is detrimental to the protection and preservation of the environment. However sustainable development is to be defined, it is an innately complex concept that will have a bearing on the future of international environmental law and will obligate states to act in manners that are somewhat different to those to which they have become accustomed to.¹⁶³ Viewed in this light, sustainable development could be an important first step towards achieving the preservation rather than the orderly exploitation of whale stocks.

Precautionary Principle

In his open address at the Bergen Conference in 1990, Gro Harlem Brundtland encapsulated the necessity to apply a precautionary approach with regards to the exploitation of the environment when he stated that:

I will add my strong support to those who say that we cannot delay action until all scientific facts are on our tables. We already know enough to start to act - and to act more forcefully. We know the time it takes from decision through implementation to practical effects. We know that it costs more to

¹⁶¹ Stoett ‘Irreconcilable differences: The International Whaling Commission and cetacean futures’ 2011 *Review of Policy Research* 633.

¹⁶² Sohn & Noyes *supra* n 127 at 672.

¹⁶³ Birnie, Boyle & Redgwell *supra* n 11 at 54.

repair environmental damage than to prevent it. If we err in our decisions affecting the future of our children and our planet, let us err on the side of caution.¹⁶⁴

It is widely agreed that the precautionary principle is best reflected in Principle 15 of the Rio Declaration which states that in order to protect the environment, the precautionary principle must be applied and that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.¹⁶⁵ The declarations made by states, their involvement in international conferences as well as their negotiations with regards to treaties provide strong evidence of an international acceptance of the precautionary principle.¹⁶⁶ Recent years have seen a prolific increase in the number of international agreements that specifically incorporate the principle, including both the FAO's Code of Conduct for Responsible Fisheries as well as the 1995 United Nations Fish Stocks Agreement which provides in article 6(2) that 'states should be more cautious when information is uncertain, unreliable or inadequate', and that the 'absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures'.¹⁶⁷

The invocation of the precautionary approach and its acknowledgment as being part of the corpus of international law by states, amounts to subsequent practice within the meaning of article 31(3)(b) of the Vienna Convention.¹⁶⁸ While the debate regarding whether or not the precautionary principle has gone so far as to achieve customary international law status is still on-going, it generally is accepted that, at the very least, the principle is evidence of an evolving norm of customary international law.¹⁶⁹

Of particular importance, given the preceding section, is the fact that the precautionary principle has been linked to the concept of sustainable development with the 1990 Bergen

¹⁶⁴ Brundtland 'Conference on "Action for Common Future"' opening address at the opening session (1990) Bergen, Norway; Cameron & Abouchar 'The precautionary principle: A fundamental principle of law and policy for the protection of the global environment' 1991 *Boston College International & Comparative Law Review* 1.

¹⁶⁵ Schröder 'Precautionary approach/principle' 2014 *Max Planck Encyclopaedia of Public International Law* 1.

¹⁶⁶ *Idem* 5.

¹⁶⁷ Freeland & Drysdale *supra* n 37 at 34; Davis *supra* n 96 at 425.

¹⁶⁸ Tladi 'Prestige Lecture: The development of the law of the sea through UN processes: The case of biodiversity in areas beyond national jurisdiction' University of Pretoria [Online] available from: <https://web.up.ac.za/sitefiles/file/47/15338/PDF%20Files/Prof%20Dire%20Tladi%20Prestige%20Lecture.pdf> (accessed 2015-04-06) 18.

¹⁶⁹ Schröder *supra* n 165 at 5.

Declaration providing that '[i]n order to achieve sustainable development, policies must be based on the precautionary principle'.¹⁷⁰ The relevance of this statement should not be underestimated since it adds weight to the argument that, in advancing development the burden of proof shifts so as to obligate states to prove that their development/activity is not causing serious harm to the environment.¹⁷¹ The possible shift in the burden of proof is particularly relevant given the stark, ethically and often propaganda-filled arguments that divide member nations of the IWC. Should whaling nations wish to continue killing whales on the basis of 'sustainable use', they will be required to prove that such sustainable use has taken the precautionary principle into account.

Together with the concept of sustainable development highlighted above, the precautionary principle could be used as another globally recognised environmental law principle that may offer answers to the preservationist goals of anti-whaling states. Whaling states have maintained that certain whale species have reached pre-whaling levels and that there is scientific evidence to suggest that the commercial exploitation of such stocks, therefore, is sustainable.¹⁷² However, on the basis of *other* scientific evidence, non-whaling and anti-whaling states have advocated the position that:

Our knowledge of whale stocks, and the inherent weakness of models developed to predict the effects of exploitative activities on those stocks, must lead the world community to adopt the philosophy and practice of the precautionary principle and oppose any commercial whaling activity.¹⁷³

If it is assumed that both whaling and non-whaling/anti-whaling states are acting in good faith but yet they are arriving at conflicting scientific conclusions, there is clearly a lack of full scientific certainty.¹⁷⁴ As has been stated above, the lack of full scientific certainty will not be used as a reason for postponing measures that would prevent any further environmental degradation. In other words, the application of the precautionary principle to the whaling issue could result in the conclusion that states should refrain from whaling due to the fact that the degree of exploitation that can be sustained by whale stocks is

¹⁷⁰ Bergen Ministerial Declaration on Sustainable Development in the Economic Commission for Europe Region UN Doc A/CONF.151/PC/10 (1990) ('Bergen Declaration') par 7.

¹⁷¹ Cameron & Abouchar *supra* n 164 at 18.

¹⁷² Maffei *supra* n 39 at 304.

¹⁷³ Davis *supra* n 96 at 426.

¹⁷⁴ Maffei *supra* n 39 at 304.

uncertain.¹⁷⁵ In the absence of full scientific certainty, states should not act contrary to their obligation to prevent serious and irreversible damage to the marine environment.¹⁷⁶ It remains to be seen whether or not the precautionary principle is ‘the fundamental principle of environmental protection policy’ but the adoption of a precautionary approach will indeed be intrinsically beneficial to both the global environment as well as the preservationist attitude taken on by many IWC members.¹⁷⁷

Environmental Impact Assessments

Environmental impact assessments (EIA) are a direct consequence of the precautionary principle mentioned above and are used as a means of integrating environmental concerns in a manner that promotes sustainable development.¹⁷⁸ EIA have been defined as ‘a procedure for evaluating the likely impact of a proposed activity [whaling] on the environment’.¹⁷⁹ The strongest international support for EIA is evidenced by Principle 17 of the Rio Declaration, which requires states to undertake EIA for all activities that could potentially have an adverse impact on the environment. The dissenting opinion of Judge Sir Geoffrey Palmer in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France)* case is worthy of mention in this regard as he states, at paragraph 91(c), that ‘customary international law may have developed a norm of requiring environmental impact assessments where activities may have a significant effect on the environment’.

In *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, the ICJ held that environmental impact assessments have:

gained so much acceptance amongst States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed activity may have a significant adverse impact.¹⁸⁰

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Cameron & Abouchar *supra* n 164 at 27.

¹⁷⁸ Epiney ‘Environmental impact assessment’ 2009 *Max Planck Encyclopaedia of Public International Law* 1; Birnie, Boyle & Redgwell *supra* n 11 at 165.

¹⁷⁹ Article 1(vi) of the 1991 Convention on Environmental Impact Assessment in a Transboundary Context.

¹⁸⁰ *Pulp Mills on the River Uruguay (Argentina v Uruguay) Judgement* (2010) ICJ Reports at par 204.

Finally, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea added to what was said in the above ICJ decision by stating that ‘the obligation to conduct an environmental impact assessment is a ... general obligation under customary international law’.¹⁸¹ Apart from complementing both the precautionary principle (a principle that seems already to have been accepted as a norm under international law by state practice) as well as the concept of sustainable development, the above examination would seem to imply that EIA have indeed become part of state practice surrounding the preservation of the environment. There is, therefore, a clear trend that EIA are being considered as customary international law binding on all states. This is relevant given the fact that whaling nations are undertaking activities that are having a clear impact on the marine environment and to date, have failed to undertake any EIA regarding their whaling activities.

At the 20th Session of the Rhodes Academy on Oceans Law and Policy, Professor Verlaan mentioned the fact that the microorganisms that live on hydrothermal vents on the sea floor are dependent on the natural death of whales in order to move from one hydrothermal vent to another (when the original vent burns out); the whale carcass is seen as a ‘stepping stone’ for these creatures to reach the next vent. However, the increased pressure on whale stocks due to commercial exploitation has lessened the frequency that whale carcasses can be found on the ocean floor and many of these microorganisms are not making it to the next vent and are, in fact, dying. The adverse impact that current commercial whaling activities have is not yet fully known but may be so far-reaching (so as to even destroy microorganisms that could be vital for the survival of hydrothermal vents) that whaling states would be in breach of their due diligence obligations under international law.

An additional and equally important statement is made in the *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* case where the ICJ held that EIA should be conducted ‘not only when States contemplate new activities but also when continuing activities begun in the past’.¹⁸² This is relevant given that whaling activities are not new and have been around for many

¹⁸¹ Advisory Opinion on the *Responsibilities and obligations of States with respect to activities in the Area* (2011) ITLOS Reports at par 145.

¹⁸² *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* *supra* n 102 at 140.

years before the concept of EIA even came to fruition. EIA are often undertaken to give due consideration to the adverse impact that an activity may have on the environment at an early stage, but due to the fact that whaling activities have been going on for so long, the necessity for whaling states to undertake EIA becomes even more apparent.¹⁸³ Our knowledge of the oceans, including the example alluded to above regarding the hydrothermal vents, is still in its infancy and the impact that current commercial whaling is having on the global environment needs to be critically assessed.

The emergence of international environmental law concepts such as sustainable development, the precautionary principle, as well as environmental impact assessments has determined the purpose and structure of modern international environmental law considerably.¹⁸⁴ These principles have the ability to directly steer and alter the behaviour of states regarding both the preservation and exploitation of the marine environment.¹⁸⁵ The principles referred to above have aided in transforming what were once merely notions or ideas into legally-binding rules that anti-whaling and non-whaling states may very well make use of in the interpretation and application of their preservationist approach.

¹⁸³ Beyerlin & Stoutenburg 'Environment, international protection' 2015 *Max Planck Encyclopaedia of Public International Law* 8.

¹⁸⁴ *Idem* 7.

¹⁸⁵ *Ibid.*

Chapter Four

Conclusion

Whales face overwhelming challenges as human activities and proximity with the marine environment increase. As humans explore and exploit more of the ocean, so the threats to whales intensify. Ship strikes, entanglement in commercial fishing gear, marine pollution and climate change are all genuine threats to whales with commercial whaling adding additional pressure to an already pressurised natural resource. Although an old problem, the effects of commercial whaling are still felt today and there is a clear need for an international law response to an international problem.

It was emphasised in Chapter Two that the Whaling Convention, having been drafted almost 70 years ago, inevitably has to be interpreted and applied in a manner that keeps abreast of contemporary rules and principles that have a bearing on the environment. Nevertheless, giving contemporary life to the Whaling Convention should not be done in a manner that subverts the original intention of the drafters. The economic interests that a handful of states continue to have in commercial whaling cannot be left unfettered and, despite the intention of the ICRW to allow for the sustainable use of whale stocks, state practice supporting the preservation of whales cannot be ignored. Chapter Three highlighted the rapid expansion of international environmental law as well as several principles that, although not specifically designed to regulate whaling, are capable of having a direct impact on whaling operations. The right to sustainable development must take cognisance of the environment and together with the precautionary approach, and environmental impact assessments are valuable tools available to those states who oppose whaling.

The present legal issue exemplifies many classic instances of modern international environmental law dilemmas – that is, the right to development versus the obligation to protect the environment. It is important to note what was said three centuries BC by King Devanampiya Tissa, who stated that as far as the environment goes, humans are its guardians and not its owners.¹⁸⁶ More recently, Professor Weiss was quoted as saying that:

¹⁸⁶ *Gabčíkovo-Nagymaros Project (Hungry v Slovakia)* *supra* n 102 (separate opinion of Judge Weeramantry) at 101.

We, as a species, hold the natural and cultural environment of our planet in common, both with other members of the present generation and with other generations, past and future. At any given time, each generation is both custodian or trustee of the planet for future generations and a beneficiary of its fruits. This imposes obligations upon us to care for the planet and gives us certain rights to use it.¹⁸⁷

Anti-whaling and non-whaling states have used the various political, scientific and ethical arguments mentioned above as part of their arsenal to ensure that their preservationist views are known, whilst whaling states have consistently upheld their 'sustainable use' and scientifically-based arguments in order to justify their right to orderly develop their whaling industries.¹⁸⁸ However, these states' stubborn insistence that there is only one correct solution to the present issue goes against several statements made by the ICJ to the effect that states 'are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it'.¹⁸⁹ Preserving the current *status quo* will promote nothing more than the continued hostile exchanges between states; some movement from entrenched opinions will inevitably be required before any meaningful progress will take place.¹⁹⁰

The above being said, anti-whaling and non-whaling movements have successfully transformed the whaling debate from regulation to conservation and, finally, to preservation.¹⁹¹ Although the current framework established for the regulation and management of whales does not prevent whales from roaming the oceans freely without the risk of being hunted, as indicated above in Chapter Two, the development of modern international environmental law concepts as well as state practice do seem to be moving in that direction.¹⁹² It may be that the goals of sustainable exploitation and preservation will possibly co-exist at some point in the future, but it would seem that the successful pursuit of

¹⁸⁷ Weiss *In fairness to future generations* (1989) 17.

¹⁸⁸ Schiffman *supra* n 105 at 355.

¹⁸⁹ *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (1969) ICJ Reports at par 85.

¹⁹⁰ Bowman *supra* n 100 at 23.

¹⁹¹ Schiffman *supra* n 105 at 359.

¹⁹² *Ibid.*

the former will inevitably depend on the immediate efforts taken to preserve dwindling whale stocks.¹⁹³

The inadequacy of the ICRW to take account of strictly legal, as opposed to purely political/ethical considerations has been highlighted above.¹⁹⁴ While regarded by some as being the nominal international agreement regulating whales and whaling, its credibility is under threat with discussions and negotiations at IWC meetings plagued by ‘mistrust and acrimony’.¹⁹⁵ However, despite these often political/emotional debates, there is an unambiguous need to protect the marine environment while adhering to the international legal system.¹⁹⁶ Such a compromise will be possible only when states are able to fulfil, in good faith, their obligations under the modern international environmental law principles alluded to above, as well as the universally-accepted obligation to cooperate. Ultimately, a compromise based on established and accepted environmental law principles appears to be the only way forward in resolving the current stalemate.¹⁹⁷ The political circus and diplomatic warfare that often overshadow the larger crisis currently threatening whales need to be set aside and replaced with a forum based on cooperation, scientific accuracy and legally-sound argumentation.¹⁹⁸

¹⁹³ Bowman *supra* n 47 at 498.

¹⁹⁴ *Idem* 497.

¹⁹⁵ Friedheim ‘Moderation in the pursuit of justice: Explaining Japan’s failure in the international whaling negotiations’ 1996 *Ocean Development and International Law* 365.

¹⁹⁶ Bowman *supra* n 47 at 497.

¹⁹⁷ Freeland & Drysdale *supra* n 37 at 36.

¹⁹⁸ Stoett *supra* n 161 at 634.

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