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Abstract

Many cetaceans are borderline persons and, as such, have a right to life. This is partly a normative and partly a positive legal claim. While many philosophers agree that cetaceans possess limited moral rights, it can also be shown that most states already behave as though they possess limited legal rights. The most basic of these, the right to life, reflects shifting contemporary norms – especially given scientific evidence as to cetacean sentience, intelligence and autonomy – and the consolidation of customary international law. The recent decision of the International Court of Justice in Whaling in the Antarctic (2014) includes important obiter dicta *to this effect and arguably suggests an avenue for future doctrinal development in this area. Nevertheless, while the cetacean right to life already exists, there are a number of obstacles that preclude its enforcement. Perhaps the most significant of these remain the traditional status of the world's oceans as a global commons and the weak sovereignty of international law.*

Modern commercial whaling was born with two inventions: the explosive harpoon and the factory ship. Twentieth-century whalers, armed with these technologies, killed more whales in four decades than in the previous four centuries. As stocks plummeted and yields continued to rise – only an apparent contradiction – the world's whaling states were spurred into action. The Convention for the Regulation of Whaling (1931) was enacted to protect the economic interests of Member States and safeguard the long-term viability of the industry. Shortly after World War II, it was replaced by the International Convention for the Regulation of Whaling (ICRW), which established the International Whaling Commission (IWC).[1] This similarly aimed to regulate the activities of Member States so as to prevent overfishing. Yet whaling intensified throughout the 1950s and peaked, in 1961, with 64,000 whales caught worldwide. Many species were reduced to a fraction of pre-exploitation levels. Blue whales in 1968 were estimated to constitute a mere 1 per cent of their population; right, humpback and fin whales also reached dramatic lows with Antarctic baleen species estimated at 4 per cent of their population (Burns, 2003, p. 73). The only species able to withstand commercial exploitation during the 1980s was the minke.

Since 1986, when the IWC's moratorium took effect, whale populations have bounced back (although six out of eleven species remain endangered).[2] Yet whales continue to be killed as a result of various state actions, some direct (commercial, 'scientific', pirate and aboriginal whaling), some indirect (ship strikes, bycatch, mass strandings), and others remote (habitat loss, anthropogenic climate change).[3] There are a number of reasons for this. First, whaling occurs at

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1 *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 *UNTS* 76 [hereafter ICRW].

2 Recent models show higher losses and lower rates of recovery than previously estimated. Jackson *et al.* (2008) predict that Southern right whales, for example, will only reach 54 per cent of pre-exploitation abundance in 2043 (54 per cent is the threshold below which whaling is prohibited) and 95 per cent in 2079.

3 This paper focuses on whaling, although it recognises that less visible threats may be of greater significance. See Stoett (2011) on commercial whaling; Anton (2010) on 'scientific' whaling; Firestone and Lilley (2005) on aboriginal subsistence whaling; Horowitz (2014) on mass strandings from naval sonar; Gillespie (2005) on entanglement in nets, long-lines and other maritime debris; and Doukakis *et al.* (2009) on habitat loss and climate change.

sea, a vast remote environment, which is nigh impossible to police (although new surveillance technologies offer hope for the future). Second, the international legal system is based on voluntary obligation and requires enforcement to be pursued at a domestic level, which often fails to occur. Third, for the IWC, there is the specific problem of managing the contradiction between its original agenda of 'conservation' and its more recent shift towards 'preservation'. These factors highlight the difficulty of trying to protect animals that migrate across national borders and spend much of their lives in international waters.

Many cetaceans are 'borderline persons' (DeGrazia, 2006) and, as such, have a right to life. This is partly a normative and partly a positive legal claim. The normative component involves a consideration of ethics and a survey of recent scientific advances with respect to cetacean sentience, intelligence and autonomy. The positive legal component involves revisiting the 'emerging right to life' that D'Amato and Chopra (1991) sketched out some twenty-four years ago to see whether it has become part of customary international law.[4] I conclude that it has as a result of the way in which the 'sources' of international law have become 'increasingly intermingled in their respective processes' (Besson, 2010, p. 164).[5] The ICRW must now be read alongside the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on International Trade in Endangered Species (CITES). There has been a considerable 'thickening' of state practice and *opinio juris* ('opinion of law') towards cetaceans.[6] And the International Court of Justice (ICJ) in *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)* (2014) has affirmed an 'objective' interpretation of Article VIII of the ICRW and declared Japan's approach in 'self-determining scientific validity … to be incorrect' (de la Mare, Gales and Mangel, 2014, p. 1126).[7] These developments show that the ICRW is an evolving instrument whose normative agenda has shifted from regulation of whaling to the preservation of cetaceans in recognition of their moral and legal rights.

I. Ecology and ethics

Modern ecology has overturned many of the traditional assumptions that govern our relationship with nature. The idea that mankind is the 'source or ground of all value' appears increasingly naive; indeed, it appears as the 'arrogant conceit of those who dwell in the moral equivalent of the Ptolemaic universe' (Fox, 1984, p. 184).[8] As ecological values move into the mainstream, many people are coming around to the view that animals have intrinsic moral worth and, as such, possess rights. These rights need not be the same as human rights: we might simply say that species possess a right to 'pursue their own evolutionary destinies' (Fox, 1984, p. 194). Of course,

4 Schiffman (1996) also foresaw that 'while the world community has not yet guaranteed that whales have a right to roam the world's oceans … it is moving in that direction' (p. 359).

5 See Burchfield (2008) for a list of legal materials relating to cetaceans.

6 *Opinio juris* is the 'subjective belief on the part of the state concerned that it is under a legal obligation to conform to the custom' (Birnie, 1985, p. 235). It comes in two types: 'where *opinio juris* relates to the creation or revision of customary international law … [and] where *opinio juris* relates to the continuation of a principle that had earlier come into existence' (Charlseworth, 2012, p. 194).

7 Article VIII provides that '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 … 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' (para. 1).

8 Cartesian orthodoxy holds that an animal, lacking a soul, is a *bête machine*. See Cottingham (1978) and Harrison (1992). An important issue is whether animal language is 'stimulus-free' (Chomsky, 2006). There is evidence for stimulus-free communications among sperm whales, humpbacks, orcas and bottlenose dolphins (Allen and Bekoff, 1999).

ecology cannot prescribe which rights a species enjoys nor how they should be resolved vis-à-vis other rights. For guidance on such matters we must turn to law. Nevertheless, it is important to recognise that ecology has made it possible to argue for an 'entitlement of whales–not just on behalf of whales' (D'Amato and Chopra, 1991, p. 23).

There are two main pro-animal positions in contemporary ethics.[9] The first, often associated with Peter Singer, is utilitarian; the second, with Tom Regan, proposes a theory of animal rights. For Singer, the motivating principle behind ethics is that of equality, which he defines not as an objective state of affairs (sameness between subjects) but as a rule prescribing conduct, as in, the taking into account of interests. Singer cites Bentham to the effect that the prerequisite to having an interest is the capacity for suffering: 'the question is not, Can they reason? nor, Can they talk? but, Can they suffer?' (Singer, 1975, p. 7). Equality requires that the interests of all suffering beings be taken into account regardless of other limiting criteria. Utilitarianism seeks to weigh the aggregate sum of positive benefits. It is willing to allow suffering if a strong enough counter-argument exists: imagine, for example, a situation in which minke whale oil was discovered to be 'an effective and safe cancer treatment' (Heazle, 2012, p. 177). This would arguably overcome any utilitarian concerns with cetacean suffering as well as environmental constraints such as the 'precautionary principle' (which I will discuss later in this paper).

Regan, on the other hand, argues that all beings which are 'subjects of a life' possess inherent value and moral rights. The fundamental wrong is not a being's suffering – that is merely the result of a deeper root cause – but rather the 'system that allows us to view animals as our resources' (Regan, 1983, p. 77). He criticises utilitarianism for its emphasis on ends over means: 'The problem with the equality of interests principle is that it does not tell us what we ought to do, once we have taken the interests of all affected parties into account and counted interests equally' (1982, p. 104). Regan prefers a rights-based approach because it is less likely to yield in the face of alternative benefits and so defends the rights holder with a higher standard. He describes his work as an 'attempt to blend certain features of utilitarianism and Kant's theory' (2001, p. 17). Cetaceans are standout candidates for a stronger Kantian theory since they meet the generally accepted criteria for personhood (White, 2008, p. 155). We do not have to fall back on utilitarianism and its lower threshold of suffering and can put to one side the common distinction between 'Kantianism for people, utilitarianism for animals' (Narveson, 1977, p. 165). Cetaceans would even appear to satisfy Narveson's own stringent grounds – 'the capacity to have a conception of oneself, to formulate long-range plans, to appreciate general facts about one's environment and intelligently employ them in one's plans' (p. 166) – although they cannot enter into an agreement with us which remains the sine qua non for moral rights from a contractarian perspective.

In navigating rapidly through these arguments it should be remembered that a right is, from a legal perspective, never an absolute: 'the lawyer is constantly aware that a right is not, as the layman may think, some strange substance that one either has or has not' (Stone, 2010, p. 18). Rights are, rather, made up of a 'sort of procedural fabric' and it is this which guarantees them judicial or administrative review (p. 18). Singer and Regan may wrangle over which ethical framework is superior, but in the juridical realm, *some* measure of value must be invoked; in other words, recognising the existence of a right does not determine 'whose rights will be protected or how those rights will be enforced' (Silverstein, 1996, p. 222). This is why many legal commentators have cautiously sidestepped ethical debates and argued for an incremental extension of animal rights, i.e. in only the most compelling cases. This inevitably involves falling

9 See Frey (1980) and Narveson (1977) for strong critiques. Alternative approaches are provided by Ryder (2000) ('speciesism') and Nussbaum (2011) ('capabilities'). See Garner (2006) and Donaldson and Kymlicka (2011) for political perspectives.

back on a consideration of sentience, intelligence and autonomy. These are the attributes we commonly associate with legal personhood even though there are many exceptions ('practical autonomies') and writs such as habeas corpus which do not require the 'cognitive ability necessary to choose to understand and assert a claim or power' (Wise, 2007; 2010).

Compelling philosophical arguments have winnowed the debate to the point where we can say that many great apes and cetaceans are 'borderline persons' (DeGrazia, 2006). But only the former have received any legal recognition as such: 'In the United States, chimpanzees at least, but likely all the great apes, appear to be edging toward a de facto "right" to life' (Wise, 2003, p. 102). A right to life is, admittedly, a long way short of accepting great apes as 'natural' let alone 'juridical persons' (Berg, 2007, p. 373).[10] Nevertheless, a de facto right to life is a step in the right direction, and a hurdle that cetaceans have yet to overcome. If cetaceans possess similar cognitive abilities to human beings and great apes – what Francione (2008) calls 'similar minds' theory – then clearly they ought to enjoy a similar status at law. Unless we accept the argument that 'personhood' denotes only 'human beings' but then such a narrow interpretation would deny many existing legal persons. Consistency therefore requires that cetaceans be 'removed from the realm of property' and given the 'same basic negative rights to life, freedom and welfare we currently enjoy under the label of "human rights"' (Cavalieri, 2006, p. 511).

It might reasonably be objected that since the greatest progress has come through a welfarist paradigm, we should continue to regard this as the best approach for advancing animal livelihoods (Garner, 2006, p. 161).[11] Whatever the value of welfare regimes, however, it seems fairly obvious that they have little to offer cetaceans. For such regimes aim to protect things that are property, and until such time as they are caught cetaceans are property belonging to no one (*res nullius*).[12] Even the Five Freedoms adopted by the UK Farm Animal Welfare Council (1992), which many use as a 'checklist' for identifying 'situations which compromise good animal welfare' (Brakes, Butterworth, Simmonds and Lymbery, 2004, p. 13), are ill-adapted to a maritime context. For all Five Freedoms are 'regularly contradicted' at sea, meaning that the 'concept is inappropriate when considering the welfare of aquatic animals in their natural environments' (Diggles, Cooke, Rose and Sawynok, 2011, p. 739). The freedoms also imply a relationship between animal welfare and ethology (Gonyou, 1994). But we know very little about the social interactions of cetaceans in the wild, and most of what we do know must be inferred from indirect research methods (Whitehead, Christal and Tyack, 2000). A right to life, on the other hand, simply asserts a basic right not to be killed, independent of any conjectures as to mental states and regardless of whether a cetacean is property or at liberty.

Positive rights also have greater mobility. Whales, like refugees, migrate through national and international waters and need a form of legal protection that can travel with them. The comparison with refugees is instructive; state practice suggests that, while 'human rights law should provide the common denominator of protections owed to refugees throughout the world ... in practice it delivers little by way of legal entitlement' (Hathaway, 2005, p. 16). This is because states 'simply have not been willing comprehensively to limit their sovereignty in favor of the essential dignity of the human person' (p. 16). This does not disprove the existence of such rights, but merely points towards their limits, and the extent to which we routinely mistake politics for

10 Stone (1974) identifies three criteria for legal personhood: 'first, that the thing can institute legal actions at its behest; second, that in determining the granting of legal relief, the court must take injury to it into account; and, third, that relief must run to the benefit of it' (p. 11). Only human beings can satisfy these criteria.

11 My thanks to the anonymous reviewer who helped clarify this aspect of my argument.

12 It is a little-known irony that animal welfare legislation systematically denies animal rights: 'enforcement can occur only through public prosecution; the state has a monopoly on implementation' (Sunstein, 2000, p. 1339).

law. As a normative document, the Universal Declaration of Human Rights is of immense value; it tells us not what the law is (*lex lata*), but what it should be (*lex ferenda*), and in doing so may shape future state practice and *opinio juris*. This is especially significant given that the international legal system operates without the compelling force of a supranational Leviathan. Yet state practice towards cetaceans is more consistent than towards refugees; even taking into account 'persistent objectors' like Norway, Iceland and Japan, the right to life appears to be a settled feature of customary international law.

The cetacean right to life distils state practice at the same time as it is a strongly normative statement as to how states, and by extension their citizens, ought to behave towards whales and dolphins (even if sometimes they don't). Such a right, while not absolute, protects against the possibility that technology may one day enable us to justify 'the "painless" mass slaughter of whales, arguably without mistreating them or abusing them' (D'Amato and Chopra, 1991, p. 28). A final factor, not to be underestimated, is that rights have 'meaning – vague but forceful – in the ordinary language, and the force of these meanings, inevitably infused with our thought, becomes part of the context against which the "legal language" of our contemporary "legal rules" is interpreted' (Stone, 2010, p. 22). I agree with Stone that 'a society in which it is stated, however vaguely, that "rivers have legal rights" would evolve a different legal system than one which did not employ that expression, even if the two of them had, at the start, the very same "legal rules" in other respects' (p. 22). Indeed, from a natural law perspective, such a right is merely the lowest rung on a teleological ladder which proceeds from the 'tacit assumption that the proper end of [cetacean] activity is survival' (Hart, 2012, p. 191).

II. Cetacean minds

The Greek poet Oppian believed that, 'equally with human slaughter, the gods abhor the death doom of the monarchs of the deep' (Burns, 1997, p. 31). Whilst Oppian based his claim on religious grounds, it nevertheless speaks to a perception that cetaceans, like human beings, are exceptional. The same logic is employed today; we should think of cetaceans, advocates stress, as the 'people of the sea' (Callicott, 1997, p. 22). This presupposes that you, dear reader, enjoy unique moral status because of your sentience, intelligence and autonomy; in which case, the argument runs, so should cetaceans. While undeniably anthropomorphic, it is difficult to avoid the conclusion that, from a legal perspective, the strength of any claim is going to depend on whether it can be shown to be an incremental extension of already accepted principles. The essence of legal method remains one in which 'legal fictions' are used to find 'new, and not very natural, meanings' for old phrases (Maitland and Montague, 2010, p. 101). Thus, as Joan McIntyre (founder of Project Jonah) has argued, we must look for 'something that is like us in other creatures … If we wish to save the whales from slaughter, part of our effort goes towards proving … they are similar to us' (Scarff, 1980, p. 265).

Marine biologists point towards profound self-awareness. The mirror-recognition test (first used with primates) has been adapted to show that bottlenose dolphins 'not only paid attention to the information in the mirror, but also they were able to interpret the images as themselves' (Brakes *et al.*, 2004, p. 24). There is a mounting body of evidence drawn from cognitive studies (Johnson, 2010; Marino, 2002, 2004; Marino *et al.*, 2007; Patrick *et al.*, 1992). Marino, in particular, has written eloquently of the implications of cetacean brain structure: 'the human brain is not the only brain that has undergone immense increases in size and complexity. Cetacean brains have as well, but along a different neuroanatomical trajectory, providing an example of an alternative evolutionary rout to complex intelligence on Earth' (Marino, 2013, p. 115). Memory may also be radically different for a cetacean: 'there is ample indirect evidence to suggest that memory-based

systems in cetaceans have been transferred from the hippocampus primarily to adjacent highly elaborated regions of the brain' (p. 122).

Such radical difference – a result of the fact that cetaceans returned to the sea about fifty-five million years ago – makes it difficult to compare humans and cetaceans. This evolutionary divergence makes 'intelligence' a somewhat slippery concept: 'with reaching arms and grasping hands, human beings have evolved a primarily practical, manipulative, problem-solving intelligence that is only secondarily reflective and speculative. As the cetaceans have no similar appendages, their intelligence might be devoted to more philosophical and contemplative applications' (Callicott, 1997, p. 23). This view is, of course, wildly speculative. The pioneering and often lamentable efforts of early cetacean neurologists such as John C. Lilly and Peter Morgane have been roundly discredited (Burnett, 2012, p. 531). Nevertheless, we can be confident of the fact that 'such impressive structures' as the cetacean brain 'would not have evolved if they were not being used' (Callicott, 1997, p. 23). In fact, we can go further than this, for we now know that when brains enlarge they do so 'allometrically', that is, they 'cannot enlarge without also reorganizing, thus creating new areas and new features simply to maintain the same level of connectivity as in a small brain' (Marino, 2013, p. 120).

This has profound implications for our understanding of cetacean cognition: 'One of the most intriguing and informative aspects of enhanced auditory processing in cetaceans is the evidence that they have integrated this perceptual system into the general cognitive domain in a way that may be unprecedented in the animal kingdom' (Marino, 2013, p. 121). Echolocation is not only a device for the ordering of spatial information, but also for communication. An analogy might be if we communicated with our eyes – which, of course, we do in sign language and body language. But this is a false analogy. The idea of echolocation suggests, at a deeper level, an ability to send signals *with the same apparatus* that receives them, and via the same medium; imagine being able to communicate by emitting photons from your retinae. In trying to understand what it is like to be a cetacean we encounter the same epistemological impasse that Thomas Nagel outlined in his famous essay 'What Is It Like to Be a Bat?' (1974): 'sonar, though clearly a form of perception, is not similar in its operation to any sense that we possess, and there is no reason to suppose that it is subjectively like anything we can experience or imagine' (p. 428).[13]

Marine biologists have also identified 'culture' in many cetacean species (Greggor, 2012). The song of the humpback is a familiar case which demonstrates a capacity for learned behaviour, memorisation, imitation and innovation. Sperm whales possess a sophisticated system of 'codas' or rhythmic clicks, while bottlenose dolphins and orcas use a range of altruistic 'alarm calls' and 'greeting calls' (Brakes *et al.*, 2004, p. 20).[14] Orcas use 'dialects that are unique to their family group', and which they pass down through 'maternal lines' so as to 'promote group cohesion and cultural identity' (Spong, 2013, p. 129). Animal language experts have found evidence for 'recursion' amongst cetaceans, although it remains open to question whether this is recursion in the strong sense outlined by Chomsky (Pinker and Jackendoff, 2005).[15] One may even infer a 'moral system' between sperm whales since they do not direct their 'echolocation clicks at a social partners ears' in the knowledge that it would 'incapacitate the recipient's ability to forage for some time, and quite likely cause permanent damage' (Whitehead, 2013, p. 158).

13 See, however, White (2013).

14 Environmental factors explain why whales communicate with sound: 'Sight is limited for marine mammals because of the way water absorbs light . . . Sound on the other hand can travel tens of miles, and some whale calls travel several hundreds of miles' (Stevenson, 2011, p. 62).

15 No one has been able to show that cetaceans have propositional semantics. This is significant as many philosophers define a 'rational animal' as one that has 'propositional attitudes' (Davidson, 1982).

All of which goes to show that, if cetaceans are the 'people of the sea', they must be a very different kind of people. We may never fully understand this difference. All we can say is that we 'share a select community of intelligent life on Earth with whales and dolphins – the community of minded organisms' (Callicott, 1997, p. 24). The question we need to ask is: Should we recognise members of this community as having moral and legal rights?

III. Investigating the death of a whale

> 'And now abating in his flurry, the whale once more rolled out into view; surging from side to side; spasmodically dilating and contracting his spout-hole, with sharp, cracking, agonized respirations. At last, gush after gush of clotted red gore, as if it had been the purple lees of red wine, shot into the frighted air; and falling back again, ran dripping down his motionless flanks into the sea.' (Melville, 1992 [1851], p. 311)

This is how Herman Melville depicted the death of a whale in *Moby-Dick* (1851). Nineteenth-century whalers wrangled with their leviathans at close range, rowing out and hurling harpoons from rickety boats. Today the basic technique is to fire an explosive harpoon ('penthrite grenade harpoon') from a deck-mounted canon, which is designed to penetrate approximately 30 cm into the whale's body and detonate, causing trauma, laceration and nervous shock (Brakes *et al.*, 2004, p. 39). Should the harpoon fail, another will be fired, or a rifle (minimum 9.3 mm calibre) employed as a secondary device. While the idea is to achieve an instantaneous death, in reality the vast majority of whales die slowly and in excruciating pain. Brakes *et al.* (2004) report that the instantaneous death rate for minke whales taken by Japan in Antarctic waters was 40.2 per cent. The rate is far lower for larger whales, as the difficulty of causing instantaneous death augments with the size of the whale. Meanwhile, the time to death rate can stretch to an hour and a half, although the average time to death was reported at four to five minutes.

Many variables frustrate the achievement of a so-called humane kill: 'even the smaller whales are large when compared with other hunted wild mammals, they are marvellously adapted for rapid and very deep diving and they are often found in seas known for some of the most inhospitable and difficult conditions' (Harrop, 2003, p. 7). It is almost impossible to 'find a lethal spot within all the bone and blubber' in a target that is moving rapidly and 'seen only vaguely and intermittently from several hundreds of metres or more' (p. 7). A crucial man-made obstacle derives from the fact that the current killing method was designed for and tested on minkes and is not suitably adapted to the morphology and physiology of other species.[16] The effectiveness of the rifle as a secondary weapon is also questionable. It can only cause death if a marksman is able to accurately target a whale's brain or heart, which occurs infrequently given the churning of the seas.

The death of a whale in a modern context departs very little from Melville's original template. Consider the following description by Dr Harry Lillie, who served as ship's physician aboard a British floating factory in the Antarctic in 1947: 'If we can imagine a horse having two or three explosive spears stuck in its stomach and being made to pull a butcher's truck though the streets of London while it pours blood into the gutter, we shall have an idea of the method of killing. The

16 The sperm whale (weighing up to 60 tonnes and reaching 18 metres in length) and the baleen whales (the sei weighing up to 30 tonnes and reaching 18 metres, and the blue whale weighing up to 190 tonnes and reaching 30 metres) present vastly different problems with respect to killing methods. They are hunted with the same explosive harpoon as the minke (weighing up to 19 tonnes and reaching 11 metres.) Though officially excluded by the IWC, all three are still being killed, as DNA tests on whale meat in Japanese markets show (Baker *et al.*, 2007, p. 2618). The statistics are from Birnie (1985). See Gillespie (2003) on humane killing and international law.

gunners themselves admit that if whales could scream, the industry would stop for nobody would be able to stand it' (Brakes *et al.*, 2004, p. 31). The fact is that whales can, and do, scream; we just don't hear them. Scientists have observed how harpooned whales change their 'characteristic whistle' to a 'low monotone' associated with pain (D'Amato and Chopra, 1991, p. 25). There is no scientific doubt as to whether whales feel pain. The moot point seems to be whether they register it to a greater or lesser degree than we do. The loss of a group member can also have a devastating social effect: 'there are numerous recorded incidents in which a whale has been harpooned or captured and taken to shore, and its mate or family has followed it or waited offshore for its return for days, even weeks at a time' (Regan, 1982, p. 104).

We may safely conclude that whaling causes pain and suffering every time a whale is killed or 'struck and lost'.[17] Yet welfare standards in the whaling industry fall far short of those required in agricultural slaughterhouses around the world. Humane slaughter dictates that an animal should not be aware of its impending death nor should it suffer throughout: cattle in the US must be 'stunned' before they can be killed (Welty, 2007, p. 176). This may now be part of customary international law (Gillespie, 2003, p. 12). The ICRW, however, does not contain any welfare provisions: 'There are no regulatory requirements for avoiding excitement, pain or suffering ... no maximum pursuit times, no limit on the number of weapons or bullets that can be deployed on one animal, no upper limit on the acceptable death time, no specific requirements for the rate of instantaneous kills and indeed, in many hunts, no upper limit on the number of animals that can be struck and lost' (Brakes *et al.*, 2004, p. 101).

It is evident that whaling is prima facie unethical. First, many whales and dolphins are borderline persons and, as such, have a right to life. These beings must properly be regarded as ends in themselves (Kant, 1996, p. 44). Second, even those cetaceans that do not qualify for personhood, such as minkes, are sentient, intelligent creatures, whose interests must be taken into account if they are to suffer. The whaling industry is not yet capable of humane (let alone sustainable) slaughter, and so it is 'incumbent on those involved in the activity to justify that activity – to show, that is, that there are other, more stringent moral demands that justify this pain-causing activity' (Regan, 1982, p. 104). Are there any arguments that can justify whaling? I will briefly look at the three main types of whaling.[18]

Commercial whaling aims to procure meat for consumption and ingredients for industrial products. Whales are killed for 'chicken feed, cattle fodder, fertilizer, car wax, shoe polish, lipstick, cosmetics, margarine, cat and dog food' (D'Amato and Chopra, 1991, p. 22). All of these can be alternatively provided for: 'There is nothing in the body of a whale, which is of use to us, for which we cannot find equivalents elsewhere' (Brakes *et al.*, 2004, p. iv). Nor is economic viability a problem. Scientific research whaling may be justified if, as the Scientific Committee has frequently stressed, it leads to genuine scientific outcomes. But in most instances non-lethal research will be more effective and less costly (Steuer, 2005). Aboriginal subsistence whaling has bedevilled the IWC largely because it is so difficult to define who is an 'aborigine' and when their whaling is 'subsistence' (Gillespie, 2005, p. 194). Putting these issues aside, 'self-determination' and

17 The IWC has little data regarding the number of whales struck and lost. Jackson *et al.* (2008) attempt to grapple with this problem.

18 Pirate whaling is a significant problem. Vast quantities of pirate meat find their way to market: 'Japan has admitted that since 1988, roughly 500,000 kgs of illegal whale meat have been seized by its customs officials; frighteningly, they believe this to represent only 15% of the total meat smuggled into Japan illegally' (Brooman and Legge, 1997, p. 406). The IWC's limited enforcement capacity is not helped by the fact that non-Member States like Indonesia, North Korea and Formosa are 'technically doing nothing wrong ... Whalers can fly "flags of convenience" from many of the other 140 nations and kill even "protected" whales without violating any international law' (Scarff, 1980, p. 248).

the maintenance of 'traditional culture' may in some cases justify the killing of cetaceans, but only those species not regarded as borderline persons.[19]

IV. Tragedy of the global commons

The history of whaling is a textbook example of how the traditional status of the world's oceans as a global commons interacts with the weak sovereignty of international law.[20] As years of unsustainable practices took their toll and stocks collapsed – despite repeated warnings from the IWC's Scientific Committee – whalers dramatically increased the size of their operations, opting for short-term benefit over the long-term cost of extinction. From the IWC's first meeting in 1949, up until the mid 1970s when the New Management Procedure (NMP) was adopted, whaling states continually set catch quotas between 15,000 and 17,000 blue whale units (BWUs).[21] Any serious attempt to introduce restrictions was undermined by the blanket refusals of Member States and the threat of withdrawal. In 1953, for example, the Scientific Committee recommended that the killing of blue whales be prohibited because stocks had reached dangerous levels. The response from Japan, the Soviet Union and the US was to lodge formal objections under Article V and take large catches regardless.[22]

The Scientific Committee's attempts to reduce the BWU quota reached desperate levels during the 1959–1960 season and met with climactic resistance which threatened to shatter the IWC. Two of the five major whaling nations withdrew: 'Recognising that the management of stocks . . . was impossible without the participation of Norway and the Netherlands, IWC members voted under Article 5 of the ICRW to dispense with the catch quota for the 1959/1960 season' (Burns, 1997, p. 38). Continued infighting kept the issue on the sidelines, resulting in three years of self-imposed national quotas, reaching a staggering high of 17,780 BWUs. Such skyrocketing catches illustrate how the destructive logic of the commons runs unchecked in a system in which consent is the only means of agreement and compliance unenforceable. Recent years have seen much the same occur in fishery after fishery around the globe: 'efforts to dampen fishing through various cooperative and mandatory measures are almost universally frustrated . . . while a single owner of the fishery would rationally fish to the point of rent maximization, open access extends extraction' to the point of collapse (Stone, 2010, p. 91).[23]

The turning point for the IWC came not in the 1960s, with its 'economic rationalism' and 'sustainable yields', but in the 1970s, with its turn against the 'economics of overexploitation' (Clark, 1973). Clark famously concluded that: 'For populations that are economically valuable but possess low reproductive capabilities, either condition [i.e. the commons or private property] may lead to the extinction of the population' (p. 634). The idea that whaling could be rationally managed had been dealt a mortal blow in both practice and theory. The anti-whaling position hardened into a kind of secular faith as the speculative findings of early cetacean neuroscience – epitomised by John C. Lilly's *The Mind of the Dolphin* (1967) and *Lilly on Dolphins: Humans of the Sea*

19 Firestone and Lilley (2005) document the claim of the Makah Indian Nation in Alaska. I disagree with their majority–minority rights framework and cultural relativism which conveniently allows them to overlook cetacean science in concluding that the 'contention that whales should not be hunted because they are special falls apart' (p. 214).

20 See Hardin (1968) and Ostrom (1990) for influential responses to the commons.

21 The BWU standard contributed significantly to the degradation of stocks since states were allowed to take as many of *any type* of whale provided they did not exceed their total BWU quota.

22 Art. V provides that amendments to the schedule 'shall become effective with respect to all Contracting Governments which have not presented an objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn' (para. 3).

23 Bowman (2009) outlines how 'complex regimes may be plunged into catastrophe by the crossing of crucial thresholds or tipping points' (p. 125).

(1975) – entered the mainstream (Burnett, 2012, p. 518). It was, ironically, not reason but unreason, what Burnett calls the 'reenchantment' (p. 624) of whales and dolphins, that proved decisive in derailing the culture of pragmatism and compromise that had always existed at the IWC and replacing it with a fiercer, unyielding environmentalism.

The last three decades have seen the IWC shift focus from 'conservation' of whale stocks for sustainable exploitation to 'preservation' of whales for the sake of ecological diversity and intrinsic worth (Stoett, 2011). This was driven by an influx of new Member States in the 1970s and early 1980s, many of whom professed a desire to protect whales even though they had no historical involvement in the fishery. Indian Prime Minister Rajiv Gandhi, for example, wrote that his country had become a member so as to 'join other nations ... in their endeavour to save this most fascinating and remarkable member of our planet's living fraternity' (D'Amato and Chopra, 1991, p. 47). The IWC's new rationale was evident in its removal of maximum sustainable yield (MSY) – formerly its central organising concept – and adoption of the 'precautionary principle' (Peel, 2005).[24] The ultimate triumph for the anti-whaling movement came in 1982 with the adoption of the moratorium, a step which had been debated and rejected for over a decade.[25] The text of the amendment evinces an intention that the moratorium be temporary and manifests a desire to scientifically review the effects of the ban and formulate a new management scheme – as Japan recently reminded Member States at IWC 65 in Slovenia – by 1990 at the latest.

Yet the IWC has been hamstrung by its inability to ensure that Member States provide accurate reporting as to annual takings. As is typical of an international body, it does not possess enforcement capacity and relies on Member States to self-regulate in terms of inspection and compliance. Until recently the IWC was unable to provide even a rough estimate of misreporting. However, in the 1990s, an ominous hint came to light when Russian scientists revealed that the former Soviet whaling industry had 'underestimated its whaling figures for more than forty years by one hundred percent or more' (Burns, 1997, p. 63; Ivashchenko, Clapham and Brownell, 2011; Yablokov, 1994). The extent of misreporting is truly staggering: 'During the 1961–62 season, for example, four Soviet fleets reported killing 270 humpbacks in the Antarctic, when in reality one fleet alone had killed more than 1,500. Another Soviet ship reported killing 152 humpbacks and 156 blue whales during the 1960s. Revised figures from Russia's whaling commissioner indicate that the actual figures were 7,207 humpbacks, 1,433 blue whales, and 717 right whales' (p. 63). Other states likely conducted similar campaigns of deception. In the light of these discoveries, the IWC was forced to fundamentally rethink its estimates, realising that any scientific basis for establishing population densities had been compromised (Jackson *et al.*, 2008). This has undermined efforts to formulate and implement a Revised Management Procedure, the long-awaited regime to replace the New Management Procedure if and when commercial whaling resumes.

V. The IWC in the twenty-first century

A major development in the battle between whaling and anti-whaling states was the establishment of the Conservation Committee at the IWC's 2003 meeting in Berlin. This was perceived to be a huge blow to the hopes of whaling states. However, the whalers' star has risen once more, thanks to Japan's aggressive campaign to induce new states into the IWC. The Future of the IWC process

24 The overturning of MSY was resolved by the Scientific Committee in 1977 and was further strengthened by the exclusion of the principle from art. 65 of UNCLOS.

25 The need for a moratorium was first enunciated at the 1972 Stockholm Environment Conference. It was not supported at the IWC, where whaling and anti-whaling states continued to fight bitterly. Moratoriums were proposed and rejected in 1974, 1977, 1979 and 1981. The successful proposal (by the Seychelles) was finally adopted in 1982, and phased out commercial whaling by 1986.

'aimed at getting compromises from both pro-whaling and anti-whaling members to resolve the bipolar and conflictive nature of the organization' (Goodman, 2011, p. 63). This was abandoned at the conclusion of the 2010 meeting. The situation is thus as precarious as ever and the moratorium, indeed the future of the IWC, hangs in the balance. The IWC remains formally committed to the resumption of commercial whaling on the proviso that quotas be set for species 'determined to be above 54 percent of pre-exploitation levels', with the ultimate prospect being the recovery of target species to '72 percent of ... pre-exploitation population levels within 100 years' (Burns, 2003, p. 261). It has gradually moved closer to realising this goal and has only been prevented by internecine wrangling between Member States over elements of the inspection and observation scheme.

Yet, in what has become a celebrated case in 'regime analysis' circles, the moratorium provides a lens through which to reinterpret the very purpose of the treaty: 'a treaty originally intended to regulate whaling has through this simple device become a treaty to protect whales' (Birnie, Boyle and Redgwell, 2009, p. 725).[26] That the IWC has managed to reinvent itself without imploding (despite coming very close on a number of occasions) has amazed many onlookers. It is frequently praised as 'a – or perhaps the – paradigm of a successful international regime' at the same time as it is denounced as 'dysfunctional', 'deadlocked' and subject to 'paralysis' (Hurd, 2012, p. 103).[27] While a small minority of states continue to treat whales and dolphins as 'non-sentient natural resources such as barrels of oil' (Harrop, 2003), the vast majority accept the premise – or at the very least are agnostic to it – that cetaceans are borderline persons. It little matters whether they have been influenced in this regard by the speculative claims of John C. Lilly or the more robust research of Lori Marino. Between these irreconcilable positions lie the formal terms of the treaty (the subject of many 'legal fictions') and the ongoing problem of scientific uncertainty.

That 'scientific uncertainty' has been exploited – first to cast doubt on and delay the adoption of the moratorium and more recently to cast doubt on and delay a return to commercial whaling – does not prove that science at the IWC is a mere smokescreen for politics (Heazle, 2012, p. 188). Such a Machiavellian thesis overlooks two points. First, cognitive studies provide firm grounds for claiming that cetaceans are borderline persons; to question the validity of this claim is to question the same grounds by which we hold human beings to be persons. Second, the history of the IWC may be a depressing parable on the failure of 'rational fisheries management', but it is one that contains a glimmer of hope. For it shows that science *can* carve out a space within politics: 'The story of whaling and whale science between 1945 and 1965 is a story of science mobilized within what was, at the time, a novel space: the committee rooms of post-war international diplomacy' (Burnett, 2012, p. 357). It was scientists in the 1960s and 1970s who developed the sophisticated language ('disinterested' and 'objective') which shattered the resistance of the old whaling bloc and saved many of the great whales from extinction. In this sense, I am inclined to agree with Burnett that 'a better example of the strategic value of boundary work would be difficult to invent' (p. 355).[28]

It might be argued, as Japan has (Kim, Lee and Riley, 2011), that there are no 'scientific' grounds for opposing the limited resumption of commercial whaling. Such opposition must be explained by way of an irrational attachment to charismatic mega-fauna. Certainly it is possible that those cetaceans who do warrant personhood have become mixed up with many others who do not; such a 'super-whale myth' has arguably compressed each species into a single 'symbolic

26 Schiffman (1996) follows D'Amato and Chopra (1991) in tracing the evolution of the IWC through six stages: Free Resource, Regulation, Conservation, Protection, Preservation, and finally Right to Life (pp. 325–329).

27 Currie (2007) argues the ICRW must be reformed if it is to satisfy current standards of 'good governance', 'dispute resolution' and 'international enforcement measures' (p. 50).

28 Burnett here builds on the important work of Jasanoff (2009).

expression of our fundamental relations with nature' (Kalland, 2009, p. 89). The mistake of applying specific traits to the genus as a whole does not, however, demonstrate that the grounds for cetacean personhood are non-scientific or based merely on 'cultural preference' and enforced via 'cultural imperialism' (Gillespie, 1996, p. 373).[29] Even granting the super-whale myth, the conflation of species seems a small price to pay for stopping the slaughter of those cetaceans who do genuinely qualify as borderline persons. We do not consider it appropriate to kill human beings simply because there is some confusion as to whether other primates should also be considered persons.

Upon closer inspection, the remainder of the Japanese argument collapses. Let us grant, first of all, that minke have reached 54 per cent of pre-exploitation abundance (above which they can be legally whaled).[30] Second, that it is possible to whale 'ethically' and 'sustainably' (Gillespie, 1996, p. 359).[31] It seems that opposition to a limited catch must be unreasonable; but we should not forget that the history of whaling has convinced a great many people that 'rational' fisheries management is a fallacy. Thus six prominent cetacean scientists (including three members of the Scientific Committee) argue that the real issue is 'not that some whales are not abundant, but that the whaling industry cannot be trusted to regulate itself or to honestly assess the status of potentially exploitable populations' (Clapham *et al.*, 2007, p. 317). The ICJ in *Whaling in the Antarctic* similarly rebuked Japan for 'weaknesses' in its scientific whaling programme: 'the decision to proceed with the JARPA II sample sizes prior to the final review of JARPA lend support to the view that those sample sizes and the launch date for JARPA II were not driven by strictly scientific considerations … Japan's priority was to maintain whaling operations without any pause, just as it had done previously by commencing JARPA in the first year after the commercial whaling moratorium had come into effect' (para. 156).[32]

Let me repeat that the misuse of science in no way proves that the IWC is a mere venue for the contestation of 'culture' and 'values'. The whaling dispute is at bottom a confrontation between international science and a small number of states who maintain non-scientific views such as that whales and dolphins are fish.[33] Others see whaling as a realpolitik wedge to use in negotiations over food security and fisheries issues: 'Japanese policy on whaling cannot be viewed in isolation, but is part of a larger framework involving a perceived right to secure unlimited access to global marine resources' (Clapham *et al.*, 2007, p. 314). There is, no doubt, a great deal of truth in this; and if Japan has been playing a 'two level game' then so too has Australia, using this issue to relieve domestic political pressure as against its strong bilateral relationship with Japan (Heazle, 2013, p. 332). But this merely goes to show how desperately states in their 'subjectivity' need the 'objectivity' of international law to render disputes practical and resolvable. For the agenda of international law is of a piece with the agenda of international science: 'As Kepler reportedly said, in midst the massacres of religious wars, the laws of elliptical motion belong to no man or principality' (Steiner, 2002, p. 214).

29 Gillespie (1996) points out that the choice between a species and 'culture' is false, since to kill off the species is to 'kill off the culture' (p. 375).

30 See, however, Clapham *et al.* (2007), who furnish data which suggest 'greatly reduced abundance of minke whales, with some predicting a reduction from the earlier point estimate of as much as 65% to 268,000 animals' (p. 317). This would place stocks well below the 54 per cent threshold.

31 See, however, the reservations of NGOs and scientists who point out that there is, as yet, *no humane method* for the slaughter of cetaceans (Brakes *et al.*, 2004; Brakes and Simmonds, 2013).

32 JARPA stands for the Japanese Whale Research Program under Special Permit in the Antarctic. JARPA was concluded in 2005 and replaced with JARPA II.

33 Many Japanese believe they have been 'eating whale for thousands of years', when the practice 'only became commonplace after World War II' (Hirate, 2005, p. 141). Whales are considered to be 'a type of fish, rather than a mammal', a view which is 'reflected and reinforced in Japan's 1500-year-old writing system, in which the symbol for whale includes within it a component that means fish' (p. 141).

VI. The *Whaling in the Antarctic* case

In many ways the *Whaling in the Antarctic* case follows on from the *Southern Bluefin Tuna* Cases *(New Zealand v. Japan; Australia v. Japan)* (1999). These cases featured the same interlocutors and centred on a disagreement over Bluefin tuna populations and their rates of recovery (an analogous problem to that before the IWC).[34] The International Tribunal for the Law of the Sea restrained Japan from 'undertaking an experimental fishing program' and asked all parties to 'act with prudence and caution in order to ensure that effective conservation measures are taken' (Rothwell, Kaye, Akhtarkhavari and Davis, 2014, p. 477). Rothwell *et al.*, conclude that, while the Tribunal did not 'expressly refer to, or endorse, the precautionary principle its decision revealed a classic precautionary approach' (p. 477).[35] The precautionary approach is usually traced to Principle 15 of the Rio Declaration on Environment and Development (1992): 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities.' International lawyers, however, see it less as a 'principle' and more as a general 'call for scientific uncertainty to be taken into account in making decisions on how to address threats of serious or irreversible environmental damage' (Peel, 2004, p. 498).[36] This distinction may shed some light on the Court's approach in *Whaling in the Antarctic*.

International lawyers predicted that the case would turn on whether Japan's programme was 'for the purposes of scientific research' under Article VIII of the ICRW, and pointed out that the Court would have to choose between a 'subjective' and 'objective' test for determining the meaning of this phrase (Anton, 2010; Mossop, 2009). The former would 'simply identify what Japan considers to be scientific', whereas the latter would require a determination as to what might 'objectively be deemed scientific' (Park, 2011, p. 204). Now that the decision has been handed down we can see that Australia was not, in fact, 'attempting the impossible' (Park, 2011), but merely giving the Court the opportunity to authoritatively declare what many international lawyers had already concluded about Japan's so-called 'scientific' whaling programme.[37] However, while the Court's decision is far-reaching – it has been described as a 'more decisive judgment than even the most strident anti-whaler could legitimately have hoped for' (Vincent, 2014, p. 266) – it is at the same time very narrow in scope.

Nowhere does *Whaling in the Antarctic* speak to the legality or otherwise of whaling. The Court emphatically ruled out any sense in which it was 'called upon to resolve matters of scientific or whaling policy' and stated that although 'members of the international community hold divergent views about the appropriate policy towards whales and whaling', it is 'not for the Court to settle these differences' (para. 69). There is nothing to stop Japan from reformulating its programme so as to bring it within the letter, if not the spirit, of the law. Indeed, the IWC recently met in September 2014 at Portoroz, Slovenia, where Japan has already announced its intention to do so.[38] Japan continues to argue that, as there is no longer any 'scientific uncertainty' as to minke populations, a limited catch should be allowed. And there is every reason to believe that whaling

34 Clapham *et al.* (2007) cite a comment made by Morishita [a Japanese delegate] at the 2001 IWC meeting: 'he explained why he disliked a procedure that had been suggested for managing Antarctic minke whales, and concluded by saying that this was "a very bad way to manage southern bluefin tuna." After a pause in which everyone in the room looked up quizzically, he added, "Sorry – wrong meeting." The slip said much about the inextricable connection between whaling and other fisheries issues … and the basic blueprint underlying [Japan's] approach to the management of a wide range of exploited marine species' (p. 318).

35 Further analyses are provided by Bialek (2000); Stephens (2004); Sturtz (2001).

36 See, for example, Judge *ad hoc* Shearer's comments in the *Bluefin Tuna* cases.

37 For a concise analysis, see Sophie Kopela's blog entry at the Lancastar Law Blog, online: ‹http://lancslaw.wordpress.com/2014/04/23/saving-the-whales›.

38 See Japan's 'Opening Statement' to IWC 65, online: ‹https://archive.iwc.int/pages/view.php?ref=3545›.

and anti-whaling states will continue to strive for 'consensus', which would logically have to include some form of commercial whaling.[39]

Yet *Whaling in the Antarctic* contains reasons to be sanguine about the future of international environmental law.[40] For the Court did, to a large extent, agree with Australia's submissions and dismiss Japan's. First, it found that it unreservedly had jurisdiction to hear the case (there was no need to make a determination as to Australia's disputed exclusive economic zone (EEZ) in the Antarctic). Second, it found that, since JARPA II was not 'for the purposes of scientific research', Japan was in breach of its obligations under the ICRW. The Court declared that, with respect to Article VIII of the ICRW, the 'standard of review is an objective one' (para. 67). This necessarily entails a consideration of 'whether the elements of a programme's design and implementation are reasonable in relation to its stated scientific objectives' (para. 88). Thus, while lethal methods are not 'per se unreasonable', Japan nevertheless needed to be able to show that they were 'not being used to a greater extent than is necessary' (para. 224).

One major implication of the judgment is that Japan's 'approach in self-determining scientific validity has been found to be incorrect' (de la Mare *et al.*, 2014, p. 1126). For state practice to be 'scientific' under the ICRW, it must be able to show 'objectives, methods, and sample sizes' that are 'sufficiently detailed so as to be capable of quantitative evaluation using normal scientific procedures' (p. 1126). The Court's objective test ('reasonableness') allowed it to adjudicate on 'the logic, rather than the details, of science' (p. 1126) without having to transform itself into a de facto scientific body. Such an approach tacitly acknowledges that the best practices of the international scientific community change over time (non-lethal research on cetaceans did not exist in 1946).[41] This will no doubt 'serve as a useful model in resolving other disputes over complex technical issues' (p. 1126). The Court's conception of the ICRW as an 'evolving instrument' also opens a narrow window onto the idea that, just as our normative reasoning towards cetaceans has changed, so too have our duties and obligations towards them.

The reasoning of the majority occupies a middle ground between the 'restrictive' reasoning of Judges Owada and Abraham and the 'expansive' reasoning of Judge Cançado Trindade and Judge *ad hoc* Charlesworth. Judge Owada found that the 'object and purpose of the Convention' must be understood by looking at the original intentions of the contracting parties: 'to pursue the goal of achieving the twin purposes of the sustainability of the maximum sustainable yield ("MSY") of the stocks in question and the viability of the whaling industry. Nowhere in this Convention is to be found the idea of a total permanent ban on the catch of whales' (para. 9). The ICRW, in his view, is 'a kind of self-contained regulatory regime on whales and whaling' which guarantees 'autonomy to the parties', although not so much as to render it 'free from the process of judicial review by the Court in accordance with the power given to it for interpreting and applying its constitutional document' (para. 14). Judge Owada's approach – what we may call legal formalism – may be familiar to readers from recent debates over the meaning of the US Constitution. His position is, for example, consistent with that taken by Justice Antonin Scalia ('Originalism') of the US Supreme Court.[42] Such a narrow judicial role prevents the Court from usurping the powers conferred upon the IWC and its Scientific Committee.

39 See Goodman (2011) on the 'Future of the IWC' process, its gradual breakdown, and the role of anti-whaling NGOs in 'preventing consensus'.

40 See Payne (2010), Anton (2013) and Nurse (2014) for analyses.

41 Gillespie (2005) points towards the Nuremberg Code 'devised to ensure the compliance of scientific research with "certain basic principles [which] must be observed in order to satisfy moral, ethical and legal concepts"' (p. 110). Such ideas are reflected in UNCLOS's emphasis on 'appropriate scientific methods' (p. 111).

42 Scalia (1988) finds risible the notion that 'the Constitution is what the judges say it is', and shows how this can easily be used to 'expand freedoms' as well as 'contract them' (p. 852).

Judge *ad hoc* Charlesworth cited the Court's previous decision in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (2010) and found that international environmental treaties 'should be interpreted wherever possible in light of the precautionary approach, regardless of the date of their adoption' (p. 3). Her emphasis on the precautionary approach as part of customary international law explains, crucially, why 'non-lethal methods of research' must be used 'wherever possible' (p. 3). This goes somewhat further than the majority's 'reasonableness' test in acknowledging that Article VIII of the ICRW has evolved in tandem with the other 'sources' of international law. For this reason, Japan needed to be able to show that lethal methods were 'indispensable to the purposes of scientific research on whales' (p. 3). This shifts the onus of proof from the plaintiff (who ordinarily needs to show harm) to the defendant (who must now show that their actions are not likely to cause harm). Yet even the majority's emphasis on non-lethal research as the de facto position in determining whether a state programme is 'for the purposes of scientific research' arguably raises a similar burden of proof issue.[43]

Judge Cançado Trindade's opinion comes closest to my argument in this paper. He described the ICRW as a 'Living Instrument' inseparable from the 'evolving *opinio juris communis*' (para. 27). He noted the 'systemic outlook' of conservation treaties which supports a 'teleological interpretation' of the ICRW as evolving towards the 'protection of wild fauna and flora' (para. 26). His opinion hinges on the idea that the ICRW must be interpreted in the light of 'a gradual move away from unilateralism and towards multilateral conservation of living marine resources' (para. 24). Like Judge *ad hoc* Charlesworth, Judge Cançado Trindade construed Article VII in the light of the other 'sources' of international law. The ICRW, he declared, does not 'stand alone as a single international Convention aimed at conservation and management of marine mammals', but sits alongside a 'plethora of international instruments adopted in recent years, aiming at conservation with a precautionary approach' (para. 57). To complete the analogy to the US Constitution, we might say that Judge Cançado Trindade and Judge *ad hoc* Charlesworth more closely resemble Ronald Dworkin, who argued for a 'coherent, principled and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution', an approach he called 'constitutional integrity' (2006, p. 118).

The reasoning of the majority – neither 'restrictive' nor 'expansive' – may perhaps be compared to the 'legal realism' of Richard A. Posner and Cass Sunstein (and others of the Chicago School). Theirs is a 'pragmatist' line of argument which draws inspiration from the philosophy of William James, John Dewey and more recently Richard Rorty. Whatever the case, *Whaling in the Antarctic* sets a clear precedent for future matters involving scientific expertise and international environmental treaties. The Court has positioned itself between description and prescription, facts and values, the positivist realm of state practice and the normative ideals of global justice; it continues, as it were, the grand tradition in which international law is 'about lifting idiosyncratic ("subjective") interests and preferences from the realm of the special to that of the general ("objective") in which they lose their particular, political colouring and come to seem natural, necessary or even pragmatic' (Koskenniemi, 2005, p. 597). The parties to the dispute as well as other IWC Member States and onlooking NGOs ('norm entrepreneurs') can now go forward with a clearer sense of where the law ends and politics begins.[44]

43 Stone (2010) argues that it is 'context – senses of direction, of value and purpose – that determine how the rules will be understood, every bit as much as their supposed "plain meaning"' (p. 22). Questions such as burden of proof and onus are 'terribly significant' in environmental cases.

44 NGOs like Greenpeace and Sea Shepherd have shaped normative attitudes towards cetaceans and their actions arguably fulfil many of the New Haven School criteria for 'international lawmaking' (Moffa, 2012). Bailey (2008) describes them as 'norm entrepreneurs who seek normative change at the domestic and international levels' (p. 290).

VII. Customary international law

Whaling in the Antarctic lends weight to the claim that international law has 'evolved drastically: from being subjective [it] has become more objective, from relative it has turned more universal' (Besson, 2010, p. 165). The treaties primarily relevant to cetaceans include the ICRW, UNCLOS and, to a lesser extent, CITES. These must be read alongside one another.[45] The major provision from the Law of the Sea is Article 65, which establishes that 'marine mammals are not subject to the obligation of optimum utilisation. Hence while the LOSC itself does not forbid whaling, it does give states and international organisations a right to do so' (Rothwell and Stephens, 2010, p. 308). Many states have 'enacted legislation prohibiting the taking of whales in their EEZs', while on the high seas whaling is 'substantially limited by the ICRW' (p. 308). States which originally restrained themselves because of the moratorium have seen now fit to outlaw whaling on their own terms.[46] The vast majority would not resume commercial whaling even if the moratorium were to be lifted. What began as a strict legal obligation has, in a compelling demonstration of the 'norm life cycle', been internalised as a new normativity (Finnemore and Sikkink, 1998).

Yet a fixation on treaties and domestic legislation may belie the relative cohesion of customary international law. Behind states' divisive rhetoric and divergent practice we may discern coherence and obedience to what H. L. A. Hart (2012) called 'second order rules', that is, those rules that give rise 'not merely to physical movement or change, but to the creation or variation of duties or obligations' (p. 81).[47] The whaling dispute shows that, whatever else they may desire, states see themselves as bound by international law: 'A legal sceptic might use the case to illustrate how self-interested states are capable of evading legal obligations ... But such a view is too simplistic ... The pro-whaling states reveal themselves to be intensely interested in how the rules are written and in finding means to fit their behavior within them' (Hurd, 2012, p. 110). Japan has gone to great lengths to legitimate its actions within the existing framework of the ICRW. There are strong geopolitical reasons why Japan may not wish to tarnish its reputation as a model international citizen at this time, i.e. its simmering dispute with China over the Senkaku or Diaoyu islands. One of the most basic reasons for having an international legal system is that it provides an avenue for resolving disputes without the need for force.

The catastrophic overfishing that led to the creation of the IWC resembles nothing so much as the hypothetical founding moment of social contract theory. Grotius, Hobbes and Pufendorf all regarded 'sovereign states as analogous to individuals in the state of nature' and subject only to 'commerce as a driver of sociability' and 'norm-structured interactions not dependent on an overarching state' (Kingsbury and Straumann, 2010, p. 34). But it is the establishment of law and a monopoly on violence which enables society to move from 'a stark Hobbesian nightmare to a more "communitarian" image' (Koskenniemi, 2005, p. 599). And as with all contracts, we do not interpret them in a vacuum, but imply certain conditions and obligations: 'Most ordinary cases of

45 UNCLOS supports a 'preservationist' reading of the ICRW (Zemantauski, 2012). What is not clear is how CITES interacts with the ICRW. Rothwell and Stephens (2010) speculate that cetaceans 'taken from the high seas would be trade, and permissible only where not detrimental for the survival of the species, and where the animals are not to be used for primarily commercial purposes' (p. 472). See Doukakis *et al.* (2009) on the interaction of UNCLOS and CITES.

46 Though commendable, such legislation, unless enforced, is of little worth. I agree that the 'single most effective measure to improve enforcement would be to liberalise the rules relating to standing' (White, 2003, p. 281).

47 I apply Hart's concept of law to international law despite his characterisation of it as a system which consists 'only of primary rules of obligation' (p. 214). Tasioulas (2007) has shown that customary international law is a special case that 'even a Hartian could in principle accept ... imposes an interpretive test for determining the validity of legal norms' (p. 24).

contract occur when the idea of making a formal contract could not be further from the minds of the contracting parties' (McClelland, 1996, p. 181). As every student of contract is taught, the law adjudicates over the interpretation of contracts, but also implies and even allows for the implicit alteration of contracts without formal consent. So it is with the IWC, even though a handful of states dispute the shift from 'conservation' to 'preservation', and have been 'persistent objectors' all the way down the line. Only a normative understanding of international law can make sense of this shift; the 'persistent objector' doctrine is rightly regarded as the 'litmus test of positivism' (Tasioulas, 2007, p. 10).

If we look at state practice and the additional element of *opinio juris*, it is clear that states feel legally bound *not* to kill whales and dolphins, and when they do, to *justify* that killing in legal terms.[48] There is every reason to believe, as D'Amato and Chopra (1991) argued, that '[w]hat states do becomes what they legally ought to do' (p. 22). However, it must be shown that state practice 'follows from a sense of legal obligation rather than from a sense of moral obligation or political expediency' (Hunter, 2014, p. 127). In recent years, state practice has shifted from the latter to the former and become sufficiently concrete to be able to declare a cetacean right to life. Birnie *et al.* (2009) describe the evolution of IWC policy as 'an example of the application in a wildlife context of a rather stronger version of the precautionary approach than that applied to fish by the UN Fish Stocks Agreement' (p. 726). The meaning and purpose of the ICRW has changed as a result of the emergence of international norms, such as the 'precautionary approach' and the cetacean right to life, and so too have the duties and obligations owed by Member States.

VIII. Conclusion

The history of whaling provides a textbook example of how complex environmental problems interact with the weak sovereignty of international law. At the precise moment when whale populations were most aggressively being depleted, the IWC, bound by its innate contractualism, was powerless to enforce its own recommendations. Even with the moratorium in place, cetaceans continue to be killed as a result of various legal and illegal practices. Yet many cetaceans are borderline persons and, as such, have a right to life. Our normative reasoning towards cetaceans has changed so radically since 1946 that the International Convention for the Regulation of Whaling ought to be renamed the International Convention for the Regulation of Whales. This is a contentious position, but one that finds support in ethics, science and international law. Nor is it alien to the reasoning of the Court in *Whaling in the Antarctic*. There is nothing theoretically radical about 'recognising the rights of whales – creatures that are more animate than corporations, more communicative than infants and mentally enfeebled persons, more communal than the society of nations' (D'Amato and Chopra, 1991, p. 51).

In practice, however, reforms are needed if the cetacean right to life it is to be of more than token value. First, it should be incorporated into the text of the ICRW, with the Scientific Committee advising on which species qualify as borderline persons. For these species (we may conjecture blue, sperm, fin, humpback, right and killer whales as well as bottlenose dolphins), the moratorium should be replaced by a permanent ban on all forms of whaling. Second, the IWC should develop an inspection and enforcement regime harnessing the combined resources of all Member States. This may sound impossibly utopian, but such a scheme would be prosaic in its workings (Burns, 1997, p. 79). Yet the biggest threat to cetaceans is no longer the whaling industry – even if commercial whaling resumes – but ship strikes, entanglement in long-lines and other marine debris, mass strandings caused by naval sonar, and most insidious of all, the collapse of

48 Roberts (2001) distinguishes between 'traditional' and 'modern' customary international law, the 'former develops slowly through state practice, while the latter can arise rapidly based on *opinio juris*' (p. 759).

krill, fish and squid stocks as a result of overfishing and anthropogenic climate change. These problems, which are beyond the scope of this paper, suggest that, despite their exceptional moral and legal status, the fate of cetaceans, to a very large extent, remains tied to the health of marine ecosystems.

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