Business As Normal Or As 'Normalised'? The Future Of The International Whaling Commission

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Originally created in the aftermath of World War II under the terms of the 1946 International Convention for the Regulation of Whaling (ICRW)[1], the International Whaling Commission (IWC) now stands at a crossroads at which its future direction must be determined. At the heart of the controversy, which is scheduled for resolution at its forthcoming 62nd annual meeting, lies the current moratorium on commercial whaling approved back in 1982. The impetus for review was effectively generated by the adoption in 2006 of the so-called St Kitts and Nevis Declaration,[2] which asserted that the IWC could only be saved from collapse by the 'normalisation' of the organisation in accordance with the letter and spirit of its constituent instrument, and other relevant legal principles.

Though both of pivotal significance, the two measures highlighted above differ crucially in terms of their legal status. The moratorium decision, which brought to an end several decades of whaling excess, constituted a legally binding amendment to the Schedule of the ICRW, where the detailed regulations governing the exploitation of whales are established. Such amendments require for their adoption 'a three-fourths majority of those members voting[3], which had become attainable through the progressive influx into the IWC of various non-whaling states, following a call for enhanced attention to the conservation of whales at the 1972 Stockholm Conference on the Human Environment. The inevitable concomitant of the moratorium was that commercial catch limits for all stocks were set at zero. Subsequently, following assiduous "encouragement" by Japan, in particular, of a further expansion of membership to embrace certain developing countries willing to support a renewal of whaling, the voting balance shifted again. Although this constituency never approached the size needed to overturn the moratorium through further amendment of the Schedule, it proved sufficient at the 58th annual meeting in 2006 to achieve the bare majority needed to adopt a non-binding recommendation under Article VI.[4] Thus, Japan was able to secure the call for 'normalisation' of the IWC, which, the resolution asserted, had 'failed to meet its obligations under the terms of the ICRW'.

This claim requires some elucidation, since the ICRW, being focused primarily upon the creation of *powers*, is extremely sparing in its imposition of obligations, whether upon the organisation itself or its members, and there is certainly no specifically stipulated duty that bears upon the matters in issue. The essence of the complaint here, however, as the preamble to the resolution confirms, was that opposition in principle to *any* resumption of commercial whaling, even on a sustainable basis, is "contrary to the object and purpose" of the ICRW, and the International Court of Justice (ICJ) would seem to have confirmed in the *Nicaragua* case that action taken to defeat the very object and purpose of a treaty may amount to a breach thereof even though no infringement of any particular provision can be identified.[5]

The response of anti-whaling IWC members predictably entailed a scramble for further recruitment to the organisation of sufficient like-minded states to restore the voting balance, which was duly achieved by the time of the next meeting. More immediately, a number of them formally dissociated themselves from the normalisation resolution. They also decided to boycott an unofficial meeting organised by Japan to

[1] 161 UNTS 72.

[2] IWC Resolution 2006-1.

[3] Article III(2).

[4] By 33 votes to 32, with one abstention.

[5] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v US), *Merits Phase* (1986) ICJ Rep 14.

explore the normalisation process. Yet a posture of wholesale disengagement was never likely to be politically maintainable for long, and a succession of informal meetings followed involving all factions, with the Pew Foundation in particular seeking to act as honest brokers in the quest for a solution. A more modest unofficial initiative, in the form of a position paper,[6] urged the anti-whaling faction to engage fully with the normalisation process, while at the same time challenging the Japanese perspective on interpretation of the ICRW, and in particular its object and purpose, through a radical and dispassionate re-examination of its text and drafting history. By this means, they could not only continue to occupy the high moral ground, but for the first time lay confident claim to the high legal ground as well. Nevertheless, given the undeniable "fisheries" orientation of the ICRW, and the fact that the risk of outright withdrawal of the pro-whaling nations from the IWC could not altogether be excluded, simply preserving the status quo was unlikely to prove sustainable in the long term; some movement from entrenched positions would accordingly be required. By the time of this paper's circulation, the IWC had in fact already launched an inter-sessional process of its own aimed in the first instance at confidence building, in order that the substantive issues arising out of the call for normalisation might then be addressed in a more favourable atmosphere.

The paper's central argument was that traditional perspectives regarding the object and purpose of the ICRW were substantially misconceived. They turn essentially on the preamble's final recital, which asserts that the convention was concluded in order to

provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry ....

This phrase has conventionally been interpreted to create two objectives - namely the conservation of whales and the development of the industry - which are in a relationship of mutual tension, if not outright conflict, and have therefore to be reconciled or harmonised. This is characteristically achieved by selecting (usually on no very clear or compelling basis) one of these as the 'primary' objective and effectively subordinating the other to it. A closer analysis exposes this perspective as highly unconvincing, however, along with its underlying assumption that the convention's aim was simply to create a "whalers' club" in the form of a cartel. In reality, the preparation of the treaty was undertaken as a unilateral initiative by the United States, which by 1946 was only minimally involved in whaling itself, with only one, small-scale whaling station operating in its entire territory at the time. A key objective of post-war US foreign policy, moreover, was actually the *breaking* of the power of trade cartels, which it saw as having contributed substantially to the tensions that had led to world conflict. It was specifically in order to wrest power away from the major whaling nations (principally Norway and the UK) that it sought to establish the IWC, in which membership was, quite deliberately, left open to all states, whether engaged in whaling or not. Accordingly, the total allowable catch was henceforth to be determined on scientific advice, ensuring that exploitation could be contained within reasonable bounds. The US text was ultimately endorsed, with relatively few changes, largely because the established whaling nations also feared that the post-war scramble for resources might get out of hand through the expansion of whaling to other states, and saw institutionally-imposed, global catch quotas as a useful means of preventing this, while preserving their own existing competitive advantage. Thus, the object and purpose of the ICRW should correctly be understood as envisaging the establishment of a mechanism to ensure the proper conservation of whale stocks as a means of *imposing order* on the development of the industry, rather than to foster development of the industry *per se*.

That said, the proper approach to contemporary interpretation must go far beyond merely clarifying the Convention's original objectives. 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. Thus, to the extent consistent with the text, it should be construed so as to harmonise with contemporary legal norms concerning maritime affairs, human rights, biodiversity conservation, animal welfare and other relevant matters. In particular, the preambular reference to whales as 'resources' should be read to reflect *all* the means by which whales might be exploited today, including for non-consumptive, educational and recreational purposes, and the very

[6] M.J. Bowman, " 'Normalizing' the International Convention for the Regulation of Whaling" (2008) 29 *Michigan JIL* 293-499 (draft version provided on request to the IWC at the prompting of the New Zealand delegation).

concept of 'whaling' reinterpreted so as to embrace modern 'whale-watching', already more widespread and lucrative by far than traditional fishery-style exploitation. This reorientation was facilitated by the fact that the ICRW's own definition of a 'whale catcher' fortuitously included any vessel 'used for the purpose of ... scouting for whales'.[7] Note should also be taken of the recognition in the Biodiversity Convention and elsewhere of the *intrinsic value* of all life-forms alongside their anthropocentric utility, and the concomitant need for their humane treatment. Given the opportunities for non-lethal exploitation, moreover, opposition to the re-establishment of quotas for the commercial killing of whales could not be presented as undermining the objectives of the convention at all. Rather, all claims for quotas should be considered on their respective merits in the light of these alternative opportunities.

The inter-sessional meetings duly moved on to address substantive issues, pursued initially through the medium of a Small Working Group, and then a 12-member Support Group designed to assist the Chair in providing direction to these deliberations. The latter was chaired by Sir Geoffrey Palmer of New Zealand - crucially, not only an experienced politician but an eminent lawyer. The ultimate package presented - a proposed consensus decision jointly advanced by the current IWC Chair and Vice-Chair - envisages a suspension of the moratorium and the consequent setting, for the first time in many years, of IWC-approved catch limits beyond those traditionally allowed for indigenous communities. These quotas, specified not merely for a single season, but right through to 2020, relate not only to the relatively prolific minke but to sperm, humpback, sei, fin and Bryde's whales as well. Predictably, therefore, the scheme has incurred the wrath of NGOs: "a good deal for the whalers and a poor deal for the whales" was the assessment of the Whale and Dolphin Conservation Society (WDCS), which proclaimed the moratorium to be "still the best hope for an end to whaling".[8]

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Yet this judgment glosses over a mass of complexities. The moratorium is scarcely a cast-iron, principled guarantee of protection for whales, as WDCS itself rightly acknowledges. It is, after all, by definition merely a *temporary* halt or delay in exploitation, and the resolution which created it called specifically for a review "by 1990 at the latest". A Revised Management Procedure (RMP), establishing a relatively conservative mechanism for determining catch limits, was agreed as long ago as 1994, and anti-whaling states have been prevaricating since that time on the grounds that the full details of a wider Revised Management Scheme (RMS), embracing such questions as monitoring arrangements, have still to be resolved. In any event, small quotas have always been set, as noted above, for the benefit of indigenous communities, in accordance with their special status for the purposes of international human rights law. In addition, Norway has continued to whale pursuant to a legally valid objection to the ban, registered under Article V(3) of the ICRW, while Iceland more controversially asserts the right to do so by virtue of a reservation attached to its re-accession to the Convention several years ago. Japan, meanwhile, conducts what many regard as essentially commercial whaling activities under the rubric of the right to take whales for research purposes, recognised in Article VIII.

The number of whales taken by virtue of these exceptions has been steadily rising, and now stands, WDCS concedes, at 1,600 whales per year even before the indigenous "take" is included. The quotas proposed are substantially lower, and believed to entail some 3,200 fewer kills in total than would occur if 2005-2009 catch levels continued, or 14,000 less than if the take for 2009 alone was replicated. NGOs are right to stress the significant difference in principle between, on the one hand, killing whales by (politically contested) unilateral fiat and, on the other, doing so with the express sanction of the international community, and it is certainly profoundly regrettable that such approval should even be under consideration. Yet the fact remains that the IWC was originally established in accordance with a traditional fisheries paradigm and cannot realistically be refashioned into something more in keeping with contemporary needs without first defusing the conflict that perpetuates the current stalemate.

[7] Article II(3).

[8] M. Simmonds and S. Fisher, "Oh No, Not Again" New Scientist, Opinion, 10 April 2010.

In particular, it is essential not to underestimate either the legal and practical difficulties involved in achieving such a transformation, or the extent to which the current plan might assist in overcoming them. WDCS, for example, welcomes the proposal to sharpen the focus on conservation generally, but suggests that this is something that the IWC should be doing in any event. Yet there is actually no specific mandate for such action in the ICRW at all, beyond the bare power under Article VI to make recommendations "on any matters which relate to whales or whaling", and even here it remains controversial whether conservation measures beyond the setting of quotas satisfy the stipulated additional requirement of relevance to the Convention's objectives and purposes. Consequently, acceptance of this part of the package would represent a major advance. Equally, the proposal to recognise the non-lethal utility of whales as a management option, and to address the associated issues, would represent a significant shift in the treaty's substantive orientation, enhancing the *legal* strength of demands that consumptive use be marginalised in the future: at present, the recommendations adopted on whale-watching have been treated by whaling states as falling beyond the legal remit of the ICRW, or at best as being of low priority. A further legal controversy would be dissolved by formal, universal commitment, as proposed, to the principle that whales be spared unnecessary suffering and that monitoring procedures specifically address this issue. It would also represent another small step in the long march to securing the protection of animal welfare as an essential, ubiquitous component in the international legal order.

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Another WDCS concern is that the quotas proposed might be circumvented, as in the past, by the framing of objections or the issue of scientific permits, but the plan actually envisages that these powers be legally suspended as part of the overall package. Since almost all conservation treaties allow for the exercise of such powers (albeit usually in narrower terms than the ICRW), getting states to surrender them, even temporarily, represents a fairly radical step. Similarly, the fear that other nations, such as South Korea, might be emboldened to take up commercial whaling is largely countered by the proposal that authorised whaling be restricted to IWC members currently engaged in the practice. Since the moratorium, and zero quotas, will be *automatically* reinstated at the end of the decade if no further progress materialises, no new amendment to the Schedule should be needed at that stage, eliminating the possibility of states registering objections to it and thereby nullifying its effect for them individually. Of course, all these features should be formally confirmed before the new proposal is finally approved, and even then some risk undeniably remains of encouraging certain states to contemplate ultimate (re-)entry into the commercial whaling arena. *Legally*, however, their position should be no more advantageous than it is currently.

For many people, the only satisfactory outcome to this long-running controversy lies in the abandonment of commercial whaling entirely, and the restriction of exploitation of cetaceans to a properly managed regime of recreational and educational observation. Yet the fact remains that there is currently no obvious legal means of securing this result. WDCS places great store by the prospect of an Australian challenge to the legality of Japanese whaling in the Southern Ocean before the International Court, but it remains uncertain either that such proceedings would actually be initiated, or that a successful outcome could be guaranteed. Australia will surely be mindful of the rebuff it has already suffered in its claim against Japan in the *Southern Bluefin Tuna* arbitration,[9] while the very recent *Pulp Mills* case[10] between Argentina and Uruguay scarcely presents the ICJ as the environment's most ardent champion, especially where economic development is at stake.

Consequently, the establishment of quotas that would significantly reduce current catch levels, while at the same time discretely re-orienting the organisation so that such exploitation might more easily be resisted in the future represents a strategy worthy of serious consideration. Indeed, while it has been characterised as "a huge step backwards", it might in time be seen as more of a sideways movement which enabled the future to be viewed and mapped more clearly. And, while stepping out from behind a barrier undoubtedly generates undesired risk, it may also offer the only feasible route to progress, for the "business as normal" option seems to be getting us nowhere.

[9] (2000) 39 ILM 1359.
[10] (2010) ICJ Reports.