


# Symposium on the State of Conservation of Whales in the 21st Century

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Development in Oceans Law from 1946 – 2006: Is the ICRW outdated?

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A perspective from outside the IWC

# Where are we now? (i)

Many features of international law were not developed 60 years ago, and thus not reflected in the ICRW

## UNCLOS & Fish Stocks Agreement

ICRW needs to be assessed in the context of:

### UNCLOS:

- Balance between Conservation & Utilization.
- “Duty to cooperate” in conservation measures.
- Article 65 - Coastal states can “prohibit, limit or regulate exploitation of marine mammal *more strictly*.”
- Article 120 – Extends protection of Article 65 to cetaceans in high seas.

### Fish Stocks Agreement:

- Application of Precautionary Principle.

## Other International Treaties

### UNCED, WSSD and CBD:

- Ecosystem-based management.
- Application of precautionary principle.
- Transparency & accountability.
- Verification & compliance.
- Avoidance & settlement of disputes.

Other principles and practices:

- CITES – Int. ban on whale product trade.
- CMS – Holistic approaches to conservation of migratory cetaceans.

**These are the measure of international consensus on principles for protection & preservation of the environment & living resources.**

# Where are we now? (ii)

## Structural Weaknesses

- Ambiguity & contradictions about its purpose.
- Allowance for 'Opt-out' & exemption from treaty obligations.
- No agreement on an effective compliance system.

Major differences on fundamental issues:

- Consumptive or non-consumptive use of whales.
- Moratorium on commercial whaling.
- Scientific whaling.
- "Opt-out" procedure under Article VIII.
- Competence to deal with small cetaceans.

**No agreed procedure for resolution of disputes & enforcement of IWC regulation.**

## Legal Interpretations

- Contracting parties have different & often conflicting interpretations of Convention provisions.

In recent years international Courts & Tribunals willing to have regard to:

- Rules of international environmental law arising outside the treaty being interpreted.
- New norms & standards developed in the period after a treaty has been adopted.

**Without a system for settling differences & disputes, and the IWC not able to seek or provide independent legal advice, a stalemate is inevitable.**

# What are the consequences if we remain on the present course?

Major issues must be resolved before completion & adoption of RMS.

- Many are technical in nature.
- Some IWC members link these to lifting the moratorium on commercial whaling.
- Meanwhile, whaling countries set themselves catch quotas & number of whale species for targeting.

The challenge for IWC membership:

**Ensure that disapproval of commercial whaling does not leave responsibility for management to the small minority who conduct whaling.**

The IWC has gained primacy & experience in the conservation & management of whale stocks.

But major deficiencies need to be corrected through:

- Changes & new initiatives within ICRW/IWC.
- Support & effective participation of the rest of the international community.

# What can be done? (i)

## International Dimension

1. The IWC is unable to benefit from the objectivity of “outside intervention” in its disputes.
2. What happens outside ICRW is a necessary reference point for the ICRW.

**Without extensive consultations & negotiations among all stakeholders, it is impossible to find an agreement.**

Status of ICRW and appropriateness & primacy of IWC is not challengeable. But, this should not :

- Grant Convention membership exclusivity about whales & their conservation.
- Inhibit broader airing of whale issues, disputes & “dysfunctionality” of IWC.

## Complexity of issues: not an ICRW monopoly

Other issues of concern: Climate Change, POPs...

- World community was able to find consensus on progress and measures for solution.
- Parties to ICRW also participated, & thus familiar with consensus decision-making in the framework of international negotiations.

# What can be done? (ii)

## International Conference or World Commission or Independent Study

1. Int. Diplomatic Conference:
  - Under auspices of the UN.
  - Requires resolution from General Assembly.
  - Probe prospects through appropriate consultations with ICRW parties & within UN system.
2. World Commission:
  - World Commission on Environment & Development (1983).
  - Independent body linked to, but outside control of, governments & UN system.
3. Independent group of qualified “eminent” persons.
  - Terms negotiated & agreed with the IWC.

## Formal relations with a UN agency

### ICRW Article III:

- IWC “brought within the framework for a specialized agency related to the UN”.
- An option if not already pursued & rejected.

## ICRW Mandate

Purpose & mandate is a central issue in current IWC disputes.

- UNFCCC – From its inception, convention mandate was also a deeply divisive issue.
  - Article 2: Is the ultimate objective aspirational or does it impose a firm commitment?

# What can be done? (iii)

## ICRW membership

Broadened membership would:

- Dispel impression of exclusive province of a few countries.
- Introduce a more internationalized setting that facilitates & provides fresh initiatives & objectivity.

Vote-consolidated/vote-buying:

- Unfair and irregular practices with no place in international relations.
- Implications for SIDS: they should participate and work on their own terms.

## Dispute settlement & compliance

### Negotiations:

- Used to good effect in a number of environmental disputes.
- *Fisheries Jurisdiction Case* – Basic objectives underlying negotiations.
- See *UNFCCC Article 14.1* or *CBD Article 27.1*.

### Compliance:

- Contemporary methods of dispute resolution include techniques for avoidance of disputes.
- *UNFCCC* → *Facilitative Branch of the Compliance Committee*.

### Arbitration:

- *UNCLOS Annex VII arbitration procedure*.

## Conclusions

No exclusivity about the ICRW & IWC operations.

Range & complexity of issues is not specific to the ICRW and IWC.

Structural weaknesses of the Convention are traceable to the age of the ICRW & the major & fundamental character of the disputed issues.

ICRW Article III.

Draw attention to unacceptable 'vote consolidation/vote-buying' phenomenon, its accompanying conditionalities and the international rejection of such a practice.

## Recommendations

Take opportunities to assert broader international concern about conservation & management of whales.

Need for efforts from within the IWC, as well as concerned governments & organizations outside IWC, to find solutions & remedies.

Give consideration to establishing an international process for dialogue & consultations:

1. Full international diplomatic conference
2. World commission at appropriate high-level;
3. More specialized group of eminent persons.

Give consideration to formal ICRW/IWC association with the UN or its agencies.

Give consideration to a public program to encourage broader ICRW membership on the basis of informed & rational considerations.