

Michigan Journal of International Law

Volume 29 | Issue 3

2008

"Normalizing" the International Convention for the Regulation of Whaling

Michael Bowman
University of Nottingham Treaty Centre

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Animal Law Commons](#), and the [Law of the Sea Commons](#)

Recommended Citation

Michael Bowman, *"Normalizing" the International Convention for the Regulation of Whaling*, 29 MICH. J. INT'L L. 293 (2008).

Available at: <https://repository.law.umich.edu/mjil/vol29/iss3/1>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mjil.repository@umich.edu.

“NORMALIZING” THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

*Michael Bowman**

I. “NORMALIZING” THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING: THE ST. KITTS AND NEVIS DECLARATION.....	294
A. <i>Introduction</i>	294
B. <i>Resolution 2006-1 St. Kitts and Nevis Declaration</i>	294
C. <i>The Legal Significance and Purport of the Declaration</i>	297
II. THE IDENTIFICATION OF RELEVANT NORMS.....	304
A. <i>Sources of Legal Norms</i>	304
1. The Principal Formal Sources.....	304
2. General Principles of Law	306
3. Material Sources	310
4. “Soft” Law	310
B. <i>Subject-Matter of Relevant Norms</i>	311
1. Foundational Norms—The Principle of Good Faith	312
2. Adjectival Norms	314
3. Substantive Norms	354
III. THE APPLICATION OF RELEVANT NORMS (1): THE VIEW FROM 1946.....	374
A. <i>The Principle of Good Faith</i>	374
B. <i>The Object and Purpose of the ICRW</i>	378
1. Conventional Approaches to Identification of the Object and Purpose.....	378
2. Identification of the Original Object and Purpose of the ICRW	386
IV. THE APPLICATION OF RELEVANT NORMS (2): CONTEMPORARY PERSPECTIVES.....	436
A. <i>Good Faith and the Evolutionary Interpretation of Treaties</i>	436
B. <i>Evolving Norms Deriving from Sources Beyond the ICRW</i>	438
1. Human Rights Norms	438
2. The Law of the Sea	446
3. Norms Concerning the Conservation and Sustainable Use of Biological Diversity	449

* Director of the University of Nottingham Treaty Centre. This Article represents a revised version of a paper that was made available to the International Whaling Commission in connection with the current deliberations concerning the future of that organization. The author’s thanks are due to Peter Davies, Director of the University of Nottingham Centre for Environmental Law, for his invaluable comments on an earlier draft of this Article.

4. Norms Concerning Animal Welfare and the Avoidance of Cruelty	458
C. <i>Mechanisms for Normative Evolution Within the ICRW Itself</i>	459
1. Evolutionary Interpretation of Open-Textured Terms	459
2. Amendment of the Schedule	474
3. Amendment of the Convention	485
4. Other Mechanisms of Adjustment	495
V. CONCLUSIONS	497
APPENDIX	498

I. "NORMALIZING" THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING: THE ST. KITTS AND NEVIS DECLARATION

A. Introduction

The history of international institutional cooperation is sprinkled with examples of the spasmodic emergence, from out of the swirling stream of activities of the major treaty-based organizations, of particular events, projects, or decisions which, in the fullness of time, can be appreciated as being of truly pivotal significance—defining moments which have the most profound effects in terms of shaping, galvanizing, or redirecting the overall evolution of the regime. In the case of the 1946 International Convention for the Regulation of Whaling (ICRW),¹ there can be no doubt that the adoption of the moratorium on commercial whaling at the Thirty-Fourth Annual Meeting of the International Whaling Commission (IWC) in 1982 was one such moment. More recently, the Fifty-Eighth Annual Meeting offered the promise of another, this time in the form of the St. Kitts and Nevis Declaration, adopted as IWC Resolution 2006-1.² The resolution was proposed by the Japanese delegation, and accompanied by a brief position paper.³

B. Resolution 2006-1 St. Kitts and Nevis Declaration

The resolution was adopted by the narrowest possible margin of thirty-three votes to thirty-two, with one abstention. Subsequently, a

1. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW].

2. International Whaling Commission [IWC], *St. Kitts and Nevis Declaration*, IWC Res. 2006-1 (June 2006). The text of this Resolution is set out as an Appendix to this Article.

3. IWC, *Normalizing the International Whaling Commission*, IWC/58/12, Agenda Item 19 (2006).

number of States that had voted against the Declaration formally dissociated themselves from it.⁴ Insofar as these statements may have been intended to draw attention to particular deficiencies in the text, they may be understandable, but if they were indicative of an outright refusal to engage in the deliberative process which the Declaration envisages, it is submitted that they were misguided. This is because the process in question may in fact represent the best, and even possibly the last, opportunity for the IWC to secure its own future, and, more importantly, that of the great whale species of the planet. In order to substantiate this point, it will be necessary first to advert briefly to some essential characteristics of the ICRW regime, and then to examine and analyze the Declaration in a little more detail.

As regards the IWC itself, it is hard to be sure whether it is truly on the point of collapse, as the Declaration suggests, though it has certainly seemed to be so at times throughout the last decade. Yet this observation could equally, perhaps, have been applied from time to time to other institutions which have, after the fashion of long-distance athletes with tortured and ungainly running styles, ultimately gone on to complete the course against all expectations. On the other hand, there have undoubtedly been high-profile cases in recent years of marathon runners whose evident discomfiture *has* ultimately led to collapse, and it would be unwise to discount this possibility in the case of the IWC. In any event, it would be difficult to dispute the assertion in the supporting paper that the organization is "dysfunctional,"⁵ certainly when judged by comparison with other major treaty institutions.

In the early years, this dysfunction took the form of a chronic failure on the part of the whaling nations to commit themselves to the acceptance of effective restraints on exploitation, a point which may perhaps be conceded by the euphemistic allusion in the Resolution to "historic over-harvesting."⁶ There is room for debate as to the extent to which the IWC had succeeded in putting its own house in order in that regard by the time it experienced a dramatic increase in membership during the 1970s. This was occasioned by an influx of States which lacked any vested interest in whaling and whose primary concern was to avert the perceived risk of extinction of cetacean species. It was as a consequence of these developments that the moratorium was introduced.⁷ Since that

4. See Chair, IWC, *Report of the 58th Annual Meeting of the IWC*, ¶ 19.2.2 (Jan. 2007), available at http://www.iwc.office.org/_documents/meetings/stkitts/CHREP58.pdf.

5. IWC/58/12, *supra* note 3.

6. IWC Res. 2006-1, *supra* note 2, pmb1. (tenth recital).

7. Once again, opinions no doubt differ as to whether this was necessary. IWC Resolution 2006-1 notes that the moratorium was not adopted on the advice of the IWC's own

time, successive changes in membership have seen the pendulum of opinion regarding a resumption of commercial whaling swing uncertainly to and fro.

There is, of course, no adverse imputation for an international organization entailed in the fact that its members disagree sharply on key policy questions: the ventilation and possible resolution of such differences may, after all, have been the very purpose that the organization was intended to serve. Yet, in the case of the IWC, there is little indication of consensus even as to the issues over which States are entitled to deliberate and disagree in that forum, or of the overall parameters within which a resolution might be sought. While these controversies must turn ultimately on the interpretation and application of relevant legal provisions, the practice appears to the outsider to have been to address them on a predominantly *political* basis, with little serious attention paid to their essentially juridical nature. As a direct result, the organization has seemed to be in a state of perpetual acrimony and turmoil. Whereas environmental treaty regimes in general promote constructive and progressive debate with a view to resolving issues of conservation concern, the IWC largely provides a venue for the recurrent reiteration of entrenched positions; while other institutions habitually conclude their deliberations through consensus, the IWC conducts its business through a sequence of bitterly contested votes; where other conventions have harnessed the commitment, resources, and expertise of non-governmental organizations (NGOs) to beneficial effect, the IWC still appears to regard them with suspicion or outright hostility. Despite the manifest dedication, expertise, and professionalism of its staff, the IWC as an institution inspires little confidence. Consequently, the call to set the organization to rights has considerable appeal. Furthermore, it is encouraging to note that there are at least traces in Resolution 2006-1 of recognition of the need to address the specifically *legal* nature of the problems involved. By the time of the Fifty-Ninth Annual Meeting in 2007, the underlying political dynamic in the IWC had altered yet again as a result of further membership changes, which had tilted the balance back in the direction of maintenance of the moratorium. Nevertheless, there were signs that the normalization issue was not intended simply to fall into abeyance, but rather that it might receive further consideration through the medium of an inter-sessional meeting.⁸ It is very much in the interest of the international community that this opportunity be taken,

Scientific Committee. On the other hand, asserting that it is "no longer necessary" might be taken as conceding that it was needed at the time.

8. See Press Release, Chair, IWC, Summary Report for the 59th Annual Meeting (May 29, 2007), available at <http://www.iwcoffice.org/meetings/meeting2007.htm#summary>.

and that the specifically legal dimensions of the problem be explored a little more thoroughly than seems to have occurred in the past. It is with that hope in mind that this preliminary analysis has been prepared, with the possibility that others may be encouraged to pursue the matter further. Given the desirability of increasing the emphasis on the legal aspects, it will be helpful to begin by setting the Resolution itself into its constitutional context.

C. *The Legal Significance and Purport of the Declaration*

The legal significance of the resolutions of any international organization is, of course, determined essentially by the provisions governing the adoption, implementation, and effects of such measures in the constituent instrument of the organization in question. In the case of the IWC, provision is made in Article V for the formulation of regulations amending the Schedule to the Convention, and, in accordance with Article III, these require for their adoption a "three-fourths majority of those members voting."⁹ Article V(3) establishes the modalities for the entry into force of such amendments, and there is no doubt that they are in principle legally binding. This point has on occasion been doubted by certain commentators,¹⁰ though their reasoning appears unconvincing. The fact that IWC members may register objections to such amendments, thereby excluding their effect, does not turn them into recommendations. The correct analysis is that amendments create conditional obligations, binding except with regard to States that exclude their effect in accordance with established procedures: the vital difference between the two characterizations would become evident in the event of mere silence on the part of dissentient States, or of attempts to evade the effect of the changes by other than the authorized means. In confirmation of the argument above, separate provision is made for measures which are properly regarded as recommendations in Article VI, which stipulates that "[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to

9. See ICRW, *supra* note 1, art. III.

10. WILLIAM BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* 294 (1994). Burke noted that

[a]lthough the ICRW refers to schedule amendments as regulations, they are more like recommendations. This is because the schedule amendments do not take effect simply on their adoption by the commission. Even if a proposal receives approval by three-fourths of the members it may be subject to objection by members within ninety days.

whales or whaling and to the objectives and purposes of this Convention.”¹¹

Such decisions may be adopted by simple majority, but do not become binding on Member States. It is clear that the St. Kitts and Nevis Declaration falls within this latter category of measure. That being so, it might perhaps be argued that it cannot in any sense be regarded as pivotal, since members of the Commission remain free simply to disregard it if they choose. Certainly, there would appear to be a long-established tradition of disregarding recommendations within the IWC as a whole.¹² Yet a central purpose of this study is to suggest that, whether the matter is viewed from a legal or a political perspective, this is not the appropriate response for States to adopt. The reason is that all such instruments represent the considered outcome of a formal process of deliberation by sovereign States, and relate to the performance of legal obligations which they are obliged to carry out in good faith. Consequently, it can be argued even from the purely legal point of view that there must at least be an obligation to give genuine and serious consideration to compliance with the recommendations in question, even if actual compliance itself is not ultimately mandatory.¹³ In addition, this particular measure touches on fundamental issues regarding the very future of the institution itself, reinforcing still further the importance of this reflective process. In order that due consideration may be given to the measure in question, it will plainly be necessary to conduct a closer analysis of its meaning and purport.

Regrettably, this task of analysis is not facilitated by the wording of the Declaration, the drafting of which gives rise to certain difficulties. Its operative provisions are extremely brief, and assert first that the IWC itself has “failed to meet its obligations under the terms of the ICRW.”¹⁴ Unfortunately, neither the failures in question, nor the obligations to which they relate, are specified, but are left to be surmised from the Declaration as a whole, and from the supporting position paper.¹⁵ In contrast to the array of obligations arising “under the terms of the ICRW” for *its parties*, there appear to be only two provisions which directly impose obligations on the Commission itself: namely, Article III(2), which requires it to elect officers and determine its own Rules of Procedure, and

11. ICRW, *supra* note 1, art. VI.

12. A good example can be found in the various recommendations that have been adopted with regard to the issue of scientific whaling, the legality of which has often been challenged by States to whom they were unwelcome. See Kazuo Sumi, *The Whale War between Japan and the United States: Problems and Prospects*, 17 DENV. J. INT'L L. & POL'Y 317, 336–40 (1989).

13. See *infra* text accompanying note 69.

14. IWC Res. 2006-1, *supra* note 2, ¶ 1.

15. See IWC/58/12, *supra* note 3.

Article IV(2), which requires it to publish reports of its activities.¹⁶ Yet full compliance with these obligations is evident from the record of IWC proceedings.

Presumably, therefore, the reference to "the Commission" is intended to connote the parties themselves, in a collective sense, though the particular complaints raised do not seem to relate to a breach of any specific duty created for the parties by the provisions of the treaty itself.¹⁷ There are certainly a number of other functions for which the ICRW makes provision, whether with regard to the parties or to the Commission, but these are seemingly couched in the form of *powers*. Thus, the Commission "may," for example, appoint its own Secretary and staff, and set up appropriate committees.¹⁸ No doubt the most crucial of these functions concerns the power of the Commission "to amend from time to time the provisions of the Schedule."¹⁹ It is, of course, possible to claim in appropriate circumstances that the exercise of powers is unlawful as being *ultra vires*, although it is unclear that that will necessarily involve a breach of duty as well, unless the duty in question is the implied obligation to act within one's powers.

Presumably, however, the crucial passage in the Resolution is the one found in the ninth recital of the preamble, which asserts that the "position of . . . members that are opposed to the resumption of commercial whaling on a sustainable basis irrespective of the status of whale stocks is contrary to the object and purpose" of the ICRW.²⁰ This suggests that the relevant "failure to meet . . . obligations" is seen to lie not in the breach of any specific provision, but rather in the general frustration of the Convention's objectives as a whole. This is a serious charge, and one which is unlikely to prove easy to establish in accordance with accepted legal criteria. In the first place, the very existence of a legal duty to avoid such effects has been the subject of some controversy in recent times, and one may recall in that context the view expressed in the *Military and Paramilitary Activities (Nicaragua)* case by the Japanese judge on the International Court of Justice (ICJ), Judge Shigeru Oda, that

[t]he "undermining of the whole spirit" of a treaty or "violation of the obligation not to defeat the object and purpose of" a treaty is not tantamount to specific breach of the treaty obligations . . .

16. ICRW, *supra* note 1, arts. III(2), IV(2).

17. *See id.* arts. III(5), VII, VIII(1)–(4), IX; *see also* IWC, The Schedule to the Convention, available at <http://www.iwcoffice.org/commission/schedule.htm>. In accordance with Article I(1), the Schedule forms an integral part of the Convention. Certain other obligations were imposed under the terms of Article III(5) and (6), but the force of these is long spent.

18. *See* ICRW, *supra* note 1, arts. III(3)–(4), IV(1)(a)–(c), V(1), VI.

19. *Id.* art. V.

20. IWC Res. 2006–1, *supra* note 2, pmbl. (ninth recital).

There is no suggestion [in Article 60 of the Vienna Convention on the Law of Treaties²¹ (the Vienna Convention)] that the undermining of the object and/or purpose of a treaty is an obligation implicit in the principle *pacta sunt servanda* I would like to take this opportunity of indicating my own understanding of this principle, which to my mind requires compliance with the letter of obligations subscribed to, and not necessarily the avoidance of conduct not expressly precluded by the terms of the treaty.²²

Even though this view would seem ultimately to have been rejected by the Court as a whole, the problem undeniably remains of determining precisely what constitutes the “object and purpose of the treaty” in any given case. For, although this may commonly be supposed to be obvious, experience suggests that this impression is extremely deceptive, and that the concept of object-and-purpose is, in fact, a surprisingly elusive one. As Judges Guerrero, McNair, Read, and Hsu Mo observed in their joint opinion in the *Reservations to the Genocide Convention* case,

[w]hat is the object and purpose of the Genocide Convention? To repress genocide? Of course: but is it more than that? Does it contain any or all of the enforcement articles of the Convention? That is the heart of the matter.²³

Finally, even if the object and purpose can be established with any certainty in a given case, there is the further complex question of whether, and to what extent, it can be said to have been undermined or defeated as a consequence of particular actions. In the *Nicaragua* case, the majority of the Court, having decided that there was indeed a general duty to refrain from defeating the object and purpose of a treaty, felt bound to recognize the difficulty in determining when that duty had been violated.²⁴ In the case of a treaty of friendship, for example, it was necessary to distinguish between the broad category of acts which were unfriendly in a generalized sense, and those that related to the specific fields in which friendship was addressed in the treaty itself. Even then, distinctions would have to be drawn between “acts *calculated to deprive* the treaty of its object and purpose,” which would give rise to legal

21. Vienna Convention on the Law of Treaties art. 60, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

22. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 75 (June 27) (separate opinion of Judge Oda).

23. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 24 (May 28).

24. See generally *Military and Paramilitary Activities*, 1986 I.C.J. at 14.

liability on this basis, and those "less flagrantly in contradiction with the purpose of the treaty," which apparently would not.²⁵

These observations strongly suggest that there are ample grounds on which governments may, in perfect good faith, disagree over the correct conclusions to be drawn at each and every one of the various states of the argument raised by the "normalization" resolution. In the case of the ICRW, indeed, the question of how it is properly to be interpreted is a matter of considerable legal complexity. In such circumstances, baldly to assert, without the support of detailed legal analysis, that one particular interpretation is correct and that any contrasting interpretation is manifestly advanced in bad faith simply invites reciprocation by the opposing camp.

Regrettably, the drafting of the normalization documents themselves shows every sign of perpetuating this cycle. Thus, Document 58/12, while calling for the exercise of good faith in the implementation and reorienting of the ICRW, seems itself to fall short of acceptable standards in that regard.²⁶ This is particularly evident in its characterization of the arguments of those who oppose the resumption of commercial whaling as essentially "emotional" in character.²⁷ In reality, no one who has made a genuine attempt to engage with the evolution of this debate could fail to be aware of the broad array of serious arguments—whether legal, ethical, cultural, or economic in character—which have been deployed in support of continuation of the moratorium. Whether these are ultimately found convincing or not, their essentially rational character can scarcely be doubted. Consequently, this description can only be regarded as a calculated attempt at denigration of the views of those with whom the pro-whaling lobby is demonstrably obliged to enter into meaningful and constructive negotiations. Naturally enough, prohibitionist arguments in relation to whaling may for many people be underpinned by emotional considerations of one sort or another, but precisely the same could be said of attachments to the rule of law, to national sovereignty, to the avoidance of human suffering, or to the maintenance of cultural traditions. Indeed, almost all legal and moral norms are likely to find reflection in the emotions at some level, yet it would be surprising to

25. See *id.* at 270–82 (emphasis added).

26. See IWC/58/12, *supra* note 3.

27. The opening paragraph of the document asserts that the IWC "has become a mere stage for emotional and political conflicts," IWC/58/12, *supra* note 3, ¶ 1, while IWC Resolution 2006-1 deprecates the displacement, "for emotional reasons," of the exploitation of whales from globally accepted norms of resource management, IWC Res. 2006–1, *supra* note 2, pmb. (first recital). See also Sumi, *supra* note 12, at 347 (noting that "[i]t seems that the strongest anti-whaling sentiments are founded on emotions rather than science and logic").

find expressions of concern for national sovereignty or human rights dismissed on that account as purely “emotional” responses.

In any event, even if arguments against commercial whaling were exclusively emotional in character, that could hardly be a ground for complaint for any State that had invoked the Universal Declaration on Cultural Diversity, as Japan and its supporters have done, since culture is defined for the purposes of that very instrument as “the set of distinctive spiritual, material, intellectual, and *emotional* features of society or a social group.”²⁸ Under Article 3, cultural diversity is seen as “a means to achieve a more satisfactory intellectual, *emotional*, moral, and spiritual existence.”²⁹ Self-evidently, demanding respect for cultural diversity—which embraces, *inter alia*, tolerance of a plurality of emotional values—while at the same time dismissing the values of others on the grounds that they are purely emotional, is not a position that anyone could expect to defend without some sacrifice of his or her own moral and intellectual reputation. Accordingly, the whole argument about emotion is probably best put quietly to one side as an isolated and regrettable aberration.

A preferable approach would surely be to break free from the cycle of recrimination over past conduct, and to embark instead on a process of constructive dialogue whereby the object-and-purpose of the ICRW may be identified and elaborated in a more sophisticated fashion for the future. It would, of course, be naïve in the extreme to believe that this process could possibly eliminate all differences of perspective, but it might at least serve to narrow the gulf between them, or create a better understanding of alternative viewpoints, and thereby pave the way for some more satisfactory accommodation of interests for the future. Ideally, that would have been the purpose of the inter-sessional meeting proposed in Document 58/12, but it is a further indication of the dysfunctional state of the organization that this seems to have produced a characteristically polarized response.³⁰ It is surely the case that all parties would wish to “respect the ICRW,” “act in accordance with its provi-

28. U.N. Educ., Scientific & Cultural Org. [UNESCO], Universal Declaration on Cultural Diversity pmb., Nov. 2, 2001, 41 I.L.M. 57 [hereinafter UNESCO Universal Declaration on Cultural Diversity] (emphasis added).

29. *Id.* at 59.

30. The meeting, which was not convened under IWC auspices, was not attended by most of the anti-whaling delegations. Additional meetings were organized in New York by the Pew Foundation and in Buenos Aires by certain Latin American countries. See Symposium on the State of Conservation of Whales in the 21st Century, Apr. 12–13, 2007, New York, *Chair's Summary Report*, IWC/59/11 (Apr. 2007), available at http://www.iwcoffice.org/_documents/commission/future/IWC-M08-INFO3.pdf (providing reports of their deliberations); The Second Pew Whale Symposium, Tokyo, Jan. 30–31, 2008, *Declaration by Argentina and the Netherlands*, IWC/59/28 (Feb. 2008), available at http://www.iwcoffice.org/_documents/commission/future/IWC-M08-INFO9.pdf (same).

sions,” and “implement it in a responsible manner,”³¹ but this is certain to require that much closer attention be paid to the complexities of the legal issues involved than hitherto appears to have been the case. Obviously, the treatment of such questions in a brief position paper like Document 58/12 itself can barely be expected even to scratch the surface.

Accordingly, if there is to be any question of getting the organization “back on track,”³² as the Japanese government proposes, a renewed focus on legal interpretation will surely be required. To pursue the railway analogy further, this process will entail reviewing the entire journey from its origins, but with a view to avoiding, rather than reenacting, the missed connections of the past. And, since the journey commenced so many years ago, in a completely different era, the very means of transportation may require an overhaul. Indeed, as so many railway operations have already discovered, contemporary expectations demand a fully effective process of integration with other transport systems, and even, perhaps, the modification of the old narrow gauge that was originally employed for the track.

Happily, there are some signs of recognition of these points in Resolution 2006-1, which looks beyond the ICRW itself to embrace “other relevant” principles of international law, including a number which have emerged or been the subject of refinement in the decades since the ICRW was drafted—respect for cultural diversity, the fundamental principles of sustainable utilization and the conservation of biological diversity, and the need to implement an “ecosystem” approach (which is seen by Resolution 2006-1 to require redirection of the focus of regulation to incorporate considerations which almost certainly were not in the minds of those who drafted and negotiated the ICRW).³³ This suggests that the proponents of “normalization” are fully cognizant and supportive of the need to ensure the application of the ICRW in full light of current circumstances and legal requirements. Some encouragement may possibly also be drawn from the conclusions of the Normalization Conference itself to establish Working Groups on, *inter alia*, the Building of Trust and Consensus and the Interpretation of the ICRW.³⁴ Consequently, the task can be approached with a degree of optimism, if not outright confidence. It must begin with an identification of the specific norms of which account must be taken as part of the implementation process.

31. See IWC/58/12, *supra* note 3.

32. *Id.*

33. That is, the taking of whales not for direct consumption, but as a form of “culling,” in order to avoid adverse impacts on the fish resources of the oceans.

34. See Conference for the Normalization of the International Whaling Commission, Tokyo, Feb. 13–15, 2007, IWC/59/7 (Feb. 2007).

II. THE IDENTIFICATION OF RELEVANT NORMS

This task of identifying the full range of norms that are relevant to the process of “normalization” referred to in Resolution 2006-1 is by no means as simple as may be supposed. As a preliminary step, it is important to recall that legal norms may be created by means of a number of distinct law-generating processes.

A. Sources of Legal Norms

The principal sources of international obligations are conveniently catalogued in Article 38(1) of the Statute of the International Court of Justice,³⁵ which provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.³⁶

The essential nature and significance of these various mechanisms are too well known to require detailed explanation, and it will be sufficient to emphasize here only those aspects which would otherwise be in danger of being overlooked, or are of particular significance to the present controversy.

1. The Principal Formal Sources

Foremost amongst the principal formal sources are treaties and international custom, unquestionably the most prominent and well understood mechanisms for the creation of international norms of conduct. In the modern context, treaties represent perhaps the most prolific

35. See MALCOM SHAW, *INTERNATIONAL LAW* (5th ed. 2003) (offering a general discussion); see also GEORG SCHWARZENBERGER, *1 INTERNATIONAL LAW* 26–27 (3d ed. 1957), reprinted in *CASES AND MATERIALS ON INTERNATIONAL LAW* 18–19 (David Harris ed., 6th ed. 2004) (1973). See generally G.J.H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* (1983) (detailing the main sources of international law).

36. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 3 Bevans 1179.

and versatile source, serving virtually as a form of "substitute legislation,"³⁷ while custom provides a less flexible and sophisticated, but nonetheless time-honored, device for the generation of legal norms, based on the practice of States as actuated by the appropriate psychological motivation.³⁸ These two elements interact in complex fashion, in the sense that treaties may codify existing customary norms, crystallize emerging norms, or form the historical source of customs which evolve subsequently,³⁹ while custom may modify or supplement treaty arrangements, or in some cases even nullify them or bring about their termination.⁴⁰

Of particular importance for the purposes of the present study will be the practice of States insofar as it bears on the interpretation of the ICRW, since this represents the focus of the normalization proposal. The question of what constitutes state practice for such purposes has not remained entirely free of controversy, but Michael Akehurst's assertion that it "covers any act or statements by a State from which views about customary law may be inferred"⁴¹ can probably be taken to represent an accurate statement of the law.⁴² On the other hand, it should also be noted that "not all elements of practice are equal in weight and the value to be given to such conduct will depend on its nature and provenance."⁴³ In relation to statements in particular, one important factor concerns the extent to which they reflect an objective, disinterested, and dispassionate view of the law, as opposed to assertions of a political character, especially those that represent attempts to protect or advance a State's own position in an ongoing dispute. This notion of weighting is reflected, for example, in the views of the arbitrator in *Aguilar-Amory and Royal Bank of Canada (Tinoco Arbitration)* regarding the significance, for the

37. SHAW, *supra* note 35, at 89.

38. This is the element known as *opinio juris*, which is a sense of legal obligation, or, in the case of a permissive rule, entitlement. *See id.* at 80–84.

39. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 38–39 (Feb. 20).

40. Notably, in the case of customary *jus cogens* principles. *See generally* NANCY KONTOU, *THE TERMINATION AND REVISION OF TREATIES IN LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW* (1994) (detailing the problem of a rule of customary law conflicting with an existing treaty provision).

41. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 2–3 (1977).

42. SHAW, *supra* note 35, at 80 (quoting Akehurst, *supra* note 41, at 2–3). Some scholars argue that mere claims—as opposed to actual enforcement action—cannot amount to state practice. *See* ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 50–51, 88 (1971). However, this appears to be a minority view. *See* Akehurst, *supra* note 41, at 1–2; SHAW, *supra* note 35, at 79; H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 58 (1972).

43. SHAW, *supra* note 35, at 80.

purpose of identifying the sovereign government of a country, of recognition by other States:

The non-recognition by other nations of a government claiming to be a national personality is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned.⁴⁴

Exactly the same considerations underlie the concept of the *critical date*, commonly presented as an aspect of the law governing territorial acquisition, but perhaps more accurately understood as a rule of evidence designed to exclude from the tribunal's purview certain self-serving pronouncements of the parties to litigation. As the International Court of Justice explained in *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, it was unable to

take into consideration acts having taken place after the date on which the dispute between the parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the position of the Party which relies on them.⁴⁵

This led to the marginalization of evidence relating to activities on the part of the litigant States during a full thirty years prior to the institution of the claim, in view of its compromised quality. Although this approach is unlikely to be applied in its full rigor beyond the context of a bilateral territorial dispute, the tendency to give greater weight to disinterested, and guile-free pronouncements is of quite general application.

2. General Principles of Law

More easily overlooked in the quest for relevant legal norms are the "general principles of law recognized by civilized nations" referred to in

44. *Aguilar-Amory and Royal Bank of Canada (Gr. Brit. v. Costa Rica)*, 1 R. Int'l Arb. Awards 369, 381 (1923). The arbitrator was W.H. Taft, Chief Justice of the U.S. Supreme Court.

45. *Sovereignty over Palau Litigan and Palau Sipadan (Indon. v. Malay.)*, 2002 I.C.J. 625, ¶ 135 (Dec. 17); *see also Argentina/Chile Frontier Case [The Palena Case] (Chile v. Arg.)*, 38 I.L.R. 10, 79–80 (1966).

Article 38(1)(c) of the ICJ Statute.⁴⁶ The underlying idea here is that there are certain axioms that are encountered in every legal system (some of them, indeed, as elements indispensable to its functioning) and which may, accordingly, be treated as forming part of international law also. Such principles come in various guises. Whereas custom and treaties are generally concerned with specifying particular rules of conduct,⁴⁷ this is not necessarily the case with general principles, which, as exemplified by such concepts as *reciprocity* or *proportionality*, often function as meta-principles,⁴⁸ shaping and amplifying the content of more fully elaborated legal norms. Beyond that, general principles embrace also "the fundamental legal concepts of which the legal norms are composed such as person, right, duty, property, juristic act, contract, tort, succession, etc."⁴⁹ At that level, they represent basic "juridical truths"⁵⁰ which are commonly presupposed by those engaged in the generation of specific norms through treaty or custom.

It has therefore been suggested that, as a matter of legal theory, general principles precede the other sources and should in that sense be seen as the primary normative category.⁵¹ While this proposition is open to debate, it is clear that even those who prefer to downplay the importance of general principles can scarcely deny their role as a *supplementary* source of law, since there are many areas into which treaties and custom tend not to intrude (particularly those which govern aspects of the judicial, as opposed to the political, process), and the need to avoid any instance of *non liquet* is well appreciated.⁵² At the very least, therefore, Article 38(1)(c) authorizes recourse to principles of the kind that would be recognized by jurists everywhere, regardless of their personal legal background, in order to fill any *lacunae* that might otherwise exist. There can be no doubt of the relevance for present purposes of general

46. See generally BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953); WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 188–210 (1964); Humphrey Waldock, *General Course on Public International Law*, 1962–II *RECUEIL DES COURS* 54, 54–69.

47. But see, e.g., Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 195 (specifying the criteria of statehood in international law).

48. Cf. Vaughn Lowe, *Sustainable Development and Unsustainable Arguments*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT* 19 (Alan Boyle & David Freestone eds., 1999) (arguing that sustainable development is a contestable concept that modifies established legal norms).

49. *South West Africa, Second Phase* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 295 (July 18) (separate opinion of Judge Tanaka).

50. *Id.*

51. *Id.*

52. See TASLIM O. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 14 (1983). See generally *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8) (arguing that principles of international humanitarian law apply to nuclear weapons).

principles of law in the eyes of the proponents of normalization, because the principle of good faith, on which the Resolution 2006-1 and Document 58/12 heavily rely, is itself a conspicuous example of a norm deriving from this source.⁵³

Since the significance of general principles is not infrequently misunderstood or overlooked entirely by those less familiar with the international legal system, it may be helpful to recapitulate briefly the process by which they are to be identified. Aside from the general conceptions of the *international* legal order (such as good faith, reciprocity, and proportionality), which have been mentioned above, general principles of law may also be gleaned from *domestic* legal systems. In view of the very considerable number of such systems which currently exist in the world, the quest for principles common to all of them might seem to demand a research effort which could only be described as prohibitive, but the approach to this problem routinely adopted by international courts and tribunals has reflected a recognition that these systems can be grouped into several major families—most notably, the common law, civil law, and Islamic law systems⁵⁴—and judges have tended to search for evidence of the principles in question at that level of generality,⁵⁵ rather than attempting to conduct an exhaustive survey of some 200 national legal orders.

Considerable enlightenment as to the nature and role of general principles of law in the modern international legal order can be gained from a sequence of individual opinions delivered over the course of time in the World Court, and in particular that of the Japanese judge, Judge Tanaka, in the *South West Africa* case,⁵⁶ which represents arguably the most comprehensive judicial treatment of this question in the modern era. Amongst the key points that Judge Tanaka made were the following. First, there was no inherent limitation on the subject-matter which fell within this category of norms: subject only to their relevance to the con-

53. See *infra* Part II.B.1.

54. See generally RENÉ DAVID & JOHN BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (John Brierly trans., 2d ed. 1978); H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2000).

55. See Waldock, *supra* note 46.

56. *South West Africa*, 1966 I.C.J. at 248, 294–301 (separate opinion of Judge Tanaka). It should be noted that, while this is technically characterized as a dissenting opinion, its value and authority regarding the issues relevant to the present discussion are in no way diminished on that account. This conclusion rests on the fact that the issue on which the Court was divided concerned whether the claims submitted by Ethiopia and Liberia should be entertained by the Court at all. Since the majority thought that these claims should not be entertained, only the minority opinions had occasion to explore the substantive principles of law which were applicable, and the sources from which they derived. Further, the majority decision on the admissibility point provoked intense controversy and was largely rejected by the international community.

trov­ersy in ques­tion, gen­eral prin­ciples might legiti­mately be derived from any branch of law, "includ­ing mun­i­cipal law, pub­lic law, con­sti­tu­tional and ad­min­is­tra­tive law, pri­vate law, com­mer­cial law, sub­stan­tive and pro­ce­dural law, etc."⁵⁷ Sec­ondly, how­ever, the analo­gies to be drawn from such prin­ciples should not be made mechani­cally, but advisedly: in par­ticu­lar, the em­pha­sis should be placed on the broad flavor of the prin­ciple, rather than the in­tri­cate de­tail.⁵⁸ Thirdly, al­though this cat­e­gory of norms, like any other, de­pends on con­sent and recog­ni­tion by the in­ter­na­tional com­munity, "this recog­ni­tion is of a very elastic na­ture" and does not re­quire to be ex­pressed through such for­mal of­fi­cial mech­an­isms as leg­isla­tive acts.⁵⁹ Nor is con­sent re­quired on an in­di­vid­ual basis, so that "States which do not recog­nize [the] prin­ciple or even deny its val­idity are never­the­less sub­ject to its rule."⁶⁰ He there­fore saw Ar­ti­cle 38(1)(c), if not as an an­ti­dote, at least as a partial pal­lia­tive to the con­straints of po­sitiv­ism, which are such that, with­out re­course to cer­tain so­ci­etal norms of a fun­damental and uni­ver­sal char­acter, the re­mit of in­ter­na­tional law would in­evitably be re­stricted to those mat­ters which formed the daily diet of foreign of­fices and sim­ilar gov­ern­men­tal agencies.⁶¹ This would scarcely have been con­ducive to such crucial global ob­jec­tives as, for ex­am­ple, the pro­tec­tion of hu­man rights (with which the *South West Africa* case was it­self con­cerned), at least if the gov­ern­men­tal prac­tices of the pre-war era were under the spot­light. It was for this re­ason that gen­eral prin­ciples of law were deemed es­pe­cially re­levant to is­sues of a hu­man­i­tar­ian char­acter, and in­deed all those which touched "the con­science of man­kind" as a whole.⁶² In a very sim­ilar vein, Judge Weeraman­try in the more re­cent *Case Con­cerning the Gab­číkovo-Nagymaros Project (Gab­číkovo-Nagymaros Project)*⁶³ treated gen­eral prin­ciples of law as in­cor­porating cer­tain "pris­tine and uni­ver­sal val­ues" which had been em­braced by all major cul­tures and civ­i­liza­tions

57. *Id.*

58. *See* *Diversion of Water from Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) 70, 76–77 (June 28) (separate opinion of Judge Hudson); *International Status of South-West Africa*, 1950 I.C.J. 128, 148 (July 11) (separate opinion of Sir Arnold McNair).

59. *South West Africa*, 1966 I.C.J. at 297 (separate opinion of Judge Tanaka).

60. *Id.* at 296; *see also* *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)* 1997 I.C.J. 7, 88–119, 95 (Sept. 25) (separate opinion of Judge Weeramantry).

61. This point was also reflected in the opinion of Judge Weeramantry which characterized general principles as a vehicle for overcoming the inherent formalism of the law. *Id.* at 108–10.

62. Note further that in *Corfu Channel*, "elementary considerations of humanity" were listed amongst a number of "general and well-recognized principles" in accordance with which international obligations might be generated. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9).

63. *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. at 108–09.

throughout history.⁶⁴ Thus, the rather anachronistic⁶⁵ and supercilious ring of the phrase “general principles of law recognized by *civilized nations*” has been discreetly re-tuned, by transferring the epithet “civilized” to the principles themselves rather than applying it to the nations which espouse them, at least in circumstances in which the interests of international justice so require.

3. Material Sources

Treaties, custom, and general principles accordingly represent the formal sources of international law. It will be remembered, however, that Article 38(1) of the ICJ Statute refers also to judicial decisions and the writings of leading publicists as “subsidiary means for the determination of rules of law.”⁶⁶ These, then, are the material sources of the system, which do not themselves create law, but provide potentially authoritative evidence of the norms generated by the range of formal mechanisms described above. At a practical level, they are likely to represent the first resort of those who wish to be informed of the nature and scope of relevant principles, and frequent reference has, indeed, already been made to examples of such materials in the course of this study. Although it is natural to treat the judgments and opinions of the World Court itself as possessing special authority amongst judicial decisions generally, the permissibility of reference to the determinations of other international courts and tribunals, and indeed of those established within national legal systems, is beyond dispute.⁶⁷

4. “Soft” Law

In addition to these traditional sources, it will also be necessary to have regard to one further category of normative standards—namely that diverse assortment of principles known collectively as “soft” law.⁶⁸ Soft law is characteristically expressed in written form, and is manifest in the

64. *Id.*

65. The explanation of this regrettable choice of terminology is largely historical, the phrase having been imported unchanged from the Statute of the Permanent Court of International Justice, which was drafted in 1920.

66. Statute of the International Court of Justice, *supra* note 36, art. 38(1).

67. Even the World Court itself occasionally refers to the jurisprudence of other tribunals. *See, e.g.*, Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 67 (June 14); Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 351, 563 (Sept. 11).

68. *See generally* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000); Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?*, 11 NETH. Y.B. INT’L L. 65 (1980); Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850 (1989).

vast array of declarations, resolutions, recommendations, charters, and codes of practice that are generated by the processes of international intercourse. It differs somewhat from the formal sources discussed above in the sense that its norms do not operate as binding legal rules, yet at the same time they are far from being devoid of legal significance. In many areas of international relations, it plays a crucial role in the supplementation, amplification, and development of hard law norms and the implementation of legal policy. At the very least, by virtue of the formality and intensity of focus surrounding their creation, soft law principles exert a strong persuasive influence on States and other legal actors; in addition, it may be possible to argue that they commonly import at least one legally binding element, namely the duty to give serious consideration to their implementation.⁶⁹ Once again, it is clear that the proponents of normalization accept the legitimacy, indeed necessity, of resort to soft law in the application of this process to the ICRW, since they refer explicitly to the importance in that context of the 2001 Universal Declaration on Cultural Diversity, which is not a legally binding instrument. In addition, Resolution 2006-1 itself, which is designed to launch the process, is plainly of soft law status. There is no doubt that they are correct to adopt this stance, though naturally the norms in this category cannot, in the event of incompatibility, prevail over rules of legally binding effect.

Having identified the various categories of legal sources from which relevant norms might derive, it is necessary to consider the potential range and scope of those norms, and the subject-matter to which they might relate.

B. *Subject-Matter of Relevant Norms*

For convenience of exposition, and without seeking to place particular reliance on the wider analytical significance of these distinctions, it will be helpful to divide the relevant norms into three broad categories: foundational, substantive, and adjectival. Foundational norms are those which might be said to underpin the structure of the international legal system generally, such as those governing international personality and the sovereign equality of States. The key

69. This would seem to represent the minimal implication of the general duty of good faith in relation to soft law, to which it is commonly treated as applicable. See Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999). Some commentators are inclined to put the case more strongly, suggesting that soft law comprises "normative commitments, in which the actors involved intended to make genuine efforts to comply." Dinah Shelton, *Commitment and Compliance: What Role for International Soft Law?*, Presentation Before Carnegie Endowment (Nov. 22, 1999), available at <http://www.carnegieendowment.org/events/index.cfm?fa=event/Detail&id=478&>.

norm in this category that requires exploration for present purposes is the *principle of good faith*. By substantive norms is meant those principles that bear directly on the conduct of States and determine their respective rights and obligations at the primary level—for example, the rules governing the exploitation and use of natural resources, the exercise of maritime jurisdiction, and the promotion of cultural diversity. Finally, the expression “adjectival norms” refers to those secondary principles which govern the operation and determine the implications of the primary, substantive norms—in particular, those concerning state responsibility, the peaceful settlement of disputes, the law of treaties, and the law of international institutions. It will be helpful for present purposes, however, to leave the discussion of substantive norms until last.

1. Foundational Norms—The Principle of Good Faith

The foundational character of the good faith principle is beyond dispute,⁷⁰ since it has been in evidence since the very dawn of the modern legal system and has subsequently achieved universal recognition;⁷¹ indeed, it provides the underlying justification for treating the solemnly declared commitments of States as legally binding in the first place.⁷² Accordingly, it pervades all aspects of the processes whereby such commitments are to be interpreted and applied,⁷³ and has also attracted specific formal endorsement in the field of sustainable development,⁷⁴ into which treaties concerned with the conservation and management of natural resources must plainly be classified. Although it is undoubtedly a normative principle,⁷⁵ good faith is “not in itself a source of obligation

70. See generally SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES, 1945–1986 ch. 3 (1989); Elisabeth Zoller, *La Bonne Foi en Droit International Public*, 28 REVUE GÉNÉRALE DE DROIT INT’L PUB. 1 (1977) (Fr.).

71. The preamble to the 1969 Vienna Convention on the Law of Treaties so describes it, along with the principle of free consent and the *pacta sunt servanda* rule. Vienna Convention on the Law of Treaties, *supra* note 21, pmbl. It was, accordingly, one of the seven fundamental principles of international law identified in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (Oct. 24, 1970).

72. CHENG, *supra* note 46, at 105; Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20).

73. See U.N. Charter art. 2, para. 2; Vienna Convention on the Law of Treaties, *supra* note 21, pmbl., arts. 26, 31(1); see also *id.* arts. 46, para. 2, 69, para. 2(b); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 20, 1986, 25 I.L.M. 543.

74. U.N. Conference on Env’t and Dev. (UNCED), June 3–14, 1992, *Rio Declaration on Environment and Development*, princs. 19, 27, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992).

75. ROSENNE, *supra* note 70, at 135.

where none would otherwise exist."⁷⁶ Rather, it represents a general standard against which action taken in pursuance of obligations generated by other means may be measured.⁷⁷

Perhaps surprisingly, the precise implications of the concept have been rather little explored in international jurisprudence,⁷⁸ though some points are clear. At the very least, it requires that the interpretation and implementation of treaty commitments be undertaken honestly and without duplicity.⁷⁹ While mere negligence does not of itself amount to bad faith, attempts to excuse impugned conduct on the grounds of lack of knowledge or expertise may appear less persuasive in the mouths of States than of private actors. Perhaps for that reason, good faith in international relations has on occasion been linked, or even assimilated, to reasonable or equitable behavior.⁸⁰ This view, indeed, appears to have prevailed among IWC members themselves, since Resolution 2001-1 asserts that good faith "requires fairness, reasonableness, integrity and honesty in international behavior."⁸¹

From any viewpoint, no State may seek to take advantage of its own wrong;⁸² knowingly disregard agreed limitations on its own powers;⁸³ proffer conflicting interpretations of a legal rule to suit the vagaries of its own convenience;⁸⁴ seek to take the benefit of a particular obligation without being prepared to shoulder any concomitant burden,⁸⁵ or demand

76. Border and Transborder Armed Actions (Nicar. v Hond.), 1988 I.C.J. 69, 105 (Dec. 20).

77. See, e.g., Geoffrey Marston, *United Kingdom Materials in International Law*, 43 BRIT. Y.B. INT'L L. 615, 707-08 (1992).

78. For an overview of the earlier case law, see ROSENNE, *supra* note 70, at 166-73. The International Law Commission deliberately decided to leave the term undefined. See *Summary Records of the 772d Meeting*, [1964] 1 Y.B. INT'L L. COMM'N 326, U.N. Doc. A/CN.4/SER.A/1964.

79. *Sapphire Int'l Petroleum Ltd. v. Nat'l Iranian Oil Co.*, 35 I.L.R. 136, 137 (1963) (Cavin, Arb.).

80. See, e.g., *Fourth Report on the Law of Treaties*, [1959] 2 Y.B. INT'L L. COMM'N 37, U.N. Doc. A/CN.4/120. For examples from case law, see *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 79 (Sept. 29); *Delimitation of Maritime Boundary in Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 305 (Oct. 12); *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27); *Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion*, 1948 I.C.J. 57, 63 (May 28); *N. Atl. Coast Fisheries* (U.K. v. U.S.), 11 R. Int'l Arb. Awards 167, 186-88 (Perm. Ct. Arb. 1910).

81. IWC, *Resolution on Transparency Within the International Whaling Commission*, IWC Res. 2001-1 (2001).

82. *Factory at Chorzow* (F.R.G. v. Pol.), 1927 P.C.I.J. 9, 31 (July 26).

83. *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 392 (June 27).

84. *Allegans contraria non audiendus est* is the principle that also formed the basis of what became Article 45 of the Vienna Convention. See *1966 Draft Articles on the Law of Treaties*, [1966] 2 Y.B. OF INT'L L. COMM'N 172, 239, U.N. Doc. A/6309/Rev.1, and accompanying commentary [hereinafter ILC Commentary].

85. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 21, art. 36(2).

of another state performance of a shared obligation unless it is itself willing to perform.⁸⁶ Good faith may also on occasion preclude reliance on an obvious error by another party,⁸⁷ or on the strict letter of a State's entitlement where that would amount to an abuse of right.⁸⁸ In many cases, the exercise of rights and responsibilities pursuant to international agreements involves the ongoing maintenance of dialogue and consultations with other States, and in such situations it is established that they "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists on its own position without contemplating any modification of it."⁸⁹ This would seem to be a point which is of particular relevance to the normalization debate.

Imputations of lack of good faith in international affairs are not to be made or accepted lightly, and any State that advances such an allegation would be well advised to ensure that its own conduct is beyond reproach in that regard.

2. Adjectival Norms

As noted above, a number of important principles falling within the category of adjectival norms are of fundamental importance in the present context.

a. Peaceful Settlement of Disputes

It is clear that the issue of normalization has arisen out of a profound and long-standing disagreement among ICRW parties regarding the proper interpretation and implementation of the treaty in question. It is axiomatic that all such disputes are to be resolved peacefully, and

86. *Diversion of Water from Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) 70, 76–77 (June 28).

87. This is as in Article 46 of the Vienna Convention. *See* ILC Commentary, *supra* note 84, at 240.

88. *See* ROSENNE, *supra* note 70, at 140; G.D.S. Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 46 BRIT. Y.B. INT'L L. 322, 333–34 (1972–73); *see also* United Nations Convention on the Law of the Sea art. 300, Dec. 10, 1982, 1833 U.N.T.S. 3, 397 [hereinafter UNCLOS] (offering a specific example of the international community's recognition of the concept of abuse of rights); *see also* United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stock, July 24–Aug. 4, 1995, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, art. 34, U.N. Doc A/CONF.164/37 (Sept. 8, 1995) [hereinafter *Straddling Stocks Agreement*].

89. *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 47 (Feb. 20); *see also* *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 264–67 (July 8) (holding that the parties to the Treaty on the Non-Proliferation of Nuclear Weapons have an obligation to pursue in good faith negotiations that will lead to nuclear disarmament).

through resort to the various mechanisms that international law has at its disposal, which include "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means. . . ." ⁹⁰ The selection from amongst these mechanisms rests with the States concerned and depends on their assessment of which mechanism is likely to prove most appropriate, given the nature and circumstances of the dispute. In any situation in which deeply entrenched attitudes have developed over the course of time, it is prudent always to be mindful of the advantages that may lie in resorting to mechanisms that offer the prospect of objective, dispassionate input, or even the possibility of full-scale, third-party determination of the dispute.

b. The Law of Treaties

Since the ICRW is a legally binding, written agreement among States, all aspects of its conclusion, application, performance, interpretation, amendment, termination, and suspension are governed by the law of treaties, which for almost all practical purposes may be regarded as those principles which are elaborated in the Vienna Convention. ⁹¹ It is no obstacle to this conclusion that the ICRW might represent the constituent instrument of an international organization (the IWC), since the Vienna Convention expressly provides that the regime thereby established extends in principle to treaties of this type. ⁹² The fact that the ICRW was adopted almost thirty-five years before this regime became operative ⁹³ precludes the applicability of the Vienna Convention in a formal sense, since the latter does not have retrospective effect. ⁹⁴ Nonetheless, the lack of retrospectivity makes relatively little practical difference since the 1969 instrument represents, in large part, a codification of previously established customary principles. ⁹⁵ Furthermore, following over a quarter

90. See G.A. Res. 2625, *supra* note 71.

91. Vienna Convention on the Law of Treaties, *supra* note 21; see, e.g., ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2000) (offering a general discussion of this area of the law); see also SUZANNE BASTID, LES TRAITÉS DANS LA VIE INTERNATIONALE; CONCLUSION ET EFFETS (Economica 1985); TASLIM O. ELIAS, THE MODERN LAW OF TREATIES (1974); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW (1996); ARNOLD D. MCNAIR, THE LAW OF TREATIES (2d ed. 1961); PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES (2d rev. ed. 1995); ROSENNE, *supra* note 70; IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed. 1984).

92. Vienna Convention on the Law of Treaties, *supra* note 21, art. 5; see *infra* Part II.B.2.c.

93. The Vienna Convention on the Law of Treaties (Vienna Convention) did not enter into force until January 27, 1980. Vienna Convention on the Law of Treaties, *supra* note 21.

94. *Id.* art. 4.

95. Article 4 excludes only the formal retrospective effect of the Vienna Convention. *Id.* The possibility of applying any of the Vienna Convention's rules to which treaties would be

of a century of actual operation of the Vienna Convention, formal acceptance by approximately 100 States,⁹⁶ routine implementation in inter-governmental relations not only by those States but by many others,⁹⁷ and recognition and application in innumerable cases by many courts and tribunals, the Vienna Convention may now effectively be regarded as the prime material source of contemporary custom, though possibly with the occasional slight gloss here and there to take account of developments in state practice since 1969. The rules it contains should therefore be treated as *prima facie* applicable to any legal problem concerning the adoption, interpretation, implementation, or termination of treaties, except to the extent that the contrary can be demonstrated, either in relation to the particular problem in question or with respect to the particular States involved.

Of all the many rules enunciated in the Vienna Convention, some are especially pertinent to the issues raised by Document 58/12. Article 26 of the Vienna Convention confirms the basic principle that every treaty must be performed in good faith, while the approved approach to treaty interpretation is set out in Articles 31 and 32.⁹⁸ These particular provisions are those that have most frequently been confirmed to reflect pre-existing customary principles, and they have regularly been applied by international courts and tribunals to treaties that (like the ICRW) were concluded long before the Vienna Convention itself entered into force.⁹⁹

subject to on some other basis, such as customary international law, is expressly preserved by the opening clause of Article 4. *Id.* This is a point which seems to have been overlooked by certain commentators. See, e.g., José Truda Palazzo, Jr., *Whose Whales? Developing Countries and the Right to use Whales by Non-Lethal Means*, 2 J. INT'L WILDLIFE L. & POL'Y 69, 70 n.6 (1999).

96. Vienna Convention on the Law of Treaties, *supra* note 21. Included among these States is Japan, a proponent of Document 58/12. IWC/58/12, *supra* note 3.

97. See AUST, *supra* note 91, at 10–11. Aust noted that

[w]hen law of treaties questions arise during negotiations . . . the rules set forth in the Convention are invariably relied upon even when the States are not parties to it. This author can recall at least three bilateral treaty negotiations when he had to respond to arguments of the other side which relied heavily on specific articles of the Convention, even though the other side had not ratified it.

Id.

98. Vienna Convention on the Law of Treaties, *supra* note 21, arts. 26, 31–32. Luckily, the ICRW was concluded only in English. ICRW, *supra* note 1, art. XI. Thus, the Vienna Convention's rules of interpretation for multilingual texts are not implicated. Vienna Convention on the Law of Treaties, *supra* note 21, art. 33.

99. See, e.g., *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045, 1059–60 (Dec. 13); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.)*, 1995 I.C.J. 6, 18 (Feb. 15); *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, 21–22 (Feb. 3); *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 14 (1975); *Beagle Channel Arb. (Arg. v. Chile)*, 52 I.L.R. 98, 124 (1977).

Before embarking on an examination of the relevant principles, however, it is important that one crucial preliminary point be understood. This is, specifically, that, while it is often asserted that the aim of interpretation is to ascertain the "intentions of the parties,"¹⁰⁰ this is only true in a highly specialized, almost figurative, sense. For any quest to discover such intentions comprehended literally would be doomed to failure from the outset, for a number of reasons.¹⁰¹ First of all, the parties to international treaties are States, and States do not in and of themselves constitute the kind of entities that are capable of entertaining intentions, which represent the cognitive attributes of natural persons. States are, of course, *represented* by natural persons for these purposes, but even within a single delegation to a given round of treaty negotiations, a considerable divergence of understandings regarding the meaning and objectives of the instrument in question may be apparent, rendering the "intentions" of the delegation as a whole an elusive commodity. Secondly, when the further fact is taken into account that it is not the intentions of any single delegation, but rather those of the various delegations taken collectively that must be identified and understood, some sense begins to dawn on the extraordinary difficulty involved in the task in hand. It follows from this focus on consensus, however, that the emphasis must inevitably be placed on *objective* appearances and *ostensible* intentions, and that the undeclared aims or secret aspirations of the parties cannot be allowed to dictate the instrument's meaning. Finally, it is readily evident to all who have studied international relations that the issues that ultimately come to form the subject-matter of disputes are all too frequently issues to which no one gave serious attention during the negotiations, or which were specifically foreseen but left unresolved in the confident expectation or vain hope that they would never arise in practice. In light of all these considerations, even the most ardent enthusiasts for the so-called "subjective" approach to interpretation have tended to recognize that "however conscientious and far-ranging the search for a common intention, there would be many and varied situations in which it could not be found."¹⁰²

Not surprisingly, however, such considerations tended to lead the International Law Commission (ILC), like the Institute of International

100. This quest is particularly associated with the so-called "subjective" or "founding fathers" approach to interpretation. See Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1 (1951) (discussing this and other main approaches); see also Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318 (1969).

101. See Jacobs, *supra* note 100, at 318–22.

102. *Id.* at 321.

Law before it, away from such an approach entirely. Rather, it was the Commission's firm view that

the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.¹⁰³

Article 31 of the Vienna Convention accordingly sets out the general rule, which is that treaties are to be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context, and in light of its object and purpose.¹⁰⁴ This confirms the fundamental importance for interpretational purposes of two factors that are heavily stressed in Document 58/12, namely good faith and the underlying objectives of the treaty. As regards those objectives, however, it is to be noted that the interpreter's task is not so much to give effect to the treaty's object and purpose, but rather *to give effect to its terms in light of that objective and purpose*.¹⁰⁵ This can be regarded as an attempt to strike a balance between the "textual" and "teleological" approaches to interpretation,¹⁰⁶ while according a degree of primacy to the former.¹⁰⁷ Part of the reason for this doctrinal preference no doubt lies in the fact that the "object and purpose" of a treaty, which features as a constituent element of a number of the rules in the Vienna Convention,¹⁰⁸ is also by no means a straightforward or easily identifiable item. Indeed, the many descriptions of this notion offered by legal commentators differ primarily in the exact degree of imprecision they attribute to it, which varies from its having "a certain vagueness about it,"¹⁰⁹ to being "rather flexible," "open-textured" or "indeterminate,"¹¹⁰ or, indeed, "virtually impossible to identify" in the case of a complex treaty.¹¹¹ It cannot even be assumed, it seems, that the con-

103. ILC Commentary, *supra* note 84, at 220.

104. Vienna Convention on the Law of Treaties, *supra* note 21, arts. 31(2), 31(4).

105. Thus, Geoffrey Marston stated, "Reference to the *object and purpose* is a secondary or ancillary process in the application of the general rule of interpretation." Marston, *supra* note 77, at 709.

106. These represent the two other principal, traditional approaches. See Fitzmaurice, *supra* note 100; Jacobs, *supra* note 100.

107. Note, however, the discussion in Part II.B.2.e, *infra*, of conduct that tends to defeat the object and purpose of the treaty entirely.

108. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 21, arts. 18, 19(c), 20(2), 31(1), 33(4), 41(1)(b)(ii), 58(1)(b)(ii), 60(3)(b).

109. FRANK HORN, RESERVATIONS AND DECLARATIONS TO MULTILATERAL TREATIES 115 (1988).

110. Jan Klabbbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FIN. Y.B. INT'L L. 138, 139-42 (1997).

111. See AUST, *supra* note 91, at 111.

cept has a uniform meaning across the various contexts in which it is employed in the Vienna Convention.¹¹² Furthermore, it has been claimed that regrettably little enlightenment can be gleaned from the existing literature or the case law on the subject,¹¹³ while a review of state practice might cause some to conclude that the "object and purpose" of a treaty means whatever States say it means.¹¹⁴ One distinguished ILC rapporteur has gone so far as to question whether multilateral treaties can truly be said to have an object and purpose of their own at all.¹¹⁵

It may be that there is an element of exaggerated pessimism in all of this, though these observations should certainly be sufficient to guard against too facile an approach to the task of identifying the object and purpose of a treaty such as the ICRW. At the heart of the difficulty lies the fact that any complex treaty is bound to have a wide range of aims, objectives, purposes, and aspirations, to each of which the parties may have attached highly divergent degrees of attention, emphasis, and commitment. Objects and purposes may be vague or specific, general or particular, immediate or long-term, dominant or subsidiary, express or implied; they may be identified in the body of the treaty text, alluded to in the recitals of the preamble, or implicit in the detail of the substantive provisions, and none of these possibilities necessarily excludes any of the others. There may well be a degree of tension, conceivably even outright incompatibility,¹¹⁶ between the various objectives. Consequently, great caution needs to be exercised before accepting at face value any claim which seeks to rely on the concept for any purpose.

How, then, is the identification of the object and purpose to be undertaken? There is little reason to dispute the view implicit in both Resolution 2006-1 and Document 58/12 that the preamble is the obvious place to start. As one eminent authority puts it:

112. Klabbers, *supra* note 110, at 148–50.

113. *Id.* at 139–44. The following observation in the joint dissenting opinion of Judges Guerrero, McNair, Read, and Hsu Mo in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, has already been noted in Part I, where they asked, "What is the 'object and purpose' of the Genocide Convention? To repress genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter." 1951 I.C.J. 15, 44 (May 28) (separate opinion of Judges Guerrero, McNair, Read, and Hsu Mo).

114. Klabbers, *supra* note 110, at 139–44.

115. See ROSENNE, *supra* note 70, at 83; *Preliminary Report on the Content, Forms and Degrees of International Responsibility*, [1980] 2 Y.B. INT'L L. COMM'N 107, 120, U.N. Doc. A/CN.4/330; see also Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123, 127 (1992).

116. Although such incompatibility is not altogether *inconceivable*, it is not lightly to be inferred, since such a conclusion would infringe the principle of effectiveness just as surely as the denial of meaning to a particular provision where some alternative interpretation is possible.

Although the objects of a treaty may be gathered from its operative clauses as a whole, the preamble is the normal place in which to embody, and the natural place in which to look for, an express or explicit general statement of the treaty's objects and purposes. Where these are stated in the preamble, the latter will, to that extent, govern the whole treaty.¹¹⁷

Given that this view is so widely accepted,¹¹⁸ it may be helpful to rehearse some basic points that must always be kept in mind in addressing this element of the treaty. The first is that there is no *requirement* that the preamble disclose anything at all regarding objectives, its only *necessary* content being an indication that what follows reflects the subject-matter of agreement amongst the parties.¹¹⁹ Nevertheless, it is customary to include some further information by way of explanation, and in some cases this is quite extensive. The Biodiversity Convention,¹²⁰ for example, contains some twenty-three recitals in all, some of which are expressed at considerable length. Inevitably, the interpretative value of some of this material may be relatively limited. One, perhaps overly cynical, view is that "the preamble is a convenient repository for the remnants of causes, large and small, which were lost during the negotiating process."¹²¹

On balance, however, it is preferable to adopt a less dismissive approach to the value of the preamble. In particular, the fact that a preamble is often described as lacking binding force should not be allowed to misrepresent its true significance. Crucially, it must be understood that any difference in terms of legal significance between the preamble and the main body of the text results not from the fact that the former is any *less important*, but only from the fact that it is *not intended to be dispositive*. For the purposes the preamble is intended to serve—typically, to provide some background detail regarding the motivations

117. Gerald C. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Points*, 33 BRIT. Y.B. INT'L L. 203, 228 (1957).

118. That is, by various courts and tribunals, including the International Court of Justice and the European Court of Human Rights. See, e.g., *Rights of Nationals of the United States of American in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176, 196; *Reservation to Convention on Prevention and Punishment of Crime of Genocide*, 1951 I.C.J. at 23; *Diversion of Water from Meuse* (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) 70, 9 (June 28); *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A), at 14, ¶ 34 (1975); see GYÖRGY HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES 106–07* (József Deacsényi trans., Akadémiai Kiadó 1973); *Jacobs*, *supra* note 100, at 336; *Klabbers*, *supra* note 110, at 155–59. The point is conceded even by Aust, who, as seen above, takes a generally skeptical view regarding the significance of the preamble. See AUST, *supra* note 91, at 337.

119. AUST, *supra* note 91, at 336.

120. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

121. AUST, *supra* note 91, at 337.

underlying the treaty's adoption and the objectives it seeks to advance—it is no less *authoritative* than any other aspect of the treaty.¹²² That being so, it may be useful to highlight the kind of features that are commonly incorporated, which fall into several categories. It is not to be expected that these features will necessarily be sharply distinguished in the drafting or presented in any logical order, and they may sometimes have to be unraveled from a jumble of inter-related clauses.

First, without wishing to cast doubt on the idea of the "object and purpose" as a unitary concept,¹²³ there is value (if only because so many treaties themselves adopt this approach) in distinguishing the ultimate *policy objectives* which the parties intended to advance from the more specific *legal purposes* that the treaty is designed to fulfill in pursuit of those objectives. In the case of the European Convention on Human Rights,¹²⁴ for example, the preamble recapitulates the political aim of the Council of Europe to achieve greater unity amongst its Member States, especially with respect to the maintenance and further realization of human rights and fundamental freedoms, but adds that the Convention itself is intended only "to take *the first steps* toward collective enforcement of *certain of the rights* stated in the Universal Declaration" of Human Rights.¹²⁵ Thus, while the legal purposes must inevitably be shaped by the underlying policy objectives, this particular Convention was evidently designed to effectuate a relatively limited advance in that direction.¹²⁶

Secondly, the stated aims in either category, legal or political, may be refined or elucidated by statements of a *narrative* or *descriptive* character, which serve to outline, for example, the particular factual circumstances which have caused the policy objectives to be formulated, or the legal situation prior to negotiation of the current instrument, which it is now seeking to develop, modify, or resolve. As to statements concerning the factual background, the Universal Declaration of Human Rights attributes its own genesis to various "barbarous acts which have

122. Gerald G. Fitzmaurice, indeed, describes it as "conclusive," and even as "binding" in that particular sense, unless contradicted elsewhere in the operative part of the text. Fitzmaurice, *supra* note 100, at 229.

123. See generally Klabbers, *supra* note 110, at 145–46. Note, however, that Article 60(3)(b) of the Vienna Convention does speak in terms of provisions "essential to the accomplishment of the object *or* purpose of the treaty." Vienna Convention on the Law of Treaties, *supra* note 21, art. 60(3)(b) (emphasis added).

124. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

125. *Id.* pmbl. (emphasis added).

126. Further advances have, of course, been achieved by a series of later protocols adding additional substantive rights.

outraged the conscience of mankind.”¹²⁷ As regards the legal antecedents, it is common to identify earlier treaties or other instruments that bear some particular significance to the project in hand, as exemplified by the reference to the Universal Declaration in the European Convention, as noted above. Where appropriate, reference may be made more specifically either to the *letter* or to the *spirit* of earlier regimes: the former is illustrated by mention of the “provisions,”¹²⁸ or “relevant provisions,”¹²⁹ or, indeed, to individually specified provisions¹³⁰ of those instruments, and the latter by invoking the “purposes” or “principles” which the treaty embodies or reflects.¹³¹ In some cases, a combination of all these techniques has been employed.¹³²

Finally, there may be some element of *commentary* or *evaluation* of the previously mentioned features, expanding on the reasons why the avowed policy objectives are judged feasible or desirable, or why the proposed convention offers an appropriate solution. In this vein, the 2000 Protocol on the Involvement of Children in Armed Conflicts¹³³ notes, *inter alia*, the overwhelming support attracted by its parent instrument, the Convention on the Rights of the Child,¹³⁴ the recent recognition of the enlistment of children below the age of fifteen as ac-

127. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (Dec. 12, 1948).

128. Note, for example, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, in which the reference is to the “provisions” of the European Convention for the Protection of Human Rights and Fundamental Freedoms. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, Nov. 26, 1987, Europ. T.S. No. 126.

129. Thus, the preamble to the 1995 Straddling Stocks Agreement begins by “[r]ecalling the relevant provisions of the United Nations Convention on the Law of the Sea of Dec. 10, 1982.” Straddling Stocks Agreement, *supra* note 88, pmbl.

130. Thus, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifically invokes Article 55 of the U.N. Charter, Article 5 of the Universal Declaration of Human Rights, and Article 7 of the International Covenant on Civil and Political Rights. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; cf. U.N. Charter art. 55; Universal Declaration of Human Rights, *supra* note 127, art. 5; International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171.

131. Most commonly, this formula is employed with regard to the U.N. Charter. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 21, pmbl.

132. Thus, the 2000 Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography begins, “in order further to achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions, especially articles 1, 11, 21, 32, 33, 34, 35 and 36” Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/RES/54/263/Annex II (Mar. 16, 2001).

133. Protocol on the Involvement of Children in Armed Conflicts G.A. Res. 54/263, Annex I, U.N. Doc. A/RES/54/263/Annex I (May 25, 2000).

134. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

tive participants in hostilities as a war crime,¹³⁵ and the conviction that a legal move to raise that age can only serve to enhance implementation of the principle that the best interests of the child represent the paramount consideration in all matters that concern them. It is only through a structured combination of analysis and synthesis of these various elements of the preamble—teleological, descriptive, and evaluative—that a clearer view of the composite object and purpose of the convention in question can be expected to emerge.

Before leaving this brief survey of interpretational rules, one further provision which is likely to prove significant in the present context should be mentioned. Article 31(3) of the Vienna Convention provides that there shall also be taken into account, together with the context,

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.¹³⁶

All three of these elements are indisputably relevant in the sense that they may be capable of shedding light on the original intentions of the parties in concluding the agreement in question. There will be a strong presumption that they have not intended, by entering into the treaty, to undermine their commitment to other legal obligations existing independently of it, and sub-paragraph (c) confirms that this is a factor to be taken into account in the interpretation process.¹³⁷ Although this provision attracted rather little attention for some time, its importance has recently been highlighted as a means of preserving "systemic integrity" in the face of growing fears regarding the fragmentation of international law,¹³⁸ a matter of sufficiently pressing concern to have been included in the work program of the International Law Commission since 2002.¹³⁹ It would seem to be of preeminent, yet hitherto largely unrecognized,

135. Rome Statute of the International Criminal Court art. 8 (xxvi), July 17, 1998, 2187 U.N.T.S. 90.

136. Vienna Convention on the Law of Treaties, *supra* note 21, art. 31(3).

137. *Id.* art. 31(3)(c).

138. See, e.g., Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INT'L & COMP. L.Q. 281 (2006); Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 280 (2005).

139. Int'l Law Comm., *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc.A/CN.4/L.702 (July 18, 2006).

importance in relation to the ICRW. Resolution 2006-1 represents something of a step forward in this regard through its recognition of the relevance of principles deriving from the Biodiversity Convention and elsewhere, though the implications are in reality far more extensive than the Resolution suggests. The question of systemic integration is therefore discussed more fully below.

As regards subsequent practice in the application of the treaty, or agreement as to how it should be interpreted or applied, these phenomena, too, may have considerable evidential value regarding the intentions of the parties *at the time the treaty was concluded*. Some judicial dicta might seem to suggest that the clarification of the parties' original intentions is the *only* legitimate function to be served by resort to such materials,¹⁴⁰ but these dicta must be read within the context of the particular treaty provisions which were under examination in the case in question, in respect of which the need for closure on lengthy and unproductive past political wranglings over territorial boundaries was paramount.¹⁴¹ More generally, it seems clear that recourse to subsequent conduct may be permissible for a wider array of purposes, which will be considered shortly.

A difficult question arising in the case of all three categories of materials specified in Article 31(3)—subsequent agreement, subsequent practice and relevant external rules—is whether these modifiers have to be applicable to *all* the parties to the treaty before they become relevant to its interpretation, or whether it will suffice that they are applicable only amongst some of their number. The Vienna Convention itself is non-committal on this point, and the matter is not addressed in the ILC's Commentary except with respect to sub-paragraph (b) (subsequent practice).¹⁴² Here, somewhat confusingly, the Commission states that its decision to delete a reference to “all” the parties from an earlier draft should not be taken to imply that the practice need not be that of the parties as a whole. The deletion was simply to avoid any misapprehension that *active* engagement of all the parties in the practice was required,

140. See, e.g., Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12, at 24 (Nov. 21) (noting that “[t]he facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court in so far as they are calculated to throw light on the intention of the Parties at the time of the conclusion of that Treaty”).

141. The Treaty of Lausanne was the peace treaty concluded with Turkey following World War I. *Id.* at 10. Article 3 was concerned with establishing the borders of its territory and, failing agreement on that question, a decisive method by which this could be determined. *Id.* at 18–19. Therefore, it was fully understandable that the Court thought it inappropriate to permit the effective reopening of the earlier negotiations considering the subsequent conduct. *Id.* at 19–22.

142. ILC Commentary, *supra* note 84, at 221–22.

since the mere acquiescence of some in the practice of others would suffice.¹⁴³

The whole question has produced much agonizing in the literature,¹⁴⁴ but it is submitted that this is to some extent misplaced. The crucial point is surely that Article 31(3) requires only that these materials “be taken into account,” and therefore everything depends on the precise purpose for which they are to be deployed, and the exact weight they are to be given, in the interpretational process. As the ILC itself pointed out in relation to subsequent practice, the value of such material “varies according as it shows the common understanding of the parties as to the meaning of the terms.”¹⁴⁵ External rules or norms that are applicable to only some of the parties to a treaty plainly cannot be treated as being in themselves *conclusive* for *all* of the parties for *all* interpretational purposes, but there are nevertheless innumerable circumstances in which they may prove capable of shedding some light on the matter. If, for example, it is claimed that a particular usage or meaning of a term contained in the instant treaty was unknown at the time the treaty was adopted, that claim may be refuted by producing an earlier treaty that used or defined the term in precisely that sense. The exact weight to be given to that evidence in relation to interpretation of the instant treaty will then obviously vary in accordance with various factors, including the proportion of the parties to the present treaty that are also bound by the former. In each case, therefore, such material should be accorded a weight commensurate with its true significance in the circumstances.

To conclude this preliminary treatment of questions of interpretation, it should also be noted that Article 32 of the Vienna Convention permits recourse to supplementary sources, including the *travaux préparatoires*, in order to confirm the meaning determined on the basis of Article 31, or to resolve any ambiguities or absurdities that may result from its application. This underlines the essentially subordinate role of the “founding fathers” in the overall process of interpretation. Part of the contemporary justification for the view that the actual text of the treaty must be regarded as the most authentic indication of the parties’ intentions¹⁴⁶ lies in the fact that a significant proportion of the current

143. See, e.g., *Delimitation of Maritime Boundary in Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 304–05 (Oct. 12) (offering general information on the questions of acquiescence and estoppel); see also *Temple of Preah Vihear* (Cambodia v. Thailand), 1962 I.C.J. 6, 23, 31–32 (June 15).

144. E.g., French, *supra* note 138, at 305–07; McLachlan, *supra* note 138, at 313–15.

145. ILC Commentary, *supra* note 84, at 222.

146. See *id.* at 220, 223. Other considerations include the fact that the reference to the *travaux préparatoires* is not only time-consuming but, as noted above, often ultimately fruitless, because the issue in question was never envisaged by anyone in the course of the negotiations, or was deliberately left unresolved.

parties to many multilateral treaties may comprise States that did not participate in the original negotiations, and may lack ready access to the preparatory materials. Furthermore, in the modern world, treaties are commonly of wide-ranging and decisive effect for entities far beyond the States that are to participate—these may include commercial corporations, NGOs, and even ordinary private individuals.¹⁴⁷ Whatever the prospect of States themselves, by one means or other, being able to acquire access to the preparatory materials, there is no guarantee that other entities will share that advantage. The text at least is more than likely publicly available.

The principles governing interpretation are by no means the only aspects of the law of treaties which are relevant to the present controversy, though it will be convenient to defer consideration of other significant rules until a later stage in the discussion.

c. The Law of International Organizations

Since the ICRW established an international organization—the IWC—it is natural that attention will also have to be paid to the legal regime that governs the creation, operation, development, and dissolution of such bodies.¹⁴⁸ This regime regulates such matters as the structure and legal personality of the organization, including the creation of subordinate agencies, the question of membership, the exercise of functions and powers, and the interpretation of the constitution generally. Most international organizations are created by treaty, and it has already been noted that the Vienna Convention regime is in principle applicable to such instruments. An important qualification, however, is that it operates “without prejudice to any relevant rules of the organization.”¹⁴⁹ One specific instance of such deference can be found in Article 20(3) of the Vienna Convention, which provides that a reservation to a treaty that is the constituent instrument of an international organization requires acceptance by a competent organ of that institution.

More generally, these “rules of the organization” are understood to embrace “the constituent instruments, decisions and resolutions adopted

147. Human rights treaties represent the most obvious category, but there are many others.

148. See generally C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* (2d ed. 2005); PHILLIPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* (5th ed. 2001); HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* (4th rev. ed. 2004); NIGEL D. WHITE, *THE LAW OF INTERNATIONAL ORGANIZATIONS* (2d ed. 2005).

149. Vienna Convention on the Law of Treaties, *supra* note 21, art. 5. The ILC noted that this reference replaced a series of individual qualifications and exceptions to the operation of particular provisions which had appeared in earlier drafts. ILC Commentary, *supra* note 84, at 191.

in accordance with them, and established practice of the organization."¹⁵⁰ It is essential that they be taken into consideration since, as Shabtai Rosenne has explained,¹⁵¹ the undeniably *contractual* basis of constituent instruments really represents more of an initial presupposition of the organization than the ongoing determinant of its activities. These characteristically unfold in an essentially organic fashion, based on decision-making processes that are very seldom dependent on securing absolute unanimity. Thus, processes may be set in motion that take the participants ever further away from the original conception of the organization as entertained by those who created it. For striking examples, one need only look to the Charter of the United Nations, which has been developed and augmented by the recognition of various additional powers and principles, while particular provisions have been side-stepped, disregarded, or effectively rewritten.¹⁵² There is certainly nothing illicit or irregular about this process, which has, indeed, received the endorsement of the International Court of Justice on several occasions.¹⁵³

In the view of Rosenne, these cases demonstrate a "constitutionalist" approach to interpretation of constituent instruments, the key characteristics of which are:

- (i) lack of interest in the intentions of the original members with corresponding disinterest in the *travaux préparatoires*;
- (ii) analysis of the function of the provision in question in the context of the constituent instrument as a whole, with particular stress on the relations between the different organs of the organization according to the constituent instrument, and on the practice of those different organs; and (iii) a powerful—yet politically highly controversial—teleological approach which reflects more the "ought" than the "is" of the constituent instrument.¹⁵⁴

150. Vienna Convention on the Law of Treaties Between States and International Organizations or Between Organizations, *supra* note 73, art. 2(1)(j) (borrowing from the definition in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character).

151. ROSENNE, *supra* note 70, ch. 4.

152. See, e.g., U.N. Charter arts. 12, 27, 43–45.

153. See, e.g., Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21); Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151 (July 20); Effect of Awards of Compensation Made by the United National Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47 (July 13); Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

154. ROSENNE, *supra* note 70, at 237.

To Rosenne himself, writing some twenty years ago and drawing on the experience of a distinguished professional career that extended back to the very dawn of the postwar era, this methodology marked a sharp and potentially troublesome departure from traditional approaches to treaty interpretation. Furthermore, it highlighted the constituent instrument of an international organization as something radically different from “the multilateral treaty as moulded by the Vienna Convention.”¹⁵⁵ He explained:

There is more than a formal distinction between a legal institution, the application of the detailed rules of which depends upon an individualistic appreciation by the State or States concerned (as in the case of reservations to a multilateral treaty) and a legal institution the application of the detailed rules of which depends upon a collective dispositive decision binding on all parties. The difference is one of kind, not of degree, for it will be seen that in the ultimate analysis there is a conceptual difference between the two types of legal institution, requiring the application of an entirely different system of legal regulation.¹⁵⁶

It is doubtful that many would be greatly troubled by these considerations today. In fact, Rosenne’s concerns regarding the dangers supposedly inherent in collective and evolutionary approaches to interpretation may have been largely outmoded even by the time they were expressed. Although particular States may occasionally dissent from the proposition in circumstances in which their own individual interests are judged to be at serious risk, there is widespread agreement, at least in principle, that the constituent instruments of international organizations must be interpreted in a purposive and dynamic manner.¹⁵⁷ The explanation for this consensus is simple: there is no alternative. The complexity of international affairs and the accelerated pace of change in the modern world is such that it is quite impossible to plan in advance for every contingency, or even for every category of contingency.¹⁵⁸ Thus, as Henry G. Schermers and Niels M. Blokker pointed out,

155. *Id.* at 252.

156. *Id.*

157. See SHAW, *supra* note 35, at 843 (explaining that “[t]his programmatic interpretation doctrine . . . is now well established and especially relevant to the United Nations, where [sixty] years of practice related to the principles of the organization by nearly [200] States is manifest,” where the figures actually cited, 40 and 160, appear to be an unamended relic from an earlier edition).

158. *Id.* at 1193–98; see also *Legality of Use by State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, 74–75 (July 8) (elaborating further on this point).

[i]t is never possible to lay down an exhaustive list of powers of the organization in a constitution, *inter alia* because any organization needs to respond to developments in practice which cannot be foreseen when it is created. Therefore, other foundations for the organization's activities exist, such as customary and implied powers.¹⁵⁹

The implications of collective decision-making may on occasion prove troublesome for individual States. However, the risk of being outvoted on particular issues is balanced by the chance of benefiting from favorable votes on other matters. While, in certain circumstances, there is the possibility of preserving formal vetoes for certain States, history shows that when this technique is employed, it is as likely to prove unacceptably disruptive of progress as to protect essential interests.¹⁶⁰

The recognition of "opt-out" powers represents an alternative mechanism for preserving individual sovereignty.¹⁶¹ Yet, even here, there is much to be said for the State in question reviewing its policies in order to ensure that they have not become unreasonably or unnecessarily entrenched. The ultimate defense for individuality—withdrawal from the organization entirely—is almost always available, but is seldom productive and not infrequently results in an application to rejoin the organization at a later date, as the history of the IWC itself graphically demonstrates.¹⁶² In reality, it may well prove preferable for States to tolerate the occasional reverse, which, in the long run, may even come to offer unexpected advantages: history certainly reveals no shortage of instances in which a State, which had at one time vehemently opposed the assumption by international organs of novel powers for which no express constitutional authorization could be found, subsequently endorsed the use of those same powers when it appeared expedient.¹⁶³

As Judge Tanaka of the ICJ so perceptively pointed out in *South West Africa*, the emergence of international organizations, which are sustained and reinforced by "highly developed techniques of communication and information" and the "growth of experience and increasing knowledge in political and social science," has facilitated a new form of "parliamentary diplomacy," whereby the old laborious and individualistic methods of

159. SCHERMERS & BLOKKER, *supra* note 148, at 175–76 (footnote omitted).

160. Consider, for example, the use of the veto in the U.N. Security Council, which has from time to time prompted calls for its restriction or elimination. *See, e.g.*, Press Release, General Assembly, More Delegates Urge Restriction of Security Council Veto, U.N. Doc. GA/9945 (Nov. 1, 2001).

161. ICRW, *supra* note 1, art. V(3).

162. *See* MICHAEL J. BOWMAN & DAVID J. HARRIS, *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* T. 200 (1984 & Supp. 1995).

163. *See, e.g.*, ROSENNE, *supra* note 70, at 193.

norm creation have given way to accelerated processes of a “collective, cumulative, and organic” character.¹⁶⁴ This development was, moreover, as welcome as it was inevitable. As pointed out by Tetsuo Sato,

[i]nternational organizations have been created because their purposes and functions cannot be achieved by the creation of simple norms of conduct by means of treaties, including multi-lateral law-making treaties. Their purposes and functions can be achieved only by the permanent operation of organizational entities. This implies that constituent instruments will always need to be adapted to the changing circumstances for the purpose of the efficient functioning and effective activities of international organizations.¹⁶⁵

Moreover, it was only through the adoption of a teleological and evolutionary approach to the interpretation of constituent instruments, through which ongoing functions and purposes were determined by the “unilateral” decisions of its authorized organs, rather than by the consent of States expressed individually, that the dynamism inherent in international organizations could be fully realized.¹⁶⁶

That is not to say, however, that the powers of international organizations are necessarily unlimited. As the ICJ concluded in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, an organization’s powers must be determined in light of a purposive interpretation of the organization’s constitution, as developed by subsequent practice and/or formal amendment, and allowing for the implication of unspecified functions where necessary.¹⁶⁷ On the other hand, the principle of specialty, which sets limits to the powers of an organization by reference to the “common interests whose promotion [the members] entrust to them,” is also applicable.¹⁶⁸ In seeking to balance these considerations, the ICJ, while recognizing that the World Health Organization’s (WHO) competence included addressing the *adverse consequences* of a use of nuclear weapons, ruled that the WHO’s competence did not extend to issues regarding the *legality* of such use and, as a result, the WHO lacked the

164. South West Africa, Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.), 1996 I.C.J. 6, 291–92 (July 18) (separate opinion of Judge Tanaka).

165. See TETSUO SATO, *EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS: A CRITICAL ANALYSIS OF THE FRAMEWORK OF THE CONSTITUENT INSTRUMENTS OF INTERNATIONAL ORGANIZATIONS* 230 (1996).

166. *Id.*

167. *Legality of Use by State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, 75 (July 8).

168. *Id.* at 78.

authority to ask it for an advisory opinion on the matter.¹⁶⁹ However, the ICJ's conclusion that it could not entertain the WHO's request for an advisory opinion was not based on a consideration of the WHO's Constitution in isolation. Rather, the ICJ went on to explain that since the WHO was "an international organization of a particular kind," namely one created pursuant to the U.N. Charter and operating within a coherent framework of specialized agencies,¹⁷⁰ it was necessary to pay attention to "the logic of the overall system" and avoid any unnecessary overlap or duplication of function.¹⁷¹ Based on this holding, it could be expected that an organization that was not subject to such inherent institutional constraints would have a much freer hand in determining the scope of its own competence.

These observations lead conveniently back to Rosenne's second key concern: the apparent gulf that these principles may be opening up between constituent instruments and all other treaties. Although similar concerns are still occasionally reasserted by other authors,¹⁷² there are in fact good reasons to doubt the current existence of any simple, sharply-drawn dichotomy. First, international organizations themselves are of such variety that they virtually defy conjugation under any single, universally applicable definition. Thus, the scope for collective decision-making and the need for a dynamic and flexible approach to the interpretation of their powers may differ from case to case. In that context, distinctions are sometimes drawn between entities that, through possessing organs and a secretariat of their own, may be regarded as international organizations *in fact* and those that, through possessing a personality and legal will of their own, may be regarded as organizations *in law*.¹⁷³

Felice Morgenstern notes that the IWC itself has been treated as an example of the former category for the purposes of Swiss law,¹⁷⁴ though, even in organizations of this type, there may, of course, be circumstances in which majority decisions become binding on individual members. Indeed, when it comes to drawing lines between these various categories,

169. *Id.* at 76. Additionally, the ICJ stated that the WHO's power to seek advisory opinions was specifically constrained by the terms of its own statutes. *Id.* at 80.

170. *Id.* at 80.

171. *Id.* at 79–81. *But see* Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) (acceding to the U.N. General Assembly's request for an advisory opinion on a very similar question).

172. *See* Catherine Brolmann, *The Institutional Veil in Public International Law: International Organizations and the Law of Treaties* 144 (Apr. 22, 2005) (unpublished doctoral thesis, University of Amsterdam) (on file with University of Amsterdam) (offering a recent example).

173. *See, e.g.,* FELICE MORGENSTERN, *LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS* 22–23 (1986).

174. *Id.*

it is impossible not to be struck by “the fineness of the distinctions involved and the circular nature of relevant arguments.”¹⁷⁵ The problem is further compounded by the recent proliferation of multilateral standard-setting instruments that, without seeking to establish international organizations as such, nevertheless create elaborate institutional machinery for their own implementation.¹⁷⁶ Such treaties, now especially common in the environmental field, undeniably display many of the “living instrument” characteristics that might once have been associated exclusively with the constituent instruments of international organizations strictly so called.

Additionally, Rosenne himself recognized the existence of a “hybrid” arrangement, one in which the creation of an organization was merely one aspect of the regime in question, rather than its sole purpose.¹⁷⁷ Since this category is broad enough to include such treaties as the 1982 U.N. Convention on the Law of the Sea (Law of the Sea Convention),¹⁷⁸ the 1944 Convention on International Civil Aviation (by which, *inter alia*, the International Civil Aviation Organization was created),¹⁷⁹ and the 1919 Peace Treaty with Germany (which incorporated both the Covenant of the League of Nations and the Constitution of the International Labor Organization),¹⁸⁰ it is evident that this form of arrangement is one of no little practical significance. While Rosenne did not fully explore the principles appropriate to govern the interpretation of such instruments, it seems plausible to suggest that some elements, at least of the dynamic and evolutionary approach, might be needed in order to reflect their constitutionalist aspect. Yet another significant category in which the “living instrument” approach has caught hold comprises treaties, most notably in the human rights field, that establish *judicial*, rather than political or administrative, machinery for their implementation.¹⁸¹ Finally, there are grounds for supposing that the evolutionary approach to implementation may sometimes be relevant even in relation to bilateral, contractual-style arrangements. For example, in *Gabčíkovo-Nagymaros Project*, the ICJ, after upholding the continued existence in force of a treaty negotiated during the Communist

175. *Id.* at 22.

176. See generally Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT’L L. 623 (2000).

177. ROSENNE, *supra* note 70, at 204.

178. UNCLOS, *supra* note 88.

179. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

180. Treaty of Peace with Germany [Treaty of Versailles], June 28, 1919, 225 Consol. T.S. 188.

181. SHAW, *supra* note 35, at 843–44.

era for the development and exploitation of water resources (despite the fact that one party had effectively repudiated the agreement and the other had attempted to implement it in a fashion far removed from that anticipated), went on to stipulate that the parties must "look afresh" at the agreement, and the institutional arrangements established thereunder, and take account of the many changes in factual and legal circumstances that had occurred since its conclusion.¹⁸² The ICJ also stated that they should negotiate an agreed solution within the cooperative context of the treaty, which should take account not only of the agreement's own objectives, but also of the wider norms of international environmental law, sustainable development, and the law of international watercourses.¹⁸³ While there were some slender threads within the treaty itself from which these requirements could conceivably be hung,¹⁸⁴ there can be little doubt that the framework of implementation of the treaty that the ICJ was prescribing was of an entirely different character from anything the parties could plausibly be taken to have intended during their original negotiation.

These examples demonstrate that what is emerging is not so much a sharp dichotomy between constituent instruments and all other treaties, but rather a continuum of possibilities that range all the way from the constituent instrument of a "full-blown" international organization, through various intermediate forms, to the traditional, short-term, bilateral, contractual-style treaty incorporating no institutional arrangements or evolutionary aspects whatsoever. Furthermore, it seems clear that both the need for, and the scope of, an evolutionary and dynamic approach to interpretation will vary according to the precise position of any particular treaty along this spectrum, which itself will be determined by the complexity, sophistication, and longevity both of the problems to be confronted and of the institutional arrangements established for that purpose.

d. The Law of Treaties Revisited—"Living Instruments"

In light of the considerations emphasized above, it will be apparent that it is a grave mistake to perceive the treaty as some kind of fossil that must be extracted intact from the sedimentary strata of jurisprudential history and viewed essentially as an intriguing relic of a bygone era. Rather, treaties must be envisaged as living instruments engaged in a

182. *Gabčikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 78–79 (Sept. 25); *see also* *Iron Rhine Ry. Arb.* (Belg. v. Neth.), 27 R. Int'l Arb. Awards 41 (Perm. Ct. Arb. 2005).

183. *Gabčikovo-Nagymaros Project*, 1997 I.C.J. at 75–80.

184. *Id.* at 22–23 (referring, in particular, to Articles 15, 19, and 20, which dealt with the maintenance of water quality and the protection of nature and of fishing interests, but did not contain any specific obligations of performance).

continuous process of evolution and development, constantly interacting with other such entities, and constructing an adaptive niche for themselves in the wider juridical environment. These phenomena have implications for every aspect of the legal regime governing the practical implementation of treaties, ranging from the moment of their conception to that of their ultimate demise.

i. Termination

Given that the one certainty that biological life offers is eventual death, it is fitting to commence with the principles that circumscribe the "mortality," or duration, of treaties themselves. The relevant rules can be found in Part V of the Vienna Convention, particularly in Articles 54-71. The first point to note is that there is no general principle concerning the extinction of treaties as a simple consequence of the effluxion of time. Though the parties may certainly choose to set a temporal limit to the operation of treaties they negotiate,¹⁸⁵ in the absence of such a determination, there is no reason why they may not endure forever.¹⁸⁶ To the layman, it may seem entirely extraordinary that an area of human activity as complex, controversial, and liable to dramatic shifts of policy as the conservation of marine resources is still governed by a treaty, the ICRW, that was concluded half way through the previous century, a period when the state of ecological awareness and the social, political, and legal climate generally bore very little resemblance to that of today. From this perspective, it might be assumed that such an instrument, conceived in a different age, would almost inevitably fail to measure up to the requirements of the present. The truth of the matter, though, is that the international law of treaties makes allowance for such considerations to be addressed through a variety of mechanisms and provisions.¹⁸⁷

An example of one such mechanism can be found in Article 62 of the Vienna Convention. Article 62 states that a treaty may be terminated on the grounds that a fundamental change of circumstances has occurred since the time of its conclusion.¹⁸⁸ However, this provision is hedged

185. See Vienna Convention on the Law of Treaties, *supra* note 21, art. 54 (stating that temporal limits may be set either through the provisions of the treaty itself or subsequently through agreement).

186. See, e.g., Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction art. XVI, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 32 I.L.M. 800; Treaty on Open Skies art. XV, Mar. 24, 1992, S. TREATY DOC. NO. 102-37, http://www.osce.org/documents/doclib/1992/03/13764_en.pdf; Treaty on European Union art. Q, Feb. 7, 1992, 1992 O.J. (C 191) I.

187. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 21, art. 60 (stating that, in appropriate circumstances, treaties may be terminated on account of breach by one or more parties); see also *infra* Part II.B.2.e.

188. Vienna Convention on the Law of Treaties, *supra* note 21, art. 62.

around with stringent qualifications, and the ICJ has made it clear on more than one occasion that the *rebus sic stantibus* principle it embodies is of extremely limited applicability.¹⁸⁹ Indeed, Anthony Aust notes that while it is universally accepted as a matter of theory, and is quite commonly invoked in argument by States, it has yet to actually be applied by any tribunal to bring a given treaty to an end.¹⁹⁰ In particular, in any case in which the treaty offers the possibility of adjustment to change—and the existence of institutional arrangements through which the parties may negotiate a solution presents the clearest possible instance—the strong preference is to uphold the treaty's continued existence and to allow the parties to retune its implementation in order to meet the needs of the present. *Gabčíkovo-Nagymaros Project* is a good example of this point. There, the ICJ pressed the *pacta sunt servanda* principle to its ultimate conclusion by rejecting a series of arguments to the effect that the agreement had come to an end and instructing the parties to negotiate a solution within the existing institutional framework. This holding left the impression that the ICJ was intent on preserving the treaty at almost any cost.

The approach adopted by the ICJ in *Gabčíkovo-Nagymaros Project* is no doubt illustrative of how problems arising under other treaties, such as the ICRW, should be resolved. Naturally, if, at anytime, all cetacean species were found to have actually become extinct, then the Convention would most certainly be liable to termination on the grounds of impossibility of performance.¹⁹¹ However, barring such a cataclysm, it will simply be a matter of continually adjusting the implementation of the treaty in order to meet contemporary needs.

In considering the respective potential of the various mechanisms that are available to foster this process of progressive accommodation, it is worthy of note that the kinds of circumstantial changes that may need to be addressed can be either factual or legal and may be generated either from within the confines of the treaty itself or from beyond.

ii. Amendment

The most obvious mechanism for facilitating adjustment to change is, of course, formal amendment of the treaty.¹⁹² Amendment of a treaty

189. See e.g., *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25); *Fisheries Jurisdiction* (U.K. v. Ice.), 1974 I.C.J. 3 (July 25).

190. AUST, *supra* note 91, at 241.

191. See Vienna Convention on the Law of Treaties, *supra* note 21, art. 61. Even then, though, by virtue of paragraph 2, no party whose breach was responsible for bringing about the impossibility would be entitled to invoke it as a ground for termination. *Id.*

192. See *id.* arts. 39–40 (making provision for the treaty amendment process). Note also the provisions in Article 41 that concern *modification* of a treaty amongst certain parties only.

may be achieved either through activation of a procedure established for that purpose under the terms of the treaty itself, or, alternatively, by means of a separate amending agreement. Both possibilities are frequently encountered in practice. In fact, as is evident from its history, the ICRW is quite familiar with both mechanisms: Article V established a procedure, which has been regularly deployed, for the amendment of the detailed regulatory provisions found in the Schedule, while amendment of other provisions must be achieved through a separate agreement, as exemplified by the 1956 Protocol to the International Convention for the Regulation of Whaling.¹⁹³ As shown by experience under the 1971 Ramsar Wetlands Convention,¹⁹⁴ the process of adjustment to change can be seriously handicapped in circumstances in which the original text of a treaty makes no provision for its own amendment. In such circumstances, the most efficient solution undoubtedly lies in the adoption of a supplementary protocol to the treaty designed to establish a suitable amendment procedure. In the case of Ramsar, a Protocol of Amendment was duly adopted in 1982.¹⁹⁵ Once the protocol entered into force, the procedure that it created was promptly deployed in 1987 in order to generate further amendments to Ramsar that modified its internal institutional arrangements.¹⁹⁶

These relatively formal procedures, though, have their drawbacks. They can often be cumbersome and time-consuming to implement. For example, in the case of the Ramsar Convention, it took more than twenty years from its original conclusion for its members to formally correct certain weaknesses in the institutional arrangements it established, despite the fact that these weaknesses were apparent to all concerned virtually from the outset.¹⁹⁷

Fortunately, these procedures by no means exhaust the mechanisms by which treaty amendments may be effected. In rejecting the argument that a treaty can only be terminated or amended by an instrument of the

Id. art. 41. Of course, procedures for the amendment or modification of treaties are available not only for the purpose of addressing changes in external circumstances, but also for correcting simple failures in the original version of the text.

193. See Protocol to the International Convention for the Regulation of Whaling, Nov. 19, 1956, 10 U.S.T. 952, 338 U.N.T.S. 366 [hereinafter 1956 Protocol] (amending arts. II(3) and V(1)).

194. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,804, 996 U.N.T.S. 246 [hereinafter Ramsar Wetlands Convention].

195. Protocol to Amend the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Dec. 3, 1982, 22 I.L.M. 698.

196. See Michael J. Bowman, *The Multilateral Treaty Amendment Process—A Case Study*, 44 INT'L & COMP. L.Q. 540 (1995) (offering a discussion of these developments).

197. *Id.* at 544–45.

same form, or equivalent formality, as that in which it was concluded,¹⁹⁸ the ILC was of the view that an amending agreement "may take whatever form the parties to the original treaty may choose. [In fact], the Commission recognized that a treaty may sometimes be modified even by a tacit agreement evidenced by the conduct of the parties in the application of the treaty."¹⁹⁹ This possibility of amending a treaty informally by means of the actual practice of the parties in the course of its implementation has already been referred to above in the context of constituent instruments and is exemplified extensively in relation to the U.N. Charter. It is clear that it is equally applicable in the case of treaties generally. In that context, it is noteworthy that an original proposal by the ILC, which would have specifically provided for the amendment of treaties through the practice of the parties,²⁰⁰ attracted critical comment on the part of one or two States and was ultimately not included in the Vienna Convention in those terms.²⁰¹ However, it appears that the principal reason for its omission was that it was judged superfluous in light of what became sub-paragraphs (a) and (b) of Article 31(3), concerning the role of subsequent practice or agreement in the process of treaty interpretation.²⁰² As noted above, the primary purpose of that provision was to admit evidence of subsequent developments as a means of shedding light retrospectively on the *original intentions* of the parties at the time of the treaty's adoption. Yet, it is clear that it may also be used as a means of

198. The theory of *acte contraire* is known to some municipal legal systems, but, according to the Commission, it forms no part of international law. ILC Commentary, *supra* note 84, at 232–33, 249.

199. *Id.* at 233.

200. *See id.* at 236 (providing the draft text of the Vienna Convention on the Law of Treaties and discussing Article 38 of the 1966 draft, formerly Article 68(b) of the 1964 draft).

201. *See* SHABTAI ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 247–49 (1970); *THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PREPARATOIRES* 304–09 (Ralf G. Wetzel & Dietrich Raushning eds., 1978). Note also the comments of the ILC Rapporteur in 1966 that the proposed provision regarding amendment by subsequent practice had been

endorsed by the United States Government as reflecting long-standing and widely accepted practice, and again no Government has questioned its correctness. The Government of Israel, however, thinks it to be indistinguishable in its practical effect from . . . article 69, paragraph 3(b), [ultimately Article 31(3)(b)] and for that reason redundant The Commission . . . recognized that "the line may sometimes be blurred between interpretation and amendment of a treaty through subsequent practice."

But, it concluded that "legally the processes are quite distinct and should be dealt with separately. *Sixth Report on the Law of Treaties*, [1966] 2 Y.B. INT'L L. COMM'N 51, 89, U.N. Doc. A/CN.4/186 & Add.1, 2/Rev.1, 3–7 (discussing draft Article 68). This final point, though broadly persuasive as a matter of strict principle, seems ultimately to have yielded to considerations of streamlining and convenience.

202. *See, e.g.*, ELIAS, *supra* note 52, at 98–100.

shaping the ongoing development of the instrument based on the *modification of those intentions*, regardless of whether it is expressed in the form of clarification, amplification, or even outright transformation. As the Permanent Court of Arbitration stated in its *Decision on Delimitation of the Border Between Eritrea and Ethiopia*, “[t]he effect of subsequent conduct may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an otherwise pertinent treaty provision may be varied, or even cease to control the situation, regardless of its original meaning.”²⁰³ This avenue to change is unlikely to pose a serious threat to the stability of treaty relations because it is clear, as explained above, that practice may only be treated as *conclusive* if it is that of the parties “as a whole.” In the contemporary context, it might have to be considered whether this criterion should be deemed to be satisfied in a situation unlikely to have been specifically in the minds of Commission members in the circumstances of 1966, namely, the manifestation of collective practice through an authoritative resolution of a body such as a Conference of the Parties. Where such measures are intended to go beyond mere recommendations and are accepted by consensus,²⁰⁴ or by such majority as would be sufficient for the adoption of a formal amendment, a case can be made for according them decisive effect.

It is beyond doubt that informal amendments are, indeed, the principal way in which many treaties adapt themselves to the evolving requirements of their subject matter. Take, for example, Article 1(1)(e) of the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS or Bonn Convention), which defined the term “endangered”—a concept of critical importance to the overall operation of the Convention—to refer to a species “in danger of extinction throughout all or a significant proportion of its range.”²⁰⁵ At the Second Meeting of the Conference of the Parties, it was resolved simply to treat this requirement as satisfied if the species was listed as “endangered” by the International Union for the Conservation of Nature and Natural Resources (IUCN) in its well-known Red Data Lists of threatened species,²⁰⁶ despite the fact that the precise wording of the IUCN criterion

203. *Decision on Delimitation of the Border Between Eritrea and Ethiopia* (Eri. v. Eth.), 25 R. Int'l Arb. Awards 83, 110–11 (Eri.-Eth. Boundary Comm'n 2002); *see also* *Payment of Various Serbian Loans Issued in France* (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) No. 20 (July 12) (offering a much earlier illustration of this point).

204. Or, perhaps, where any dissentients do not expressly dissociate themselves from the proposition after its adoption.

205. *Convention on the Conservation of Migratory Species of Wild Animals*, June 23, 1979, 1651 U.N.T.S. 356 [hereinafter *Bonn Convention*].

206. *Convention on Migratory Species [CMS], Guidelines for the Application of Certain Terms of the Convention*, Res. 2.2 (Oct. 1998), available at http://www.cms.int/bodies/COP/COP2/English/Res2.2_E.pdf [hereinafter *CMS Res. 2.2*].

was not identical. Furthermore, at the Fifth Meeting of the Conference of Parties in 1997, following an extensive overhaul of the IUCN criteria resulting in a much more elaborate formulation, it was resolved that the term would mean "facing a very high risk of extinction in the wild in the near future" and that application of the term would be guided by either the findings of the IUCN or by an independent assessment performed by the CMS's own Scientific Council based on the best available data.²⁰⁷ The preamble to the resolution suggested that this would achieve maximum compatibility with the IUCN's "Categories of Threat," "whilst still keeping within the definition" given in Article 1(1)(e) of the CMS. However, it might have been more accurate to suggest that the Conference of the Parties had attempted to honor the *spirit* of that provision while subtly adjusting its wording to reflect the latest scientific thinking on the subject. This process also, of course, succeeded in avoiding all the time, trouble, and expense involved in activating the formal amendment procedure under Article 10 of the CMS,²⁰⁸ thereby maximizing both the effectiveness and the efficiency of the process of change.

Numerous examples can be found of the adoption of a similar approach in relation to other treaties.²⁰⁹ Thus, there is little room for doubt that Malcom Shaw was correct in his observation that "[s]ubsequent practice may indeed have a dual role: it may act as an instrument of interpretation and it may also mark an alteration in the legal relations between the parties established by the treaty in question."²¹⁰

Having established that there are a number of distinct procedures in accordance with which amendments may be made, we may also note that the subject matter of amendments is infinitely variable, in the sense

207. CMS, *Interpretation of Certain Terms of the Convention*, Res. 5.3 (Apr. 1997), available at http://www.cms.int/bodies/COP/cop5/English/Res5.3_E.pdf [hereinafter CMS Res. 5.3]. CMS Resolution 5.3 was adopted "without amendment." Fifth Meeting of the Conf. of the Parties, Geneva, Switz., Apr. 10–16, 1997, *Report of the Fifth Meeting of the Conf. of the Parties*, at 22, available at http://www.cms.int/bodies/COP/cop5/English/cop5_report.pdf.

208. In fact, the process is less problematic under the CMS because amendments may be effected at ordinary meetings of the Conference of Parties, unlike many other treaties where an extraordinary meeting must be convened for that purpose. Bonn Convention, *supra* note 205, art 10.

209. See Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES] (offering an evolving approach to the interpretation of the concepts of "artificially propagated" and "captive bred" specimens under Article 7(4)–(5)); see also WILLEM WIJNSTEKERS, *THE EVOLUTION OF CITES* (8th ed. 2005) (discussing the creation of a new, related exception known as "ranching," for which no provision is found in the text at all). Note also the apparent conflation in the practice of the Ramsar Convention of the notions of "conservation" and "wise use," ostensibly envisaged by the drafters of the Convention as divergent standards for the management of listed and unlisted wetlands respectively. See Michael J. Bowman, *The Ramsar Convention Comes of Age*, 42 *NETHS INT'L L. REV.* 1, 14–16 (1995).

210. SHAW, *supra* note 35, at 841.

that they may relate to any aspect of the original version of the instrument in question. Even in this brief overview, it has been shown that amendments may be affected by one or other means in relation to (i) the definition of key terms adopted for the purposes of an agreement; (ii) the principal substantive obligations created; (iii) the various categories of exceptions to those obligations; (iv) the institutional arrangements adopted; and (v) the final clauses of the agreement. There is equally no doubt that they may relate even to something as fundamental as the object and purpose of the agreement—once again, the Ramsar Wetlands Convention provides a convenient example. While the preamble noted in general terms that wetlands constituted “a resource of great economic, cultural, scientific, and recreational value, the loss of which would be irreplaceable” and affirmed the parties’ desire “to stem the progressive encroachment on and loss of wetlands now and in the future,” it is clear from other preambular recitals,²¹¹ the wording of various substantive provisions,²¹² and the Convention’s very title,²¹³ that the predominant motivation underlying this convention was the protection of habitat for waterfowl. Indeed, ornithological organizations, such as the International Wildfowl Research Bureau (IWRB), were particularly active in promoting the need for the Ramsar Wetlands Convention, preparing early drafts and providing technical and scientific data and services. While the approach to conservation was always intended to be holistic, the principal underlying objective was clear.²¹⁴ Yet over the years, the clear trend has been progressively to downplay this aspect with a view to maximizing the Convention’s potential impact and to focus increasing attention on the importance of wetlands as habitat for fish and other creatures, regulators of flood and drought, locations for recreational activities and sources of water supply. These changes have been effected through a range of means, including an extension of the habitat types thought to merit protection as wetlands (so as to include, for example, underground karst systems); revised criteria to govern the process of designation for the List of Wetlands of International Importance (so as to place a heavier emphasis on both general biological considerations and habitat for non-avian species); the development of guidelines on wise use (so as to embrace all aspects of water allocation, as well as wetland inventory,

211. Ramsar Wetlands Convention, *supra* note 194, pmb1. Note in particular the second and fifth recitals.

212. *Id.* Note in particular Articles 1(2), 2(1), 2(2), 2(6), 4(1), 4(2), 4(4), 6(1), 7(1).

213. The Convention’s full title is the Convention on Wetlands of International Importance Especially as Waterfowl Habitat.

214. See PROCEEDINGS, INTERNATIONAL CONFERENCE ON THE CONSERVATION OF WETLANDS AND WATERFOWL, RAMSAR, IRAN, 30 JANUARY–3 FEBRUARY 1971 (E. Carp ed., Slimbridge 1972), reprinted in Final Act of the International Conference on the Conservation of Wetlands and Waterfowl, available at http://www.ramsar.org/key_final_act_1971.htm.

management, and regulation); and the systematic confrontation of problem cases, regardless of whether ornithological interests are involved or not.²¹⁵ In this way, the overall orientation of the Convention has been subtly, but significantly, adjusted.

As one might expect, these considerations apply with equal force to the constituent instruments of international organizations. We may note, as an illustration, one of the less well-known examples of its kind, but an institution that has nevertheless performed sterling service on behalf of the international community for over three-quarters of a century, the World Organization for Animal Health (OIE).²¹⁶ The OIE was established in Paris on the basis of an international agreement that was concluded in 1924 in the wake of a disastrous outbreak of rinderpest in Europe.²¹⁷ According to its Statutes, the "main objects" of the OIE are

the promotion and coordination of experimental research work concerning the pathology or prophylaxis of contagious diseases of livestock for which international collaboration is desirable, the collection and dissemination of data concerning the spread of such diseases and the means to control them, and the examination of international agreements regarding animal sanitary measures and the provision of assistance in supervising their enforcement.²¹⁸

Pursuant to a mandate created under the World Trade Organization's (WTO) Agreement on Sanitary and Phyto-Sanitary Measures (SPS), the OIE publishes health standards for international commerce in animals and animal products, thereby helping to safeguard international trade. Despite the fact that the SPS does not per se address issues of animal *welfare*, the OIE did acknowledge the close connection of such questions with animal health and identified them as a priority in its Strategic Plan for 2001–2005. Following the unanimous acceptance at the OIE's 70th General Session of the recommendations of an ad hoc group convened to examine these questions, a permanent Working Group on animal welfare was established. At a later session, in May 2005, various welfare standards were agreed on for inclusion in the Organization's *Terrestrial Animal Health Code*, and work on aquatic animal welfare was

215. See generally The Ramsar Convention on Wetlands, <http://ramsar.org> (last visited Aug. 25, 2008) (providing information regarding all of these issues and developments).

216. The acronym OIE derives from the French name for the organization, l'Office International des Epizooties.

217. International Agreement for the Creation of an International Office for Epizootics in Paris, Jan. 25, 1924, 57 L.N.T.S. 135. The outbreak originated from a consignment of zebus that docked at the port of Antwerp en route from India to Brazil.

218. *Id.* app. art. 4.

subsequently initiated. This quiet revolution in the functional priorities of what was previously an essentially anthropocentric program of activities, which was designed to protect the economic interests of livestock owners, seems to have occurred with a minimum of fuss or legal formality,²¹⁹ demonstrating once again the extreme flexibility of international institutional arrangements.

Such possibilities were, indeed, presaged long ago even by that most conservative of international lawyers, Sir Gerald Fitzmaurice, through his notion of “emergent purpose,”²²⁰ which Rosenne declares to have been vindicated by the decisions of the ICJ.²²¹ As Sato approvingly explains,

[a]ccording to this theory, the notion of object and purpose is itself not a fixed and static one, but is liable to change, or rather develop, as experience is gained in the operation and working of the convention. At any given moment, the convention is to be interpreted not so much, or not merely, with reference to what its object was when entered into, but with reference to what that object has since become and now appears to be.²²²

The potential effect of the provisions in Article 31(1)(a)–(b) of the Vienna Convention can therefore be seen to be very extensive indeed.

iii. Systemic Integration

As in the case of biological entities, treaties exist not in isolation but in the context of a wider “ecosystem,” which, in the juridical context, can be understood to refer to the legal system as a whole. Indications of “life” in a treaty may accordingly be found not only in the fact of mere persistence or development over time, but in the process of interaction with this broader environment. This point is reflected in a provision of the Vienna Convention to which reference has already been made—Article 31(3)(c). This article requires that the process of interpretation of a treaty provision must take into account, “together with the context[,] . . . any relevant rules of international law applicable in the relations

219. It is not clear that any amendment of either the Agreement or its Organic Statutes has been thought necessary. The Agreement itself contains little by way of explanation of its object and purpose, other than a reference to the desire to create the organization. Under Article 5 of the Agreement, the parties reserve the right to make, by common consent, any changes that are deemed desirable in light of their experience. While superfluous from a legal point of view, this provision might be interpreted to allow for a relaxed approach to the attendant legal formalities.

220. See, e.g., Fitzmaurice, *supra* note 100, at 8 n.2.

221. ROSENNE, *supra* note 70, at 240.

222. SATO, *supra* note 165.

between the parties."²²³ It is quite clear that the external principles to be considered in this process may derive from any of the recognized sources of international obligation, namely treaties, custom, or general principles of law.²²⁴ What is required is that the interpretation of each individual provision must be woven into the broader fabric not only of the treaty as a whole, but of the wider legal system. Therefore, "when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."²²⁵ This is referred to as the principle of harmonization.

There are, however, significant limitations as to what can be achieved by this means. First, it is above all designed to foster consistency with extraneous rules through a process of *interpretation*. There can be no question of effectively reconstructing or "redrafting" the treaty in question to achieve a fit with these extraneous rules.²²⁶ Secondly, such a "redraft" might not always be appropriate because some agreements are predicated on a deliberate and wholly legitimate desire to *depart* from existing rules. Such is the case in regards to treaty-based exceptions to customary norms, to which there can be no valid objection unless the norms in question represent *ius cogens*. Finally, even though there is no specific requirement either in the Convention itself or in the ILC Commentary that the external rules be applicable to *all* the parties to the present treaty, the extent of their applicability amongst them is obviously an important consideration. Clearly, any attempt to steer interpretation of the treaty toward consistency with the extraneous commitments of only a small group of parties has the potential to undermine the consistency of the treaty itself with putatively contrasting external obligations of other groups. Everything, therefore, as explained above, depends on the precise interpretative purpose for which the external rule or principle is to be used. In the last resort, should the instant treaty contain obligations which plainly *are* inconsistent with others to which any particular State may be subject, that State must be left to answer for the consequences itself. Indeed, with that possibility specifically in mind, Article 30 of the Vienna Convention addresses the question of prioritization of potentially inconsistent treaty obligations.²²⁷

In view of the early date of adoption of the ICRW and the relatively under-developed state of international law (especially with regard to

223. See generally French, *supra* note 138, at 284 (quoting the Vienna Convention on the Law of Treaties, *supra* note 21, art. 31(3)(c)).

224. Int'l Law Comm., *Fragmentation of International Law*, *supra* note 139, ¶ 18.

225. *Id.* ¶ 4.

226. Naturally, it is open to the parties to take this more drastic step if they choose, but it is theoretically distinct from the process of interpretation.

227. Vienna Convention on the Law of Treaties, *supra* note 21, art. 30 (emphasis added).

conservation issues) at the time, the corpus of *pre-existing* substantive norms which will bear on its interpretation is likely to be relatively small. It is clear, however, that such norms are not the only ones that are relevant. This is evident from the fact that the phrase “any relevant rules” in Article 31(3)(c) replaced a decidedly more restrictive reference in an earlier draft to “general rules of international law *in force at the time of its conclusion*.”²²⁸ This confirms that it is necessary to apply the process of interpretational harmonization not only to pre-existing external norms but on an ongoing basis to any that may subsequently emerge.²²⁹ Resolution 2006-1 plainly accepts this point through its reference to the Biodiversity Convention of 1992. This takes the process of interpretation into the realms of “intertemporal law.”

iv. Intertemporal Law

The “intertemporal law” doctrine dictates that the legality, and indeed legal implications generally, of any fact, act, or state of affairs, is to be determined in accordance with the law in force at the time of its occurrence.²³⁰ The principle is not merely one of the law of treaties, but of international law generally, and is most commonly encountered in connection with the law of territory. In one of the most well-known and informative forensic determinations of territorial sovereignty issues, the arbitrator, Max Huber, stated:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law.²³¹

228. See ILC Commentary, *supra* note 84, at 183.

229. See *id.* (noting the deliberate effect of the change in wording); see also KONTOU, *supra* note 40.

230. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 126–28 (5th ed. Oxford 1998) (1966); D.W. GREIG, *INTERTEMPORALITY AND THE LAW OF TREATIES* (2001); ROSENNE, *supra* note 70, at 76–80 (noting the various resolutions of the Institute of International Law); SHAW, *supra* note 35, at 429–30; Taslim O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT’L L. 285 (1980); Rosalyn Higgins, *Time and Law: International Perspectives on an Old Problem*, 46 INT’L & COMP. L.Q. 501 (1997).

231. Island of Palmas Case (U.S. v. Neth.), 2 R. Int’l Arb. Awards 821, 845 (Perm. Ct. Arb. 1928).

The principle is one of elementary common sense, though its application is not always straightforward. Some commentators have concluded that the second limb—the principle governing the continued manifestation of the right—somehow undermines the first. Properly applied, it should not.²³² The key to the conundrum is to identify correctly the fact, act, or state of affairs the legal implications of which have to be determined in each instance. For example, in the case of territory acquired by conquest in 1850, a valid title might be acquired, since international law did not preclude the use of force at that time. This determination reflects the intertemporal law governing the *initial creation* of the right, and subsequent changes in the law cannot affect it. The *continued manifestation* of that right—the *retention* of title—must be evaluated on an ongoing basis founded on the law in force in relation to *that* question at any given moment, most notably that at which the dispute arises. In fact, the legal regime throughout the modern era has remained unchanged, stipulating that title to territory validly acquired is *automatically* retained in the absence of an intention to abandon it (*animus derelictionis*),²³³ an intention which is, furthermore, not lightly to be presumed. In the face of a competing claim involving an actual display of sovereign functions by another State, however, sufficient evidence of the recent exercise of sovereign authority by the first State would generally be

232. See Phillip C. Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT'L L. 735 (1928). Some of the arbitrator's comments are admittedly highly equivocal. See, e.g., *Island of Palmas Case*, 2 R. Int'l Arb. Awards at 846. Max Huber stated,

It seems therefore incompatible with this rule of positive law [that occupation must be effective in order to generate a claim for sovereignty] that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, *in virtue solely of a title of acquisition which is no longer recognized by existing law.*

Id. (emphasis added). These statements should, however, be read as being restricted to the specific context in which they were uttered, namely one of extreme, unresolved doubts concerning the capacity of mere *discovery*, at any epoch in history, to generate more than an inchoate title which had to be perfected by effective occupation within a reasonable time. They arguably do not need to be read to refer to the case of a title *definitively established* in accordance with the law in force at the time.

233. *Judicial Decisions Involving Questions of International Law: France-Mexico: Arbitral Award on the Subject of the Difference Relative to the Sovereignty Over Clipperton Island*, 26 AM. J. INT'L L. 390, 395 (1932). It might, of course, theoretically be possible for the law governing continued manifestation of title to evolve in such a way that title to territories acquired by means which subsequently became unlawful was lost, and had somehow to be re-established. This evolution was the scenario questionably assumed by Jessup to be the consequence of application of Huber's intertemporal principle. See Jessup, *supra* note 232. However, such an evolution would scarcely be conducive to stability in international relations and has never actually been the law.

required in order to negate any suggestion of acquiescence in the rival claim.²³⁴

This aspect of the law of territory has been considered at greater length than might at first sight seem appropriate because it bears directly on the application of the same principle for the purpose of the law of treaties. In that regard, it is noteworthy that Humphrey Waldock, in his capacity as ILC Rapporteur on the Law of Treaties, proposed the inclusion of a provision intended directly to reflect Huber's intertemporal principle.²³⁵ It ran:

1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.
2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is to be applied.²³⁶

This provision was ultimately excluded from the draft treaty, however, on account of concerns over whether it captured the full richness of the intertemporal principle.²³⁷ In particular, there is an obvious element of tension between the two paragraphs, arising out of the uncertain relationship between the concepts of *interpretation* and *application*.²³⁸ Furthermore, it was noted that the *intentions of the parties* form a key aspect of the principles governing both of these elements, but that the proposed wording did not give sufficient, indeed any, guidance on the complexities of its effects. It was eventually decided, given the widespread recognition and pervasive significance of the concept of intertemporality in international law, that it might be treated as imported by reference to the requirement that every treaty be interpreted in good faith and in light of "any relevant rules of international law applicable in the relations between the parties."²³⁹ Intertemporality is, in any event, reflected in certain more specific aspects of the codified law of treaties. Notable examples include the rule of non-retroactivity of the Vienna Convention²⁴⁰ and the principles governing the conflict of treaties with

234. See *Island of Palmas Case*, 2 R. Int'l Arb. Awards at 869.

235. *Third Report on the Law of Treaties*, [1964] 2 Y.B. INT'L L. COMM'N 8, U.N. Doc A/CN.4/167 & Add. 1-3.

236. *Id.*

237. See ROSENNE, *supra* note 70, at 76-80; ILC Commentary, *supra* note 84, at 222.

238. That is, they are conceptually less distinct than the notions of *acquisition* and *retention* of title in the territorial context. Cf. Maarten Bos, *Theory and Practice of Treaty Interpretation*, 27 NETH. INT'L L. REV. 3, 11-13 (1980) (exploring the complexities of the relationship between interpretation and application).

239. Vienna Convention on the Law of Treaties, *supra* note 21, art. 31(3)(c).

240. See *id.* art. 4.

jus cogens.²⁴¹ As regards the latter, it will be remembered that a treaty that fails to respect a peremptory norm already established at the time of its conclusion is void *ab initio*, with the consequence that the parties must bring their relations into conformity with this norm, as far as possible eliminating the consequences of any acts already performed in reliance on the offending provision(s).²⁴² By contrast, a treaty which proves inconsistent with a peremptory norm that does not emerge until after its adoption becomes void and terminates only from the time of emergence of that norm, releasing the parties from further obligations but leaving unaffected any rights, obligations, or legal situations already created (though these may only be maintained in the future to the extent that they do not involve any conflict with the norm in question).²⁴³

There is, therefore, little room for doubt that the principle of intertemporal law must be confronted in the interpretation of treaties and that the significance of intention in this context must be specifically addressed. Perhaps the crucial point to grasp is that, since both law and intentions may evolve over time, intertemporality is relevant to both. As discussed, Waldock's first point was that each treaty is to be interpreted in light of the law in force at the time it was created, which is correct, although regrettably uninformative as to the precise role of intention in this process. One necessary clarification would be that it is the intention of the parties *at that same time* that is relevant for this purpose, at least in the first instance.²⁴⁴ Thus, for the purposes of interpreting the treaty, the parties cannot be credited with knowledge, aims, or motivations which they did not possess during the negotiating process and which only subsequently emerged.

There are, however, various considerations which combine to prevent this principle of "contemporaneity" operating as an unwarranted impediment to the process of adjustment of ongoing treaty relations to meet the needs of the moment. The first is that it must, of course, be applied not only in the case of the original treaty, but also in relation to each and every subsequent amendment. Thus, the original intentions of the parties must be regarded as having been modified from the date when

241. See *id.* arts. 53, 64, 71.

242. *Id.* art. 71(1). Note that this rule departs from the general rule for invalid treaties that "acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity." *Id.* art. 69(2)(b). Presumably, acts in defiance of peremptory norms cannot *ex hypothesi* be performed in good faith.

243. *Id.* art. 71(2). This final stipulation operates as a gloss on the usual rule for termination established by article 70(1)(b). *Id.* 70(1)(b).

244. Land and Maritime Boundary between Cameroon and Nigeria (Eq. Guinea intervening), 2002 I.C.J. 303, ¶ 59 (Oct. 10); see, e.g., Decision on Delimitation of the Border Between Eritrea and Ethiopia (Eri. v. Eth.), 25 R. Int'l Arb. Awards 83, ¶ 3.5 (Eri.-Eth. Boundary Comm'n 2002) (discussing the principle of "contemporaneity").

the amendment takes effect, at least with regard to the issues that form the subject-matter of that amendment. This is a simple question of common sense, for the object and purpose of many amendments could obviously be defeated if they were interpreted by reference to the intentions of the parties at an earlier time than that at which the amendments themselves were actually conceived. In the case of any treaty that is regularly amended, like the ICRW, it is accordingly plain that the rules of treaty interpretation require that the intentions of the parties be treated as essentially fluid.

Moreover, in certain respects, this may be true even in the absence of any question of formal amendment. Given that the parties to treaties are governmental entities well-versed in the need for creating regulatory mechanisms that are as far as possible proof against the gathering pace of change in social, political, economic, and scientific affairs, it is reasonable to suppose that any such mechanisms that they choose to create at the international level would aim to incorporate some measure of adaptability from the outset. In other words, even the *original* intentions of the parties may have recognized that the terminology, substantive provisions, and even underlying objectives of the treaties they have negotiated should contain an element of flexibility. This point was clearly recognized in the ICJ's following observation in its *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* advisory opinion:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant [of the League of Nations]—"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust." The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of the law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings

relate, the last fifty years, as indicated above, have brought important developments.²⁴⁵

A very similar approach, as noted above, was taken in the *Gabčíkovo-Nagymaros Project* case.²⁴⁶ In addition, valuable guidance as to the implications of this notion of evolutionary intention can be gleaned from a further decision of the ICJ, the *Aegean Sea Continental Shelf* case.²⁴⁷ In the course of determining the question of its possible jurisdiction over the dispute, the Court was required to consider the effect of Greek accession, in 1931, to the 1928 General Act for the Pacific Settlement of International Disputes, and in particular of its reservation regarding disputes "relating to the territorial status of Greece."²⁴⁸ In response to a claim presented by Greece against Turkey concerning delimitation of the continental shelf, the latter sought to rely on this reservation by virtue of the principle of reciprocity, so as to exclude the Court's jurisdiction. Greece argued that the concept of the continental shelf was unknown in 1931, and that its reservation consequently could not be interpreted, in accordance with the state of knowledge at the time, to cover such disputes. The Court disagreed, holding that

[o]nce it is established that the expression "the territorial status of Greece" was used . . . as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like "domestic jurisdiction" and "territorial status" were intended to have a fixed content regardless of the subsequent evolution of the law.²⁴⁹

Accordingly, the ICJ was "of the opinion that the expression in reservation (b) "disputes relating to the territorial status of Greece" must be

245. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21).

246. *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7 (Sept. 25).

247. *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1978 I.C.J. 3 (Dec. 19).

248. *General Act for the Pacific Settlement of International Disputes*, Sept. 26, 1928, 93 L.N.T.S. 342.

249. *Aegean Sea Continental Shelf*, 1978 I.C.J. at 33.

interpreted in accordance with the rules of international law as they exist today, and not as they existed in 1931.”²⁵⁰ The jurisdiction of the Court was therefore excluded.

This body of jurisprudence confirms the essential role of the principle of intertemporal law in ensuring the ongoing effectiveness and adaptability of treaties in light of the changing demands that circumstances may place on them.²⁵¹ The overall effect of the principles referred to is conveniently summarized in the observations of the ICJ in the *Gabčíkovo-Nagymaros Project* case:

In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is determined by the rules of the relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of state responsibility

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as it is feasible. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997.²⁵²

These considerations are certain to apply with even greater force to the ICRW, given the much longer time-span between the conclusion of the treaty and the current dispute, and the correspondingly profound changes which have taken place in the factual and legal background during that period.²⁵³ This conclusion is unlikely to come as a surprise to IWC members because it was presaged long ago in the legal opinion provided by Derek Bowett in the following terms:

Where, as in the 1946 Convention, a treaty establishes a continuing regime with international organs, such as the [ILC],

250. *Id.* at 34.

251. *Cf.* ELIAS, *supra* note 52, at 17 (discussing the necessity of rigorous application of the doctrine of intertemporal law to dispute resolution).

252. *See* *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, ¶¶ 132–34 (Sept. 25).

253. *See id.* at 114 (separate opinion of Judge Weeramantry) (“It matters little that an undertaking has been commenced under a treaty of 1950 if in fact that undertaking continues in operation in the year 2000. The relevant environmental standards that will be applicable will be those of the year 2000.”).

performing continuing functions under that regime, there is marked tendency to regard such a treaty as a "dynamic" instrument, akin to a Constitution in a State, capable of adaptation to changing circumstances by a process of interpretation rather than as a static statement of rights and duties the content of which is fixed and unchangeable.²⁵⁴

Bowett regarded the reasons for this approach as being "obvious," and it is to be hoped that the proposition can by now be taken as uncontroversial in relation to the ICRW. Certainly, the need to have regard to temporal effects in the application of legal instruments appears to be implicit in Document 58/12 and, indeed, to have been fully recognized by its principal proponent, Japan, in other international fora.²⁵⁵

e. State Responsibility and Other Consequences of Breach

Given that the dispute involves the proper approach to the performance of treaty obligations, it inevitably impinges on the province of state responsibility. It is clear that a breach of treaty, like that of any international obligation, gives rise to responsibility on the part of the State concerned.²⁵⁶ Such responsibility does not itself affect the continuing duty of that State to perform the obligation in question,²⁵⁷ but entails secondary obligations to desist from the wrongful act, to offer assurances of non-repetition if circumstances so require, and to make appropriate reparation.²⁵⁸ The internal law of a State may never be relied on to justify or

254. Legal Opinion on Two Questions Concerning the Interpretation of the 1946 Convention (Apr. 28, 1979) (on file with author).

255. See Erik Franckx, Convention on International Trade in Endangered Species, Application of the Term "Introduction for the Sea," http://www.cites.org/eng/news/meetings/ifso5/term_IFS.pdf. In the course of discussions at the Eleventh CITES Council of Parties of CITES Resolution Conf.11.4,

Japan stressed that new scientific findings with respect to cetaceans were not taken into account, and therefore rendered the proposed resolution obsolete. Together with Australia, it furthermore had difficulties with recital 19, which implied the acceptance by the conference of the parties in 2000 of a text adopted by the IWC in 1978.

Id. at 8.

256. Responsibility of States for Internationally Wrongful Acts, G.A. Res 56/83, art. 1, 2, U.N. Doc A/56/49 (Vol. I)/Corr.4 (Dec. 12, 2001); see JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2002) (discussing this draft); see also IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I (1983); CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928) (discussing state responsibility generally).

257. Responsibility of States for Internationally Wrongful Acts, *supra* note 256, art. 29 (noting that the obligation may, however, effectively be brought to an end by the State to which it is owed terminating the treaty in question).

258. *Id.* arts. 30–31, 34–39.

excuse a breach of treaty,²⁵⁹ since States are obliged to ensure that their internal law is brought into conformity with their international obligations.²⁶⁰ In the case of the ICRW itself, this principle is effected through Article IX, which requires each party to take appropriate measures to ensure the application of the provisions of the Convention.²⁶¹

The illicit or excessive use of a *power* may also be amenable to legal process, but does not entail state responsibility as such, except to the extent that some concomitant right of another State has been incidentally infringed. This is because responsibility is concerned only with breaches of *duty*. Nevertheless, as indicated in the previous Part, the essence of the complaint expressed in Resolution 2006-1 appears to be that the conduct of IWC members who persistently oppose the resumption of commercial whaling is calculated, in one sense or another of that word, to undermine or frustrate the object and purpose of the ICRW, and the decision in the *Nicaragua* case does appear to confirm, notwithstanding the reservations of the British and Japanese judges, that there is a general duty of the parties to any given treaty not to engage in such conduct.²⁶² Although it was perhaps surprising to see the duty in question characterized as one arising under customary international law rather than by virtue of the treaty itself (one would have thought it was an implied obligation of every treaty to avoid defeating its object and purpose), it is difficult to disagree with the conclusion that such a duty may exist. Certainly, the arguments advanced to the contrary do not ultimately appear convincing.

To elaborate, Judge Oda suggests that the concept of object and purpose “is referred to several times in the 1969 Vienna Convention on the Law of Treaties, but *only*” in certain specified contexts, namely Articles 19 (reservations), 41 (modification), and 60 (material breach).²⁶³ In relation to the last of these contexts, he suggests that a material breach of a treaty, according to Article 60(3)(b), consists in “the *violation of a provision* essential to the accomplishment of the object and purpose of the treaty” and concludes that conduct which tends to defeat the object and purpose without amounting to a breach of a specific provision cannot give rise to responsibility. With respect, however, this overlooks the effect of various other provisions, most notably Articles 18 and 60(3)(a). The former establishes a specific duty “to refrain from acts which would defeat the object and purpose of a treaty” that a State has signed (unless

259. *Id.* art. 32; Alabama Claims Arbitration (U.S. v. U.K.), 1 Int. Arb. (Moore) 495, 656 (1871).

260. Exchange of Greek and Turkish Populations case (Greece v. Turk.), 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 20).

261. ICRW, *supra* note 1, art. IX.

262. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

263. *Id.* at 239 (separate opinion of Judge Oda).

and until it makes clear its intention not to become a party), or by which it has expressed its consent to be bound, pending entry into force of the treaty (and provided this is not unduly delayed).²⁶⁴ If such a duty can exist prior to the treaty as a whole becoming binding on the State concerned, it is extremely difficult to understand why it should not remain effective once the treaty does become binding. It might perhaps be argued that, at the moment when the treaty becomes binding on the party in question, the specific duties that it establishes somehow *supplant* the duty not to defeat the object and purpose, but it is surely more convincing to argue that these various duties simply *co-exist*. It would certainly be an extraordinary consequence if the effect of a treaty becoming operative for a particular State were to nullify the most fundamental element of its commitment to the entire regime.

The significance of Article 60(3)(a) for present purposes is that it provides an alternative justification for termination of the treaty to that mentioned by Judge Oda, specifically "a repudiation of the treaty," and it is difficult to see why conduct calculated to defeat the very purpose of a treaty should not be regarded as a repudiation.²⁶⁵ Consequently, the parties that were able to substantiate the claim that they were the victims of such conduct would in principle be entitled to suspend or terminate the treaty, either for all parties or as against the defaulting States, although under the Vienna Convention this would entail following the procedures set out in Articles 65–68 to govern that eventuality. The existing jurisprudence on this issue suggests that it is extremely difficult to persuade a court or tribunal that such a right has accrued. The claim that a large proportion, perhaps even a majority, of the parties to a multilateral treaty has conspired to defeat its object and purpose may be so inherently implausible as to beg a variety of questions, both factual and legal.

In practice, the power of withdrawal from the organization established by Article XI of the ICRW offers an alternative course of action for any IWC Member State that feels aggrieved. This power, however, must now be read in light of such provisions as Article 65 of the Law of the Sea Convention and Article 5 of the Biodiversity Convention. Much more importantly, the break-up of the IWC would reflect so poorly on all of the parties in a political sense and doubtless result in such severe repercussions from civil society, that every effort should now be made to resolve the matter through negotiation. This will, in particular, require that much closer and more serious attention be paid to the specific *legal* aspects of the controversy than has ever been thought appropriate in the past.

264. Vienna Convention on the Law of Treaties, *supra* note 21, arts. 18, 60(3)(a).

265. *Military and Paramilitary Activities*, 1986 I.C.J. at 14.

3. Substantive Norms

Having considered the complex question of the adjectival norms which must be taken into account in the process of normalization of the ICRW, it is now necessary to turn to the question of substantive norms, which is scarcely more straightforward. The activity of whaling falls at the intersection of various substantive areas of legal regulation, of which the prime examples are the law governing the conservation and sustainable use of biological diversity and the law of the sea. In both contexts, moreover, it may be necessary to bear in mind certain broader principles concerning man's relations with the natural world. Document 58/12 suggests that principles governing the recognition and advancement of cultural diversity and food security may also require consideration.²⁶⁶

a. Conservation and Sustainable Use of Biological Diversity

Since whaling of any description inevitably impacts the conservation and sustainable use of biological diversity, it would seem inevitable that regard would have to be paid to the major conventions that address such issues, in particular, because they, in large part, post-date the Whaling Convention. Therefore, in principle, they take priority over it in the event of any clear incompatibility.²⁶⁷ Specifically, the Biodiversity Convention, which has been accepted by virtually every member of the international community, provides an overarching framework for the conservation activities of the international community generally. Its relevance is expressly acknowledged by Document 58/12.²⁶⁸

In many cases, however, a clear intention has been manifested in later treaties not to trespass into the domain of the IWC, but to leave the question of whaling to be regulated under the ICRW. Article 6 of the 1980 Convention on the Conservation of Antarctic Marine Living Resources,²⁶⁹ for example, provides quite specifically that "nothing in this Convention shall derogate from the rights and obligations of the Contracting Parties under the International Convention for the Regulation of Whaling,"²⁷⁰ while Article 12(2) of the 1979 Bonn Convention on Migra-

266. IWC/58/12, *supra* note 3.

267. Vienna Convention on the Law of Treaties, *supra* note 21, art. 30.

268. IWC/58/12, *supra* note 3.

269. Convention on the Conservation of Antarctic Marine Living Resources art. 6, May 20, 1980, 33 U.S.T. 3476.

270. *Id.* Nevertheless, the benefits of reciprocal advancement of observer status by the two organizations were recognized at an early stage. See, e.g., IWC, *Resolution to Consider the Implications for Whales of Management Regimes for Other Marine Resources*, IWC Res. 1979-2 (1979), available at http://www.iwcoffice.org/meetings/resolutions/IWCRES31_1979.pdf; see also IWC, *Resolution on Cooperation and Coordination Between the International Whaling Commission and the Proposed Commission for the Conservation of Antarctic*

tory Species²⁷¹ indicates more generally that the "provisions of this Convention shall in no way affect the rights or obligations of any Party deriving from any existing treaty, convention or agreement."²⁷²

In other cases, however, the position is less clear cut. The Convention on International Trade in Endangered Species (CITES)²⁷³ is potentially relevant to the normalization process envisaged by Document 58/12. It establishes a regime for regulating trade in wildlife and wildlife products based on the issue of permits and certificates, to be granted by reference to criteria formulated with regard to the conservation status of listed species. Crucially, Article I defines "trade" extremely widely, to embrace "export, re-export, import, and introduction from the sea," the last of which is itself defined as "transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State."²⁷⁴ Essentially, therefore, virtually all movements across international boundaries are covered.²⁷⁵ In the case of the endangered species listed in Appendix I, no such transactions are permitted if the specimens are to be used "for primarily commercial purposes,"²⁷⁶ but commercial trade is allowed, subject to bureaucratic controls, for the less vulnerable Appendix II species.²⁷⁷

The question of CITES' relationship with other legal measures is expressly addressed in Article XIV. The second paragraph of this article asserts that the

provisions of the present Convention shall in no way affect the . . . obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking or possession or transport of specimens which is in force or

Marine Living Resources, IWC Res. 1980-5 (1980), available at http://www.iwcoffice.org/meetings/resolutions/IWCRES32_1980.pdf.

271. Bonn Convention, *supra* note 205, art. 12(12).

272. *Id.* Nevertheless, the involvement of both conventions in cetacean conservation led to the adoption of a Memorandum of Understanding between the two Secretariats in 2000. See Memorandum of Understanding Between the Secretariat of the International Whaling Commission and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (CMS), July 25, 2000, reprinted in CMS, *Cooperation with Other Bodies*, UNEP/CMS/Conf.7.11, Annex 1 (Aug. 21, 2002), available at http://www.cms.int/bodies/COP/cop7/list_of_docs/pdf/en/CP7CF7_11_Cooperation_Other_Bodies.pdf.

273. CITES, *supra* note 209; see also D.S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES (1989); SIMON LYSER, INTERNATIONAL WILDLIFE LAW (1985); WIJNSTEKERS, *supra* note 209; Joni E. Baker, *A Substantive Theory of the Relative Efficiency of Environmental Treaty Compliance: The Case of CITES*, 2 J. INT'L WILDLIFE L. & POL'Y 1, 9 (1999); Peter H. Sand, *Whither CITES?*, 8 EUR. J. INT'L L. 29, 29 (1997).

274. See CITES, *supra* note 209, art. I.

275. See *id.* arts. VII, XV(3), XXIII(2) (discussing the exemptions and exclusions provided for in Articles VII, XV(3), and XXIII(2)).

276. *Id.* app. I.

277. *Id.* app. II.

subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.²⁷⁸

It is implausible, however, to suggest that the category envisaged here includes the ICRW, because the latter does not concern any "other" aspects of trade, etc., but *the very aspects* that CITES itself addresses, specifically the introduction from the sea of specimens listed in the various appendices. Accordingly, the more relevant provisions may be found in the fourth and fifth paragraphs of Article XIV, which provide:

4. A State Party to the present Convention, which is also a Party to any other treaty, convention, or international agreement which is in force at the time of the coming into force of the present Convention and under the provisions of which protection is afforded to marine species included in Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention, or international agreement.

5. Notwithstanding the provisions of Articles III, IV, and V, any export of a specimen taken in accordance with paragraph 4 of this Article shall only require a certificate from a Management Authority of the State of introduction to the effect that the specimen was taken in accordance with the provisions of the other treaty, convention, or international agreement in question.²⁷⁹

The meaning of these provisions, and especially the relationship between them, is not particularly easy to unravel. They are plainly applicable, *inter alia*, to States engaged in whaling, and the aim of paragraph four is clearly to exempt certain of their activities from the purview of CITES entirely. The more difficult question is to identify those exempted activities with precision. First, it should be noted that the obligations excluded in relation to these marine species are those in respect of "trade," which is defined to include, export, re-export, import, or introduction from the sea. It therefore seems curious for paragraph five to create a specific obligation regarding export, since that falls squarely within the category of duties the effect of which has already been ex-

278. *Id.* art. XIV(2).

279. *Id.* art. XIV(4)-(5).

cluded by the previous paragraph.²⁸⁰ Consequently, although the drafting is scarcely ideal, paragraph five, as a matter of common sense, must be interpreted as creating an exception to paragraph four, so as to avoid being deprived of all effect.²⁸¹ The key practical result appears to be that the introduction from the sea of specimens of the marine species in question is to be treated as exempt from CITES formalities, whereas any subsequent *export* of those specimens requires the certificate of lawful taking, which serves in lieu of any other CITES documentation.²⁸² More importantly, however, this exemption is stated to apply only to CITES Appendix II species, and not to Appendix I, to which all the usual bureaucratic formalities must accordingly apply. Since almost all the ICRW-protected great whale taxa are in fact listed in Appendix I, the exemption is virtually without effect in this context.²⁸³ Uniquely, however, the West Greenland population of the minke whale is included in Appendix II, and all takings from this stock, if in accordance with the ICRW, therefore fall within the relaxed documentary regime described above.²⁸⁴ CITES Resolution 11.4, a consolidating measure, aspects of which derive from earlier resolutions agreed on since 1979, and which was itself revised at the Twelfth Conference of Parties to CITES, recommends that the Parties pay particular attention to these documentary requirements.²⁸⁵ In practice, however, the significance of all of these measures is marginalized by the fact that various Parties, including the major whaling nations, have formulated reservations with respect to those cetacean species that they have any interests in exploiting.²⁸⁶ Under

280. *Id.* art. XIV(4) (noting that the party in question would be relieved of its obligations under paragraph 5 along with all the other "obligations imposed on it under the provisions of the present Convention").

281. This outcome can be achieved by combined application of the principle of effectiveness and the maxim *specialia generalibus derogant*, but it would have been preferable for paragraph 4 to have made this relationship explicit, by beginning "[s]ubject to the provisions of the following paragraph. . ."). *Id.*

282. See WIJNSTEKERS, *supra* note 209 (discussing a broadly similar effect, though seemingly without regarding the issue as in any way problematic and noting further that the reference in paragraph 5 to Articles III, IV, and V is, strictly speaking, incorrect, since it is only Article IV which addresses species listed in Appendix II).

283. In this sense, CITES reinforces the ICRW, since no commercial trade is permitted under the former in respect of those cetacean species for which zero quotas have been established by the latter. See IWC, *Resolution on Cooperation between the IWC and CITES*, IWC Res. 1998-8 (1998); see also IWC, *Resolution on Cooperation between the IWC and CITES*, IWC Res. 1999-6 (1999).

284. Plainly if other cetacean taxa were at any time transferred from Appendix I to Appendix II, they too would be brought within the scope of this regime.

285. CITES, *supra* note 209.

286. *Viz.*, (where I, J, N, P, SVG indicate reservations formulated by Iceland, Japan, Norway, Palau, and St. Vincent and the Grenadines, respectively): Baird's beaked whale (*Berardius bairdii*) (J); Northern bottlenose (*Hyperodon ampullatus*) (I); sperm whale (*Physeter catodon*) (I, J, N, P); minke whale (*Balaenoptera acutorostrata*), except W.

Article XXIII(3) of CITES, the effect of a reservation is that the State in question is treated as not a party to the Convention at all, and therefore exempt from *any* obligation, as far as the particular species in question are concerned.²⁸⁷ While the relationship between CITES and the ICRW is therefore theoretically fairly complex, it is currently unlikely to have a significant bearing in practice as far as the call for normalization is concerned.

Of potentially much greater significance for present purposes amongst conservation treaties of global application, however, is the 1992 Biodiversity Convention.²⁸⁸ Biological diversity is defined for the purposes of the Convention as “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species, and of ecosystems.”²⁸⁹

It goes without saying that whales, and indeed all cetaceans, represent manifestations of this diversity. The CBD was opened for signature at the Rio Earth Summit, following several years of intensive negotiations, and has attracted near-universal participation, with only the United States and a handful of other nations choosing to remain outside of it. It may, in certain respects, have reflected customary international law at the time of its adoption, and is certainly likely to have served to crystallize emerging customary rules in the subsequent decade and a half,²⁹⁰ along the lines envisaged by the ICJ in the *North Sea Continental Shelf Cases*.²⁹¹ A number of its key provisions, indeed, would be likely to

Greenland population (I, J, N, P); Antarctic minke whale (*B. bonaerensis*) (I, J, N); sei whale (*B. borealis*) (I and, with exclusion of certain populations, J, N); Bryde's whale (*B. edeni*) (J); blue whale (*B. musculus*) (I); fin whale (*B. physalus*) (I, J, and, for certain populations, N); humpback (*Megaptera novaeangliae*) (I, SVG). Japan also maintains a reservation regarding the Irawaddy dolphin (*Orcaella brevirostris*). No reservations appear to have been formulated regarding other CITES Appendix I-listed cetaceans, such as the Grey whale (*Eschrichtius robustus*), bowhead (*Baleana mysticetus*), right whales (*Eubalaena* spp.), and pygmy right whale (*Caparea marginata*).

287. CITES, *supra* note 209, art. XXIII(3).

288. CBD, *supra* note 120; *see also* INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY (Michael J. Bowman & Catherine J. Redgwell eds., 1996); FIONA MCCONNELL, THE BIODIVERSITY CONVENTION: A NEGOTIATING HISTORY (Kluwer Law Int'l 1996); TIMOTHY SWANSON, GLOBAL ACTION FOR BIODIVERSITY: AN INTERNATIONAL FRAMEWORK FOR IMPLEMENTING THE CONVENTION ON BIOLOGICAL DIVERSITY (1997); Françoise Burhenne-Guilmin & Susan Casey-Lefkowitz, *The New Law of Biodiversity*, 3 Y.B. INT'L ENVTL. L. 43 (1992); Lyle Glowka et al., *A Guide to the Convention on Biological Diversity* IUCN Envtl. L. & Pol'y Paper No. 30, 1994; Cyrille de Klemm & Clare Shine, *Biological Diversity Conservation and the Law* IUCN Envtl. L. & Pol'y Paper No. 29, 1993.

289. CBD, *supra* note 120.

290. *See* INTERNATIONAL LAW AND THE ENVIRONMENT 636–38 (Patricia W. Birnie & Alan E. Boyle eds., 2d ed. 2002) (advancing a relatively cautious view on this question).

291. *North Sea Continental Shelf Cases* (F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

receive the endorsement even of States which have remained outside the system.

The CBD recognizes a wide range of values in biological diversity and treats its conservation as a matter of common concern for all mankind, emphasizing the merits of the precautionary approach.²⁹² Although Document 58/12 refers to its emphasis on sustainable utilization, the CBD's fundamental objectives are in reality three-fold, namely the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.²⁹³ The obligations imposed on States under the CBD apply not merely to areas within their national jurisdiction but also to those beyond, at least in the case of activities carried out under their jurisdiction or control, a provision which is plainly applicable in principle to whaling wherever it is conducted.²⁹⁴ In such cases, the parties are to cooperate directly or through competent international organizations in order to ensure conservation and sustainable use,²⁹⁵ a provision of obvious relevance to the IWC.

A preliminary responsibility is to identify components of biodiversity the conservation and sustainable use of which are judged to be especially important in light of criteria spelled out in Annex I, as well as processes and activities likely to have an adverse effect on these objectives.²⁹⁶ There can be no doubt that whales satisfy a number of the specified criteria, being not only of "economic value," but also of "social, scientific, or cultural importance." Furthermore, whales may have a possible significance for purposes of biodiversity research. In addition, a number of the larger cetacean species are currently classified as "threatened." Lastly, whaling activities are plainly capable of producing "significant adverse impacts" on conservation, in the absence of the kind of regulation and management measures envisaged by Article 8(1).²⁹⁷ This obligation sits alongside various more general duties regarding *in situ* conservation that are spelled out in other paragraphs of Article 8 and may be of relevance in the present context. A wide range of supporting measures are established under various provisions of the Convention. As in the case of other conservation treaties, this primary level of regulation is complemented by a vast body of principles, recommendations, and guidelines formulated over the years by the Conference of the Parties.

292. The preamble is extremely extensive, and these represent just some of the fundamental principles noted.

293. CBD, *supra* note 120, art. 1.

294. *Id.* art. 4.

295. *Id.* art. 5.

296. *See id.* arts. 7(a), 7(c).

297. *Id.* art. 8(1).

It is therefore clear that the Biodiversity Convention impinges directly on the activities addressed by the ICRW, although it is not its intention simply to replace earlier treaties of this kind. Rather, Article 22(1) of the CBD disclaims any intention to affect the rights and obligations deriving from existing agreements *except* where their exercise would cause a serious damage or threat to biological diversity. The risk of such a conflict may not always be easy to estimate with certainty, and this provision has therefore been interpreted under other treaty regimes to require a collaborative approach with CBD organs in order to avert or remove any fundamental disharmony of policy with the regime it establishes.²⁹⁸ At the Eighth Meeting of the CBD Conference of Parties in 2006, Decision VIII/16 urged CBD Parties to “facilitate cooperation among international organizations, and to promote the integration of biodiversity concerns into all relevant sectors by co-ordinating their national positions among the various conventions and other international forums in which they are involved, as appropriate.” Since the vast majority of IWC members are also parties to the CBD, it will plainly be necessary, as part of the normalization process, to give careful consideration to the compatibility of approaches under the two conventions. Of particular significance for this purpose are the CBD’s Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, adopted at the Seventh Conference of Parties in 2004.²⁹⁹ In addition, it will also have to be borne in mind that Article 22(2) requires CBD parties to implement the CBD consistently with the rights and obligations of States under the law of the sea wherever the marine environment is concerned.

298. This process is pursued in a variety of ways, including participation in the Liaison Group of the biodiversity-related conventions, established pursuant to CBD Decision VII/26. For the report of its most recent meeting, see Liaison Group of the Biodiversity-related Conventions, Bonn, F.R.G., May 31, 2008, *Report of Sixth Meeting*, available at <http://www.cbd.int/cooperation/BLG-6-rep-final-en.doc>. Furthermore, cooperative work programs have been agreed in some cases. See, e.g., CMS, Cooperation with Other Bodies: CBD/CMS Joint Work Programme (2002–2005), UNEP/CMS/Inf.7.13 (July 31, 2002). Finally, particular CBD measures, such as the Addis Ababa Guidelines on Sustainable Use of Biodiversity, have been adopted by the organs of other treaties. See *infra* text accompanying notes 718–728; see, e.g., *Sustainable Use of Biodiversity: Addis Ababa Principles and Guidelines*, CITES Res. Conf. 13.2 (Oct. 2004), available at <http://www.cites.org/eng/res/13/13-02R14.shtml>; *Cooperation and Synergy with the Convention on Biological Diversity*, CITES Res. Conf. 10.4, 13.2 (June 1997), available at <http://www.cites.org/eng/res/all/10/E10-04R14.pdf>.

299. SECRETARIAT OF THE CBD, CBD GUIDELINES: ADDIS ABABA PRINCIPLES AND GUIDELINES FOR THE SUSTAINABLE USE OF BIODIVERSITY (2004), available at <http://www.cbd.int/doc/publications/addis-gdl-en.pdf> [hereinafter ADDIS ABABA PRINCIPLES AND GUIDELINES]. Note also the Elaborated Programme of Work on Marine and Coastal Biological Diversity, which states that the overall vision is “to halt the loss of marine and coastal biodiversity nationally, regionally and globally and secure its capacity to provide goods and services.” Elaborated Programme of Work on Marine and Coastal Biological Diversity, Annex I to Decision VII/5. The Goal of Programme Element 2 is to ensure the conservation and sustainable use of marine and coastal living resources.

It will therefore be necessary shortly to turn to the question of the law of the sea, but before doing so, it should be noted that it is not only conservation treaties of global application that are relevant to the normalization process. It is also necessary in principle to consider the implications of *regional* treaties that may have a bearing on these issues, particularly because they have in some cases evolved so as to represent instances of local application of the Biodiversity Convention itself. In practice, however, the majority of these are likely to have little significant impact. The 1940 Organization of American States (OAS) Convention Respecting Nature Protection and Wildlife Preservation³⁰⁰ predates the ICRW, and, therefore, obviously cannot prevail over it by reference to any *lex posterior* principle, although it may conceivably bear some relevance to its interpretation, a question which will be explored in subsequent Parts. The 1985 Association of Southeast Asian Nations (ASEAN) Agreement on the Conservation of Nature and Natural Resources (Nature Conservation Convention)³⁰¹ has never entered into force, while the lists of protected species under the 1968 Algiers Convention on the Conservation of Nature and Natural Resources³⁰² do not seem to include any cetaceans; this agreement is in any event in the process of being phased out by the 2003 Revised Convention of Maputo,³⁰³ which contains a savings clause for all existing agreements.³⁰⁴ The whaling issue is not directly addressed in the 1976 Apia Convention on Conservation of Nature in the South Pacific,³⁰⁵ the operation of which has, in any event, recently been formally suspended until further notice.³⁰⁶ Noteworthy, however, is the high level of commitment in that

300. Convention between the United States of America and Other American Republics Respecting Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 229 [hereinafter Western Hemisphere Convention].

301. Agreement on the Conservation of Nature and Natural Resources, July 9, 1985, 15 E.P.L. 64.

302. African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1976 U.N.T.S. 4.

303. See IUCN—THE WORLD CONSERVATION UNION, AN INTRODUCTION TO THE AFRICAN CONVENTION ON THE CONSERVATION OF NATURE AND NATURAL RESOURCES (Mohamed Ali Mekouar & Francoise Burhenne-Guilmin eds., IUCN Env'tl. Pol'y & L. Paper No. 56, 2004).

304. *Id.* at 51.

305. Apia Convention on Conservation of Nature in the South Pacific, June 12, 1976, 20 I.P.E. 10, 359. Note that, despite its title, the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP), is essentially a regional seas pollution agreement. However, like others of its kind, it does provide for protected areas. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, 26 I.L.M. 38.

306. Pacific Regional Environment Programme: Regional Conventions, <http://www.sprep.org/legal/regional.htm> (last visited Aug. 24, 2008) (noting suspension of the Convention at the Eighth Meeting of the Parties in 2006).

region to the protection of whales, particularly through the creation of sanctuaries. Building on work previously undertaken under the aegis of the South Pacific Regional Environmental Program (SPREP),³⁰⁷ a 2006 Memorandum of Understanding concerning the Conservation of Cetaceans and their Habitats in the Pacific Islands Region³⁰⁸ was concluded in accordance with Article IV(4) of the Bonn Convention.³⁰⁹ It took effect on September 15 of that year, and, by the time of writing one year later, it had attracted as signatories some thirteen States of the region and a number of key international NGOs.³¹⁰ The Memorandum, which is not legally binding, is supported by an Action Plan, which is of an essentially programmatic, rather than normative, character. It may nonetheless have an impact on the attitudes adopted by States of the region in relation to their implementation of the ICRW. It will doubtless be the responsibility of these States and those of other regions to ensure that they draw the attention of the IWC to any treaty that the States consider to be pertinent to the normalization process.

One regional arrangement which must certainly be considered relevant, however, is the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats, which recognizes that “wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic, and intrinsic value that needs to be preserved and handed on to future generations.”³¹¹ With that in mind, Article 2 requires the Parties to take appropriate measures to maintain wildlife populations at, or adapt them to, levels which correspond to ecological, scientific, and cultural requirements, while taking account of economic and recreational requirements. It is widely accepted that this accords general priority to conservation over economic considerations.³¹² More specifically, Article 6 requires them to prohibit particular conduct, including “all forms of deliberate capture and keeping and deliberate

307. Pacific Island Countries Sign New Agreement to Conserve Whales and Dolphins and Their Habitats (Sept. 15, 2006), available at http://www.sprep.org/article/news_detail.asp?id=312.

308. See Information Paper from the Government of Australia to the Conservation Committee (May 2007), available at http://www.iwcoffice.org/_documents/commission/IWC59docs/59-CC5.pdf (providing an overview of the Memorandum of Understanding).

309. Bonn Convention, *supra* note 205, at 2–3.

310. Notably, the International Fund for Animal Welfare (IFAW), the Whale & Dolphin Conservation Society, and WWF International.

311. Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, Europ. T.S. No. 104 available at <http://conventions.coe.int/Treaty/FR/Treaties/Html/104-3.htm> [hereinafter Berne Convention].

312. See, e.g., COUNCIL OF EUROPE, THE EXPLANATORY REPORT CONCERNING THE CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE AND NATURAL HABITATS (1979); Lyster, *supra* note 273, at 131–32.

killing" in relation to those species listed in Appendix II.³¹³ This Appendix includes a large number of cetacean species,³¹⁴ including the blue, fin, humpback, bowhead, Bryde's, and North Atlantic right whales, as well as the minke and sei whale when they are in the Mediterranean.³¹⁵ There is no savings clause in respect of the exercise of rights or obligations under the ICRW (or any other treaty) and this article is therefore a highly significant provision in the present context. The implications of the Berne Convention will therefore demand closer attention in the Parts that follow.

b. The Law of the Sea

The law of the sea is, of course, relevant to the activity of whaling in all its aspects, although the majority of these are unlikely to give rise to particular controversy in relation to the specific question of normalizing the ICRW. The principles clearly relevant to that particular issue are those concerning the exploitation of marine living resources, which are set out in general terms in the 1982 Law of the Sea Convention.³¹⁶ The Convention has attracted the support of over 150 members of the international community,³¹⁷ and much of its content can by now be taken to be reflective of customary international law.³¹⁸ Consequently, the rules it establishes can *prima facie* be taken to be applicable to IWC members, unless they are able to show that they have somehow exempted themselves from their scope.³¹⁹ The Law of the Sea Convention contains rules concerning the exploitation and the conservation of resources both in the Exclusive Economic Zone (EEZ) and on the high seas, and these are of clear potential relevance to the present controversy.

In many cases, particular fisheries are the subject of regulation by Regional Fisheries Management Organizations that have been created

313. Berne Convention, *supra* note 311.

314. All cetaceans not listed here are included in Appendix III, which permits regulated exploitation. *Id.* app. III.

315. The Berne Convention does not exclude the listing of sub-species or populations, though this is generally discouraged. The designation "for the Mediterranean" appears to reflect a different technique of protection, however, effectively creating a sanctuary area for certain species, rather than protecting a particular stock wherever it may roam. *See id.*

316. Third United Nations Conference on the Law of the Sea: Final Act arts. 61–73, 116–20, Nov. 1982, 21 I.L.M. 1261; *see also* Straddling Stocks Agreement, *supra* note 88.

317. *See* Chronological Lists of Ratifications, Accessions, and Successions, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (last visited Aug. 24, 2008).

318. *See, for example,* the views of the ICJ on this point in the *Gulf of Maine Case*, which was decided well before the Convention had even entered into force. *Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246, 294 (Oct. 12).

319. For Law of the Sea Convention parties themselves, the opportunities are strictly limited by Article 309. *See* UNCLOS, *supra* note 88, art. 309.

pursuant to specific international agreements.³²⁰ Document 58/12 calls for the harmonization of decision-making policy in the IWC with such instruments, ostensibly on the grounds that “whales should be treated as any other marine living resources available for harvesting subject to conservation and science-based management.”³²¹ This assertion, however, manifestly begs the question of the relevance of these agreements, which is by no means immediately apparent. Insofar as many of these instruments apply only to specified fisheries, there would appear to be no substantive functional overlap with the ICRW; accordingly, they are not to be regarded as “treaties relating to the same subject-matter” within the meaning of Article 30 of the Vienna Convention. Where there is the theoretical possibility of such overlap, this will normally have been resolved (as in the case of CCAMLR discussed above) by the insertion of a dedicated provision in the treaty in question, which in all probability will accord primacy to the ICRW. Equally, there is no practical likelihood of any formal legal relationship between the ICRW and treaties of the kind specified in Article 31(2) or 31(3)(a) of the Vienna Convention.³²² Further, since most of them post-date the conclusion of the ICRW, they cannot even be regarded as part of the circumstances under which the latter was concluded, as envisaged by Article 32.

It may, of course, be the case that in many countries the same government agency is responsible for the administration of these Regional Fisheries Management Organizations as for the ICRW, and that it would therefore be convenient for them if a uniform approach were to be adopted in relation to their interpretation and application. However, this is plainly not a consideration of any legal significance—indeed, the possibility cannot be excluded that such a consideration might actually tend to exert a *distorting* influence on the proper interpretation of the ICRW, thereby contributing to the generation and exacerbation of the conflicts that have arisen in its application. What can be accepted, however, is that, since these conventions may have to operate in the same physical, ecological, and organizational milieu as the ICRW, there is a genuine possibility that the application of the latter might in some practical sense impact on that of the former: it has been claimed, for example, that the moratorium on commercial whaling has produced adverse effects on fish

320. See PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 584–87 (Cambridge Univ. Press 2003) (1995); see also *DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW* (E. Hey ed., 1999) (providing a more detailed discussion); *GOVERNING HIGH SEAS FISHERIES* (O. Stokke ed., 2001); S. KAYE, *INTERNATIONAL FISHERIES MANAGEMENT* (2000).

321. IWC/58/12, *supra* note 3.

322. That is, they constitute neither “agreements relating to” the ICRW made “between all its parties” and “in connection with its conclusion,” nor “subsequent agreements between the parties regarding its interpretation or application.” See Vienna Convention on the Law of Treaties, *supra* note 21, arts. 31(2), 31(3)(a).

stocks, thereby possibly undermining the conservation endeavors of other organizations and treaty regimes. Without passing judgment at present on the validity of such claims, it should be conceded that such considerations might conceivably justify treating these fisheries agreements as the source of "relevant rules of international law applicable in the relations between the parties" to the ICRW, or some of them, and therefore as materials to be "taken into account" in accordance with Article 31(3)(c).³²³ These issues will accordingly be reserved for exploration in the Parts that follow.

c. Respect for Cultural Diversity

Alongside the CBD, the one other instrument to which express reference is made in Document 58/12 is the U.N. Educational, Scientific, and Cultural Organization's (UNESCO) Universal Declaration on Cultural Diversity.³²⁴ Adopted in 2001, the Declaration affirms that "respect for the diversity of cultures, tolerance, dialogue, and cooperation, in a climate of mutual trust and understanding are among the best guarantees of international peace and security."³²⁵ Article 4 declares that "the defense of cultural diversity is an ethical imperative, inseparable from respect for human dignity."³²⁶ Culture is defined for this purpose as "the set of distinctive spiritual, material, intellectual, and emotional features of society or a social group," and "encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions, and beliefs."³²⁷ Insofar as it might be claimed that the pursuit of whaling is a cultural tradition of certain communities, forming part of their lifestyle and value system, it is arguable that the 2001 Declaration could have some bearing on the debate regarding future implementation of the ICRW, and that it therefore merits consideration as part of the normalization process. Although it is not a legally binding instrument, that does not, of course, rob it of legal significance entirely: the Director-General of UNESCO has suggested that it lays down "not instructions but general guidelines,"³²⁸ and therefore a case might be made for its having soft-law status. Even that may risk overstating its effect, however, since many of its provisions are not really expressed in normative terms at all,

323. ICRW, *supra* note 1, art. XXXI(3)(c).

324. UNESCO Universal Declaration on Cultural Diversity, *supra* note 28, pmb1.

325. *Id.* (seventh recital).

326. *Id.* art. 4.

327. *Id.* (fifth recital). This definition is said to be in line with the conclusions of the World Conference on Cultural Policies (MONDIACULT, Mexico City, 1982), the World Commission on Culture and Development (Our Creative Diversity, 1995), and the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998).

328. UNESCO Universal Declaration on Cultural Diversity, *supra* note 28 (introduction).

being purely descriptive, argumentative, or aspirational.³²⁹ Article 2, for example, reads:

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied, and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.³³⁰

Even where particular provisions flirt with normativity, it is usually of a very loosely expressed and open-ended kind—thus, “care should be exercised so that all cultures can express themselves and make themselves known.”³³¹

It might therefore appear surprising that the normalization documents make no reference to the later instruments through which UNESCO has endeavored to invest certain of the principles and aspirations contained in the Declaration with concrete and binding legal significance, namely the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage³³² and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.³³³ These agreements complement, and in some respects parallel, the 1972 World Heritage Convention,³³⁴ in that each establishes an international fund for supporting cultural projects and advancing cultural diversity in particular respects, while the former incorporates a Representative List of the Intangible Cultural Heritage of Humanity, as well as a further list of elements of that heritage which are in urgent need of safeguarding. Despite their recent adoption, these treaties have rapidly secured a sufficient

329. *Id.* art. 2.

330. *Id.*

331. *Id.* art. 6.

332. UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO Doc. MISC/2003/CLT/CH/14 (Oct. 17, 2003), available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>.

333. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, 45 I.L.M. 73, available at <http://unesdoc.unesco.org/images/0014/001429/142919> [hereinafter World Heritage Convention].

334. UNESCO Convention Concerning the Protection of the World Cultural and National Heritage, Nov. 16, 1972, 11 I.L.M. 1358, available at <http://whc.unesco.org/archive/convention-en.pdf>.

level of governmental support to bring about their entry into force, the former on April 20, 2006, and the latter on March 18, 2007.³³⁵

Although the center of gravity of these instruments is rather far removed from the preservation of traditional practices of hunting and resource exploitation, the key concepts involved have a decidedly open texture, raising the question of their possible relevance for present purposes. The 2003 Convention defines the intangible cultural heritage in terms of "practices, representations, expressions, knowledge, skills"—together with associated instruments, objects, artifacts and cultural spaces—that communities, groups, and individuals recognize as part of their cultural heritage.³³⁶ In contrast, the 2005 Convention embraces the many manifestations of human creativity expressed through sound, images, activities, or artifacts and transmitted through books, television programs, music, live performances, and other forms of cultural activities, goods and services.³³⁷ Perhaps the former is more likely to be on point. Although its principal focus is on the preservation of traditional manifestations of the performance arts (*i.e.*, song, dance, theatre, etc.),³³⁸ Article 2(2) confirms that "social practices," "knowledge and practices concerning nature," and "traditional craftsmanship" are also included, and it is therefore at least arguable that customary methods of resource exploitation might be subsumed within it. In any event, the specific domains referred to in the text are indicative rather than exhaustive, and it has been expressly contemplated that they might be expanded to include, for example, traditions of animal husbandry.³³⁹ Indeed, such matters already form component parts of certain traditions that have been included in the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity,³⁴⁰ which is to represent the permanent centerpiece of the

335. As of this writing, the 2003 Convention boasts 100 parties and the 2005 Convention eighty-nine (including the European Community). UNESCO 2003 Convention Signatories, <http://portal.unesco.org/la/convention.asp?KO=17116&language=E> (last visited Aug. 24, 2008); UNESCO 2005 Convention Signatories, <http://portal.unesco.org/la/convention.asp?KO=31038&language=E> (last visited Aug. 24, 2008).

336. Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 332, art. 2(1).

337. See UNESCO, Diversity of Cultural Expressions, http://portal.unesco.org/culture/en/ev.php-URL_ID=33014&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Aug. 24, 2008).

338. All the Japanese entries in the Proclamation, for example, are of this kind (*i.e.*, Kabuki, Bunraku Puppet Theatre, and Nogaku Theatre). UNESCO, Masterpieces of the Oral and Intangible Heritage of Humanity, <http://www.unesco.org/culture/en/masterpieces/> (follow "List of the 90 Masterpieces" hyperlink) (last visited Aug. 24, 2008).

339. UNESCO, Intangible Heritage Domains in the 2003 Convention, <http://www.unesco.org/culture/ich/index.php?pg=00052> (last visited Aug. 24, 2008).

340. The Proclamation was launched in 1997, independently of any plans for the adoption of a convention, but has subsequently been brought within its remit. It contains ninety entries from 107 countries (many of the traditions it recognizes are transnational), compiled in

Representative List which the Convention establishes; for example, the “[c]ultural Space of the Bedu in Petra and Wadi Rum” embraces traditions relating to knowledge of wildlife, traditional medicine, camel husbandry, and tent-making craftsmanship amongst the semi-nomadic pastoral communities of southern Jordan.

On the other hand, the substantive provisions of these agreements suggest that, however widely their operational scope might ultimately be drawn, they are unlikely to play a significant part in the current debate. The principal obligations of the 2003 instrument apply essentially at the national level, requiring parties to identify and safeguard the intangible heritage constituted within their own territory, and to endeavor to adopt general policies and measures designed to secure its promotion, preservation, and appreciation.³⁴¹ The role of other parties is restricted to general duties of cooperation and the establishment of mechanisms of assistance,³⁴² especially through the institutions that the UNESCO Convention establishes.³⁴³ Most importantly, Article 3(b) provides that nothing in the Convention is to be interpreted as “affecting the rights and obligations of State Parties deriving from any international instrument relating to . . . the use of biological and ecological resources to which they are parties,” thereby indicating the intention of the parties to yield primacy to such instruments over considerations of cultural diversity.³⁴⁴

Very much the same message can be taken from regional treaties addressing the question of cultural diversity, such as the 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Framework Convention).³⁴⁵ Although the provenance and over-

three phases between 2001 and 2005, and closed on the entry into force of the Convention. The Masterpieces may be incorporated within the Convention’s Representative List in accordance with Article 31; currently around half of them are associated within the territories of contracting parties. UNESCO, *Masterpieces of the Oral and Intangible Heritage of Humanity*, *supra* note 338.

341. See Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 332, arts. 11–15.

342. *Id.* arts. 19–24.

343. *Id.* arts. 4–10.

344. The 2005 Convention makes complex provision for its relationship to other treaties in Articles 20 and 21, entailing the obligation to promote the Convention’s objectives in other fora, foster mutual supportiveness between instruments, and “take into account” relevant provisions in the interpretation of other treaties; it does, however, disclaim any intention to modify the parties’ rights or obligations under other treaties. See Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *supra* note 333.

345. Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Dec. 27, 2005, Council Europ. T.S. No. 199, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/199.htm> (last visited Aug. 24, 2008) [hereinafter Framework Convention]; see also *id.* (Explanatory Report). The Convention is unlikely to be in force for some time. In any event, it will not be directly applicable to the majority of IWC members; it is discussed only with respect to the light it may cast on the legal protection of cultural diversity generally. *Id.*

all focus of this treaty is substantially different from that of the UNESCO instruments,³⁴⁶ the Framework Convention does clearly record the Parties' recognition that "rights relating to cultural heritage are inherent in the right to participate in cultural life" and that "everyone, alone or collectively, has the responsibility to respect the cultural heritage of others, as much as their own heritage."³⁴⁷ Yet, once again, these principles are heavily qualified. Articles 4(c) and 6 both allow for the subordination of the exercise of the right to cultural heritage to the protection of the public interest and/or the rights and freedoms of others.³⁴⁸ Article 6 further provides that nothing in the Framework Convention should in any event be interpreted as creating enforceable rights.³⁴⁹ Under Article 7, finally, the Parties undertake, *inter alia*, to encourage reflection on ethical issues relating to the cultural heritage, as well as respect for diversity of interpretations, and to establish processes for conciliation to deal equitably with situations in which contradictory values are exhibited by different communities.³⁵⁰ This suggests that even in geopolitical regions where notions of cultural heritage are taken seriously, there is little sign of a move toward the recognition of enforceable rights in that regard, or to give traditional practices automatic priority over other considerations.

In light of these considerations, it would seem that the various instruments concerning cultural diversity can have at best a marginal impact on the normalization debate. Nevertheless, since it might be claimed that, even after the adoption of the treaties mentioned, the 2001 Declaration retains some residual significance over the entire field, it will be appropriate to address that possibility in the Parts that follow.

At the same time, it is conceivable that a stronger source of support for the recognition within the IWC of the importance of preserving cultural traditions may be found in the suite of earlier treaties designed to give direct and concrete effect to the principles originally articulated in the 1948 Universal Declaration on Human Rights, because these are more obviously dedicated to the recognition of enforceable rights and the demarcation of acceptable limitations thereto. Foremost amongst these are the two U.N. International Covenants of 1966, together with their various regional counterparts.³⁵¹ It is not suggested that the decision-making processes of the IWC are likely to engage the liability of

346. *Id.* § B.

347. *Id.* arts. 1(a), 4(b).

348. *Id.* arts. 4(c), 6.

349. *Id.* art. 6.

350. *Id.*

351. See generally BASIC DOCUMENTS ON HUMAN RIGHTS (Ian Brownlie & Guy S. Goodwin-Gill eds., 4th ed. 2002).

States under these Covenants directly, but simply that it would be preferable that the policy outcomes avoid any consequence that might be discordant with their provisions or otherwise contrary to their spirit. In order for this possibility to be meaningful, it must first, of course, be demonstrated that the notion of cultural diversity represents an objective of these instruments, or can somehow be grafted on to them. The principle referred to above from the 2001 Declaration regarding participation in cultural life, for example, seemingly has its origins in Article 15(1)(a) of the 1966 International Covenant on Economic, Social, and Cultural Rights,³⁵² while Article 15(2) establishes that the steps to be taken by the Parties to achieve realization of this right of participation “shall include those necessary for the conservation of . . . culture.”³⁵³ On the other hand, questions of failure to conserve culture and exclusion from participation are inevitably relative in character, and provision is in any event made for the possible limitation of all such rights “for the purpose of promoting the general welfare in a democratic society.”³⁵⁴ This simply takes us back to the general substantive debate about the pros and cons of commercial whaling, while at the same time failing to offer concrete guidance on its resolution. A key point here is that the programmatic nature of the International Covenant on Economic, Social, and Cultural Rights envisages only a process of gradual progression toward achievement of the rights incorporated,³⁵⁵ the majority of which are not viewed as “self-executing,”³⁵⁶ while the mechanisms for implementation are not such as to generate the kind of case law from which specific guidance can readily be gained.³⁵⁷

Of greater potential assistance, therefore, are those treaties that do tend to generate such jurisprudence, namely those for the protection of *civil and political* rights, at least insofar as they are capable of bearing on issues regarding the conservation of, and participation in, cultural traditions. Despite the broad distinctions recognized in the drafting of

352. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. This provision in turn derives ultimately from Article 27 of the Universal Declaration of Human Rights. Universal Declaration of Human Rights, *supra* note 127, art. 27.

353. International Covenant on Economic, Social, and Cultural Rights, *supra* note 352, art. 15(2).

354. UNESCO Universal Declaration on Cultural Diversity, *supra* note 28, art. 4.

355. See Comm. on Econ., Soc., & Cultural Rts. [CESCR], *General Comment No. 3*, Dec. 14, 1990, available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument).

356. According to the CESCR, possible exceptions include Articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4), and 15(3), but no reference is made to Article 15(1)–(2). *Id.* ¶ 5.

357. Implementation takes the form of a general reporting system, overseen since 1987 by the CESCR, acting on behalf of the U.N. Economic and Social Council (ECOSOC). International Covenant on Economic, Social, and Cultural Rights, *supra* note 352, arts. 16–22.

the International Covenant on Civil and Political Rights on the one hand, and the International Covenant of Economic, Social, and Cultural Rights on the other, it is clear that no watertight division between the two categories of rights can be maintained. Article 27 of the Covenant on Civil and Political Rights does indeed refer expressly to the entitlement of certain persons "to enjoy their own culture."³⁵⁸ What is more, the Human Rights Committee charged with enforcing the Covenant has specifically observed that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources" and that "that right may include such traditional activities as fishing and hunting."³⁵⁹ While this appears to be more promising in terms of its specific relevance to the issue in hand, it must be noted that this particular right is not one of those guaranteed to "everyone" or to "all persons," but rather only to persons belonging to "ethnic, religious, or linguistic minorities."³⁶⁰ Although there still seems to be no universally agreed-upon definition of what constitutes a minority for this purpose,³⁶¹ the general idea is clear enough, with indigenous peoples representing perhaps the most clear and prominent—though by no means the only—example. Indeed, there is now a substantial body of international law devoted to the protection of minorities in general,³⁶² and indigenous peoples in particular.³⁶³ Under the ICRW, the position of indigenous peoples is

358. International Covenant on Civil and Political Rights, *supra* note 130.

359. U.N. Hum. Rts. Comm., *General Comment No. 23: The Rights of Minorities*, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994).

360. *See generally* Working Group on Minorities, Sub-Comm. on Promotion and Protection of Human Rights, U.N. Econ. & Soc. Council [ECOSOC], *Final Text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, ¶ 33, U.N. Doc. E/CN.4/Sub.2/AC.5/2001/2 (Apr. 2, 2001) [hereinafter ECOSOC Declaration of Minority Rights]; CASES AND MATERIALS ON INTERNATIONAL LAW, *supra* note 35, at 725–29 (offering commentary and examples of relevant cases).

361. *See generally* Special Rapporteur of the Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, ECOSOC, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, ¶ 568, U.N. Doc. E/CN.4/Sub.2/384/Rev.1/1979 (1979) (defining the term "minority"); CASES AND MATERIALS ON INTERNATIONAL LAW, *supra* note 35, at 725; JOSHUA CASTELLINO & DEIRDRE O'LEARY, MINORITY-RIGHTS.ORG, SOME DEFINITIONS OF "MINORITIES" (2003), available at http://minority-rights.org/docs/mn_defs.htm.

362. *See generally* Framework Convention for the Protection [sic] of National Minorities and Explanatory Report, opened for signature Feb. 1, 1995, Europ. T.S. No. 157; ECOSOC Declaration of Minority Rights, *supra* note 360; JAVAID REHMAN, THE WEAKNESS IN THE INTERNATIONAL PROTECTION OF MINORITY RIGHTS (Kluwer Law Int'l 2000) (2000); PATRICK THORNBERRY, INTERNATIONAL LAW AND MINORITIES (1991); Gudmundur Alfredsson & Alfred de Zayas, *Minority Rights: Protection by the United Nations*, 14 HUM. RTS. L.J. 1 (1993); Nigel S. Rodley, *Conceptual Problems in the Protection of Minorities: International Legal Developments*, 17 HUM. RTS. Q. 48 (1995).

363. *See generally* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007); Int'l Labor Org. [ILO], Indigenous and Tribal Peoples Convention, June 27, 1989, 28 I.L.M. 1382; ILO, Indigenous and Tribal Populations Convention, June 26, 1957, 328 U.N.T.S. 247; S. JAMES ANAYA,

specifically safeguarded through the special arrangements governing aboriginal whaling, and it is unclear that there is any possible basis on which the Japanese coastal communities that engage in whaling can be considered a “minority” within the generally agreed understanding of the term. In any event, the Japanese authorities would seem themselves to have excluded any such possibility through their repeated insistence that whaling represents a cultural tradition of the Japanese people as a whole.³⁶⁴ Consequently, the norms governing the protection of minorities seem to have no role to play in this context.

Nevertheless, it is still possible to envisage that the denial to coastal communities of the opportunity to engage in whaling activities might be considered incidentally to involve the breach of one or other of the established civil or political rights to which all individuals are entitled, such as the rights to freedom of association, freedom of thought or conscience, respect for privacy or private life, or peaceful enjoyment of possessions. Under the European Convention, for example, it has been held that (i) the construction of a hydro-electric power station within lands traditionally occupied by nomadic people, whose culture and lifestyle were dependent on the maintenance of open space, and (ii) measures affecting the stationing of caravans, in relation to persons of itinerant lifestyle, both raised potential issues under such provisions.³⁶⁵ As it happens, the claimant in each case was a member of a recognized minority,³⁶⁶ but it is unlikely that this is a necessary condition of such a claim. More recently, a national court declined to exclude *in limine* a similar claim by individuals who had no such affiliation, but were merely members of the fox hunting community in the United Kingdom, and were complaining of the prohibition of this activity by the Hunting Act of 2004.³⁶⁷ The claim was thought to justify consideration on the

INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996); JUSTICE PENDING: INDIGENOUS PEOPLES AND OTHER GOOD CAUSES (Gudmundur Alfredsson & Maria Stavropoulou eds., 2002); THE RIGHTS OF PEOPLES (James Crawford ed., 1988); Elsa Stamatopoulou, *Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic* 16 HUM. RTS. Q. 58 (1994).

364. See, e.g., Government of Japan, *Background Paper for Japan's Small-Type Coastal Whaling*, IWC/60/9 (May 14, 2008), available at http://www.iwcoffice.org/_documents/commission/iwc60docs/60-9.pdf; see also Embassy of Japan in South Africa, *The Japanese Government's Position on Whaling*, http://www.za.emb-japan.go.jp/topics/topics_whaling.html (last visited Aug. 31, 2008); Media Release, Japan Whaling Ass'n, *The History and Science of Whales* (June 2004), available at <http://www.whaling.jp/english/release/040909.html>.

365. See *Chapman v. United Kingdom*, 33 Eur. H.R. Rep. 18 (2001); *G. and E. v. Norway*, 35 Eur. Comm'n H.R. Dec. & Rep. 30 (1983).

366. The Lapps in *G. and E.* and the Roma in *Chapman* were recognized minorities. See *supra* note 365.

367. See *R. (Countryside Alliance) v. Attorney Gen.* [2006] EWCA (Civ) 817, [2007] Q.B. 305 (Ct. App. (Crim)) (Eng.).

merits at least in the case of those for whom hunting was central to their personal lifestyle. Consequently, a similar argument might be applicable by analogy to the Japanese whaling communities on the basis of general principles of human rights law. The application of such principles will therefore be considered in Part IV.

d. Food Security

It is arguable that human rights principles may impact on the normalization debate not only from the point of view of the maintenance of cultural diversity, but also with regard to the protection and advancement of food security. The relevance of human rights law to food issues certainly cannot be doubted, since Article 11 of the International Covenant on Economic, Social, and Cultural Rights, echoing Article 25 of the Universal Declaration, proclaims the right of everyone to "an adequate standard of living for himself and his family, including adequate food, clothing, housing." The following paragraph requires the parties, in recognition of "the fundamental right of everyone to be free from hunger," to take the measures necessary "to improve methods of production, conservation and distribution of food," referring also to "the most efficient development and utilization of natural resources."³⁶⁸ In extreme cases, denial of access to food may also entail infringement of civil and political rights, and even the right to life itself. The moratorium on commercial whaling has undoubtedly impacted on the availability of whalemeat, which is still valued as a food source in certain communities, while it has also been claimed that the resulting increase in whale populations has served to deplete fisheries resources which might otherwise have been available for human consumption. The global interest in food security is certainly a sufficient justification for examining the whaling issue from that perspective.

e. Other Relevant Norms

The potential relevance of norms governing the conservation and sustainable use of living resources, the law of the sea, respect for cultural diversity, and the protection of food security, all of which have been specifically referred to and recognized in Document 58/12, is amply established. Since many of the relevant principles have emerged and evolved during the postwar period, subsequent to the adoption of the ICRW, it will be appropriate to consider them in Part IV, as part of the examination of contemporary perspectives on the implementation of the

368. International Covenant on Economic, Social, and Cultural Rights, *supra* note 352, art. 11. This point is made with specific regard to the development and reform of agrarian systems, though this reference might be regarded as merely illustrative.

ICRW. It is most unlikely that these exhaust the bodies of legal material applicable to the process of normalizing the ICRW, however. It will be for the parties to the ICRW to raise further relevant areas of substantive legal principle, but there is one body of principles that is surely inescapable: namely, the protection and welfare of animals, and their humane treatment in the course of any sanctioned exploitation. Although there appears to be a rather unconvincing attempt in Document 58/12 to brush these issues aside, this is not an approach that can rationally be sustained, not least because the principles in question are so closely interconnected with those on which reliance is placed in that very document. If, for example, it is claimed that the whaling traditions of coastal communities in Japan or elsewhere are worthy of respect and consideration, it is difficult to understand the justification for neglecting the cultural traditions and value systems of hundreds of millions of people worldwide that demand consideration be given to the humane treatment of sentient creatures. In any event, as virtually every serious investigation by the international community into the question of sustainable utilization has demonstrated, it is all but impossible to devise a rational and acceptable system for the exploitation of living resources without confronting this question.³⁶⁹ Although there is a degree of complexity and controversy attached to this issue, that is hardly a reason to neglect it. Indeed, the IWC would forfeit the respect and confidence of the international community if it were seen as shirking a task of such importance. Given the complexities of this issue, it is appropriate for the purposes of the present study to postpone its consideration until after the analysis and application of the other categories of norms identified in this Part.

First, it is necessary to examine the question of the proper interpretation of the ICRW, and especially its fundamental object and purpose, as it was originally conceived, and prior to the clear emergence of other relevant norms in the postwar period. It is this topic that forms the subject matter of the following Part.

III. THE APPLICATION OF RELEVANT NORMS (1): THE VIEW FROM 1946

A. *The Principle of Good Faith*

Document 58/12 asserts that “responsible management of whaling requires full respect for the ICRW” and interpretation of the treaty in

369. See generally *CARING FOR THE EARTH* (David A. Munro & Martin W. Holdgate eds., 1991).

good faith.³⁷⁰ This is undeniably correct, although it does not follow that it will necessarily be easy to arrive at an unchallengeable, uniform perception of precisely what the dictates of good faith and responsible management will ultimately require in this context. While the document presents its own perception of these issues in forthright terms, it will be necessary to investigate the question of interpretation of the treaty more fully in order to determine whether this perception is capable of commanding endorsement by an impartial arbiter.

At the heart of the call for normalization lies the assertion that "the position of some members that are opposed to the resumption of commercial whaling on a sustainable basis irrespective of the status of whale stocks is contrary to the object and purpose of the [ICRW]"³⁷¹

In its context, this statement is difficult to interpret other than as an allegation of bad faith on the part of the governments in question. It is inevitable, however, that any such accusation will tend to cast a reflective glare back on the conduct of those who advance it, exposing their own activities to scrutiny for evidence of deviation from accepted standards of conscientious behavior. The whaling nations themselves are most unlikely to emerge unscathed from any such process, since the history of the IWC offers such a rich vein of examples of conduct that might be thought to fail to measure up to the dictates of good faith.

It would be difficult to imagine a more egregious manifestation of bad faith than that involved in a systematic, long-term failure by a party to comply with its legal obligations, coupled with attempted concealment of this non-compliance through the false reporting of its activities. However, this seems to be precisely what occurred in the case of the Soviet Union, almost from the moment of entry into force of the ICRW. According to one well-placed whistleblower, "[t]he information on violations of rules contained in official Soviet reports to the IWC bore no relation to reality All information about Soviet whaling was false, and the conclusions based upon it erroneous."³⁷²

The full extent of this delinquency was subsequently confirmed by the Russian authorities, following an internal investigation, and amounted to a total falsification of 82.2 percent of the officially reported

370. IWC/58/12, *supra* note 3.

371. See IWC Res. 2006-1, *supra* note 2, pmbl. (ninth recital).

372. Robbins Barstow, *Global Perspectives on Whaling*, WHALES ALIVE!, Apr. 1994, available at <http://www.whales.org.au/policies/barstow.html> (quoting ERNST CHERNY, INTERNATIONAL FUND FOR ANIMAL WELFARE (1994)). Cherny is reported to have worked as a young man in the Soviet whaling industry before eventually becoming Chair of the Independent Union of Fishery Workers of the Russian Federation. See *id.* The article itself quotes extensively from Commercial Whaling: A Corrupt Industry, IFAW Technical Briefing 94/6 (Feb. 1994).

harvest.³⁷³ In all, the taking of “more than 9,000 blue whales, about 46,000 humpback whales, 3,350 right whales, and more than 21,000 sperm whales” went unreported.³⁷⁴ In relation to humpbacks, it seems that the Soviet take alone during this period was actually three to four times greater than the entire global postwar catch as reported to the IWC.³⁷⁵ The circumstances that gave rise to the revelation of these abuses were, furthermore, somewhat unusual, and it strains credulity to believe that no cases of suppression or falsification of data have ever occurred on the part of other whaling fleets. One experienced participant in IWC scientific activities notes,

I would not . . . wish to give the impression that the USSR was alone in large-scale falsification of whaling statistics; this is known now because of the subsequent collapse of the State. More recently similar kinds of falsification of Japanese statistics have been documented, but relating to the coastal whaling activities in the North Pacific. This, too, occurred in the period when international (IWC) observers were assigned to the whaling platforms and, as with the Soviet revelations, have been brought to light by scientists and by official inspectors who were involved at the time. The devices adopted to defy timely detection were similar: species wrongly identified; two or more small whales counted as one large one; inspectors and observers lured away from their posts. As such information comes at last into the open, it seems increasingly likely that such falsification was more widespread in the various Antarctic operations—both pelagic and from land stations—than had been presumed even by cynics.³⁷⁶

Indeed, in the run-up to the Fifty-Ninth Annual Meeting of the IWC, allegations surfaced in Western media that South Korean fishermen had been deliberately netting minke whales and passing them off as accidental “by-catch” of other fishing operations. It was claimed, furthermore,

373. V.A. Zemsky, A.A. Berzin, Yu. A. Mikhalyev & D.D. Tormosov, *MATERIALS ON WHALING BY SOVIET WHALING FLEETS, 1947–1972* (1995).

374. Alexey V. Yablokov, *On the Soviet Whaling Falsification*, *WHALES ALIVE!*, Oct. 1997, available at <http://csiwhalesalive.org/csi97403.html>.

375. *Id.*

376. Sidney J. Holt, *Sharing the Catches of Whales in the Southern Hemisphere*, in *CASE STUDIES ON THE ALLOCATION OF TRANSFERABLE QUOTA RIGHTS IN FISHERIES* 322, 368 (Ross Shotton ed., FAO Fisheries Technical Paper 2001), available at <ftp://ftp.fao.org/docrep/fao/004/y2684e/y2684e23.pdf>; see *ENDANGERED SPECIES HANDBOOK: TRADE: PIRATE WHALING* (Animal Welfare Inst. 2005) (1983), available at http://www.endangeredspecieshandbook.org/trade_pirate.php (last visited Aug. 25, 2008) (providing information on the apparent falsification of catch statistics of the “pirate” whaling operation run by Aristotle Onassis in the 1950s).

that the number of specimens caught in this way was almost double the numbers officially reported, putting at risk the survival of minke whales in the Sea of Japan.³⁷⁷ It remains to be seen whether such claims can ultimately be substantiated, but it seems logical to conclude that the exacting circumstances under which whaling is conducted create a powerful inducement toward the evasion of regulatory controls through the falsification of catch data. Consequently, even if they were not opposed to the resumption of commercial whaling in principle, many objective observers might justifiably require assurance of the most rigorous and independent systems of inspection and catch verification before offering their endorsement.

Be that as it may, breaches of good faith have by no means been confined to covert non-compliance. The record of the early years of IWC regulation reveals numerous instances of more overt lapses of commitment. The persistent failure to agree to realistic catch quotas, along with a propensity to opt out of quotas already agreed on, gravely undermined the credibility of the entire organization from the start.³⁷⁸ It will be remembered that, by virtue of the doctrine of abuse of right, even the exercise of rights and powers that are specifically accorded to a State under the terms of a treaty can amount to a failure to act in good faith if the effect is to subvert its fundamental object and purpose. In more recent times, there has been widespread concern, manifest both in official pronouncements³⁷⁹ and in academic commentary,³⁸⁰ that resort by the Japanese government to the scientific whaling exemption established by Article VIII of the ICRW amounts to a breach of good faith on its part. It is fair to point out that the government in question has vigorously rejected these charges,³⁸¹ although recent criticism both from inside Japan³⁸² and elsewhere³⁸³ has cast further doubts over the legitimacy of the program.

377. Peter Aldhous, *Too Many Dead Whales in Korea*, NEW SCIENTIST, May 12, 2007, at 10, available at <http://www.newscientist.com/data/pdf/press/2603/260310.pdf> (reporting a research project conducted by Scott Baker of Oregon State University); see also Media Release, *New Study: DNA Analysis Suggests Under-Reported Kills of Threatened Whales* (May 16, 2007), available at <http://oregonstate.edu/dept/ncs/newsarch/2007/May07/whalemeat.html>.

378. For further discussion, see *infra* Part III.B.2.f.

379. See, e.g., U.S. Department of State: *Clinton Letter to Congress on Japan's Whaling Practices*, 3 J. INT'L WILDLIFE L. & POL'Y 312 (2000).

380. See, e.g., Gillian Triggs, *Japanese Scientific Whaling: An Abuse of Right or Optimum Utilization?*, 5 ASIA PAC. J. ENVTL. L. 33 (2000).

381. Sumi describes it as a "deplorable misunderstanding." Sumi, *supra* note 12, at 317, 320; see also *id.* at 317-24 (offering a general discussion).

382. See A. Ishii & A. Okubo, *An Alternative Explanation of Japan's Whaling Diplomacy in the Post-Moratorium Era*, 10 J. INT'L WILDLIFE L. & POL'Y 55, 79-81 (2007).

383. KAREN STEUER, WWF, SCIENCE, PROFIT AND POLITICS: SCIENTIFIC WHALING IN THE 21ST CENTURY (2005), available at <http://assets.panda.org/downloads/>

Finally, it was noted in Part I that there are regrettable manifestations even in the normalization documents themselves of a tendency to misrepresent and disparage the motivations underlying opposition to commercial whaling—a tendency which calls into question the genuineness of the claims made in those documents regarding respect for cultural diversity and implementation of the ICRW in good faith. As indicated in that Part, it would be greatly preferable if a more constructive and conciliatory approach to resolving the IWC's problems could be adopted, and it is encouraging that some hopeful signs at least were evident in the proposals emerging from the Normalization Conference held in Tokyo in February 2007. Nevertheless, this process is likely to require a rather more searching and sophisticated investigation of the meaning to be attributed to the terms of the ICRW than is generally evident from past discussions. In particular, the question of the requirements of good faith cannot realistically be pursued without a clearer sense of the object and purpose of the Convention, to which the present discussion is intended to make a modest contribution.

B. *The Object and Purpose of the ICRW*

Despite the fact that the Vienna Convention on the Law of Treaties refers frequently to “the object and purpose” of a treaty,³⁸⁴ the point has already been made that, in the case of a multilateral law-making agreement, this may well prove a very slippery concept of which to gain a firm hold. At the very least, it can be expected to assume a complex and multi-faceted character, and it may, indeed, be more realistic to suppose that such agreements would normally exhibit a range of objectives of differing prominence and priority. As it happens, the ICRW itself refers expressly to the “objectives and purposes” (plural) of the Convention,³⁸⁵ thereby circumventing any possible controversy that might otherwise have arisen in that regard.

1. Conventional Approaches to Identification of the Object and Purpose

By what means, then, are these objectives and purposes to be identified? In the absence of their specific enumeration in the substantive provisions of the treaty, it was established in the previous Part that the

wwfsciwhalingreportfinal.pdf; C.S. Baker & P.J. Clapham, *Ethics of Scientific Whaling: Issues and Alternatives*, in SCIENCE, PROFIT AND POLITICS: SCIENTIFIC WHALING IN THE 21ST CENTURY, *supra*, at 27.

384. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 21, arts. 18, 19, 31, 33, 41, 58, 60.

385. ICRW, *supra* note 1, arts. V(2), VI.

preamble represents the obvious starting point for such a task, and most conventional analyses of the ICRW draw particular attention to the final recital,³⁸⁶ which states that the parties have "decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry"³⁸⁷

This is characteristically presented as creating two objectives—the conservation of whale stocks and the development of the whaling industry—that are seen as being essentially distinct, or even in conflict with one another. While some see this as a straightforward reflection of the contrasting objectives of the negotiators,³⁸⁸ others are of the view that the drafters did not even recognize the contradictions inherent in the conjunction of the two goals.³⁸⁹ Since the tension between these two objectives is plain, the argument runs, they have somehow to be prioritized, but this task is typically undertaken without extensive analysis, and ultimately accomplished, it might appear, largely in accordance with the preferences or preconceptions of the individual commentator. Thus, from one viewpoint,³⁹⁰ the phrasing of this recital

makes it quite clear that the *primary purpose* of the Convention is conservation of whale stocks for the *secondary objective* of enabling the whaling industry to develop in an orderly fashion.

386. For a range of examples by commentators of different nationalities, perspectives, and disciplines, see P.W. BIRNIE, *INTERNATIONAL REGULATION OF WHALING* 168–72, 655–60 (1985); BURKE, *supra* note 10, at 288–91; J. CHERFAS, *THE HUNTING OF THE WHALE* 112 (1989); LYSTER, *supra* note 273; K. MULVANEY, *THE WHALING SEASON* 116 (2003); S.V. SCOTT, *THE POLITICAL INTERPRETATION OF MULTILATERAL TREATIES* 120 (2004); S. Andresen, *The Making and Implementation of Whaling Policies, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 433 (D.G. Victor, K. Raustiala & E.B. Skolnikoff eds., 1998); Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 34 (1991); R.H. M'Gonigle, *The Economizing of Ecology: Why Big Rare Whales Still Die*, 9 ECOLOGY L.Q. 120 (1980); S. Oberthur, *The International Convention for the Regulation of Whaling: From Over-Exploitation to Total Prohibition*, Y.B. INT'L CO-OPERATION ENV'T & DEV. 29, 34 (1998–99); G. Rose & S. Crane, *The Evolution of International Whaling Law, in GREENING INTERNATIONAL LAW* 164 (P. Sands ed., 1993); G. Rose & G. Paleokrassis, *Compliance with International Environmental Obligations, in IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW* 151 (J. Cameron, J. Werksman & P. Roderick eds., 1996); J.E. Scarff, *The International Management of Whales, Dolphins and Porpoises*, 6 ECOLOGY L.Q. 326, 353–54 (1977); Sumi, *supra* note 12, at 317, 324–27; C. Wold, *Legal Opinion on the Competence of the IWC to Include Humane Treatment and Human and Cetacean Concerns in the RMS* (2000), available at http://www.lclark.edu/org/ielp/objects/comp_opinion.pdf.

387. ICRW, *supra* note 1, pmb1.

388. Rose & Crane, *supra* note 386, at 164.

389. Scarff, *supra* note 386, at 353–54.

390. LYSTER, *supra* note 273, at 20; see also CHERFAS, *supra* note 386; D'Amato & Chopra, *supra* note 386.

Conservation is the *top priority*: development of the whaling industry comes *next*.³⁹¹

To others, that self-same wording “makes clear that to the extent that it referred to protection of the stocks, this was to be done with a view to ensuring the future of the whaling industry: the *ultimate aim* of this Convention was to develop the industry.”³⁹²

To the dispassionate observer, however, there might seem to be little reason thus far to favor either option over the other, and it is noticeable that commentators who strive for a more balanced view seem to achieve it largely by vacillating between these two approaches.³⁹³

One recent analysis seeks to eschew so-called “legal” approaches entirely, advocating instead the adoption of an overtly political approach to treaty interpretation based on the theory of “Cognitive Structures of Cooperation” (CSC).³⁹⁴ This entails, it seems, the identification of the common goal which risked being frustrated in the absence of the establishment of a regime for cooperation, and calls for the identification of the “foundation ideology” of the CSC—a “principle or small set of inter-related principles that underpins the limits that a group of States is prepared to place on the pursuit by each of [the] common goal.” In the case of the ICRW, the common goal “can be understood to be the profit motive from the whaling industry, for if the industry in each country pursued this without limit and the whale stocks were decimated, there would be no industry.”³⁹⁵ The foundation ideology is identified as “conservation.” It is asserted that this was a term in widespread use in the mid-twentieth century, and that its meaning was well understood. Broadly, it connoted “guarding against over-exploitation,” and could be contrasted with “environmentalism,” which demands “protection of the environment for its own sake, and non-use for aesthetic or other ‘utopian’ reasons.”³⁹⁶ More specifically, the notion of conservation is said to be encapsulated in the definition given in Article 2 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas,³⁹⁷ which defines “conservation” as

391. LYSTER, *supra* note 273, at 20 (emphasis added).

392. SCOTT, *supra* note 386, at 125 (citing BIRNIE, *supra* note 386, at 172) (emphasis added) (internal quotes omitted); *see also* Andresen, *supra* note 386; Rose & Paleokrassis, *supra* note 386.

393. *See, e.g.*, BIRNIE, *supra* note 386, at 172, 655.

394. SCOTT, *supra* note 386, ch. IX.

395. *Id.* at 122.

396. *Id.* at 124–25.

397. Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas art. 2, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285.

[t]he aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. Conservation programs should be formulated with a view to securing in the first place a supply of food for human consumption.³⁹⁸

Thus, the CSC theory approach to interpretation leads to the conclusion that the ultimate aim of the Convention was to develop the whaling industry.³⁹⁹ Unfortunately, however, the cogency of this argument is somewhat diminished by the fact that this was virtually the premise from which the author's whole discussion started.⁴⁰⁰

In truth, this supposedly novel approach appears to differ from those it criticizes only in compounding their deficiencies. In particular, it assumes most of what it seeks to prove and then proceeds to paint the interpretational picture with such a broad brush as virtually to guarantee glossing over any inconvenient details, of which there are, regrettably, quite a few. We may note as examples:

That there are good reasons to doubt that the single, common goal of the negotiators was to secure the profitability of the industry, as the author herself seems to concede at one point;⁴⁰¹

That other accounts of the general development of conservation theory during this period suggest a much more confused and uncertain picture;⁴⁰²

That the technical issues associated with fisheries conservation in particular, such as maximum sustainable yield, were in fact the focus of profound controversy at the time in question;⁴⁰³

398. *Id.*

399. SCOTT, *supra* note 386, at 125.

400. See Jennifer L. Bailey, Working Paper, Arrested Development: "The Prohibition of Commercial Whaling" as a Case of Failed Norm Change (2006), available at <http://www.svl.ntnu.no/iss/Jennifer.Bailey/Bailey%20APSA%202006%20norm%20change.pdf> (offering another recent study manifesting some of the same problems).

401. SCOTT, *supra* note 386, at 123.

402. See, e.g., INTERNATIONAL LAW AND THE ENVIRONMENT, *supra* note 290, at 550-54; ROBERT BOARDMAN, INTERNATIONAL ORGANIZATION AND THE CONSERVATION OF NATURE 49-50 (1981) (noting that "[l]andmark publications . . . appeared at intervals during the 1950s and 1960s. The intellectual basis of conservation, that is, was being slowly put together piecemeal at a time when the urgency of the threat facing the world's wildlife seemed to many to be approaching crisis proportions."). IUCN, the World Conservation Union, was not even founded until October 1948, with its original name being the International Union for the Protection of Nature (IUPN). It did not change its name to incorporate "Conservation of Nature and Natural Resources" until 1956.

403. FRANCIS T. CHRISTY, JR., & ANTHONY SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES 189 n.23 (1965) (citing S. Oda, *The 1958 Geneva Convention on the Fisheries*, 55 DIE FRIEDENS-WARTE 317, 317 (1960)) (offering a contemporaneous perspective); see also

That the clause from the 1958 Geneva Convention on the High Seas, cited above, was in fact originally advanced to explain the “primary objective” of conservation rather than as a comprehensive definition;⁴⁰⁴

That the Conference at which the Convention was concluded duly adopted a resolution on humane killing, with particular regard to whales and seals,⁴⁰⁵ which plainly did reflect recognition of the need to protect certain creatures for their own sake, if only as an ancillary consideration;

That the definition quoted was in any event expressed to apply for the internal purposes of the 1958 Convention itself,⁴⁰⁶ and there is little or no indication of its having been adopted by other conventions of the period;⁴⁰⁷

That the Convention did not attract widespread ratification and, from one perspective, “largely proved a dead letter”;⁴⁰⁸ its definition of conservation certainly did not survive later codification efforts,⁴⁰⁹ which recognized the need for a more sophisticated approach;

That, since key aspects of thinking on fisheries conservation were still being refined during the late-1950s, it is uncertain how firmly established they could have been in the minds of the drafters of the ICRW over a decade earlier—whereas the 1958 Geneva Convention on the High Seas purported to be “generally

MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 972–73, 975 (1962). McDougal and Burke noted that

[t]he Convention on Fishing . . . is not drafted in the most precise, unambiguous terms and therefore is subject to various interpretations; those delegates voting for the same provisions were not necessarily voting for the same interpretations There was perhaps little consensus at the Conference on the real meaning of ‘Conservation’ or the proper means of implementing it.

Id.; see INTERNATIONAL LAW AND THE ENVIRONMENT, *supra* note 290 (offering a similar assessment); R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 279–327 (3d ed. 1999); D’Amato & Chopra, *supra* note 386, at 35–36.

404. *Report of the International Law Commission to the General Assembly*, 2 Y.B. INT’L L. COMM’N 286–88, 11 U.N. GAOR Supp. (No. 9).

405. Conference on the Law of the Sea, Geneva, Switz., Feb. 24–Apr. 27, 1958, *Resolution*.

406. See Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, *supra* note 397.

407. See ALEXANDRE C. KISS, *SELECTED MULTILATERAL TREATIES IN THE FIELD OF THE ENVIRONMENT* (Imprint Nairobi ed., 1983) (offering examples of treaties from the period).

408. CHURCHILL & LOWE, *supra* note 403, at 281, 287.

409. See UNCLOS, *supra* note 88; Straddling Stocks Agreement, *supra* note 88.

declaratory of established principles of international law," no such claim was ever made in or of the Fisheries Convention;

That the emphasis on "conservation" and its supposed meaning unhelpfully distracts attention away from other key considerations, such as the precise implications of the term "orderly development"; and

That it is in any event essential to consider not merely the original motivations underlying the ICRW, but the extent to which they might have changed or evolved during the past sixty years.

Given their questionable theoretical and factual foundations, it is not particularly surprising that arguments of this kind have produced confusion, and the possibility cannot be excluded that this may even have contributed to the polarization of views within the IWC itself, thereby exacerbating its dysfunctional state. Needless to say, governments have tended simply to align themselves with one approach or the other depending on their political stance on the whaling question at any given time. Often, this involves "cherry-picking" phrases in the preamble that seem to suit the needs of the moment. This is, indeed, a notable feature both of Resolution 2006-1 and Document 58/12, neither of which makes any genuine attempt to get to grips with the preamble in its entirety.

The real problem here is that *all* of these approaches to interpretation, insofar as they evince a preoccupation with what might be regarded as the "headline" features of the preamble, in truth have much more of a *political* than a genuinely *legal* flavor about them: for, while politics may justifiably entail obsessing over the headlines, lawyers are surely required to read all the way down to the small print. That process will, moreover, necessarily entail paying scrupulous attention to what the treaty actually provides, rather than becoming diverted by preconceptions as to what it might have been expected to contain. Furthermore, it must always be borne in mind during the course of such examination that a key principle of treaty interpretation—the principle of effectiveness—cautions against assumptions of outright redundancy or contradiction in treaty clauses whenever alternative constructions not entailing those consequences are possible. While it may be utopian to expect that international conventions will be wholly free of errors, omissions, ambiguities, and elements of internal tension, it is surely not unrealistic to expect that treaty makers will have steered clear of fundamental contradictions in their expression of basic objectives. This calls into question the general thrust, and hence the methodology, of many of the analyses that have been presented to date.

Some of the problems with these accounts may in turn be attributable to the fact that they appear to pay both too much and too little attention to the significance, for the purposes of treaty interpretation, of the perspectives and circumstances prevailing in 1946, the year of the ICRW's adoption. Too little, in the sense that they tend to disregard key elements of the social, economic, and political background to the drafting process, which will certainly have helped to shape the legal terms of reference for its elaboration. Too much, in the sense that they fail to accord sufficient weight to subsequent changes in the broader legal environment within which the ICRW currently has to be interpreted and applied.

How, then, is the task of identifying the objectives and purposes of the ICRW correctly to be approached? It is assumed that there will be no dissent from the proposition that a legal instrument should be interpreted responsibly, in good faith and in accordance with established legal criteria. It is extremely encouraging to note that these basic principles all find reflection in the normalization documents. It is submitted that the task must be tackled in two phases. First, it is necessary to extract from the preamble, in conjunction with the text as a whole and the surrounding circumstances, a more reliable and comprehensive sense of the *original* motivations that prompted the adoption of the ICRW and the extent to which they have formally been encapsulated in its "objectives and purposes." Secondly, it is crucial to assess whether, and to what extent, those elements might have *evolved* or *been transformed* in the sixty years or more since the ICRW was adopted. The latter task will be the subject of the following Part, while the remainder of the present Part is devoted to tackling the former.

First, in seeking to identify the original object(s) and purpose(s) of the ICRW, it will be important to recall that, unlike many other international agreements, the ICRW was not the product of prolonged or recurrent multilateral negotiations amongst national delegations which commenced with a blank sheet of paper and elaborated a draft virtually from first principles. Rather, it was the product of a single conference lasting around ten working days,⁴¹⁰ conducted under the pressures of difficult postwar circumstances, which essentially endorsed—subject to

410. The conference ran from November 20 to December 2, 1946. It did not meet on either Sunday within those dates or on Thanksgiving Day, and evening sessions were precluded by social events. Not all delegations were able to be present for the entire event. Apart from the ICRW itself, the conference had also to draft a Final Act and a Protocol to cover the 1947–48 whaling season. A great deal of time was also spent throughout the meeting discussing a single issue—the Norwegian legislative embargo on its nationals cooperating with nations that had not recently been engaged in whaling—which was of particular concern to the Dutch delegation, even though it was plainly felt by the Chair to fall outside the conference remit. See *infra* Part III.B.2.d.

comparatively minor modifications—a draft treaty put together in relatively short order through the individual efforts of just one power, the United States.⁴¹¹ Very little advance notification of the proposals had been given.⁴¹² Inevitably, therefore, the majority of the treaty's essential elements were conceived and crafted in accordance with the policies and perceptions of the United States, which for various reasons may well have differed quite considerably from those of other participants. While the detailed implications of this consideration are explored in the arguments below, it is important that it be taken on board as a general issue from the outset, in view of its significance to the overall process of interpretation. In particular, it is essential to appreciate the precise bearing which this consideration has on the determination of the ICRW's goals. Crucially, there is *no suggestion* here that the ICRW, *as a matter of legal principle*, should be understood to *mean what the United States says it means*—international treaties are not the property of any individual State, however prominent its role in the drafting process, and are to be applied on the basis of their meaning as determined objectively and in accordance with globally accepted principles. On the other hand, the preeminent contribution of a particular State to the elaboration of a treaty draft is almost certain to result, *as a matter of practical reality*, in the outcome that the treaty generally *says what that State meant it to say*—consequently, any seemingly incongruous elements or surprising implications of the text may be attributable to that State's own individual—perhaps even idiosyncratic—concerns. With that general point in mind, we may embark on the quest to determine the ICRW's objectives.

411. The Official Records of the Washington Conference are currently held by the International Whaling Commission itself, the Secretariat of which is located at The Red House, 135, Station Road, Impington, Cambridge, CB24 9NP United Kingdom. The author would like to express his sincere thanks to Dr. Nicola Grandy and her staff at the IWC for their invaluable assistance in the provision of materials and facilities for the preparation of this study, which was, however, not undertaken on behalf of the IWC and remains the sole responsibility of the author. See also BIRNIE, *supra* note 386 (providing the most thorough and persuasive account of the negotiations to date). Amongst the more substantial modifications of the U.S. text noted by Birnie are the rejection of proposals (i) for the creation of an Executive Committee; (ii) for bringing the IWC/ICRW under the aegis of FAO; and (iii) for allowing the Convention to be brought into force by just three ratifications. *Id.*

412. This point was repeatedly made at the Conference itself. See IWC, *Minutes of the 2nd Session*, ¶ 211, IWC/14 (Nov. 20–Dec. 2, 1946) (on file with IWC) (offering observations by the Dutch delegation); *Minutes of the 6th Session*, ¶ 65, IWC/26 (Nov. 20–Dec. 2, 1946) (on file with IWC) (offering observations by the Soviet delegation); *Minutes of the 10th Session*, ¶ 64, IWC/47 (Nov. 20–Dec. 2, 1946) (on file with IWC) (offering observations by the French delegation). Note further that contemporary correspondence of the Australian government suggests that detailed notification of the proposals had been received only on November 21, just days before the Conference was due to commence. See Cablegram 1660, Nov. 27, 1946, *reprinted in* 10 HISTORICAL PUBLICATIONS: DOCUMENTS ON AUSTRALIAN FOREIGN POLICY No. 252 (Dep't Foreign Aff. & Trade, Gov't of Austl. ed.), *available at* <http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/vWeb?OpenView>.

2. Identification of the Original Object and Purpose of the ICRW

The most obvious features of the preamble of the ICRW are its relative prolixity and complexity, at least in comparison with those of its predecessors in the field. While the preamble to the 1937 Whaling Agreement comprised no more than a single recital, the 1931 prototype convention omitted any rehearsal of objectives at all.⁴¹³ This move toward greater expansiveness may to some extent have been attributable simply to the emerging fashions of the day with regard to the drafting of treaties, but it is also likely to have indicated a degree of enhanced sophistication in the motivations underlying regulation. It is therefore essential to scrutinize the recitals of the preamble in detail and with care, and in as objective a fashion as possible, in order to fully and reliably identify the “object and purpose” of the ICRW.

a. Regulatory Antecedents

We may begin by recapitulating that one well-established device for demonstrating the underlying purpose of a legal instrument is to explain it by reference to its relationship to any regulatory antecedents. The aim may variously lie in advancing further down the trail that its predecessors have blazed, branching off on a slightly different track, or changing course entirely. The preamble to the ICRW can be seen to have followed this time-honored practice by referring in its sixth, penultimate recital to the 1937 International Agreement for the Regulation of Whaling (together with its Protocols of 1938 and 1945),⁴¹⁴ using wording that makes it clear that some element of continuity with those instruments was intended.

Yet, to the treaty lawyer, by far the most striking feature of this cross-reference lies in the altogether extraordinary terms in which it is expressed. Whereas typical formulations would involve simply recalling specified earlier instruments by name, or referring to the “principles or purposes” which they embody, or invoking more specifically their “provisions,” or certain of them, the ICRW effectively combines these approaches, announcing *its* quite distinctive intention as being to estab-

413. The text simply began with Article 1, which provided that “The High Contracting Parties agree to take, within the limits of their respective jurisdictions, appropriate measures to ensure the application of the provisions of the present Convention and the punishment of infractions of the said provisions.” Convention for the Regulation of Whaling art. 1, Sept. 24, 1931, 49 Stat. 3079, 155 L.N.T.S. 349.

414. See ICRW, *supra* note 1, pmb1; Convention Between the United States of America and Other Governments Respecting Whaling, Dec. 2, 1946, 148 U.N.T.S. 1143; Protocol Amending the International Agreement for the Regulation of Whaling, Nov. 26, 1945, 11 U.N.T.S. 43; Agreement Between the United States of America and Other Powers for the Regulation of Whaling, June 8, 1937, 190 L.N.T.S. 79.

lish a system of regulation "based on the *principles embodied in the provisions*" of the earlier instrument. Since no comparable usage of terminology in a multilateral treaty came immediately to the present author's mind, a brief survey was conducted of over 100 such preambles, both in environmental agreements and more generally, but not a single instance of similar phraseology was discovered. This strongly suggests that something rather unusual was intended. The crucial point here is that while the principles or purposes embodied *in a treaty* must be gleaned from the text as a whole, and can be read extremely widely, certainly to include its overall object and purpose, the *provisions* of any instrument would conventionally be understood to comprise, strictly, its *dispositive* elements only,⁴¹⁵ rather than the entirety of the text. The "principles embodied in the provisions," therefore, should be read as being potentially narrower than those in the text as a whole, and specifically to *exclude* any broader indications of motivation or purpose disclosed exclusively in the preamble.⁴¹⁶

If this view should require confirmation, it can be obtained both from standard dictionary definitions and from established usage within the specific context of the law of treaties. As to the former, the term "provisions," when applied to a legal instrument, is customarily "used in the sense of regulations or rules,"⁴¹⁷ and has been defined as "the *articles* of an instrument or statute,"⁴¹⁸ or taken to refer to its "conditions," "measures," or "stipulations,"⁴¹⁹ rather than to any accompanying material of an expository or rhetorical nature.⁴²⁰ As far as the law of treaties is

415. "Dispositive" meaning "having the quality or function of directing or controlling" as the *Oxford English Dictionary* defines it, and to be contrasted with the "introductory," "explanatory," or "testimonial" elements of a legal instrument. Some might prefer to use the terms "prescriptive," "substantive," or "normative" to convey this sense, though in truth none of these words is capable of avoiding ambiguity or imprecision entirely. The notion of the dispositive *elements* of a treaty is not to be confused with the somewhat different concept of a "dispositive" (as opposed to "constitutional") *treaty*. See, e.g., MCNAIR, *supra* note 91.

416. See, e.g., BIRNIE, *supra* note 386, at 170–71. Interestingly, this part of the preamble, if adverted to at all, seems to fall victim to uniform misreading by commentators regardless of their overall perspective on the issues; thus, it is stated to require regulation "on the basis of the principles of the earlier agreements." *Id.*; see also BURKE, *supra* note 10, at 288–89 (noting "on the basis of the principles embodied in specific agreements in 1937, 1938 and 1945").

417. R. v. Sec'y of State for Soc. Sec. [1991] 1 W.L.R. 198, 202 (H.L.) (Eng.); Walsh v. Sec'y of State for India, [1863] 10 H.L. 367, 384–85 (Eng.); STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES (D. Greenberg & A. Milbrook ed., 6th ed. 2000).

418. COLLINS SHORTER DICTIONARY AND THESAURUS (1st ed. 1995) (emphasis added).

419. BLACK'S LAW DICTIONARY (8th ed. 2004); CHAMBERS ENGLISH DICTIONARY (1988); HEINEMANN ENGLISH DICTIONARY (1979); II NEW SHORTER OXFORD ENGLISH DICTIONARY (4th ed. 1993).

420. See, e.g., G. Haider et al., *The Comparative Part of the Corpus Legis Project: Using SGML for Intelligent Information Retrieval of Legal Documents*, www.juridicum.su.se/IRI/corpus/expersys.html (last visited Aug. 28, 2008) (offering a searchable database of

concerned, the term “provisions” is not one of those defined in the Vienna Convention,⁴²¹ but is employed throughout that instrument, and seemingly always to refer to the dispositive elements of agreements, *i.e.*, to indicate the measures through which rights or obligations are created,⁴²² modified or excluded,⁴²³ or suspended or terminated;⁴²⁴ or those which determine the legal significance of their violation,⁴²⁵ validity,⁴²⁶ or relationship to extraneous norms.⁴²⁷ The *provisions* of a treaty, put simply, are those elements which *regulate* relevant questions,⁴²⁸ including the meaning of terms,⁴²⁹ rather than merely explain or elucidate them in a more general way, as does the preamble.⁴³⁰ This is also the sense in which the ubiquitous expression “the treaty provides”—or “so” or “otherwise” “provides”—seems to be employed wherever it appears in the Vienna Convention.

Further support for this point can be obtained from the situations in which the Vienna Convention *avoids* the expression “provisions.” Specifically, there are certain contexts in which the Convention finds it necessary to establish rules to govern the treaty instrument *as a whole*, and not merely its dispositive elements: the most obvious examples concern the rules governing interpretation and rectification (since the preamble is obviously no less in need of interpretation, nor prone to contain clerical errors, than any other part of the treaty). Here, significantly, the rules in question are stated to apply not to the “provisions” of the treaty but rather to “the treaty” itself, or (when it is necessary to highlight its content) “the text” or (to emphasize the component parts of that content) “the terms” of the treaty.⁴³¹

international legal instruments, based on the following structure: Preamble, Main Provisions, Final Provisions).

421. Vienna Convention on the Law of Treaties, *supra* note 21, art. 2.

422. *Id.* arts. 35, 36.

423. *Id.* arts. 17(2), 21, 41(1)(b)(ii).

424. *Id.* arts. 42(2), 43–44, 54, 56–57, 65(1), 67, 70, 72.

425. *Id.* art. 60.

426. *Id.* art. 69.

427. *Id.* arts. 30, 59, 65(4), 71; *id.* arts. 73, 75 (referring to the norms of the Vienna Convention itself, rather than those of the treaties it seeks to regulate); *id.* art. 46 (concerning provisions of domestic law).

428. *Id.* pmb. para. 9.

429. *Id.* art. 2(2).

430. See generally I OPPENHEIM'S INTERNATIONAL LAW ¶ 587 (Robert Jennings & Arthur Watts eds., Longman, 9th ed. 1992); INTERNATIONAL LAW DICTIONARY 273 (Robert Bledsoe & Boleslaw Boczek eds., 1987); GERHARD VON GLAHN, LAW AMONG NATIONS 483 (Allyn & Bacon, 7th ed. 1996) (1965). This point is rarely confirmed explicitly in the literature, perhaps because it is thought so obvious. It is, however, often clearly implicit in what is said.

431. Vienna Convention on the Law of Treaties, *supra* note 21, arts. 31–33, 79.

There is little reason, moreover, to suppose that usage of the expression "provisions" during the mid-twentieth century differed in any way from that of later eras. Indeed, one conservation treaty negotiated almost contemporaneously with the ICRW, the 1950 International Convention for the Protection of Birds,⁴³² and one fisheries convention adopted shortly afterwards,⁴³³ actually make explicit the fact that their "provisions" consist in what follows the preamble.⁴³⁴ Although there is nothing quite so unequivocal in the instruments on whaling, usage of the term in both the ICRW and its 1937 predecessor is certainly entirely consistent with that approach, since all references to the term "provisions" appear to be to their dispositive elements, whether in the body of the text or, in the case of the ICRW, in the Annex.

What, then, are the precise implications of the fact that the ICRW was intended to create a new regulatory system based on "the principles embodied in the provisions of the 1937 Agreement" rather than those embodied in that Agreement as a whole? The answer could hardly be clearer. The "principles embodied in the provisions" embraced essentially the various devices for regulating the industry, including the prohibitions on the taking of certain species,⁴³⁵ or of specimens of particular characteristics;⁴³⁶ restrictions on the use of land stations, factory ships, and associated whalers in particular areas or for particular periods of time;⁴³⁷ the avoidance of waste in processing or exploitation;⁴³⁸ the controls on remuneration of gunners and crews;⁴³⁹ the maintenance and publication of proper records;⁴⁴⁰ the enforcement of the rules by contracting governments, including the punishment of infractions;⁴⁴¹ and the power, notwithstanding other provisions, to grant permits for scientific research.⁴⁴² All of these elements can duly be seen to be reflected in the 1946 Convention, either in the Annex or in the body of the text.

432. International Convention for the Protection of Birds, Oct. 18, 1950, 638 U.N.T.S. 186. Initial deliberations concerning the adoption of the Convention, conceived as a replacement for a predecessor of 1902, commenced around 1937, and active negotiations took place during 1947–48. See BOARDMAN, *supra* note 402, at 160–62.

433. Warsaw Agreement Concerning Cooperation in Marine Fishing, July 28, 1962, reprinted in SELECTED MULTILATERAL TREATIES 170 (Kiss ed., Grotius 1983).

434. See also THE TREATY MAKER'S HANDBOOK 46–47 (Hans Blix & Jirina Emerson eds., 1973).

435. International Agreement for the Regulation of Whaling art. 4, June 8, 1937, 190 L.N.T.S. 79 [hereinafter Regulation of Whaling Agreement].

436. *Id.* art. 5 (size restrictions on certain species); *id.* art. 6 (calves, sucklings, or accompanied females).

437. *Id.* arts. 7–9.

438. *Id.* arts. 11–12.

439. *Id.* arts. 13–14.

440. *Id.* arts. 14, 16–17.

441. *Id.* arts. 1–2.

442. *Id.* art. 10.

And which elements of the old regime were to be abandoned or excluded from the new? Again, there can be no doubt as to the answer, since the only non-dispositive feature in the entire 1937 Agreement comprised the single, succinct, and uncompromising preambular assertion of its object and purpose: namely “to secure the prosperity of the whaling industry and, for that purpose, to maintain the stock of whales.”⁴⁴³ To summarize, the effect of the penultimate recital of the preamble to the ICRW was to base the new regulatory system on essentially the *same general conservation techniques* as had applied previously, but to do so in light of a *significant change of philosophy and purpose*, no longer dedicated to securing the profitability of the whaling industry itself. It was perhaps for these reasons that the U.S. Acting Secretary of State Dean Acheson, in laying the treaty before the President for transmission to the Senate, described the ICRW as a “complete replacement” of the earlier agreements (so much so that they were formally to be denounced), while at the same time describing the “regulations” it contained as “substantially similar.”⁴⁴⁴

Given, however, that this interpretation is so different in emphasis from that advanced in the bulk of the literature to date,⁴⁴⁵ it is certainly essential that it be subjected to intensive scrutiny in order to determine its robustness in the face of alternative constructions. There are, it would seem, two principal grounds on which it might be thought open to challenge. These are, first, that it might seem to place great weight on the interpretation of one short phrase—“principles embodied in the provisions”—which may conceivably not have been used advisedly or with great forethought; and, secondly, that it is inherently implausible that an agreement to establish what is generally referred to as a “whalers’ club” should have put aside what had, less than a decade earlier, been declared to be the sole objective of regulation, *i.e.*, the profitability of the industry. It will be convenient to deal with the latter argument first.

The need to evaluate proposed treaty interpretations in light of their general plausibility can certainly not be denied, since the Vienna Convention makes clear that the avoidance of absurdity or unreasonableness represents one aim of the relevant rules.⁴⁴⁶ On the other hand, plausibility would seem essentially to be a relative rather than an absolute notion, as

443. *Id.* pmb1.

444. *See generally Whaling Conventions*, 4 WHITEMAN DIGEST OF INTERNATIONAL LAW § 15 (1965).

445. Note in particular the view of Scott that the “common goal” of the parties to the ICRW “can be understood to be the profit motive from the whaling industry.” SCOTT, *supra* note 386, at 122. Later in the discussion, however, Scott acknowledged that there is at least one reason to query this assumption. *Id.* at 123.

446. Vienna Convention on the Law of Treaties, *supra* note 21, art. 32.

there are likely to be few constructions of complex legal instruments that succeed in dispelling every lurking doubt as to their correctness. In particular, the persuasiveness of the view advanced in this Part must always be weighed against the inherent implausibility of the *rival* interpretation—namely, that the parties to the ICRW chose to set up a regulatory system based on two fundamental objectives, identified in a single sentence, which were intrinsically and transparently contradictory. In addition to this point, however, there are a number of more positive reasons for rejecting the claim that the interpretation now proposed can be impugned as implausible.

First of all, the description of the ICRW as a "whalers' club" is potentially extremely misleading, at least in the absence of more detailed exploration. A preliminary point is that, of the countries with an active tradition of whaling, several attended the 1946 conference solely in the capacity of observers,⁴⁴⁷ while Mexico opted to stay away entirely. Furthermore, the postwar political situation precluded the invitation of Germany and Japan.⁴⁴⁸ A much more crucial factor, however, is that the initiative for calling the 1946 Conference, and all the preliminary drafting work for the new Convention, was, as noted above, undertaken by the United States, which, though it still maintained an active interest in whale products, "was no longer a major whaling country and was unlikely to be again."⁴⁴⁹ Indeed, the real whaling era for this nation had effectively ended more than fifty years earlier.⁴⁵⁰ It was therefore in a

447. Observer States at the conference were Iceland, Ireland, Portugal, South Africa, and Sweden. Full participants were Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the United Kingdom, the United States, and the USSR.

448. There are indications that the Americans might have preferred to involve the Japanese, who, at the prompting of General MacArthur, had recently resumed whaling under American direction. Plainly, however, this supervision was intended as only a short-term expedient, after which Japan would be a full participant in the industry in its own right. By the end of 1946, however, the conclusion of a peace treaty was not in sight and other governments were extremely apprehensive about the return of Japan to the Antarctic. It was therefore agreed that Japanese participation in the Washington Conference would be unacceptable. See generally Cablegram 1385 from Australian Embassy in Washington, D.C., to Australian Department of External Affairs, Oct. 5, 1946, reprinted in 10 HISTORICAL PUBLICATIONS: DOCUMENTS ON AUSTRALIAN FOREIGN POLICY, *supra* note 412, No. 156, available at <http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/vVolume/4986F141B4B98CCA256B7E007AA784>; see also Shirley Scott, *Australian Diplomacy Opposing Japanese Antarctic Whaling 1945–1951: The Role of Legal Argument*, 53 AUSTL. J. INT'L AFF. 179 (1999).

449. SCOTT, *supra* note 386, at 123.

450. Most accounts suggest that American commercial whaling activities peaked in the mid-nineteenth century when the industry employed some 70,000 people and well over 700 ships. By 1895, this fleet had dwindled to approximately fifty vessels. Subsequently, the ports of Boston, Provincetown, and San Francisco abandoned whaling altogether, leaving only New Bedford, which sent out its last whaler during the mid-1920s. See, e.g., CHERFAS, *supra* note 386, at 59–106; E.J. DOLIN, *LEVIATHAN: THE HISTORY OF WHALING IN AMERICA* epilogue

position to take a relatively detached view of the industry, as reflected in its attempts to shift the emphasis toward a more (objective) scientific approach and away from (more subjective) economic and political considerations. Furthermore, it was expressly recognized from the outset that “if whaling was to be regulated on the basis of scientific information there was no reason . . . why the Commission should consist only of whaling countries,”⁴⁵¹ and therefore no attempt was made in the treaty to exclude participation by other States.⁴⁵²

Finally, the “whalers’ club” label tends to obscure the fact that participating governments also had other relevant affiliations and concerns. It is not to be overlooked, for example, that five of the six-strong American contingent—*i.e.*, more than one-third of the States participating in the drafting Conference as a whole—arrived fresh from the launching of another significant conservation initiative in the form of the 1940 Convention on Nature Protection and Wild Life Preservation in the Western

(2007); *see also* New Bedford Whaling Museum, Overview of American Whaling, http://www.whalingmuseum.org/kendall/index_KI.html (last visited Feb. 7, 2008). Thereafter, only a few modestly-sized factory ships operated out of sheltered anchorages, and the U.S. contribution to global whale oil production fell to two to three percent in 1929, down from approximately ten percent a decade earlier. The last voyage to Antarctica occurred in 1940. The previous year, a solitary land station had briefly opened at McNears Point, near San Rafael, California, and this was succeeded by one further up the coast at Fields Landing, Eureka, which operated intermittently between 1940 and 1951, buoyed initially by the war-time market for whalemeat. Throughout the period covering the Washington Conference and the first meeting of the IWC, this was the sole whaling facility in the whole of the United States. *See generally* Press Release, U.S. Dep’t of Interior, Whaling Commission Meets in London, Dr. H.J. Deason Sails as U.S. Delegate (May 20, 1949); Anonymous, *Submarine Steaks*, TIME, May 10, 1943, available at <http://www.time.com/time/magazine/article/0,9171,851567,00.html>; Dale W. Rice, *The Blue Whales of the Southeastern North Pacific Ocean*, AFSC Q. REP., Oct.—Dec. 1992, at 3. Commercial whaling flickered briefly into life again in the mid-1950s with the launching of operations in the San Francisco Bay area by the Del Monte and Golden Gate fisheries companies, designed primarily to supply the pet food trade. *See* Interview by Judith K. Dunning with Pratt Peterson, in Point Richmond, Cal. (Apr. 4, 1986), available at <http://www.archive.org/details/fishermanwhaler00peterich>. Even then, activities were at an extremely modest level, and the value of 1971 landings was estimated at less than \$35,000. Bailey, *supra* note 400, at 21 n.29. This represented only around a quarter of the sum realized by the sale of oil and baleen recovered in a single voyage by the whaler *Envoy* in 1851, and a tiny fraction of the total proceeds of whaling in that era, which peaked at \$11 million in 1853. Dolin, *supra*, at 205–06, 270–72. Post-World War II activities were therefore no more than a footnote to the history of whaling in the United States. Indeed, in Dolin’s account, the entire period from 1924 is covered in a single footnote. *Id.* at epilogue n.13. Eventually, anti-whaling sentiment firmly made itself felt, and the engagement of U.S. vessels or citizens in whaling on the high seas was formally prohibited by the Marine Mammal Protection Act of 1972. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421 (1972).

451. SCOTT, *supra* note 386, at 127 (citing *Establishment of Permanent Commission*, IWC U.S. No. 5 (Nov. 21, 1945) (on file with IWC)).

452. *See* ICRW, *supra* note 1, art. X.

Hemisphere,⁴⁵³ a ground-breaking treaty which may well have exerted some influence over their attitudes toward conservation in general and whaling in particular.⁴⁵⁴ More importantly still, all of the participants in the Washington Conference were members of the fledgling United Nations, and, supposedly at least, committed to its goals of universalism, economic and social cooperation, and the development of peaceful and friendly relations. The need to address the urgent food-supply problems of the immediate postwar era, particularly of oils and fats,⁴⁵⁵ had led to a rapid upsurge of interest and investment in whaling,⁴⁵⁶ and it was vital to ensure that peace and good order were not jeopardized by any renewed scramble for resources.⁴⁵⁷ Given, indeed, that Antarctica would inevitably form a primary focus for whaling activities,⁴⁵⁸ the political sensitivities could scarcely have been greater, as it meant that such matters became inextricably implicated with a whole host of more fundamental political controversies. As one inside account put it,

[f]rom the beginning of 1946, as a numbed and war-torn world reflected upon an uneasy peace, Antarctica and the polar regions once again became a powerful magnet to human fancy. In January, plans by Lincoln Ellsworth were announced in the press for an aerial and ground-mapping exercise in Antarctica in 1947. Also in January, famous aviator Eddie Rickenbacker was pushing for [U.S.] exploration in Antarctica, including the use of atomic bombs for mineral research. By late autumn the Netherlands and

453. Western Hemisphere Convention, *supra* note 300. Canada did not become a member of the Organization of American States until 1990, and was the only ICRW negotiating State from the region that had no involvement in this treaty.

454. It will be necessary to return to this question shortly.

455. See G.L. Prichard, *The Current Economic Situation as Related to Fats and Oils*, 28 J. AM. OIL CHEM. SOC'Y 453 (Nov. 1951); J.E. Wall, *The World Food Situation*, 23 INT'L AFF. 307, 312-13 (1947). Whale oil had been widely used for the production of margarine since 1911, when the recently invented process of *hydrogenation* was first applied on an industrial scale. From the 1950s, however, it was progressively replaced by fish oil and ultimately vegetable oil.

456. GORDON JACKSON, *THE BRITISH WHALING TRADE* 235-36 (Adam Black & Charles Black eds., 1978) (noting that "[t]he opportunities for whaling after the war were greater than the most optimistic company could have expected in the bleak days of 1939"). This was reflected in the fact that between 1945-46 and 1948-49 the Norwegian fleet expanded from forty-four vessels to 101 and the British from thirty-three to forty. *Id.* at 238. The Soviet fleet visited Antarctica for the first time, and the Japanese revived their brief pre-war activities in the area. In addition, the Dutch resumed whaling after a lapse of 75 years. See *The Fisheries of the Netherlands*, in *ATLANTIC OCEAN FISHERIES* 119, 121 (Georg Borgstrom & Arthur J. Heighway eds., 1961).

457. See CHERFAS, *supra* note 386, at 111.

458. The extent of this dominance is reflected in the fact that during the seasons 1945-46 to 1947-48 the Antarctic's share in world production of whale and sperm oil amounted to around ninety-five percent. See JACKSON, *supra* note 456, at 281.

Soviet Union whaling fleets were operating in Antarctic waters for the very first time November headlines in the *New York Times* declared a six-nation race to Antarctica “set off by reports of uranium deposits” For the first time in history, an international crisis was brewing over territorial claims in the Antarctic wasteland.⁴⁵⁹

When interpreting the ICRW some sixty years after this event, it is important not to be unduly preoccupied with fisheries matters alone, to the exclusion of the wider political “circumstances of its conclusion,”⁴⁶⁰ since such matters are bound to have influenced the intentions and aspirations of those involved. Newly endowed with super-power status and responsibilities, the United States is sure to have been only too aware, when drafting the ICRW, of the potential for conflict posed by unregulated competition for the natural resources of Antarctica. It would certainly be no surprise if such considerations greatly overshadowed concerns about industrial profitability, which could be adequately resolved over time.⁴⁶¹ Indeed, from the ideological perspective of the United States, the maintenance of industrial profitability is unlikely to have been viewed as a suitable topic for governmental intervention at all, since, as one commentator stated, it “still believed that competition between individual firms on strict capitalist principles was the only way to bring down prices and maintain the ‘freedom of the seas’”⁴⁶²

It was, no doubt, for precisely these reasons that no attempt was made to apportion the overall quota—indeed, Article V(2)(b) of the ICRW specifically forbade any such intervention. Just as the arrival of kerosene and sprung steel had precipitated the collapse of the U.S. whal-

459. Richard Byrd & Richard Cruzen, *The United States Navy Antarctic Developments Project 1946–1947*, ch. 2, <http://www.south-pole.com/p0000150.htm> (last visited Feb. 5, 2008); see also W.L.S. Fleming, *Contemporary International Interest in the Antarctic*, 23 INT’L AFF. 546 (1947).

460. Vienna Convention on the Law of Treaties, *supra* note 21, art. 32; see U.S. DEP’T OF STATE, I FOREIGN RELATIONS OF THE UNITED STATES (1946) (offering an excellent indication of the full range of diplomatic issues with which the United States was preoccupied at the time, and the place of whaling within them).

461. As it happens, the question of economic revival was addressed relatively promptly and on a broader front by various means, including the Marshall Aid Program, of which several whaling countries became beneficiaries. See, e.g., Ola H. Grytten, *The Economic History of Norway*, in EH NET ENCYCLOPEDIA, available at <http://eh.net/encyclopedia/article/grytten.norway>; R.M. Havens, *The Norwegian Investment Program*, 17 S. ECON. J. 166 (1950) (discussing the case of Norway); see NINA SERAFINO, CURT TARNOFF & DICK K. NANTO, U.S. OCCUPATION ASSISTANCE: IRAQ, GERMANY AND JAPAN COMPARED, Order No. RL33331 (Mar. 23, 2006) (providing information on the question of postwar assistance to Germany and Japan).

462. JACKSON, *supra* note 456, at 238–39. The United States’ position on this point was specifically confirmed by the Chairman of the Washington Conference. See IWC/14, *supra* note 412, ¶ 261.

ing industry through sapping demand for whale oil and whalebone,⁴⁶³ so, too, would contemporary whaling operations simply have to take their chance in the marketplace. The emphasis would henceforth be placed on the establishment of institutional arrangements, to minimize the risk of conflict, and the development of a science-based restriction on the overall catch, to ensure that competition did not lead to the ultimate destruction of the resource.

While other participants in the Conference may not necessarily have shared all of these sentiments, they were evidently prepared to go along with the overall U.S. strategy as a means of ensuring that the anticipated escalation in whaling effort did not get out of hand. In particular, the established whaling nations would have been troubled by the prospect of its expansion into countries that had not previously been involved in the industry. Some accordingly pressed for even stricter regulation than the U.S. itself had contemplated.⁴⁶⁴ One compelling reason not to insist on maintaining the traditional emphasis on profitability was, of course, that, despite its having provided the foundation for several decades of regulation,⁴⁶⁵ it had comprehensively failed to deliver measurable conservation benefits, although it is uncertain how clearly that link was perceived at the time. Eventually, however, the realization occurred that the focus on profitability was almost inevitably self-defeating, as classical economic theory was inclined to place a premium on immediate over deferred benefits,⁴⁶⁶ and the economics of the whaling industry in particular—involving heavy initial outlay on boats and equipment and the concomitant reluctance to allow them to remain idle, regardless of the state of whale stocks—has the tendency to create an almost irresistible pressure in favor of over-exploitation.⁴⁶⁷ In any event, the fact that securing the

463. See James S. Robbins, *How Capitalism Saved the Whales*, 42 FREEMAN 311, 312–13 (1992).

464. For example, some participants unsuccessfully attempted to render IWC decisions binding on all members, without the possibility of any opt-out procedure. See *infra* Part III.B.2.c (offering further discussion).

465. These began with unilateral measures designed to protect national industries, such as exclusion of foreign whalers from the Bering Sea by Russia in 1821 and the various pieces of Norwegian legislation dating from 1903, continued with private agreements within the industry, and culminated in the treaty arrangements of the 1930s and early 1940s. See generally CHERFAS, *supra* note 386, at 109–11; D'Amato & Chopra, *supra* note 386, at 28–32.

466. See ALEXANDER GILLESPIE, INTERNATIONAL ENVIRONMENTAL LAW, POLICY, AND ETHICS 57–61 (1997) (offering a helpful discussion).

467. This much is now seemingly accepted by most commentators regardless of their perspectives on other issues. See, e.g., BURKE, *supra* note 10, at 289 n.126; CHERFAS, *supra* note 386, at 201–03; SCOTT, *supra* note 386, at 122–23; D'Amato & Chopra, *supra* note 386, at 30–32; Oberthur, *supra* note 386, at 30–34; Rose & Paleokrassis, *supra* note 386, at 151–53. Thus, Holt describes whaling as more akin to “mining” than “harvesting.” Holt, *supra* note 376, at 345; see PETER G. EVANS, THE NATURAL HISTORY OF WHALES AND DOLPHINS 249–66 (1987) (offering a more detailed explanation); J.A. GULLAND, THE MANAGEMENT OF MARINE

prosperity of the industry might no longer represent the underlying motivation for regulation certainly did not require individual whaling nations to abandon any aspirations or attempts to make their industries profitable; it was simply that the object and purpose of the 1946 Convention itself was to be grounded in other considerations.

In retrospect, therefore, the 1937 Agreement can realistically be seen as the last throw of the dice for the "profitability" paradigm. There is no real surprise in this, since, although the Final Act to its drafting conference⁴⁶⁸ had contained formal expressions of confidence in the Agreement's prospects of contributing to industrial prosperity,⁴⁶⁹ the bulk of the document reveals that the parties actually entertained grave doubts over the efficacy of the instrument they had just adopted. It was recognized, for example, that the question of whaling methods still required to be addressed, from the point of view both of wastage and of cruelty.⁴⁷⁰ What is more, even those restrictions that had been established inspired relatively little faith, and the option of imposing further measures, including the permanent closure to whaling of certain areas, was specifically reserved.⁴⁷¹ The risk was also acknowledged that the controls on pelagic whaling might simply be circumvented by the re-flagging of vessels to the registries of non-party States or the transfer of whaling activities to land stations.⁴⁷² Finally, the possibility was expressly contemplated, in the event of an intensification of competition resulting from the depredations of unregulated vessels, of actually abandoning regulation entirely, and permitting a brief flurry of exploitation until the industry simply collapsed under the weight of its own excesses.⁴⁷³

When, therefore, the 1937 Agreement duly failed to deliver the desired conservation benefits, it is scarcely surprising that the United States and others should have been seeking to establish a new regime based on a radically altered paradigm. Whereas the earlier attempts to regulate whaling could with justification be described as a "cartel,"⁴⁷⁴ and it is,

FISHERIES 105-26 (1974); C.W. Clark & R. Lamberson, *An Economic History and Analysis of Pelagic Whaling*, 6 MARINE POL'Y 103, 103-20 (1982).

468. Secretary of State for Foreign Aff., *International Agreement for the Regulation of Whaling, 1937*, Brit. Parl. Paper, Misc. Ser. No 4 (1937), Cmd. 5487, at 9-11.

469. *Id.* ¶¶ 2, 10.

470. *Id.* ¶ 8.

471. *Id.* ¶ 7.

472. *Id.* ¶¶ 5, 6, 9.

473. *Id.* ¶ 10.

474. A cartel in this sense is defined as a "manufacturers' union to control production, marketing arrangements, prices etc." THE CONCISE OXFORD DICTIONARY 141 (J.B. Sykes ed., 7th ed. 1982). Such cartels were generally created with the specific intention of "keeping up prices [and] monopolizing production." CHAMBERS ENGLISH DICTIONARY 261 (Catherine Schwarz ed., 1993). While the IWC undoubtedly shared some of these features, its essential

indeed, not unusual to see the IWC itself described as such,⁴⁷⁵ it is very unlikely that it was the intention to create one in 1946, since the breaking of the power of such associations was a key ambition of postwar U.S. policy.⁴⁷⁶ The general disposition of the day to place trust in the potential of global institutional arrangements⁴⁷⁷ offered the opportunity to make that aspiration a reality in the whaling context. The United States' own medium-term aspiration, indeed, was to internationalize such operations fully by bringing the IWC under the umbrella of the newly-created U.N. Food and Agriculture Organization (FAO), though this particular proposal proved controversial at Washington and emerged only in diluted form in Article III(6).

Bearing all these points in mind, it can be seen that there is no inherent implausibility in the suggestion that the ICRW was predicated on the implicit abandonment of the profitability of the whaling industry as the *raison d'être* of regulation. That does not in itself prove that the ICRW actually effected such a change, however. In order to establish that point specifically, it is necessary to look beyond a single short

nature and overall focus were very different, particularly through its references to consumers' interests and provision for the involvement of non-whaling States in policy determinations.

475. See, e.g., Michael De Alessi, Op-Ed., *Privatize the Whales*, ASIAN WALL ST. J., Oct. 17-18, 1997, at 6; Stuart R. Harrop, *From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission*, 6 J. INT'L WILDLIFE L. & POL'Y 79, 88 (2003); Adrienne M. Ruffle, Note, *Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort*, 27 BROOK. J. INT'L L. 639 (2002).

476. See GABRIEL KOLKO, *CONFRONTING THE THIRD WORLD* (1988). Kolko noted that U.S. Secretary of State Cordell Hull

regarded the breakup of the world economy into isolated trading blocs after the 1929-31 Depression as the single most important cause of the Second World War as well as the most likely cause of future wars. Restrictive trade cartels, which had especially inflated the price of the United States' increasingly essential raw material imports, were integral to this distorted world economy From 1941 onward the United States never tired of stressing that "raw material supplies must be available to all nations without discrimination" after the war.

Id. at 12-13; see also President Roosevelt's 1945 Statement to the Senate on Postwar Rehabilitation—Bretton Woods Monetary Proposals, 91 CONG. REC. 987 (1945) (confirming this point); EDWARD S. MASON, *CONTROLLING WORLD TRADE: CARTELS AND COMMODITY AGREEMENTS* (1946); Vincent W. Bladen, Fritz Machlup, Robert B. Schwenger & Floyd L. Vaughan, *Discussion*, 36 AM. ECON. REV. 768 (1946); Bernard F. Haley, *The Relation Between Cartel Policy and Commodity Agreement Policy*, 36 AM. ECON. REV. 717 (1946); Walton H. Hamilton, *The Economic Man Affects a National Role*, 36 AM. ECON. REV. 735 (1946); Klaus E. Knorr, *The Problem of International Cartels and International Commodity Agreements*, 55 YALE L.J. 1097 (1946) (offering a contemporary discussion of cartels, which formed one of the "hot" topics of the day); Robert P. Terrill, *Cartels and the International Exchange of Technology*, 36 AM. ECON. REV. 745 (1946).

477. See KOLKO, *supra* note 476. Kolko notes that the United States had a strong belief in the "efficacy of its institutional proposals for an integrated postwar economic and political structure." *Id.* at 15.

phrase in a preambular recital,⁴⁷⁸ which may perhaps have been inexpertly, or even ineptly drafted, and to consider the effect of the preamble, and indeed the treaty, as a whole.⁴⁷⁹ The reason for this, of course, is that words or phrases are not to be read in isolation, but in their context, and the context includes the entire text, including the preamble and annexes.⁴⁸⁰

b. The Preamble as a Whole

As it happens, it is unnecessary to read beyond the first line of the first recital of the preamble for confirmation that a radical change in direction had occurred. For it was here that the need to safeguard “the great natural resources represented by the whale stocks” was recognized to reflect the interest of “the nations of the world” generally, rather than the contracting parties, in particular, and that the intended beneficiaries were identified not as the whaling industry but as “future generations.” Furthermore, acknowledgement of the conspicuous lack of success of all previous attempts at regulation, directed as they were to the profitability of the industry, was implicit in the second preambular recital, which observed that “the history of whaling has seen over-fishing of one area after another and of one species of whale after another”⁴⁸¹ The urgent need for a new approach was therefore fully apparent.

In an attempt to elaborate that approach, the fourth recital identified the common interest as lying in the achievement of “the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress.”⁴⁸² Taken together with the statements mentioned above, this reflects clear recognition of the instrumental value of whales as resources, conceived in terms of the interests both of present and of future generations. On the other hand, it plainly does not actually define the “optimum level” of stocks by reference to such considerations—indeed, it does not define or explain it at all. Further guidance on this issue, and its impact on the object and purpose of the ICRW as a whole, must therefore be sought in other preambular recitals. Of central importance in this context, and following directly from the reference to the history of whaling in the second recital, is the identification of the essential need “to protect all species of whales from further

478. That is, “on the basis of the principles embodied in the provisions of the [1937] International Agreement.” ICRW, *supra* note 1, pmb1.

479. While this point is not infrequently acknowledged by commentators on the ICRW, regrettably the full implications are not always taken on board. *See, e.g.*, BURKE, *supra* note 10, at 288.

480. Vienna Convention on the Law of Treaties, *supra* note 21, art. 31(1)–(2).

481. ICRW, *supra* note 1, pmb1.

482. *Id.*

over-fishing."⁴⁸³ The use of terminology here is intriguing. The term "protection" has a lengthy pedigree in international law as it bears on human relations with the animal world, and while it might at one time have been employed to indicate conservation activities undertaken essentially for utilitarian purposes, it has more recently come to be used to signify a defensive regime undertaken at least in part for the benefit of the entities covered by the measures in question.⁴⁸⁴ The possibility that this was the intention in the case of the ICRW is considerably strengthened by the fact that the targets of protection are described not as "whale stocks" or "whale fisheries" but as "all *species* of whales."⁴⁸⁵ It is true that this protection is expressly conferred only with respect to over-fishing, but it is likely that this was perceived as the only significant threat to them at the time. Although the wording can hardly be described as unequivocal, this passage is at least open to the interpretation that it involves recognition of the need to protect whales for their own sake: otherwise, it serves little purpose, given that the instrumental value of whales is amply addressed in other recitals. It could be viewed merely as providing a narrative link between the notions of safeguarding resources for the future and rapidly achieving the optimum level of stocks, but this interpretation is implausible in view of the fact that the phraseology used is plainly teleological in character; indeed, the protection of whales is the *only* aim to be specified as "essential." It is possible that the phrase "to protect all species of whales" was deliberately chosen for its ambivalence,⁴⁸⁶ leaving States free to act on their own perceptions of the matter,⁴⁸⁷ though that would doubtless risk planting the seeds for future controversy when amendments to the regulatory system were discussed.

Whatever the uncertainties surrounding this particular phrase, it is scarcely open to dispute that the points referred to above represent the policy objectives of the ICRW in a general sense, since they are not only

483. *Id.*

484. Note the markedly different conceptions of "protection." Compare Convention for the Protection of Birds Useful to Agriculture, Mar. 19, 1902, 191 Consol. T.S. 91, with International Convention for the Protection of Birds, *supra* note 432, and Convention Relative to the Preservation of Fauna and Flora in their Natural State, Nov. 8, 1933, 172 L.N.T.S. 241 (influencing the change in the concept of "protection"), and Western Hemisphere Convention, *supra* note 300 (influencing the change in the concept of "protection"). It is arguable that the change in emphasis can be traced to the 1933 African and 1940 Western Hemisphere Conventions. See *infra* Part III.B.2.e. On the question of "protection," see generally Michael J. Bowman, *The Protection of Animals under International Law*, 4 CONN. J. INT'L L. 487 (1989).

485. See ICRW, *supra* note 1, pmbl.

486. Ambivalence, as opposed to outright internal contradiction, is a well-practiced technique of treaty draftsmanship.

487. In particular, any non-whaling States that joined the IWC would have the power to act on this motivation when exercising their votes on quotas, sanctuaries, etc.

couched in the terminology of objectives, but expressly described as such in the opening words of the fifth recital, which speaks in terms of "achieving these objectives." The avoidance of widespread economic and nutritional distress, presented as a rider or qualification on the goal of restoring stocks to optimum levels, may doubtless be seen as an important ancillary objective. The interests both of the whaling industry itself, and of its consumers, might be brought into play by these words, but only to the extent that agreed regulatory measures might put them *at serious risk* through their restriction of catch levels.⁴⁸⁸ Given the need to address contemporary food shortages, such considerations might have been expected to prove especially significant in the short term.

The only other matter that precedes the reference to "these objectives," and might therefore be regarded as falling within the scope of that phrase, can be found in the third recital of the preamble, which reads:

RECOGNIZING that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales which may be captured without endangering these natural resources⁴⁸⁹

On one reading, this might be regarded as indicating an actual objective of increasing catch levels in due course, but the obvious difficulty with this interpretation is that, unlike the first, second, and fourth recitals, this one is not expressed in terms of goals, aims, needs, or interests at all, but is rather a simple assertion of fact, the main purpose of which seems to lie in providing a narrative or explanatory link between the declared objectives of protection against over-fishing and securing an optimum level of stocks. That is to say, it simply presents one of the potential advantages of the adoption of conservation measures. At the very least, however, it elucidates the matter in a negative sense, confirming that it was certainly not part of the overt objectives of the ICRW to *preclude* all taking of whales from the outset.⁴⁹⁰ Given the immediate need to address widespread food shortages, that would obviously have been a most unlikely starting-point for the regulatory process. Further endorsement of this point, if any were needed, can be found in the fifth recital,

488. That is to say, recognizing a need to avoid widespread economic distress in pursuing conservation objectives is a far cry from seeking to advance economic interests as a primary objective.

489. ICRW, *supra* note 1, pmb1.

490. Of course, this is by no means the same as saying that a decision to preclude all harvesting, or all commercial harvesting, is inherently contrary to the ICRW's object and purpose. The matter is simply left for determination by means of the decision-making processes that the ICRW establishes.

which identifies the general means by which the ends identified above were to be achieved, namely that "whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers."⁴⁹¹

In order to identify the detail of the proposed approach, the array of techniques employed under the 1937 Agreement was then the subject of cross-reference in the sixth recital, as explained above. These methods could be expected "to ensure proper and effective conservation and development of whale stocks,"⁴⁹² provided always that they were applied in light of the newly stated objectives, rather than driven by the old mantra of the profitability of the industry itself.

The final recital of the preamble, which indicates the precise legal purpose of the parties in concluding the Convention, must plainly be understood by detailed reference to the underlying policy objectives and explanatory statements in the earlier recitals, as a result of which it inevitably emerges in a subtly different light. In particular, the words "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry"⁴⁹³ are to be read not as implying any *dissonance*, or dichotomy of interest, between conservation of stocks and development of the industry, which must then somehow be reconciled or prioritized, but rather as reflecting the perceived *consonance* or complementarity of the characteristics that these processes were henceforth respectively to display, *i.e.*, *proper* in the case of conservation (as opposed to the philosophically misconceived and unsuccessful regulatory endeavors of previous decades) and *orderly* in the case of development of the industry (to displace the chaotic practices of the past and avoid any risk of conflict in the scramble for resources). In short, these are not two separate currencies at all, but rather the two sides of a single coin—twin aspects of the single goal of establishing a stabilizing legal mechanism that would serve to protect all species of whales from the major threat they faced, and preserve the resources they embodied for the benefit of future, and indeed present, generations.

A critical weakness of all interpretations which see the development of the industry as a key objective in its own right is that they fail to accord appropriate weight to the word *orderly*, as though it served no significant normative function at all. Given that its ostensible role was in fact to determine the very path that such development should follow, this seems to be a particularly cavalier infringement of the principle of

491. ICRW, *supra* note 1, pmbl.

492. *Id.*

493. *Id.*

effectiveness. In contradiction of this approach, the well-established rules of treaty interpretation clearly require that it be given its ordinary meaning in the context in which it appears, when viewed in light of the overall object and purpose of the treaty. Admittedly, there is a difficulty here, in that the word appears in a preambular recital the very function of which is to establish that object and purpose, and therefore a key element of the conventional guidance as to the intended meaning of the word is unavailable in a strict sense. Nevertheless, much can be gleaned from the other elements of the preamble, the contents of the treaty as a whole, and the surrounding circumstances generally.

On the one hand, the word "orderly" might simply have been intended to convey that an enhanced degree of *organization* would henceforth be imposed on whaling activities by the treaty, not only through its codification of the established mechanisms of regulation, but by virtue of the creation of a permanent international forum for ensuring their ongoing application. Yet although this aspect of its meaning is undeniable, it is unlikely that it exhausts the full purport of the word, which, while not exactly a term of art, would have been recognizable to the negotiating States as being heavily pregnant with implications in light of established usage. In 1946, the implications in question would have derived ultimately from the specific conceptions and ramifications of the notion of "order" (or "good order" or "public order") that prevailed within the international community at the time. From a consideration of diplomatic usage, there is ample evidence that the concept was seen as closely related to notions of peace, security, and the rule of law and that it connoted specifically the preservation, restoration, or establishment of constitutional equilibrium within a given community in circumstances in which controversy or conflict had either been anticipated or actually experienced. In this vein, the Principal Executive Officer of the U.S. delegation to the U.N. General Assembly in the late 1940s described the earlier League of Nations Covenant⁴⁹⁴ as having embodied the goal of "subjecting the inevitability of change to the restraints of *orderly* procedures" and as "altering political frontiers by *orderly* means."⁴⁹⁵

The term was, moreover, routinely employed in international legal instruments to convey the same general idea. In some cases, the notion of "order" was central to the very objectives of the instrument, as in the case of the 1928 Treaty for the Renunciation of War as an Instrument of

494. Covenant of the League of Nations, June 28, 1919, 225 Consol. T.S. 195.

495. DONALD C. BLAISDELL, *INTERNATIONAL ORGANIZATION* 273 (1966) (emphasis added).

National Policy,⁴⁹⁶ the third preambular recital of which proclaimed the conviction that any changes in the parties' mutual relations "should be sought only by pacific means and be the result of *peaceful and orderly process*."⁴⁹⁷ Similarly, Articles 1 and 2 of the 1936 International Convention Concerning the Use of Broadcasting in the Cause of Peace required the parties to prohibit broadcasts from their territories which constituted an incitement to war, or to *acts contrary to the internal order or security* of another State.⁴⁹⁸ In other instances, "order" featured rather as an overriding interest to be protected in the course of addressing particular causes or consequences of conflict. Thus, Article 6 of the 1923 Lausanne Convention Relating to the Regime of the Straits prohibited the stationing of troops in the demilitarized zones of Turkey other than "the police and gendarmerie forces *necessary for the maintenance of order*."⁴⁹⁹ In a similar way, the "*just requirements of . . . public order*" were considered of sufficient importance to qualify as one of the general justifications for the limitation of human rights in the 1948 Universal Declaration.⁵⁰⁰

Although these conventions might be considered as rather far removed from the ICRW in terms of scope and substance to carry much weight as aids to its interpretation, it is apparent that precisely the same usage was regularly encountered, at both the national and international levels, in legal instruments regulating both maritime and commercial affairs, into both of which categories the ICRW unquestionably falls. To take the latter as an example,⁵⁰¹ it was specifically the interests of "orderly" marketing which had inspired the creation of the national Wheat Boards which were established in Canada and Australia during the First World War and revived at or around the time of the Second World War.⁵⁰² Similar arrangements had been applied to other commodities, such as

496. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (emphasis added) (naming the "Kellogg-Briand Pact" for Frank B. Kellogg, U.S. Secretary of State at the time, and not Remington Kellogg, the principal architect of the ICRW).

497. *Id.*

498. International Convention Concerning the Use of Broadcasting in the Cause of Peace, Sept. 23 1936, 186 L.N.T.S. 301 (1938).

499. Convention Relating to the Regime of the Straights art. IV, July 24, 1923, 28 L.N.T.S. 115 (emphasis added). This convention was signed with the Treaty of Peace, July 24, 1923, 28 L.N.T.S. 11.

500. Universal Declaration of Human Rights, *supra* note 127, art. 29; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 124, Article 29; *id.* arts. 6(1), 8(2), 9(2), 10(2), 11(2), 15(1) (following through on article 29 and referencing the "protection of public order" or the "prevention of disorder" as potentially legitimate grounds for such restrictions).

501. *See infra* Part III.B.2.f (explaining the implications of the term in the maritime context).

502. *See, e.g.,* The Canadian Wheat Board, Parliamentary Research Board 98-2E (Sept. 1998); *The Australian Wheat Industry*, 2006 AUSTL. Y.B. 436.

wool,⁵⁰³ and in other countries, including New Zealand.⁵⁰⁴ Although these arrangements not infrequently incorporated a protectionist aspect, what they essentially had in common was that they all represented instances of crisis management in the form of governmental interventions into the market place in the wider interests of social stability. In the case of New Zealand, for example, they were specifically designed to combat the activities of black marketeers during World War II.⁵⁰⁵ Despite this strong wartime association, “orderly marketing” arrangements had also been adopted at other times of trade turmoil or acute national stress, as in the case of the U.S. farming industry during the 1930s, following “sporadic outbreaks of violence on American farms,” and fears of an imminent “revolution in the countryside.”⁵⁰⁶ Furthermore, the terminology of “orderly marketing” was to re-emerge in other international commodities agreements dedicated to the achievement of stability in the immediate postwar era, such as the 1951 Commonwealth Sugar Agreement,⁵⁰⁷ and in the vernacular of the 1947 General Agreement on Tariffs and Trade.⁵⁰⁸

In light of this general pattern of usage, the “ordinary meaning” of the word “orderly” in its context in the ICRW should sensibly be seen as going far beyond a desire to impose a degree of *organization* on the

503. M.J. Keneley, *Woolgrowers, Brokers and the Debate over the Sale of the Australian Wool Clip, 1920–1925*, 41 AUSTL. ECON. HIST. REV. 35, 41 (2001).

504. See J.V.T. Baker, *War Economy*, in OFFICIAL HISTORY OF NEW ZEALAND IN THE SECOND WORLD WAR, 1939–45, 1, 1–3 (1965), available at http://www.nzetc.org/tm/scholarly/tei-WH2Econ_N72825.html.

505. *Id.* at 1.

506. *Agricultural Adjustment Relief Plan: Hearings on H.R. 13991 before the U.S. Senate Committee on Agriculture and Forestry*, 72nd Cong. 15 (1933) (statement of Edward A. O’Neal, President, American Farm Bureau Federation).

507. See generally Arvid Boolell, ACP Ministerial Spokesman on Sugar & Minister of Agriculture, Fisheries, and Cooperatives, *Address at the Proceedings of the Fiji/FAO 1997 Asia Pacific Sugar Conference: The Importance of Special Trading Arrangements in the Promotion of Growth and Stability in Developing Countries*, <http://www.fao.org/docrep/005/X0513E/x0513e08.htm> (last visited Aug. 29, 2008) (noting that this agreement was recently described as representing the beginnings of a process of liberation for producing countries from “the bondage of poverty and misery,” through its contribution to “social harmony” and the “principles of democracy, good governance and the rule of law”).

508. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; R. Sharma, *Agriculture in the GATT: A Historical Account*, in MULTILATERAL TRADE NEGOTIATIONS ON AGRICULTURE: INTRODUCTION AND GENERAL TOPICS (FAO Corporate Doc. Repository 2000), available at <http://www.fao.org/docrep/003/x7352e/x7352e04.htm> (describing GATT as aiming to create “an orderly and transparent framework within which barriers to trade could be gradually reduced and international trade expanded”). In a more specific sense, Orderly Marketing Agreements (OMAs) are understood to refer to inter-governmental arrangements designed to ensure stability through the restraint, by means of quotas or licenses, of surges in exports that might otherwise threaten to disrupt sensitive sectors of industry in the importing country. See, e.g., Institute for Trade and Commercial Diplomacy, *Glossary: I. Terms Related to Trade Policy and Negotiations* (2004), available at http://www.itconline/introduction/glossary1_opqr.html (providing a comprehensive definition).

industry, and to reflect the need to ensure that its activities did not pose any threat to international peace and stability. This obviously begs the question of why such concerns should have arisen in this particular context: after all, there had been several earlier examples of instruments which established international institutions concerned with the exploitation of fishery resources,⁵⁰⁹ but they do not appear to have disclosed any preoccupation with orderly conduct or conditions in the above sense. The simple answer seems to be that what distinguished whaling from these other activities was its much greater potential for generating discord, particularly in light of the political circumstances surrounding the conduct of the negotiations. As one commentator put it,

[f]isheries organizations preceding the IWC were established to achieve essentially non-controversial tasks: to promote research . . . or to rebuild stocks which had been depleted Under the 1946 Convention[,] the Whaling Commission was concerned with the *prevention* of overfishing. Here the interests of nations do not coincide. Accordingly the Whaling Commission was the first international fisheries organization to deal with problems that were inherently controversial in nature.⁵¹⁰

In fact, the hazards that the IWC would inevitably have to address were quite formidable, and stemmed from the interactions amongst a number of key factors. First, the ICRW was expressly designed to *regulate* the whaling industry, the inherent intractability of which was demonstrated by the fact that it had effectively defied all previous attempts at regulation. Secondly, the complexities of this regulatory endeavor arose both in the *marketing* and the *harvesting* phases of activity. As to the former, *under*-production of essential oils and fats, and for some communities meat, could have proved disastrous in light of postwar food shortages. At the same time, the problems associated with *over*-production were already well appreciated, not least with regard to their impact on the precarious condition of whale populations. In particular, the rapid postwar escalation of investment in whaling had created a

509. See, e.g., Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish, Apr. 5, 1946, 1956 U.K.T.S. 8; Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fisheries in the Fraser River System, U.S.-Can., May 26, 1930, 8 U.S.T. 1058; Convention for the Preservation of the Pacific Halibut Fishery, U.S.-Can., Mar. 2, 1923, 32 U.N.T.S. 93. Note also the existence of the International Council for the Exploration of the Sea (ICES), created in 1902, and the International Commission for the Scientific Exploration of the Mediterranean Sea (1919), neither of which was constituted on a treaty basis until after the adoption of the ICRW.

510. ALBERT W. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES 88 (1973); see also CHERFAS, *supra* note 386, at 111 (noting that without the establishment of effective institutional regulation, "there might have been appalling conflict").

renewed risk of extreme and unbridled over-exploitation. Thirdly, over and above the threat to conservation, potential problems arose from the extreme *volatility* of whaling as an activity, as exemplified by (i) the highly competitive nature of the harvesting process, which came to be known as the “Whaling Olympics”; (ii) the fact that this process would necessarily unfold *on the oceans*, where direct confrontations between participants could occur in circumstances far removed from the social and political constraints that normally govern commercial activities; (iii) the consideration that the particular arena where this drama would largely be enacted was, as explained above, one of the utmost political sensitivity; and (iv) the fact that the principal protagonists not only shared a long history of intense rivalry in these matters, but had in addition barely emerged from a situation of all-out global conflict, in which the nature and consequences of their involvement had been highly divergent, to say the least.⁵¹¹

To expand on these points, it can be observed that, in the years immediately preceding World War II, diplomatic correspondence between putative IWC members, especially Norway and the United Kingdom, had been peppered with frosty exchanges over fisheries matters, whaling included.⁵¹² In a number of cases, the use of force—usually in the form of the deployment of naval gunboats—had been called for by fishermen, and actively considered or even specifically threatened, by governments.⁵¹³ In 1946, forebodings as to the threats posed to stability and good order by confrontations over the exploitation of marine resources would inevitably have loomed largest in areas where there was a risk of fanning back into flame the dying embers of the recent military conflagration. As an example, in the months leading up to the Washington Conference, the U.S. government had received urgent expressions of concern from its Australian counterpart over the extension of Japanese whaling “into waters of direct and permanent security interest to Australia,

511. Even leaving aside the case of Japan, consider simply the positions of the five States on whose ratification entry into force of the ICRW was to be made conditional: the Netherlands, Norway, the USSR, the United Kingdom, and the United States.

512. See, e.g., 63 BRITISH DOCUMENTS ON FOREIGN AFFAIRS [hereinafter BDFAs], ser. F, pt. 2, Docs. 205, 229, 252, 272–274 (Kenneth Bourne, D. Cameron Watt & Michael Partridge eds., 1996) (noting the ongoing dispute over fishing limits between these States); 64 BDFAs, *supra*, ser. F, pt. 2, Docs. 143, 163; 65 BDFAs, *supra*, ser. F, pt. 2, Docs. 18, 19, 113, 114; 66 BDFAs, *supra*, ser. F, pt. 2, Docs. 112, 113; 64 BDFAs, *supra*, ser. F, pt. 2, Doc. 120 (concerning whaling disputes in particular); 65 BDFAs, *supra*, ser. F, pt. 2, Docs. 81, 96 (regarding trawler disputes with Iceland); 18 BDFAs, *supra*, ser. E, pt. 2, Docs. 53, 93–97, 112, 113 (exhibiting the disputes between the USSR and Japan).

513. See 63 BDFAs, *supra* note 512, ser. F, pt. 2, Doc. 229; 18 BDFAs, *supra* note 512, ser. E, pt. 2, Doc. 53 (noting the Japanese government’s declared willingness “in the last resort to take effective and appropriate measures for the defence of Japan’s rights”).

without prior consultation."⁵¹⁴ The British, along with Norway and New Zealand, had voiced similar anxieties, echoes of which continued to circulate in public debate for many months.⁵¹⁵

Of course, it was not to be expected that the specific reasons why good order might be at risk would have been identified or elaborated on in the text of the ICRW itself: that would scarcely have been considered appropriate.⁵¹⁶ Nevertheless, they would have been fully apparent to the negotiating States, as is evidenced by their reiteration at meetings of the Far East Commission⁵¹⁷ and their reemergence in the terms of the Treaty of Peace with Japan⁵¹⁸—not finally concluded until September 1951—to which almost all of those States were to become parties. A key element of this instrument was the requirement that Japan enter into negotiations with the Allied Powers for the regulation and limitation of fishing and the conservation and development of high seas fisheries,⁵¹⁹ and the particular urgency of such action in relation to whaling is evident from Japan's admission to the IWC some months before the Treaty of Peace was actually finalized.⁵²⁰

Even amongst the Allied Powers themselves, and specifically those that were directly involved in the Washington ICRW negotiations, tensions had been steadily escalating during 1946, not only with regard to Antarctica but over a host of issues of more general political significance.⁵²¹ During the months leading up to the Conference,

514. Aide-memoire from the U.S. Department of State, forwarded by the Australian Embassy in Washington, D.C., to the Australian Department of Foreign Affairs, Sept. 26, 1946, *reprinted in* 10 HISTORICAL PUBLICATIONS: DOCUMENTS ON AUSTRALIAN FOREIGN POLICY, *supra* note 412, No.138, *available at* [http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/\(LookupVolNoNumber\)/10~138](http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/(LookupVolNoNumber)/10~138).

515. *See, e.g.*, ECONOMIST, Nov. 23, 1946, at 843; ECONOMIST, June 28, 1947, at 1043.

516. Aide-memoire, *supra* note 514. The U.S. government's correspondence with the Australian government over its specific concerns in this matter was classified as "Most Immediate Secret."

517. *See* Cablegram 869 from the U.S. Department of State to the Australian Department of Foreign Affairs, July 3, 1947, *reprinted in* 12 HISTORICAL PUBLICATIONS: DOCUMENTS ON AUSTRALIAN FOREIGN POLICY, *supra* note 412, No. 402, *available at* [http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/\(LookupVolNoNumber\)/12~402](http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/(LookupVolNoNumber)/12~402). Despite the acuteness of Australian sensitivities on this issue, the matter was ultimately not pressed at FEC, as it was anticipated that the United States, determined to reduce the burden on its economy of support for Japan, would use its power of veto for the first time in that organization.

518. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 46.

519. *See id.* art. 9.

520. To put the matter into perspective, the key objectives of the Australians, as far as the Peace Treaty was concerned, specifically included, alongside all of the expected elements, "the banning of Japanese whaling in the Antarctic." Cabinet Submission, May 22, 1947, *reprinted in* 12 HISTORICAL PUBLICATIONS: DOCUMENTS ON AUSTRALIAN FOREIGN POLICY, *supra* note 412, No. 314, *available at* [http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/\(LookupVolNoNumber\)/12~314](http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/(LookupVolNoNumber)/12~314).

521. To take just the briefest sample, U.S. policy regarding the testing and exclusive possession of nuclear weapons had attracted protest from a variety of sources; the USSR had

moreover, the extreme fragility of maritime security had been dramatically exposed by events in the Corfu Channel,⁵²² which were subsequently to provide the newly created ICJ with its first substantive item of business.⁵²³ In these circumstances, it would have been altogether extraordinary if the need to ensure that the rapid escalation of whaling did not further prejudice good order had not been a prominent consideration in the consciousness of participants in the ICRW negotiating process.⁵²⁴

There is certainly little room for doubt of this in the case of the United States. The urgent need for a new array of institutional arrangements to regulate not merely *political* relations, but *economic* and *commercial* activities, had been explained to Congress by President Roosevelt in 1945.⁵²⁵ Essentially, the choice was seen as lying between “a world caught again in the maelstrom of panic and economic warfare culminating in war . . . or a world in which the members strive for a better life through mutual trust, cooperation, and assistance.”⁵²⁶

Alongside the creation of a new world financial system and a food and agriculture organization within the United Nations, this was seen to

found itself increasingly at odds with the other major powers over a range of issues, including its own plans to build a nuclear bomb, the creation of the so-called “Iron Curtain,” spying activities, the question of admission of States to the United Nations, and the appointment of the first Secretary-General; the United Kingdom and the United States had been involved in sharp exchanges over the situation in Palestine; South Africa had been condemned over its plans for South-West Africa and Argentina in connection with the sheltering of war criminals.

522. See generally ERIC LEGGETT, *THE CORFU INCIDENT* (1974) (providing a graphic, journalistic account of the incident).

523. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

524. Memories were perhaps also still fresh of the devastating consequences of a 1941 wartime incident concerning the whaling industry specifically, when an entire Norwegian whaling fleet was seized by German vessels off Antarctica. Note the following account of this extraordinary episode:

World War II interrupted any further research efforts in Antarctica, but the continent was not immune to wartime activity. On the night of January 13th 1941, German commandos boarded and captured two Norwegian factory ships in the sea north of Dronning Maud Land. By the end of the next day, the Germans had taken possession of three factory ships and eleven catchers. The German navy later used the waters of the peninsula and the sub-Antarctic islands as a haven from which they could venture forth to attack allied shipping. Their main base was an obscure harbor on Kerguelen Island. Mines laid by this German Antarctic fleet around the ports of Australia sank the first American vessel lost to enemy action.

Antarctic History, <http://www.antarcticonline.com/antarctica/history/history.htm> (last visited Feb. 5, 2008); see also Byrd & Cruzen, *supra* note 459, ch. 2; Norwegian Victims of Pinguin, <http://www.warsailors.com/raidervictims/pinguin2.html> (last visited Feb. 5, 2008).

525. Franklin D. Roosevelt, Message to Congress on the Bretton Woods Money and Banking Proposals, Feb. 12, 1945, *reprinted in* 13 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 548 (Samuel I. Rosenman ed., 1950).

526. *Id.*

require in particular "the reduction of trade barriers, the *control of cartels*, and the *orderly* marketing" of commodities.⁵²⁷ In relation to whaling, it was, furthermore, precisely the establishment of a new standing body, the IWC, that created the opportunity for the imposition of order, and indeed for the full ramifications of the ICRW's preambular notions of *propriety* and *orderliness* to be progressively elaborated over time.

All these considerations strongly support the notion that the emphasis of the final preambular paragraph is on *orderly* development rather than *development* as such. In view of the unequivocal indications at the time of a rapid and imminent intensification of competition in the pursuit of whales, the aim was not so much to facilitate the development of the industry as to ensure that its already inevitable, and indeed potentially rampant, expansion did not prove prejudicial to the *good order* of the oceans, and thereby of the international community generally. Indeed, given the abandonment of profitability as the overt motivation for regulation, and the relegation of whaling industry interests generally to the status of only subordinate concerns, it is simply not credible to see the development of the industry for its own sake as the ultimate objective of the ICRW, or even as one of its major goals.

c. The Text as a Whole

Yet it would still be unwise to embrace this conclusion as definitive without pursuing the process of interpretation through all of its stages. The task of identifying the object and purpose of the ICRW may begin with the preamble, but it does not end there, and it is also necessary to examine the text as a whole for confirmation, or indeed counter-indications, regarding the view provisionally reached on this issue. In fact, relatively few provisions shed much additional light, though those that do tend to reinforce the impression of a radical change of fundamental objectives. Article X, for example, is noteworthy in allowing non-whaling States to become parties to the ICRW because, although this was theoretically possible under the earlier whaling agreements as well, the consequences would now be entirely different. Instead of merely assuming a series of *obligations* (which would be of little relevance for States that were not actually engaged in whaling), such States would henceforth acquire significant *powers*, since, as members of the Commission, they would enjoy an equal say in shaping the ongoing evolution of the regime.⁵²⁸ Obviously, the involvement of such States might considerably enhance the prospects of imposing order on the industry and

527. *Id.* (emphasis added).

528. ICRW, *supra* note 1, art. III(1).

conserving stocks, confirming that the preambular recognition of the interests of all nations was no mere rhetorical flourish.

Perhaps the key provision in this context, however, is Article V(2), which established the parameters for future development of the Convention through adjustment of the Schedule, in which the detail of the regulatory scheme was set out. Amendments were, first of all, to be “such as are necessary to carry out the objectives and purposes of this Convention *and* to provide for the conservation, development, and optimum utilization of the whale resources.”⁵²⁹ This wording is surprising in that the imposition of these two conditions, linked by the word “and,” might be taken to suggest that the conservation, development, and optimum utilization of whale stocks were *not* in themselves part of the ICRW’s original objectives. Yet, in light of the preamble, this can scarcely be true of conservation and development, even if it is in the case of optimum utilization. On the other hand, by requiring that future amendments satisfy this composite criterion, this provision unquestionably gives “optimum utilization” a substantial role in shaping the Convention’s future. Perhaps this clause is best understood as providing confirmation that the objectives of the Convention extended beyond conservation and rational utilization alone to embrace other concerns as well, the preservation of good order in maritime affairs obviously being the most plausible candidate. Although it cannot be claimed that the wording of these provisions is ideal, some sense can at least be made of them by reading them in that way.

Optimum utilization itself is not defined, and was presumably left to be elaborated over the course of time, though there is certainly nothing to suggest that it equated to *maximum* utilization.⁵³⁰ In light of concerns expressed in the preamble, however, it should at least be taken to have entailed that immediate attention be paid to the avoidance of economic and nutritional distress, and the ongoing relevance of such considerations is confirmed by sub-paragraph (d) of Article V(2), which requires that amendments “take into consideration the interests of the consumers of whale products and of the whaling industry.”⁵³¹ This wording, however, strongly underlines the extent to which the profitability of the whaling industry had been relegated in importance: henceforth, the interests of the industry were not to be the only, or even the paramount, consideration, and should not dictate the outcome, but merely have some claim to influence it.⁵³² Profitability as such is not mentioned at all. In its place,

529. *Id.* art. V(2)(a) (emphasis added).

530. For further discussion of this point, see *infra* Part II.B.2.d.

531. ICRW, *supra* note 1, arts. V(2)(b), V(2)(d).

532. See William T. Burke, *Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the IWC*, 27 OCEAN DEV. & INT’L L. 315 (1996) (stating

sub-paragraph (b) identified a new consideration—science—the findings of which were intended to become a fundamental (albeit clearly not exclusive)⁵³³ element in the elaboration of the regulatory system for the future.

Despite this new emphasis, the provisions of the ICRW were plainly not intended to subjugate the industry entirely. All remained free to compete for acquisition of the resource, since, as noted above, Article V(2)(c) expressly forbade the imposition of restrictions on the number or nationality of factory ships or land stations, or the allocation of specific quotas to any factory ship or land station, or to any group thereof, despite the fact that such measures might well have proved "the most effective for conservation purposes."⁵³⁴ In addition, traditional attachments to state sovereignty dictated the eventual retention of a power to opt out of agreed controls via the objections procedure,⁵³⁵ against the wishes of certain whaling nations, who foresaw the abuses that might follow.⁵³⁶ Ironically, it seems to have been the United States that ultimately insisted on the inclusion of this provision,⁵³⁷ partly no doubt out of concern that certain whaling States might otherwise not agree to participate at all, but also, perhaps, partly out of unwillingness in principle to contemplate its own ultimate powers of decision being curbed by an international institution.

d. Preparatory Work

Next, it must be remembered that the materials relevant to treaty interpretation are not strictly confined within the four corners of the text, but may in appropriate circumstances be gleaned from beyond. Article

that the phrase "shall take into consideration" is "a formula that serves mainly as a reminder of relevant interests rather than mandating satisfaction of such interests").

533. Fundamental, in the sense that amendments were to be "based on" scientific findings, but clearly not exclusive, in that the additional considerations enumerated above had also to be borne in mind.

534. BIRNIE, *supra* note 386, at 192. It seems that ideological considerations may have triumphed here over pragmatism and good sense. It is perhaps unfortunate that the United States had not paid more heed to the successes it had achieved through an earlier treaty concerning the exploitation of marine mammals which had involved a far more interventionist approach to management and exploitation. See Convention for the Preservation and Protection of Fur Seals, Dec. 14, 1911, 37 Stat. 1542, 214 Consol. T.S. 80.

535. ICRW, *supra* note 1.

536. See IWC, *Minutes of the 2nd Session*, *supra* note 412, ¶¶ 263–271 (noting that the United Kingdom, backed by Norway, voiced the strongest opposition); IWC, *Minutes of the 10th Session*, *supra* note 412, ¶¶ 43–103 (same).

537. IWC, *Minutes of the 2nd Session*, *supra* note 412 (noting that it was most strongly supported by France, which saw it as an important safeguard for sovereignty in light of the importance of the issues under discussion and the lack of prior notice of the detail of the U.S. proposals); BIRNIE, *supra* note 386, at 162 (noting that the U.S. position perpetuated the stance it had taken at the earlier, 1945, negotiations, prior to embarking on the current draft).

32 of the Vienna Convention, for example, refers to the preparatory work of the treaty as a “supplementary means of interpretation” to which resort may be had to confirm the meaning resulting from the application of the basic rule of interpretation under Article 31, or to determine the meaning when that process

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.⁵³⁸

In point of fact, passing reference has already been made to the background to development of the ICRW, and relatively little needs to be added here. It is well-known in any event that the guidance to be gained from such sources is often limited and equivocal, which is why they are accorded an essentially subsidiary role under the Vienna Convention.

A further difficulty here is that the ILC purposely refrained from defining the notion of *travaux préparatoires*, but did indicate that they should not necessarily be regarded as limited to published documents, or to records of deliberations in which all the eventual parties had participated.⁵³⁹ Plainly, this approach creates some uncertainty with regard to where the line should be drawn in circumstances in which, as in this case, all the preliminary drafting work has been undertaken by a single State. Common sense suggests that the records of the Washington Conference itself should be regarded as the primary source of guidance, though it may still be instructive to take brief cognizance of the general background to the genesis of the text, if only as a means of setting the negotiations in context.

Specifically, it is noteworthy that, since the only draft for consideration in Washington had been prepared by the United States, the primary force in shaping its original form and content was not the whaling industry itself, as the United States had none to speak of at the time. Instead, that role fell to the career diplomats and lawyers of the U.S. State Department, together with their established cetacean expert, A. Remington Kellogg.⁵⁴⁰ Kellogg, who has been described as arguably “the single most

538. Vienna Convention on the Law of Treaties, *supra* note 21, arts. 31–32.

539. ILC Commentary, *supra* note 84, at 223. One passage might be read to require that unpublished documents at least be accessible. In *Iron Rhine Railway Arbitration*, it was held that documentary materials may only be deemed to possess the character of *travaux préparatoires* to the extent that they “serve the purpose of illuminating a common understanding” of the negotiating States as to the meaning of particular terms. *Iron Rhine Ry. Arb.* (Belg. v. Neth.), 27 R. Int’l Arb. Awards 41, 63 (Per. Ct. Arb. 2005).

540. It is clear that there was also significant input from fisheries officials, though some of this was to be excised from the draft during the negotiations. See *infra* text accompanying notes 571–575.

influential person in the history of efforts to regulate whaling,⁵⁴¹ had been a member of the U.S. delegation to the earlier 1930 and 1937 whaling conferences and was subsequently to chair both the Washington Conference and, ultimately, the IWC itself. Significantly, his professional background was as an academic researcher in marine mammal palaeo-biology and an administrator in educational and scientific institutions, most notably the Smithsonian. His strong personal interests, as his papers confirm, lay in the evolution and conservation of whales rather than the development of whaling.⁵⁴² This disposition was evident in the fact that he "had strongly advocated trade sanctions against whaling nations that did not join the IWC, but U.S. diplomats decided that trade and conservation issues should not be intertwined."⁵⁴³

Where he was much more successful, however, was in urging the Department of State

to use the opportunity provided by World War II to grab control of whaling diplomacy from Norway and the United Kingdom. He feared . . . that the British and Norwegians would be more concerned with harvesting whales in the aftermath of the war than with conserving them. Only American leadership, he concluded, could give science its proper place relative to the whalers, who seemed to have too much say in London and Oslo.⁵⁴⁴

Such considerations would not, of course, be of any great legal significance were it not for the fact that they had such an obvious effect on the way the structure and content of the ICRW was actually to evolve. Undoubtedly, the whaling industry had bequeathed to the United States a significant legacy in the form of the text of the earlier agreements, which rendered it unnecessary to begin the drafting process with a completely blank sheet, but beyond that their essential role in 1946 was only as eleventh hour consultees. In all these circumstances, and bearing in mind also the very recent termination of global hostilities, it would have been surprising if the main thrust of the innovatory input to the regulation of whaling had not resided in science-based conservation, institutional cooperation, diplomacy, and the rule of law, as indeed the analysis of the text offered in earlier sections of this Part suggests that it did.

541. Kurk Dorsey, *US Foreign Policy Encyclopedia: Environmental Diplomacy*, <http://www.answers.com/topic/environmental-diplomacy> (last visited Aug. 29, 2008).

542. *Id.* (conducting extensive research on Kellogg's personal papers in preparing his analysis); Remington Kellogg, *The History of Whales: Their Adaptation to Life in the Water*, 3 Q. REV. BIOLOGY 29-76, 174-208 (1928).

543. Dorsey, *supra* note 541.

544. *Id.*

As regards the Conference itself, certain general observations are also in order. First, although it was no part of its formal brief to discuss the military conflagration from which the world had so recently emerged, the war inevitably came to form a kind of continuous backdrop on to which the deliberations were projected. It was, after all, the primary reason for the troubling food shortages, especially of oils and fats,⁵⁴⁵ which now needed to be addressed; for the original loss, and subsequent potential restoration, of ships to the whaling industry,⁵⁴⁶ which was now expanding at a precipitate rate;⁵⁴⁷ for the possible recovery in whale populations during the recent hiatus in exploitation; for the absence, loss, or destruction of records regarding certain categories of whaling activities;⁵⁴⁸ and for the sensitivities over the resumption of whaling in crucial areas.⁵⁴⁹ As noted above, it also provided the explanation for the absence of one key player, Japan,⁵⁵⁰ whose future role in the overall unfolding of events would obviously be critical, but who lacked any opportunity to influence the shape of the regime under which they would be conducted. In hindsight, and with the benefit of temporal distance from these events, it would have been greatly preferable if Japan had been represented at the proceedings.

On questions of detail, however, the Conference was somewhat less instructive for present purposes, since, although the plenary sessions were comprehensively minuted, they contain relatively little of relevance to the elucidation of the Convention's objectives. As is not unusual at such events, most delegations appear to have arrived with a shopping list of specific substantive items for inclusion in—or exclusion from—the draft, and had not exercised their minds greatly over questions of general policy or philosophy. Consequently, when Kellogg, having confirmed from the Chair that the function of the preamble was indeed to provide an indication of the ICRW's object and purpose,⁵⁵¹ requested comments on its wording, none were forthcoming. Regrettably, this appears to have

545. IWC/14, *supra* note 412, §§ 60–72; *Corrigendum* to IWC/14 (on file with IWC).

546. See, e.g., IWC, *Minutes of the 13th Session*, ¶¶ 32 *et seq.*, IWC/14 (Nov. 20–Dec. 2, 1946) (on file with IWC).

547. IWC, *Minutes of the 4th Session*, ¶¶ 22 *et seq.*, IWC/14 (Nov. 20–Dec. 2, 1946) (on file with IWC).

548. See IWC, *Norwegian Investigations in the Antarctic*, IWC/19 (on file with IWC); IWC, *Report on Japanese Whaling Operations 1939–45*, IWC/51 (on file with IWC).

549. See *supra* Part III.B.2.a.

550. Japanese attitudes and activities were not infrequently the focus of express consideration at the Conference. See IWC, *Minutes of the 3rd Session*, ¶ 60, IWC/14 (Nov. 20–Dec. 2, 1946) (on file with IWC); IWC, *Minutes of the 4th Session*, *supra* note 547; IWC, *Minutes of the 13th Session*, *supra* note 546; IWC, *Report on Japanese Whaling Operations*, *supra* note 548. One may surmise that it was much more often the undisclosed subject of attention in the minds of participants.

551. IWC, *Minutes of the 2nd Session*, *supra* note 412, ¶ 137.

been the case on each occasion that the matter was raised, from the initial presentation of the original draft, right through to the adoption, without objection, of the final amended version,⁵⁵² despite the fact that the phraseology had undergone quite extensive modification in the interim. These changes had been effected by an ad hoc Drafting Committee,⁵⁵³ and seem for the most part to have been made purely in the interests of achieving greater clarity, brevity, elegance, and coherence: this is precisely as might be expected, as it was not the role of this Committee to make alterations of substance. On the other hand, this is a notoriously difficult frontier to police, and it may on occasion have been transgressed, although the Chair of that Committee was certainly alert to the desirability in principle for genuinely substantive issues to be transferred to other groups.⁵⁵⁴ Unfortunately, committee deliberations appear in the official records not in the form of detailed minutes, but as brief overview reports and, in the case of this particular committee, merely the text of the draft treaty with proposed changes overwritten on it,⁵⁵⁵ making it difficult to ascertain their precise rationale.

As regards the crucial, final recital of the preamble, it is interesting to note that the wording of the original U.S. draft had contained no specific reference to the whaling industry at all, but had stated, "[h]aving decided to conclude a convention to provide for the orderly conservation and development of the whale fisheries."⁵⁵⁶ Plainly, however, the expression "orderly conservation" is less than ideal either semantically or stylistically, and it was transformed into "the *proper* conservation of whale stocks" in the ultimate version, which also produced greater consistency with the wording of the previous recital. The word "orderly" was obviously considered too important to lose, however, and came to be attached to a newly inserted phrase—"development of the whaling industry"—to which it more accurately relates. This strongly supports the notion that the incorporation of this latter phrase was designed essentially to provide a suitable semantic peg on which to hang the concern

552. See *id.* ¶¶ 137–142; IWC, *Minutes of the 7th Session*, ¶¶ 232–235, IWC/14 (Nov. 20–Dec. 2, 1946) (on file with IWC); IWC, *Minutes of the 12th Session*, ¶¶ 78–81, IWC/14 (Nov. 20–Dec. 2, 1946) (on file with IWC).

553. The Committee was chaired by Thomson (United Kingdom) and comprised representatives of the various national delegations as follows: Chile (1), France (3), the Netherlands (1), New Zealand (1), Norway (3), the United Kingdom (1 other), and the United States (2). Consequently, all of the major whaling interests were represented. It was supported by a U.S. secretariat of two. See IWC, *Final Act of the Conference*, IWC/64 (on file with IWC).

554. See, e.g., IWC, *Minutes of the 8th Session*, ¶ 57, IWC/14 (Nov. 20–Dec. 2, 1946) (on file with IWC).

555. See IWC, *Report of the Drafting Committee*, IWC/49 (Nov. 20–Dec. 2, 1946) (on file with IWC).

556. See IWC, *United States Draft of the International Convention on the Regulation of Whaling*, IWC/3 (Nov. 20–Dec. 2, 1946) (on file with IWC).

for good order, rather than to indicate a redirection of basic objectives for the benefit of the whaling industry, since it was not the function of the Drafting Committee to make such changes.

The discussions in plenary session, for what they are worth, offer broad endorsement to that interpretation. Passing references were undeniably made by various delegations to the importance to them of the whaling industry and the difficulties it faced,⁵⁵⁷ and individual provisions were certainly revisited to take account of such concerns.⁵⁵⁸ But, the United States repeatedly drew attention, without apparent challenge, to the fact that the overall objective was one of *conservation*. Addressing the Conference in its opening session, Under-Secretary of State Acheson recalled the era in which the United States had itself been the primary exploiter of whale resources and regretted that conservation responsibilities had not been taken more seriously during that period.⁵⁵⁹ Conservation can, of course, readily be viewed not as posing a threat to the interests of the industry at all, but rather as a prerequisite to its long-term survival, and the United States was certainly not averse to making that connection,⁵⁶⁰ although that in any event served its own interests by offering an inducement to participants to adopt and ratify the ICRW. By contrast, however, when it came to matters that concerned the development of the industry in a more general sense—such as the Dutch objections to the Norwegian embargo on the provisions of skilled employees to new entrants to the whaling industry, which they regarded as discriminatory—the U.S. delegation remained resolute in their determination to keep them out of the draft. Although considerable opportunity was allowed for the matter to be aired in debate,⁵⁶¹ Kellogg, from the Chair, expressed the view that it was beyond the formal remit of a “conservation conference.”⁵⁶² The U.S. position was confirmed during the

557. See, e.g., IWC, *Minutes of the Opening Session*, IWC/14 (Nov. 20–Dec. 2, 1946) (on file with IWC) (U.K. response to opening address); IWC, *Minutes of the 2nd Session*, *supra* note 412 (statement of the Netherlands); IWC, *Minutes of the 4th Session*, *supra* note 547 (statement of the USSR). The Norwegian delegation arranged for the showing on several occasions of a film designed to demonstrate “the magnitude and importance of the whaling industry.” See C.G. Davidson, Nor. Assistant Sec’y of the Interior, *Address*, IWC/42 (July 2–6, 1990) (on file with IWC).

558. These were often points of detail. The Norwegians were, for example, concerned about the issue of penalties for illegally taken whales. See IWC, *Minutes of the 3rd Session*, *supra* note 550, ¶ 53.

559. IWC, *Minutes of the Opening Session*, *supra* note 557 (opening address by Davidson).

560. See, e.g., Davidson, *supra* note 557.

561. Indeed, a committee was created to address the matter, although, since it contained both principal protagonists, it was unable to reach a conclusion. See IWC, *Report of the Industry Committee*, IWC/59 (May 28–31, 2007) (on file with IWC).

562. See IWC, *Minutes of the 2nd Session*, *supra* note 412, ¶ 76.

Thirteenth Session: "We came together to discuss conservation of whale stocks. This issue which has come forth is broadly related to the whole question of whaling, however, we feel that it is strictly a question of foreign policy which should be taken up by other means."⁵⁶³

Eventually, it was decided by nine votes to three not to offer collective endorsement of the Dutch concerns even in the Final Act, let alone in the treaty itself.⁵⁶⁴ A British proposal to impose sanctions on nations that ultimately declined to participate in the ICRW regime received even shorter shrift from the U.S. delegation, on the grounds that it was inappropriate "in a strictly conservation measure"—the economic aspects of whaling should be dealt with through other channels.⁵⁶⁵ Here, too, their view ultimately prevailed.⁵⁶⁶

As regards elucidation of the wider aspects of the Convention's object and purpose, drawn from the preamble as a whole, the few faint glimmers of light to be derived from the discussions tended to emphasize the interests of whales rather than the whaling industry. In a telling instance of scene-setting for the entire Conference, Acheson's opening address drew specific attention to the fact that whales "belong to no single nation nor to a group of nations but rather they are the wards of the entire world."⁵⁶⁷ In so doing, he underlined, first, the truly global nature of the interest in cetacean stocks and the determination effectively to reclaim them from the handful of States still engaged in active exploitation. The lack of any restriction on the ability of nations to join the IWC can therefore justly be seen as a direct and tangible means of giving effect to this aspiration. It is clear, moreover, that the implications of this

563. IWC, *Minutes of the 13th Session*, *supra* note 546, ¶ 67.

564. The Netherlands was, however, permitted to attach an addendum to the Final Act, recording the tenor of the discussion. It should be noted that even the Dutch statement had attempted to justify the need for action "in the interest of effective conservation and development of whale stocks" and not "in the interest of development of the whaling industry." *See id.* (concluding the debate on industrial whaling).

565. IWC, *Minutes of the 14th Session*, ¶¶ 330, 336, IWC/14 (Nov. 20–Dec. 2, 1946) (on file with IWC). It was also made clear that "the instructions of the American delegation allow no latitude on this point." *Id.* In reality, of course, securing the participation of all the major players could readily be construed as absolutely vital to conservation. Indeed, a major irony is that it was the U.S. delegation that had first formulated this very proposal in previous conferences, when the United Kingdom had been unwilling to support it. *See id.* (concluding the debate on industrial whaling). Dorsey suggests that the State Department may well have prevailed over Kellogg himself on this point. *See supra* text accompanying note 541. Actually, the United States gave a number of reasons why it was now opposed to such action, including that it was contrary to its policy on international trade and was in any event unlikely to work. Perhaps it was judged unduly inflammatory in the postwar context, the United States believing that there were other means by which the participation of key players could be secured. *See IWC, Minutes of the 14th Session, supra.*

566. *See Minutes of the 14th Session, supra* note 565, ¶ 336.

567. IWC, *Minutes of the Opening Session, supra* note 557 (opening address by Acheson).

provision were fully appreciated by the negotiating States, since there was specific discussion of the possible impact on decision-making of Member States with little personal interest in whaling.⁵⁶⁸ Secondly, the striking description here of whales not merely as resources but as “wards of the entire world” is strongly suggestive of their recognition as entities worthy of consideration in their own right.⁵⁶⁹ If so, it tends to confirm the potential duality of focus envisaged in the regulatory regime between the “protection” of whales for their own sake, and the “conservation” of whales as resources. Patricia W. Birnie correctly notes in this connection that the U.S. recruitment of the notion of wardship did not result in any formal change in the legal status of whales under the Convention, in that they were still seen as a common property resource,⁵⁷⁰ but this fact is in no way inconsistent with the possibility that the motivations underlying the instrument had expanded to include protection of whales for their own sake.

Obviously, much would also depend on how the key concept deriving from Article V, that of “optimum utilization,” was properly to be interpreted, though that would seem effectively to have been left to be determined over the course of time. One intriguing aspect of this issue, however, is that the original American draft of the preamble had expressly included a statement that the “ultimate objective should be to achieve and to maintain the stocks at a level which will permit a sustained capture of the maximum number of whales,”⁵⁷¹ but that this statement was excised completely during the course of the negotiations. Ordinarily, such an excision could be taken as a reasonably clear indication of a deliberate change of policy,⁵⁷² although in this case it appears to have been effected by the Drafting Committee,⁵⁷³ which would not normally have been expected to undertake modifications of such substantive magnitude and effect. It is possible that the explanation may lie in a concession by the U.S. delegation in another context that, in preparing the

568. See, e.g., IWC, *Minutes of the 10th Session*, *supra* note 412, ¶ 45.

569. Certainly, legal notions of wardship or guardianship would commonly carry that implication.

570. BIRNIE, *supra* note 386, at 166.

571. This language appeared in the wording of what became the fourth recital, after the reference to the need to avoid economic and nutritional distress. See IWC, *United States Draft of the Preamble to the International Convention on the Regulation of Whaling* (Nov. 20–Dec. 2, 1946) (on file with IWC).

572. Indeed there is judicial authority for the view that “[i]n the technique of treaty interpretation, there can never be a better demonstration of an intention not to provide for something than first including and then dropping it.” *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A), at 14, ¶ 45 (1975) (separate opinion of Judge Fitzmaurice). While this proposition may have been overstated, it does make a valid general point.

573. See IWC, *Notes of the Drafting Committee of the 49th Annual Meeting* (1997) (on file with IWC).

draft, it had for convenience engaged in what it called a "pot-boiling operation," which had entailed the incorporation of various notions and provisions commonly found in fisheries arrangements generally. It readily agreed that it would be sound practice to eliminate any that were judged inappropriate, superfluous or misleading, and it may therefore be the case that the "maximum sustained capture" objective fell victim to that particular purge.⁵⁷⁴ It was certainly a concept that was beginning to gain firm acceptance in North American fishery management circles at the time,⁵⁷⁵ but perhaps it was ultimately thought unsuitable for the ICRW. What cannot be denied, however, is that the Convention as finally approved contained no such objective or expectation, and that its omission had survived the scrutiny of all the major whaling nations at the committee stage, and of every delegation present in plenary session.

e. Elucidation from External Sources

Finally, there are various grounds on which it may be relevant to consider other materials external to the treaty itself for the purposes of its interpretation. In particular, recourse may be permitted under Article 32 of the Vienna Convention to other agreements, to instances of state practice, and to surrounding factual conditions as supplementary means for the interpretation of any given treaty insofar as they form part of the "circumstances of its conclusion," while norms deriving from other agreements, or from any other authoritative source, may have to be taken into account to the extent that they constitute "relevant rules of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c). In point of fact, numerous references have already been made to such sources in the discussion above, and the purpose of this Section is largely to address any that may previously have been overlooked.

In particular, it is noteworthy that Document 58/12 itself refers to the harmonization of IWC decision-making with that of the various regional organizations that have been established for the regulation and management of fishing activities, although, as explained in the previous Part, the precise legal basis of the significance of these agreements for

574. See IWC, *Minutes of the 6th Session*, *supra* note 412, ¶¶ 40–47. The discussion concerned the need for a provision concerning "stricter domestic measures," which was also ultimately excised.

575. P.A. Larkin, *An Epitaph for the Concept of Maximum Sustained Yield*, 106 *TRANSACTIONS AM. FISHERIES SOC'Y* 1 (1977). The point is evidenced by its formal appearance in the preambles to the International Convention for the Northwest Atlantic Fisheries, Feb. 8, 1949, 1 U.S.T. 477, 157 U.N.T.S. 157 [hereinafter ICNAF]; see also Convention for the Establishment of an Inter-American Tropical Tuna Commission, U.S.-Costa Rica, May 31, 1949, 1 U.S.T. 230 [hereinafter IATTC]; Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea art. 3(2), U.S.-Can., Mar. 2, 1953, 5 U.S.T. 5.

present purposes is not at all clear.⁵⁷⁶ In strict formal terms, such agreements could only be pertinent to the interpretation of the ICRW as originally conceived if they were already in existence at the time of its conclusion, which is not in fact the case as far as most of them are concerned. Nevertheless, it is proposed to consider them here both out of deference to the view expressed in the normalization documents and because the possibility cannot be excluded that, regardless of the precise moment of their adoption, they may cumulatively reflect some general sense of ongoing fisheries policy during the immediate postwar era, and thereby shed some light on the question of interpretation of the ICRW in particular.⁵⁷⁷ A brief overview of such instruments is therefore desirable.

A convenient starting-point for this survey can be identified in the form of a bilateral treaty concluded between the United States and the United Kingdom during the inter-war period. The 1923 Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean⁵⁷⁸ is claimed to be “the first treaty to be concluded anywhere for the conservation of a depleted deep-sea fishery.”⁵⁷⁹ It was twice extended during the 1930s,⁵⁸⁰ and renewed in 1953,⁵⁸¹ thereby overlapping the entire period during which whaling became the focus of international legal regulation. The same parties had meanwhile concluded the International

576. The reference to harmonization of decision-making with that of these agreements suggests that their relevance is seen to lie in the extent to which they bear on the *ongoing evolution* of the ICRW regime, rather than its purport at the time it was adopted. This question forms the subject of separate consideration in the Part that follows.

577. See Fisheries & Aquaculture Dep't, Food & Agric. Org. of the United Nations, <http://www.fao.org/fishery/> (last visited Aug. 29, 2008); see also D.M. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* (1965) (providing a contemporaneous analysis of these agreements); International Fisheries Treaty Database, <http://www.intfish.net/treaties/index.htm> (last visited Aug. 29, 2008) (offering a valuable database of such treaties, containing their texts and additional information). Note that the acronyms in the text that follows relate strictly to the institution established by the treaty in question, but are used in this paper, for convenience, to refer to the treaty itself. In some cases, acronyms have been specifically devised for that purpose.

578. Convention for the Preservation of the Halibut Fisheries of the Northern Pacific Ocean, U.S.-U.K., March 2, 1923, T.S. No. 701.

579. See Int'l Pac. Halibut Comm'n [IPHC], <http://www.iphc.washington.edu/halcom>. It was doubtless for that reason that, despite the limitations of its brief, the organization it created was originally known simply as the International Fisheries Commission. It is now the International Pacific Halibut Commission (IPHC).

580. See Convention on the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, U.S.-U.K., Jan. 29, 1937, T.S. No. 917; Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, U.S.-U.K., May 9, 1930, T.S. No. 837.

581. Protocol amending the Convention between Canada and the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, May 2, 1953, 1953 T.S. No. 14, 1931 U.N.T.S. 46.

Pacific Salmon Fisheries Convention (IPSFC)⁵⁸² in 1930. The 1946 Convention for the Regulation of Meshes of Fishing Nets and the Size Limits of Fish,⁵⁸³ concluded just a few months prior to the ICRW, was, despite its modesty of purpose, significant in constituting the first multilateral fisheries regime for the North Atlantic, although it was soon replaced by a revised arrangement.⁵⁸⁴

Subsequently, a host of other marine fisheries agreements was concluded that attracted various combinations of IWC members as participants. Examples include the 1948 Multilateral Agreement Respecting the Establishment of the Indo-Pacific Fisheries Council (IPFC),⁵⁸⁵ the 1949 equivalents for the Mediterranean,⁵⁸⁶ and Northwest Atlantic (ICNAF);⁵⁸⁷ the bilateral convention of the same year for the Establishment of the Inter-American Tropical Tuna Commission;⁵⁸⁸ several agreements of 1952 concerned respectively with establishing Measures for the Protection of Stocks of Deep-Sea Prawns, European Lobsters, Norway Lobsters and Crabs (DSP),⁵⁸⁹ the Permanent Commission of the Conference on Use and Conservation of Marine Resources of the South Pacific (CPPS),⁵⁹⁰ and the International North Pacific Fisheries Commission;⁵⁹¹ the 1959 North-East Atlantic Fisheries Convention,⁵⁹² the

582. Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fisheries in Fraser River, U.S.-Can., May 26, 1930, 50 Stat. 1355, 184 L.N.T.S. 305.

583. Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish, *supra* note 509.

584. North-East Atlantic Fisheries Convention, Jan. 24, 1959, T.I.A.S. No. 7078, 486 U.N.T.S. 158 [hereinafter NEAFC].

585. Multilateral Agreement Respecting the Establishment of the Indo-Pacific Fisheries Council, Feb. 26, 1948, 62 Stat. 3711 [hereinafter IPFC]. The IPFC later became the Asia-Pacific Fisheries Commission [hereinafter APFIC].

586. Agreement for the Establishment of a General Fisheries Council for the Mediterranean, Sept. 24, 1949, 1952 U.N.T.S. 239 [hereinafter GFCM].

587. International Convention for the Northwest Atlantic, Feb. 8, 1949, 1967 U.N.T.S. 292 [hereinafter ICNAF]. This Convention was eventually replaced by the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Oct. 24, 1978, 1 U.S.T. 477, 1135 U.N.T.S. 369.

588. See IATTC, *supra* note 575.

589. Kiss, *supra* note 407, at 94 [hereinafter DSP].

590. Agreement Relating to the Organization of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, Chile-Ecuador-Peru, Aug. 18, 1952, 1006 U.N.T.S. 331.

591. International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 205 U.N.T.S. 65 [hereinafter INPFC]. This treaty was replaced by the Convention for the Conservation of Anadromous Fish Stocks in the North Pacific Ocean, Feb. 11, 1992, S. TREATY DOC. NO. 102-30, available at [http://www.npafc.org/new/publications/HandBook/English%20\(page1-44\).pdf](http://www.npafc.org/new/publications/HandBook/English%20(page1-44).pdf).

592. NEAFC, *supra* note 584. The NEAFC was eventually replaced by the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, Nov. 18, 1980, 1285 U.N.T.S. 129.

1959 Convention concerning Fishing in the Black Sea;⁵⁹³ the 1962 Agreement concerning the Protection of the Salmon Population of the Baltic Sea;⁵⁹⁴ the 1966 International Convention for the Conservation of Atlantic Tunas;⁵⁹⁵ and the 1969 Convention for the Conservation of the Living Resources of the South-East Atlantic Fisheries.⁵⁹⁶ During that period, a multilateral agreement of intended universal scope, the 1958 Geneva Convention on Fishing and Conservation of Living Resources of the High Seas,⁵⁹⁷ already discussed in the opening Section of this Part, was also concluded. The year 1969 may be treated as a (slightly arbitrary) cut-off point for the purposes of this survey of fisheries instruments, since, however long the immediate postwar era can be regarded as extending, it must certainly be regarded as having ended by the early 1970s. By this time, the acquisition of independence by a large number of formerly dependent territories, the dramatic changes in attitude toward the rights of coastal States in the context of fisheries conservation, the formal adjudication of certain critical fisheries disputes in the North Sea,⁵⁹⁸ the progressive replacement of a number of the earlier regional fisheries agreements by revised arrangements, the commencement of negotiations for an entirely new global convention on the law of the sea, and the convening of the Stockholm Conference on the Human Environment unmistakably heralded the arrival of a new age.

What, then, can be learned from this substantial body of international legislation that might provide elucidation as to the proper interpretation of the ICRW? The overriding impression is that although all these treaties draw on the same broad armory of conservation weapons for the purpose of establishing the mechanisms of regulation, the ICRW stands very much on the fringes of this group, if not outside it altogether, when it comes to consideration of the precise goals and objectives which this weaponry is

593. Convention Concerning Fishing in the Black Sea, July 7, 1959, 377 U.N.T.S. 220 [hereinafter FBS]; see also Kiss, *supra* note 407, at 141. It is unclear whether the Convention is still actively applied.

594. Agreement Concerning Protection of the Salmon Stock in the Baltic Sea, Dec. 20, 1962, 955 U.N.T.S. 259 [hereinafter APSBS]. This Agreement was effectively superseded by the 1973 Convention on Fishing and Conservation of the Living Resources of the Baltic Sea and the Belts. Kiss, *supra* note 407, at 137.

595. International Convention for the Conservation of Atlantic Tunas, May 14, 1966, 20 U.S.T. 2887, 673 U.N.T.S. 63 [hereinafter ICCAT]; Kiss, *supra* note 407, at 202.

596. Convention on the Conservation of the Living Resources of the South-East Atlantic Fisheries, Oct. 23, 1969, 801 U.N.T.S. 101 [hereinafter ICSEAF]; Kiss, *supra* note 407, at 225. The Convention was amended in 1985 and terminated in 1990. It was eventually replaced by the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean. Apr. 20, 2001, 41 I.L.M. 257.

597. Geneva Convention on Fishing and Conservation of Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285.

598. See *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1974 I.C.J. 3 (July 25).

designed to secure. In particular, although no fully comprehensive survey of these instruments has as yet been undertaken by the present author, a preliminary analysis strongly suggests that the "object and purpose" of the ICRW is characterized by a number of features that are not shared by the remainder of treaties in this category.

First, although all conservation is by definition undertaken with an eye to the future, the ICRW is distinctive in its express preambular recognition of the interests of future generations. Furthermore, while the ICRW specifically recognizes the interest of all "the nations of the world" in the conservation of whales, the other conventions are for the most part more narrowly focused on the parties themselves and driven by their "mutual,"⁵⁹⁹ "common,"⁶⁰⁰ "shared,"⁶⁰¹ or "joint" interests,⁶⁰² or "common concerns."⁶⁰³ This is not universally the case, however, and the preamble to the INPFC, for example, which was established by Canada, Japan, and the United States, does speak of serving "the common interest of mankind."⁶⁰⁴ On the other hand, it then immediately refers to the "interests of the Contracting Parties" as well, having already strongly reaffirmed the parties' sovereign rights under international law to exploit the fishery resources of the high seas.⁶⁰⁵ Furthermore, the substantive provisions of the INPFC limit the right of participation in certain decision-making processes to those parties that are actually engaged in substantial exploitation of the stocks in question.⁶⁰⁶ By comparison with the ICRW, therefore, the avowed concern for the common interest of mankind looks rather more like window-dressing.

Next, the emphasis in the fisheries agreements tends to be much more heavily weighted toward exploitation. Thus, while statements of aims often begin modestly enough with talk of "conservation," "rational" or "proper" "utilization" or "exploitation,"⁶⁰⁷ this is sometimes coupled with references to "full" utilization,⁶⁰⁸ improving fishing methods⁶⁰⁹ or increasing yields or productivity⁶¹⁰ through the development of fishing.⁶¹¹

599. IATTC, *supra* note 575; IPSFC, *supra* note 582; IPFC, *supra* note 585; GFCM, *supra* note 586; ICCAT, *supra* note 595; ICSEAF, *supra* note 596.

600. FBS, *supra* note 593.

601. ICNAF, *supra* note 575.

602. IPFC, *supra* note 585.

603. IPSFC, *supra* note 582; IATTC, *supra* note 575.

604. INPFC, *supra* note 591, pmbi.

605. *Id.*

606. *Id.* art. III(1)(c)(ii).

607. GFCM, *supra* note 586, pmbi.; NEAFC, *supra* note 584, pmbi.; FBS, *supra* note 593, pmbi.; ICSEAF, *supra* note 596, pmbi.; IPFC, *supra* note 585, pmbi.

608. IPFC, *supra* note 585, art. IV.

609. GFCM, *supra* note 586, art. III(b).

610. IPFC, *supra* note 585, art. IV(b)(i).

611. FBS, *supra* note 593, pmbi.

In other cases, the aim is quite explicitly to secure “*maximum* sustained catches,”⁶¹² “yields,”⁶¹³ or “productivity.”⁶¹⁴ In the ICRW, by contrast, we have already seen⁶¹⁵ that such an objective was specifically rejected and replaced by the goal of achieving “the *optimum level of whale stocks* as rapidly as possible without causing wide-spread economic and nutritional distress”—a very different proposition indeed.⁶¹⁶ Although it was expressly recognized in the preamble that a recovery in whale stocks would permit an increase in the number of whales that could be taken, this was not, as noted above, couched in the form of an objective as such.

The sense that whales were, from the outset, seen as rather different from fish, is compounded by the reference to the essential need “to *protect all species* of whales from further overfishing,” to which there appears to be no close parallel in the fishing agreements, where the targets of conservation or protection are almost always stated to be “fisheries”⁶¹⁷ or “resources”⁶¹⁸ or “stocks”⁶¹⁹ or “populations” of fish.⁶²⁰ Since these terms appear in the ICRW also, there can be no doubt that whales were seen as resources for possible exploitation. On the other hand, this comparison with the fishing agreements tends to reinforce impressions of the existence of an additional dimension to the conservation of whales, whereby the latter were seen also as entities meriting protection in their own right. This latter perspective can, moreover, plainly be expected to have had some substantive practical implications, almost certainly in the form of providing additional constraints on the incidence of exploitation.

This is not a matter about which it is satisfactory to rest content with mere speculation, however, so it is fortunate that there is firm evidence not only of the existence of such attitudes, but of formal commitment to them in legally binding form. This evidence derives essentially from the

612. ICCAT, *supra* note 595, pmb1.; IATTC, *supra* note 575, pmb1.; ICNAF, *supra* note 575, pmb1.

613. IPHC, *supra* note 579, art. III(2) (as amended through 1953).

614. INPFC, *supra* note 591.

615. See BIRNIE, *supra* note 386, at 169.

616. See MCDUGAL & BURKE, *supra* note 403, at 941–42 (offering further information on this comparison).

617. IPHC, *supra* note 579; IPSFC, *supra* note 582; INPFC, *supra* note 591; ICNAF, *supra* note 575; NEAFC, *supra* note 584.

618. GFCM, *supra* note 586; IPFC, *supra* note 585; CPPS, *supra* note 590; ICNAF, *supra* note 575; INPFC, *supra* note 591; ICCAT, *supra* note 595; ICSEAF, *supra* note 596.

619. INPFC, *supra* note 591; NEAFC, *supra* note 584; FBS, *supra* note 593; APSBS, *supra* note 594; DSP, *supra* note 589.

620. IATTC, *supra* note 575.

entry into force, shortly before negotiation of the ICRW,⁶²¹ of the 1940 Western Hemisphere Nature Conservation Convention (WHC), the subject of brief reference earlier in this Part.⁶²² The United States had deposited the first acceptance of this agreement, which had also been ratified by Argentina and Peru in the months leading up to the ICRW conference. In addition, Brazil and Chile were signatories, and therefore under a provisional obligation to do nothing to defeat its object and purpose pending their determination whether to ratify. The WHC is not expressly invoked or mentioned in the ICRW, and there is, of course, no suggestion that either the treaty as a whole, or the meaning it attributes to particular terms, can of itself be formally binding on IWC members who are not party to it.⁶²³ The only question concerns its elucidatory potential with regard to the interpretation of the ICRW, in respect of which its claims would certainly seem to be at least as strong as those of the early fisheries treaties previously discussed, and stronger than most, given its earlier date of adoption. At the very least, it may shed light on the contemporary perspectives of some ICRW parties, especially the one party responsible for the actual drafting.⁶²⁴

621. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193 [hereinafter WHC]. The WHC entered into force on May 1, 1942.

622. See D. Sheinin, *Wilderness and Pan-American Preservation 1910–1948*, Paper Presented to the Latin American Studies Association, XXIth International Congress, Chicago, Ill. (Sept. 24–26, 1998), available at <http://168.96.200.17/ar/libros/lasa98/Sheinin.pdf> (offering an instructive analysis).

623. See Vienna Convention on the Law of Treaties, *supra* note 21, arts. 34, 35.

624. Note that in the course of his address to the 1946 Whaling Conference, the U.S. Assistant Secretary of the Interior observed that the “[c]onservation of wildlife resources offers an excellent opportunity for successful concerted action on an international level. We who live in the Western Hemisphere have already enjoyed the benefits of international cooperation in this field and can point with pride to results arising out of more than 30 years experience,” though the 1940 Convention was not mentioned specifically. U.S. Assistant Sec’y of the Interior, *Address*, IWC/42 (July 2–6, 1990) (on file with IWC). Anyone inclined to doubt the possibility of substantive linkage between these two treaties may care to note that both were instigated primarily by the United States, and that the main motivating force was in each case provided by the twin engines of the Smithsonian Institute and the U.S. State Department. Indeed, the U.S. representative to the Pan American Union’s Inter-American Commission of Experts on Nature Protection and Wildlife Preservation in 1940—who has been described as the “architect” of the whole treaty and therefore the counterpart of Remington Kellogg in relation to the ICRW—was none other than his long-term friend and colleague, Alexander Wetmore. The two had met at the University of Kansas in 1910, falling under the tutelage of Charles Dean Bunker, Curator of Birds and Mammals. Both emerged as palaeobiologists, Wetmore specializing in avian species and Kellogg transferring his original interest in entomology to the field of mammalogy. Wetmore, the elder by some years, joined the U.S. Department of Agriculture’s Bureau of Biological Survey in 1911 and helped Kellogg to secure vacation employment there while still an undergraduate. He became Chief Administrative Officer of the U.S. National Museum in 1925, and Kellogg joined him there three years later, serving first as Assistant Curator, then Curator in the Division of Mammals, before succeeding his mentor as Chief Administrative Officer in 1948. Finally, Wetmore served as Secretary of

Building on certain ideas elaborated in the 1933 Convention for the Protection of Fauna and Flora⁶²⁵ in Africa (to which, incidentally, certain other ICRW signatories had already committed themselves),⁶²⁶ this agreement was in many respects of a pioneering nature, marking something of an attitudinal step-change from the more narrowly focused, essentially utilitarian conservation treaties of the past. In addition to providing for the establishment of various categories of protected area and imposing fairly standard forms of control over the exploitation of certain species,⁶²⁷ these conventions also contained some more innovative features. First, each contained a provision in virtually identical wording that declared the “protection of the species mentioned in the Annex . . . to be of special urgency and importance.”⁶²⁸ Despite the absence of any express requirement that these species actually be endangered, the regime governing their management was to be extremely strict:

Species included therein shall be protected as completely as possible, and their hunting, killing, capturing, or taking shall be allowed only with the permission of the appropriate government authorities in the country. Such permission shall be granted only under special circumstances, in order to further scientific purposes, or when essential for the administration of the area in which the animal or plant is found.⁶²⁹

Unlike the African treaty (the annex to which contained no cetaceans), the WHC Annex was compiled purely on the basis of unilateral designations, and there is some evidence that even prior to 1946, consideration was being given in certain quarters to the inclusion of cetacean species.⁶³⁰

the Smithsonian from 1945–52, overlapping with Kellogg’s stint as Assistant Secretary. *See generally* National Academy of Sciences, *Remington Kellogg*, 46 *BIOGRAPHICAL MEMOIRS* 158 (1975); H.W. Seltzer, *Obituary: A. Remington Kellogg, 1892–1969*, 58 *J. MAMMOLOGY* 251 (1977); <http://siarchives.si.edu/findingaids/FARU7170.htm> (last visited Aug. 29, 2008) (providing archival material). In these circumstances, it would have been extremely surprising if there had *not* been some considerable convergence of perspective between the two individuals, and in their respective inputs to the two treaty regimes.

625. Convention Relative to the Preservation of Fauna and Flora in their Natural State, *supra* note 484.

626. Specifically, France, South Africa, and the United Kingdom. *See id.*

627. *Id.* art. 8; WHC, *supra* note 623, arts. 5, 7.

628. Convention Relative to the Preservation of Fauna and Flora in their Natural State, *supra* note 484, art. 8(1); WHC, *supra* note 623, art. 8.

629. WHC, *supra* note 623, art. 8.

630. See the notification to the PAU by Brazil on Oct. 2, 1940. Digital Library of the Marine Mammal Commission, <http://nsdl.tierit.com/search.asp> (last visited Aug. 29, 2008). It is extremely lengthy and complex, and includes, alongside already protected and strictly protected species, certain taxa listed as “Under Study.” These include, under the heading *Balaenidae*, an entry reading “*Balaena—todas las especies*,” which presumably covers the

In addition, one feature peculiar to the WHC was its separate provision for the designation, on the basis of their "aesthetic, historic, or scientific interest," of certain species as "nature monuments," to be given such "strict protection" as to render them "inviolable . . . , except for duly authorized scientific investigation or government inspection."⁶³¹ This can be contrasted with the less rigorous form of regulation applicable to wildlife in national reserves, areas that were designed essentially for the "conservation and utilization of natural resources."⁶³² While the precise implications of some of its provisions remain unresolved,⁶³³ the WHC clearly demonstrates that some highly significant changes in thinking had taken place in the relatively brief intermission between the Whaling Conventions of 1937 and 1946. In particular, for many States, the utilitarian value of wildlife no longer provided the exclusive motivation for conservation,⁶³⁴ and the term "protection" was certainly regarded as applicable in connection with these more ethically eclectic regimes. The possibility that these attitudinal changes may have produced some impact on the philosophical underpinnings, and hence the drafting, of the ICRW, cannot therefore be excluded.

Finally, it is necessary to consider whether any guidance can be obtained from external materials on the meaning and significance of other key terms appearing in the preamble, especially the concept of "orderly" development. If that expression was simply intended to connote that a degree of *organization* would be superimposed on the industry as a result of the new institutional arrangements that were to be established,

Bowhead (*Balaena mysticetus*) and possibly also the right whales, formerly known as *B. australis*, *glacialis*, and *japonica*, though now more commonly designated as *Eubalaena*. Moreover, Birnie notes the *actual* designation of certain great whale species by both Argentina (blue) and the United States (blue, right, bowhead, grey) though without indicating the date at which this occurred. See BIRNIE, *supra* note 386, at 156. It does not appear to have been during the initial phase of notifications, however.

631. WHC, *supra* note 623, art. 1(3) (emphasis added).

632. *Id.* art. 1(2).

633. These included (i) the precise relationship between Articles 1(3) and 8; (ii) the extra-territorial scope of the two provisions (compare with Articles 2 and 8); and (iii) the question whether obligations regarding species in the Annex applied to all parties or only those who had listed them. See generally Lyster, *supra* note 273, ch. 6. Unfortunately, the absence of a provision in the WHC for any institutional arrangements for the treaty's implementation precluded the elucidation of these issues.

634. In relation to the United States, Sheinin observed that

[a]s late as 1931, wildlife preservation still stressed commercial and social objectives over environmental ones. . . . But as the decade wore on, the Bureau [of Biological Survey] and other government agencies—while still concerned about the plight of farmers and the dangers of injurious animals—de-emphasized the commercial and human components of preservation, turning increasingly to preservation for preservation's sake.

Sheinin, *supra* note 622, at 15–16.

then it might be expected that similar terminology would be encountered throughout the mass of other treaties discussed in this section whereby fisheries of all descriptions were subjected to similar forms of regulation. Once again, however, a preliminary survey has detected little or no sign of such language in this array of instruments.

On the other hand, the notion of order does tend to appear in contexts in which fishing—or other—activities might be expected to give rise to a heightened risk of conflict. Under the terms of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone,⁶³⁵ for example, the failure by foreign fishing vessels to observe local fisheries regulations would automatically render their passage through the territorial sea of a coastal State non-innocent, on the grounds of being prejudicial to the “peace, good order, or security of the coastal State.”⁶³⁶ In some cases, moreover, such considerations have represented the driving force behind the entire treaty regime. One such instrument, designed specifically “to ensure good order and conduct” in fishing grounds was the 1967 Convention on the Conduct of Fishing Operations in the North Atlantic.⁶³⁷ This was not mentioned in the survey above because it is not a conservation treaty as such, but rather one designed to establish policing arrangements for activities in the fishery in question, and to prevent interference with fishing operations and disputes between fishermen of different nationalities. Concluded in the interlude between the First and Second “Cod Wars” of the modern era, involving Iceland and the United Kingdom, it was designed to deal with growing problems of congestion and harassment amongst fishing vessels.⁶³⁸ Such problems were not, of course, in any way new, and had indeed been the subject of formal regulation since as early as 1882, through the Convention for Regulating the Policing of the North Sea Fisheries.⁶³⁹ Unfortunately, this treaty had not proved sufficient to prevent the outbreak in 1893 of the original Cod War, in the wake of a controversial extension by Denmark of its coastal fishing limits.

635. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.

636. *Id.* art. 14(4) (emphasis added). Under the 1982 Law of the Sea Convention, by contrast, it is actual engagement in “fishing activities” which has that effect. UNCLOS, *supra* note 88, arts. 19(1), 20(1); see CHURCHILL & LOWE, *supra* note 403, at 84–86 (offering further discussion).

637. Convention on Conduct of Fishing Operations in the North Atlantic, June 1, 1967, 1051 U.N.T.S. 102.

638. See generally FISHERIES CONFLICTS IN THE NORTH ATLANTIC: PROBLEMS OF MANAGEMENT AND JURISDICTION (Giulio Pontecorvo ed., 1974).

639. Convention for Regulating the Policing of the North Sea Fisheries, May 6, 1882, 160 Consol. T.S. 219. The Convention was followed by a Supplementary Convention of 1887.

In 1946, in the immediate aftermath of a global military confrontation, and with the whaling industry expanding at a precipitous rate and operating in an area of acute political sensitivity, the problems facing the parties had much in common with these scenarios. It is therefore likely that these were the considerations that led to the concern for *orderly* development, though the establishment of institutionalized arrangements for agreeing quotas and other conservation measures, along with the punishment and reporting of infractions, was evidently thought to be sufficient for this purpose. There seems to be little doubt from subsequent events that this was a miscalculation, and that more stringent measures should actually have been incorporated in the ICRW, as some parties had advocated.

More generally, the notion of good order, or public order, was familiar and well established throughout the international community at the time, as seen above.⁶⁴⁰ In maritime affairs, the concept of the "public order of the oceans" has been particularly widely recognized in the literature from this period right up to the present day,⁶⁴¹ whether by commentators of academic, governmental, or judicial background. In their seminal 1962 work, *The Public Order of the Oceans*, Myres S. McDougal and William T. Burke identify the four key determinants of international interactions at sea as being the physical characteristics of the sea itself, the relationship of such events with those on land, the degree to which such interactions are organized or unorganized, and the variations in levels of expectations of violence.⁶⁴² From this perspective, the notion of *order* itself might be seen to have a dual focus, broadly corresponding to the latter two elements. In one sense—as reflected, perhaps, in the adjective *ordered*—it refers to the existence of a legal regime through which a degree of organization might be imposed on the

640. For examples of recognition of the concept of "good order" in the literature, see Myres S. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915 (1952); Myres S. McDougal & Florentino P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771 (1958); Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); Wesley A. Sturges, *The Quest for World Law and Order*, 22 TUL. L. REV. 558 (1948).

641. See generally ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY (Davor Vidas & Willy Østreg ed., 1999); CTR. FOR FOREIGN POL'Y STUD., CANADA'S OCEANS STRATEGIES PROJECT—THE ATLANTIC: FINAL REPORT 71 (Fred W. Crickard & Glen J. Herbert eds., 1997); MCDUGAL & BURKE, *supra* note 403; GIULIO PONTECORVO ET AL., THE NEW ORDER OF THE OCEANS (Giulio Pontecorvo ed., 1986); P. SREENIVASA RAO, THE PUBLIC ORDER OF OCEAN RESOURCES: A CRITIQUE OF THE CONTEMPORARY LAW OF THE SEA (1975); Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131 (2005).

642. MCDUGAL & BURKE, *supra* note 403, at 20.

participants; in another (corresponding more closely with the adjective *orderly*), it connotes the extent to which that regime is concerned with the avoidance of conflict or violence.⁶⁴³ This latter association was specifically recognized, for example, by the Norwegian Minister of Foreign Affairs in the opening address he recently delivered to a millennial conference entitled *Order for the Oceans at the Turn of the Century*, a topic he explicitly conceptualized in terms of the “peaceful uses of the seas” and the prospects that “conflicting interests are settled through negotiations and the rule of law.”⁶⁴⁴ In a similar vein, a recent article by a distinguished member of the International Tribunal on the Law of the Sea (ITLOS) explains the whole of the law in this area essentially in terms of its capacity to “bring order to the oceans and promote international stability” through the curbing of unilateral claims and actions and the prevention of ocean-related conflict.⁶⁴⁵

The fact that the notion of “good order” has such a pedigree in the maritime context sheds considerable light on the choice of the phrase “orderly development” in the ICRW. In particular, the obligations imposed, by virtue of their common membership of the United Nations, on all the original ICRW signatories regarding the maintenance of international peace and security have unquestionably to be taken into account in view of the risk of conflict developing over the exploitation of whale resources in the short term. To recapitulate, the concern was not so much to ensure the development of the industry, which was already occurring at a precipitate rate—and from the point of view of conservation alone might preferably have been retarded or delayed—but to ensure that the battle for resources did not threaten the good order of the oceans, and hence the security of the international community generally.

In conclusion, therefore, the object and purpose of the ICRW must be understood as being complex and multi-faceted. Its overall policy objectives were to ensure the protection of all whale species from over-fishing—in part, arguably, for their own sake, but primarily as a means of safeguarding the resources they embodied for the benefit of future generations of all nations. Optimum levels of whale stocks were accordingly to be secured as rapidly as possible, albeit without causing widespread economic or nutritional distress, which could be achieved only through the establishment of proper and effective conservation ar-

643. That is, to describe an activity as “ordered” emphasizes the *fact* of regulation, whereas “orderly” emphasizes the *consequences* of regulation.

644. Knut Vollebæk, *Opening Address to the Conference “Order for the Oceans at the Turn of the Century,”* in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 641, at xxxi.

645. Jose L. Jesus, *Reversing the Loss of Environmental Resources: The Ocean’s Wealth is Not Inexhaustible*, U.N. CHRON., Dec. 2002–Feb. 2003, at 54.

rangements entailing confinement of whaling operations to species best able to sustain exploitation. The immediate legal purpose was the creation of such arrangements through the agency of a permanent international institution employing established conservation techniques, and acting with an eye to ensuring that the development of the industry should pose no threat to the good order of the oceans. In view of past failures, however, the profitability of the industry was abandoned as the primary goal of regulation.

f. The Impact of Subsequent Practice

In light of these considerations, the description of the ICRW as "hardly a revolutionary document"⁶⁴⁶ seems to fall short of doing it justice, since it could in fairness be regarded as exhibiting a number of radical and visionary features. It may be, indeed, that some of the difficulties it encountered in its early years should rather be attributed to the fact that it was, in certain respects, *too far ahead of its time* in terms of the attitudes prevailing in the international community as a whole, and more particularly in the whaling industry itself. What is undeniable, however, is that it *failed to effect a revolution*, at least in the short term. This is by no means an unusual phenomenon in international affairs, especially in the conservation field, where the moment of adoption of a multilateral treaty may well represent one of the high points of governmental enthusiasm for the entire project, and the initial determination and commitment has the tendency to drain away in the face of the harsh realities of practical implementation. A key test of the long-term viability of such treaties lies in their ability to withstand these early setbacks and develop some momentum of their own.

In the case of the ICRW, a number of key factors conspired to defeat the rapid achievement of its object and purpose.⁶⁴⁷ The first of these was the marked lack of interest showed by the "nations of the world" generally in defending their heritage, with the IWC very rapidly assuming the reality of a whalers' club, or cartel. Indeed, whaling nations that had not been full participants in the original negotiations, and were strongly disposed toward maximum utilization of the resource, predictably arrived before long to impress their own distinctive viewpoint on proceedings.⁶⁴⁸ Secondly, and as a consequence, the quotas initially adopted predominantly reflected the perceived short-term interests of the whaling industry itself and, as could so easily have been predicted, led almost

646. D'Amato & Chopra, *supra* note 386, at 34.

647. See generally BIRNIE, *supra* note 386, at 202-03.

648. Whaling States that soon became IWC members despite not having been full participants in the Washington Conference included Iceland (acceded Mar. 10, 1947), Japan (Apr. 21, 1951), and Mexico (June 30, 1949).

directly to ruin. The inability to impose quotas on particular factory ships or land stations was an obvious handicap, while the objections procedure gravely undermined those amendments to the Schedule that were agreed, in some cases being so extensively invoked as to nullify the effect of the measures entirely.⁶⁴⁹ The regulatory techniques employed were in any event scarcely fit for purpose: the blue whale unit in particular, devised essentially as a means of regulating the flow of oil on to international markets, was inherently incapable of protecting "all species of whales" against over-fishing, because it paid no real regard to species as such.⁶⁵⁰ A final deficiency lay in the absence of scientific information of sufficient sophistication and reliability to make effective regulation a realistic possibility.

In light of the fact that this early practice was driven so intensively by the immediate economic interests of the whaling industry, it becomes necessary to consider whether any doubt is thereby cast on the validity of the conclusion reached above regarding the abandonment of industrial profitability as the underlying object and purpose of regulation. This is a perfectly fair question, since it is beyond doubt that recourse may be had to the subsequent practice of the parties to a treaty for the purpose of retrospectively casting light on their *original* sense of its meaning.⁶⁵¹ There are, however, a number of reasons for doubting that the provisional conclusions of this paper can be undermined on this basis. The first is that, as noted above, it is by no means unusual for treaties in the environmental field to take some considerable time to exert any real impact on the political consciousness and the entrenched practices of the parties. Indeed, the vast majority of such treaties would probably be judged as failures if assessed exclusively on the basis of their first ten to fifteen years of existence. Secondly, and in any event, it has already been noted that the argument that the pursuit of industrial profitability was no longer to be seen as the object and purpose of regulation in no way implies that it was of itself *contrary to* that object and purpose. Industrial profitability could certainly be pursued to the extent that it was consistent with the actual object and purpose, as outlined above.

More importantly, however, it is impossible to argue that the *headlong, unrestrained* pursuit of immediate profit, to the detriment of long-term, sustainable exploitation, was in any way consistent with the treaty's objectives, and yet that appeared to be precisely what was occurring in the early years. Consequently, this early practice should from any

649. See LYSTER, *supra* note 273, at 27. Even the United States, it should be noted, succumbed to this temptation.

650. *Id.* at 25.

651. Vienna Convention on the Law of Treaties, *supra* note 21, art. 31(3)(b).

viewpoint be seen as being in outright defiance of the treaty's aims, rather than as an indication of what the treaty was intended to permit. This impression is strongly confirmed by the fact that no one, it seems, now seeks to defend these early activities, even those that were responsible for them. In this vein, Sumi observes that "[e]ven after the establishment of the IWC in 1946, many of its regulations were not necessarily effective, especially until the mid-1960s, because short-term economic considerations overrode long term conservation needs. This was symbolized in the adoption of the BWU."⁶⁵² He specifically concedes, moreover, that "[p]ast Japanese whaling policy was biased toward the promotion of the whaling industry. Throughout the prewar and post-war periods, economic considerations were given too much weight. Japanese whaling activities were governed by short-range economic considerations rather than by the requirements of conservation."⁶⁵³

Accordingly, it seems appropriate to view early practice under the ICRW as an aberration, rather than as an indication of what the ICRW was understood to entail. Subsequently, the systematic flouting of the Convention's basic objectives undoubtedly diminished, although there is disagreement as to the precise timing and cause of this development. One view is that it was the influx into the IWC, in response to the clarion call sounded at the Stockholm Conference, of a number of non-whaling States seeking at last to exercise the prerogative of "the nations of the world" to have their say in regulation, and specifically to impose a moratorium on further commercial exploitation.⁶⁵⁴ An alternative perspective is that the IWC had already put its house in order some years earlier with the sharp quota reductions of 1965.⁶⁵⁵ No essential purpose will be served by entering into this controversy here.

The broader significance of the membership changes cannot be denied, however, and it is commonplace to suggest that a transformation was wrought in the history of the IWC, either for better or for worse, depending on one's personal viewpoint. For the purposes of this study, however, the real importance of these developments lies in their impact on the relevance of *practice* under the ICRW. In particular, the arrival of these non-whaling States brought a balance that was slightly more representative of the international community as a whole, and closer, perhaps, to that which had originally been envisaged when the ICRW was drafted.

652. Sumi, *supra* note 12, at 367.

653. *Id.*

654. CHERFAS, *supra* note 386, preface; D'Amato & Chopra, *supra* note 386, at 37–38.

655. See GULLAND, *supra* note 467, at 10–37; J.L. McHugh, *The Role and History of the International Whaling Commission*, in *THE WHALE PROBLEM: A STATUS REPORT* 305–35 (W.E. Schevill ed., 1974); Sumi, *supra* note 12 (offering examples of this perspective).

Consequently, it may be particularly relevant to look for indications of the parties' collective understanding of the object and purpose of the Convention during the middle period of the IWC's history, after the era of initial excess had passed but before the organization became locked in perpetual acrimony following the adoption and continuance of the moratorium, when governmental perspectives may have become colored by the need to defend a particular position in that controversy. A broad impression may be obtainable from a perusal of the selection of just over forty resolutions taken from the Twenty-Eighth to the Thirty-Fourth Annual Meetings of the IWC, 1976–1982,⁶⁵⁶ and included in Birnie's *International Regulation of Whaling*.⁶⁵⁷ It would seem that, of these, a little over a third made overt reference in their preambles to the object and purpose of the ICRW. In every case but one, the form of words employed affirmed that its purpose was "to provide for the effective conservation and management of whale stocks."⁶⁵⁸ By contrast, in only one case is the development of the industry mentioned, and then only as part of a verbatim quotation from the final recital of the preamble. Admittedly, this brief overview falls a long way short of the systematic and comprehensive survey of practice which would ideally have been undertaken had time permitted, but it certainly provides little support for the notion that the long-term development of the industry was perceived as being the primary objective of regulation.

While subsequent practice may still be capable, even in its contemporary manifestations, of casting light back on the pristine intentions of the negotiating States, a further key aspect of its legal potential is not to be overlooked: namely to *modify* or *redirect* the original intention of the treaty. It will shortly be necessary to move on to an exploration of its role in that regard, but, before doing so, there is one final context in which the relevance of practice falls to be considered for the illumination it may shed on the understanding of the terms of the ICRW in their original, unmodified sense.

It will be remembered that a central contention of the argument advanced above was that the word "orderly" in the preambular declaration of the parties' aim to "make possible the *orderly* development of the whaling industry" has been significantly undervalued—indeed, all but ignored—in almost all conventional analyses of the ICRW. In reality, and viewed especially in light of the fraught, immediately postwar, circumstances in which the ICRW was drafted, it should be seen as

656. This selection also includes the IWC Special Meeting of December 1978.

657. See generally BIRNIE, *supra* note 386, at 773–95.

658. In a minority of these cases, the word "worldwide" also appears somewhere in the text.

reflecting a particularly vital aspect of the treaty's legal purpose—namely to avoid any risk that the scramble for resources might result in renewed conflict or confrontation in maritime affairs. Given the welcome relaxation in global tensions as the memory of hostilities gradually receded, the diminution in competition for the resources in question as various countries abandoned their involvement in whaling, and the eventual establishment of an entirely new political climate during the era of the United Nations, it might have been expected that concerns over the impact of whaling on public order would have tended to recede over time, perhaps even to the extent that their importance in the original scheme of things might risk being forgotten.

And yet, it seems that such considerations are never displaced entirely, as recent events have served only to confirm the latent tendency of whaling activities to generate discord of one sort or another. In present circumstances, the risk of confrontation arises not so much from competition between national fleets for acquisition of the resource, but rather from the intensity of opposition to exploitation on the part of certain non-governmental actors who have engaged in various forms of confrontation and harassment of whaling vessels at sea.⁶⁵⁹ In a relatively rare display of unity, IWC members have recently combined to express their concern over such activities, and (given their propensity to jeopardize human life, property, and the marine environment) to recognize the need for action by contracting governments to discourage them.⁶⁶⁰ One interesting, and highly significant, feature of the resolutions in question is that it is the very concept of "order" in maritime navigation that is invoked—one might almost say disinterested—for this purpose. Indeed, there could scarcely be a clearer or more reliable indication of the meaning of this expression for ICRW purposes, given that (i) the most recent resolution was adopted without opposition;⁶⁶¹ (ii) it had been jointly drafted and submitted by two governments, Japan and New Zealand, which are prominent members respectively of the pro- and anti-whaling camps;⁶⁶² (iii) it declared "order" in maritime navigation to be, and to "have long been," a common interest of nations worldwide,⁶⁶³ thereby demonstrating its pervasive and perennial significance in maritime affairs;

659. See generally DAVID DAY, *THE WHALE WAR* (1987); Bailey, *supra* note 400, at 34–35.

660. See IWC, *Resolution on Safety at Sea and Protection of the Environment*, IWC Res. 2007-2, IWC/59/25 (May 29, 2007), available at http://www.iwcoffice.org/_documents/commission/IWC59docs/59-25.pdf; IWC, *Resolution on the Safety of Vessels Engaged in Whaling and Whale Research-Related Activities*, IWC Res. 2006-2 (2006).

661. See Press Release, IWC, Day 3, 59th Annual Meeting (May 30, 2007), available at <http://iwcoffice.org/meetings/meeting2007.htm#pressrelease>.

662. See IWC Res. 2007-2, *supra* note 660, agenda item 11.

663. *Id.* pmb. (first recital).

and (iv) it employed the term in a context far removed from the principal area of dispute between IWC members, thereby giving assurance that it represents a genuine and objective indication of their understanding, uncompromised by the need to maintain or advance any entrenched political position in an ongoing dispute.

All of these factors lend considerable support to the contention that the word “orderly” in the preamble to the ICRW is no mere semantic embellishment or makeweight, but was intended from the outset to ensure that the development of the whaling industry be steered away from any possibility of generating conflict or discord, through recourse to institutional arrangements designed to introduce *propriety*—as well as *effectiveness*—into the conservation process.

To recapitulate, the concern was not so much to secure the development of the whaling industry, as to ensure that its development did not undermine the good order of the oceans. It is with these considerations in mind that we may turn at last to the exploration of the evolutionary aspects of ICRW interpretation.

IV. THE APPLICATION OF RELEVANT NORMS (2): CONTEMPORARY PERSPECTIVES

A. *Good Faith and the Evolutionary Interpretation of Treaties*

Although a good deal of attention has been paid in the previous Part to the implementation of the ICRW in light of its object and purpose as originally conceived, the really significant question in relation to the normalization process concerns what is required of—or permitted to—its parties in the present and for the future. Some legal commentators appear to believe that the requirements of good faith involve the application of the ICRW in exactly the fashion as that (allegedly) anticipated by its negotiators some sixty years ago, though quite how this can be reconciled with the requirements of the law of treaties—especially those which are constitutive of international organizations—as so meticulously explained by the ICJ in so many cases is not at all clear. It is, indeed, something of an irony that one relatively recent reaffirmation of this static and conservative perspective on interpretation⁶⁶⁴ occurred in the very year that the ICJ held, in relation to the implementation of a treaty concluded only two decades earlier, that “what might have been a correct application of the law in 1989 or 1992 . . . could be a miscarriage

664. See William T. Burke, *Whaling and International Law*, in *WHALING IN THE NORTH ATLANTIC* (G. Petursduttir ed., 1997).

of justice if prescribed in 1997.”⁶⁶⁵ On that basis, it is surely to be expected that a convention concluded as long ago as the ICRW might require some quite significant fine-tuning if it is to be capable of continuing to fulfill its functions into the new millennium.

It is, furthermore, important to understand that it is the very concept of good faith that both enables and requires the necessary adjustments to be made. After all, it will be remembered that when, in the process of drafting the Vienna Convention back in the 1960s, the ILC was called on to address “the problem of the effect of the evolution of the law on the interpretation of legal terms in a treaty,” it ultimately found the elaboration of a specific provision to be unnecessary, the principle of good faith, applied in conjunction with the rule requiring treaties to be interpreted in light of other relevant rules of international law, being of itself sufficient to achieve that purpose.⁶⁶⁶ In particular, the well-established canon of construction known as the principle of effectiveness, *ut res magis valeat quam pereat*, dictates that, wherever possible, treaties be interpreted in such a way as to ensure their ongoing vitality, and thereby avoid the fate of slow suffocation or marginalization. This point also serves to demonstrate that there was nothing remotely novel or unexpected in the pronouncement of the ICJ cited above: the principles that it saw fit to apply have long been understood to represent the law, as the analysis in Part II has already sought to demonstrate. Specifically, international treaties, particularly those of a multilateral, institutionalized, law-making character, are to be seen not as fixed and unyielding instruments of regulation, but as essentially fluid and malleable devices eminently capable of responding to evolving needs.

Despite some ambivalence, broad acceptance of this principle seems to be implicit in Resolution 2006-1 and its supporting documentation, through its endorsement of the relevance, in connection with interpretation of the ICRW, both of evolving perceptions of conservation need (the “ecosystem” approach and the possible threat posed to food security by burgeoning populations of whales) and of relevant legal instruments concluded in the decades following 1946 (specifically, the Biodiversity Convention and the Universal Declaration on Cultural Diversity). Hopefully, therefore, a general consensus will be discernible amongst ICRW parties that its ongoing interpretation may be affected, and its aims and objectives brought into contemporary relief, by considerations and norms unfamiliar to, and even unforeseeable by, its negotiating States.

665. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 132–34 (Sept. 25).

666. *Report of the International Law Commission on the Work of its Eighteenth Session; Chapter II: the Law of Treaties*, [1966] Y.B. INT'L L. COMM'N 172, 222, U.N. Doc. A/CN.4/191 (July 19, 1966).

The aim of the current Part is therefore to consider the question of the implementation and interpretation of the ICRW in light of the many changes that have occurred in the factual and legal environment surrounding its operation over the six decades that have elapsed since the time of its adoption.

In exploring these possibilities, it will be important to recognize that the crucial engines of change in affecting this evolutionary development may be found both within and beyond the ICRW itself. For the purposes of exposition, the principles, procedures, and provisions of the Convention itself, coupled with practice thereunder, all viewed in light of adjectival rules deriving from the law of treaties, the law of international organizations, and international law generally, will be treated as internal mechanisms, while those deriving from other substantive areas, such as the laws of the sea, biodiversity conservation, and human rights, will be treated as external. The overall task is essentially to be approached in two stages. The first involves an examination of these external mechanisms in order to establish what normative implications they have for the conduct of whaling activities, and the second is to analyze the internal mechanisms to determine what prospects they offer for the harmonization and integration of these external norms into the ICRW regime.

B. Evolving Norms Deriving from Sources Beyond the ICRW

It is clear from the discussion in Part II that there are a number of distinct, albeit sometimes inter-related, areas of international law from which norms relevant to the implementation of the ICRW might derive, and it is therefore necessary to consider these in turn.

1. Human Rights Norms

First, the matter may be approached from the general perspective of human rights. Indeed, given the greatly enhanced significance of human rights principles in the postwar era, ensuring that instruments such as the ICRW do nothing to undermine the operation of such norms within the contemporary legal order must be considered a particularly vital aspect of the quest for systemic integrity. Building on the approach evinced in the normalization documents, the principles in question may be grouped into various sub-categories.

a. Cultural Diversity

In the earlier discussion, notwithstanding the fact that the various agreements recently adopted within UNESCO to give binding legal effect to the 2001 Declaration on Cultural Diversity appeared to yield primacy to environmental obligations, or for other reasons did not seem

to have any significant normative impact on the whaling question, the possibility was left open that the Declaration itself might have retained some residual legal significance in this context. On closer inspection of its provisions, however, it is extremely difficult to see how it could prove capable of making any appreciable contribution to the resolution of the present controversy. First of all, it has already been noted that its status even as soft law is open to question since many of its provisions either have no normative content at all, or are drafted in an extremely loose and open-ended fashion: "[C]are should be exercised so that all cultures can express themselves and make themselves known."⁶⁶⁷ It is, of course, difficult to see how any other approach could have been adopted, for a bare principle that all activities that have traditionally occurred should be allowed, in the name of cultural diversity, to continue would self-evidently be absurd.⁶⁶⁸ For one reason, cultural practices may persist, or be artificially sustained, as indefensible anomalies which are fundamentally at odds with the wider traditions or nobler ideals even of the communities in which they are practiced. Sometimes, for example, it is only the support of voluble and determined pressure groups, or the patronage of wealthy and powerful factions in society, that underwrites their survival. Others linger on in defiance of *international* norms of behavior: slavery, torture, and child abuse, for instance, all constitute social phenomena that have been widespread historically, and continue to exist in many places, and yet the urgent aim of international law is plainly to secure their absolute and unconditional elimination, not to encourage their continuance. Since the preservation of cultural diversity is conceived essentially as but one aspect of human rights protection,⁶⁶⁹ it is obvious that it cannot be allowed to undermine the many more fundamental principles and mechanisms that have been so painstakingly established for that purpose in the past. Thus, where the Declaration does assert a principle of a more clearly normative (and potentially relevant) character—for example, that "all persons have the right to participate in the cultural life of their choice, and to conduct their own cultural practices"—this is clearly stated to be "subject to respect for human rights and fundamental freedoms."⁶⁷⁰ Quite obviously, moreover, that cannot be the only constraint, for a cultural practice that entailed the undermining of world peace or the destruction of the natural environment would be equally intolerable; accordingly, it is provided that each State must define its

667. UNESCO Universal Declaration on Cultural Diversity, *supra* note 28.

668. This represents an extreme interpretation of Article 7, which asserts that "... heritage in all its forms must be preserved, enhanced and handed on to future generations . . ." *Id.* art. 7.

669. *Id.* pmb. (second & first recitals), art. 5.

670. *Id.* art. 5.

cultural policy with due regard to its wider international obligations generally.⁶⁷¹ Obviously, such obligations would include those relating to species conservation.

In light of these points, it becomes clear that there are certain fundamental tensions at the heart of the Declaration that are by no means easy to resolve in the present context. For while, on the one hand, respect for the cultural traditions of others may indeed be regarded as an ethical imperative of sorts, it is also recognized that the entrenchment and sanctification of cultural differences may lead ultimately to fundamentalism and segregation, which would run counter to the basic tenets of the Universal Declaration on Human Rights.⁶⁷² The Director-General of UNESCO accordingly notes that it is certainly not intended that cultural diversity should be viewed as an “unchanging heritage,” and perhaps the best that can therefore be expected is the initiation of some form of dialogue between communities, with a view to resolving or accommodating such inter-cultural differences as may exist.⁶⁷³ Obviously, there are many divergences of lifestyle or attitude which are, quite simply, intrinsically incompatible and therefore not simultaneously sustainable in accordance with any simple principle entailing the maintenance of diversity. For example, the conflicting beliefs that some particular activity (*e.g.*, bride-burning, genital mutilation, enforced marriages) must (i) out of respect for tradition, be preserved at all costs or (ii) as a matter of ethical imperative, be expeditiously eliminated plainly cannot be accommodated within any simple paradigm of preserving cultural diversity, for the endorsement of one inevitably entails the sacrifice of the other.

The arguments for and against commercial whaling might well be thought to fall into this category, too. That is, while whaling has commonly been presented as a cultural tradition within certain countries or communities, it is by no means clear, given the very wide definition of culture employed in this instrument, why equally strong claims might not be made regarding the development and recognition over recent decades of a cultural value system requiring that whales be *exempted* from all such exploitation. This might, indeed, even be regarded as the resurgence and more widespread pervasion of a cultural tradition that had

671. *Id.* art. 9. This principle is stated in stronger terms in the accompanying Action Plan, clause 18, which calls for the development of cultural policies “in accordance with the international obligations incumbent on each State.” *Id.* Action Plan, cl. 18.

672. *Id.*; see also K. MATSUURA, *Introduction to UNESCO UNIVERSAL DECLARATION ON CULTURAL DIVERSITY* (2001).

673. See MATSUURA, *supra* note 672.

existed in certain communities from much earlier times,⁶⁷⁴ and which is therefore no less deserving of protection than the exploitative tradition. Since whales represent a global resource, there is no simple means of resolving the attendant dilemmas—rather, moral choices must be made and policy preferences established for the benefit of the international community as a whole.⁶⁷⁵ Unfortunately, there is little in the Declaration to indicate the principles in accordance with which such accommodations might be attempted.

b. Basic Human Rights Norms

Nor does it seem likely that significant guidance can be obtained from the established body of jurisprudence relating to more basic and clearly defined human rights norms. As noted in Part II, instances of express legal recognition of rights to the perpetuation of, or participation in, cultural traditions tend to be focused primarily on specialist categories of claimant, most notably representatives of indigenous peoples or other minorities.⁶⁷⁶ Although claims of this kind can sometimes legitimately be brought within the scope of more widely applicable civil and political rights, such as freedom of association or expression, and have indeed been admitted for consideration on that basis by courts and tribunals both national and international, the individuals who have presented such claims have as a matter of fact often actually been members of recognized minority groups, and have even despite that advantage tended to be unsuccessful.⁶⁷⁷ In the case of *Chapman v United Kingdom*,⁶⁷⁸ for example, the European Court of Human Rights held that measures

674. See *Whaling in Korea: Issues After the Moratorium*, JAPAN WHALING ASS'N NEWSLETTER No. 27, July 2003 (recognizing this point in relation to Korea).

675. That is not, of course, to say that some suitable compromise or accommodation may not sometimes be found.

676. See, e.g., International Covenant on Civil and Political Rights, *supra* note 130. The special claims of indigenous peoples pursuant to this provision were confirmed and explained by the Sapporo District Court in Japan in *Kayano v. Hokkaido Expropriation Committee*. 127 I.L.R. 173 (Sapporo Dist. Ct. Mar. 27, 1997).

677. See, e.g., *Länsmann v. Finland*, Communication No. 671/1995, CCPR/C/58/D/671/1995 (1995) (holding that the authorization by the Finnish government of certain economic development activities in traditional Sami lands did not amount to a violation of the cultural rights of local reindeer breeders). By contrast, the District Court in the *Kayano* case did, it seems, allow a claim of this kind by plaintiffs representing the Japanese Ainu people in respect of the expropriation and inundation of their ancestral lands in the course of a dam construction project, on the grounds that the Minister had failed to undertake a sufficiently careful balancing of public and private interests. Since, however, the project had already been completed at vast expense and was judged to be of considerable public benefit, the plaintiffs' only remedy lay in a declaration of illegality. No doubt those with expertise in Japanese law will be in a position to explain the current state of the law within that jurisdiction.

678. *Chapman v. United Kingdom*, 33 Eur. H.R. Rep. 18 (2001); see also *G. and E. v. Norway*, 35 Eur. Comm'n H.R. Dec. & Rep. 30 (1983).

concerning the stationing of caravans in the United Kingdom could be justified, despite their effects on persons of itinerant lifestyle, by reference to the wider public interest, the planning legislation under which they were adopted having made adequate provision for the representation of all the relevant stakeholders and concerns.

One recent English case that did not involve a minority in the accepted sense, and arguably comes very close to mirroring the position of the Japanese coastal communities that have been denied the opportunity to continue to engage in certain whaling activities, is *R. (Countryside Alliance) v. Attorney-General*.⁶⁷⁹ In this case, the appellants—various individuals for whom the traditional country pursuit of using dogs to hunt such animals as fox, deer, and hares had previously formed a core aspect of their lifestyle—argued that the prohibition of such activities by virtue of the Hunting Act 2004 had infringed their human rights. They invoked specifically the rights to respect for their homes and private lives, into which they sought to integrate aspects of cultural heritage and personal autonomy, and to peaceful enjoyment of their property and to freedom of association and assembly. The Court of Appeal, however, upholding the conclusions of the Divisional Court⁶⁸⁰ held that, for the most part, these rights were not even engaged, let alone infringed, and that it was therefore unnecessary to determine whether such incursions could be justified. Only the property right was genuinely implicated, and then solely in the limited sense that a degree of state control had been exercised over the use of the appellants' property. That, however, could readily be justified by virtue of the legislative aim of “preventing or reducing unnecessary suffering to wild mammals, overlaid by a moral viewpoint that causing suffering to animals for sport is unethical,”⁶⁸¹ to which the measures adopted were entirely proportionate. The *Countryside Alliance* Court made clear that its conclusions were founded on a willingness to assume that the adverse social and economic consequences predicted by the appellants as likely to result from the hunting ban *would* actually occur, although it also emphasized that this assump-

679. *R. (Countryside Alliance) v. Attorney Gen.* [2006] EWCA (Civ) 817, [2007] Q.B. 305 (Ct. App. (Crim)) (Eng.). The appellants also sought to invoke aspects of E.C. law, in respect of which they were equally unsuccessful. For an earlier Scottish case arising out of similar legislation, see *Adams v. Scottish Ministers*. [2003] S.L.T. 366 (O.H.) (Scot.).

680. *R. (Countryside Alliance) v. Attorney Gen.*, [2005] EWHC (Civ) 1677, [2006] U.K.H.R.R. 73, (D.C.) (Eng.). The decision of the Court of Appeals was subsequently upheld by the House of Lords. See *R. (Countryside Alliance) v. Attorney Gen.*, [2007] UKHL 52, [2008] 2 All E.R. 95 (H.L.) (U.K.).

681. See *R. (Countryside Alliance)*, [2006] EWCA (Civ) 817, ¶ 117. The “sport” aspect of fox hunting is one element which is presumably not evident in coastal whaling activities, though other comparable factors are present in that context which affect the overall balance of policy considerations, such as the possible hazards to health of human consumption of whalemeat.

tion was, in reality, "by no means fully supported by the evidence."⁶⁸² There were, after all, alternatives available to the appellants, such as trail-hunting, which did not involve live quarry.⁶⁸³ In any event, policy decisions taken by governments not infrequently had a major impact on people's life-styles, as the collapse of the heavy manufacturing and coal-mining industries had amply demonstrated, but that did not in and of itself represent a failure to respect fundamental rights.⁶⁸⁴

It would seem, therefore, that even if the norms deriving from international human rights law could be treated as representing an appropriate standard for the evaluation of IWC decisions affecting the situation of the coastal communities in Japan, it is most unlikely, based on present evidence, that they would be found to have been violated. Adjustment to changes in social conditions and moral attitudes is an inescapable aspect of modern existence, on which all human progress and development ultimately depends, and the mere requirement to adjust cannot convincingly be presented as an infringement on fundamental rights. If particular communities allow a "siege mentality" to develop, whereby they refuse to accommodate such change and in consequence spurn the chances of improving their own material conditions of life, it is extremely difficult to see how human rights norms can legitimately be recruited to assist them.⁶⁸⁵

c. Food Security

Much the same is true if the matter is approached from the perspective of food security. Although various treaties enshrine the right of everyone to "adequate food," or to "freedom from hunger,"⁶⁸⁶ the precise

682. *Id.* ¶ 51.

683. *See id.* ¶ 104. Here again, a close parallel may be evident in the case of the coastal whaling communities in Japan, for whom whale-watching might seem to many outsiders to be an obvious, and ethically acceptable, alternative means both of celebrating, and of capitalizing on, their cultural traditions. *But see infra* note 685.

684. *See R. (Countryside Alliance)*, [2006] EWCA (Civ) 817, ¶ 103.

685. One contemporary commentator has chronicled the way in which the coastal community in Taiji, Japan, for example, has in recent decades "rejected administrative consolidation with neighboring cities and towns" and, out of attachment to tradition, opted to persist with small-scale whaling activities despite the fact that they "provide only 3.2% of the town's budget" and are perceived to have impacted adversely on tourism, which the locals are otherwise anxious to encourage. Whale watching has apparently not developed in Taiji, as it has in certain other coastal communities, as its "citizens do not even consider the possibility." Shio Segi, *The Coexistence of Whaling and Whale Watching in a Traditional Whaling Region: The Case of Taiji, Wakayama Prefecture, Japan*, SPC TRADITIONAL MARINE RESOURCES MANAGEMENT & KNOWLEDGE INFO. BULL., July 2003, at 23.

686. *See, e.g.*, International Covenant on Economic, Social, and Cultural Rights, *supra* note 352, art. 11; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights art. 12, O.A.S. T.S. No. 69 (1988), *entered into force* Nov. 16, 1999. In addition, although the right to food is not explicitly incorporated in the

circumstances in which this commitment could be said to have been violated are obviously subject to significant disparities of appreciation and opinion. While it may no longer be tenable to claim that economic and social rights are by their nature nonjusticiable,⁶⁸⁷ it is extremely difficult to envisage findings of violations of such rights other than in relatively extreme and unusual circumstances.⁶⁸⁸

Where, moreover, the issue arises within the context of legitimate debates over the proper approach to the conservation of wildlife species, many of which are known to be threatened with extinction or otherwise vulnerable to environmental hazards, the matter begins to appear incapable of resolution from a food security perspective alone. Obviously, *any* decision to impose restrictions on the exploitation of species that are capable of satisfying the alimentary requirements of human beings is open to potential challenge on these grounds, but a rational approach would be bound to recognize the necessity of considering other interests, including the need to preserve resources for future generations or the desire to explore other economically or socially beneficial forms of exploitation, not to mention the preservation of species for their own sake. It is true that some soft law instruments strongly encourage the positive exploitation of marine resources, and even emphasize a preference for direct human consumption,⁶⁸⁹ but despite the undeniable importance of that consideration, it must still be balanced against others, including doubts that have been raised regarding the inherent suitability of cetaceans for such purposes in view of the high concentrations of contaminants that have sometimes been detected in their bodies. While there have also been demands for a resumption in the harvesting of cetaceans on the grounds of an alleged need to restrict their own consumption of fish, which might otherwise be available for humans, such claims have been regarded by

African Charter on Human and Peoples' Rights, it has been held by the African Commission on Human and Peoples' Rights to be "inseparably linked to the dignity of human beings" and "therefore essential for the enjoyment and fulfillment of . . . other rights" guaranteed by the Charter. Soc. & Econ. Rights Action Ctr. v. Nigeria, Communication No. 155/96, 2001–02 Afr. Ann. Act. Rep., annex V.

687. See *Autism-Europe v. France*, Complaint No. 13/2002, Eur. Comm. of Soc. Rts. (Sept. 29, 2003), available at http://www.escri-net.org/usr_doc/3InterventionAutismEuropeAudition29septembre2003final.pdf (French).

688. Soc. & Econ. Rights Action Ctr., Communication No. 155/96, 2001–02 Afr. Ann. Act. Rep., annex V. In the *African Commission* case referred to above, the government of Nigeria was found to have violated this right through the destruction and contamination of the food sources of the Ogoni people, undertaken as part of a campaign of terrorization connected with the imposition of measures for the exploitation of oil resources. The scenario was, therefore, very far removed from that under the ICRW. For a recent, skeptical analysis of the rights-based approach to the question of food security, see Jaqueline Mowbray, *The Right to Food and the International System*, 20 LEIDEN J. INT'L L. 545 (2007).

689. See, e.g., Universal Declaration on the Eradication of Hunger and Malnutrition, ¶ 5, G.A. Res. 3348 (XXIX), U.N. Doc. E/CONF.65/20 (Dec. 17, 1974).

many as speculative and controversial.⁶⁹⁰ It is, accordingly, well within the wide range of opinions that might reasonably be held on this matter that the moratorium on commercial whaling currently has rather limited implications for food security. A more compelling argument—both in fact and law—for permitting controlled exploitation may be thought to arise in the case of indigenous peoples, though these peoples are, of course, already the beneficiaries of separate treatment under the ICRW regime.

If the focus is shifted away from the claims of individuals or particular communities to embrace the interests of the international community as a whole, the range of factors to be taken into account alongside food security is expanded to the point at which the issue must inevitably transcend the bounds of legal justiciability entirely, and can only be addressed as a question of broad policy. In light of these many complexities, it is scant surprise that the provisions of human rights instruments that relate to food security tend ultimately to lay emphasis on the need for international collaboration to resolve the many conflicts and uncertainties which will inevitably arise in relation to such questions.⁶⁹¹ And, the IWC itself plainly represents a well-established and inclusive international forum in which they may be discussed, and hopefully resolved.

These considerations strongly suggest that the jurisprudence of human rights in general, and of the preservation of cultural diversity or food security in particular, is simply not the optimum reference point for those who hope to harmonize human interests with principles governing the conservation and management of biological resources. It may therefore be that the international law of biodiversity represents a more promising source of guidance, and it is accordingly to that body of norms that we must shortly turn.

As a preliminary to that exercise, however, it must be noted that the parties to the Biodiversity Convention itself are required to "implement [the] Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea,"⁶⁹² and it is therefore important to consider the effect of relevant norms of maritime law in order to establish whether any significant problems of harmonization or prioritization are in fact likely to arise in the present context.

690. See *infra* Part IV.B.3.b (offering further discussion of this point).

691. See, e.g., International Covenant on Economic, Social, and Cultural Rights, *supra* note 352, art. 11; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, *supra* note 686, art. 12(2); Universal Declaration on the Eradication of Hunger and Malnutrition, *supra* note 689, ¶ 9.

692. CBD, *supra* note 120, art. 22(2).

2. The Law of the Sea

Since the recognition by the U.N. Convention on the Law of the Sea of the concept of the EEZ, there has been a significant general shift of power toward coastal States at the expense of the distant water fishing fleets of the major maritime powers, motivated largely by the belief that this would prove advantageous to the cause of conservation. In reality, it is far from clear that this expectation has as yet been borne out.⁶⁹³ Nevertheless, the recognized principle is that, within the EEZ, the coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing" these resources, and is authorized to determine the allowable catch.⁶⁹⁴ It must, however, have due regard to the rights of other States and is required to ensure through proper conservation and management measures that the maintenance of living resources is not endangered by over-exploitation. These measures must aim to maintain or restore populations of harvested species at or to levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the effects on associated or dependent species.⁶⁹⁵ Without prejudice to these principles, the coastal State is to promote the objective of optimum utilization and, if it does not have the capacity to harvest the allowable catch, must arrange to give other States access to the surplus.⁶⁹⁶ Special provision is made for straddling stocks and for anadromous, catadromous, sedentary, and highly migratory species.⁶⁹⁷ On the high seas, all States have the right to engage in fishing, subject to a duty to cooperate in the adoption of measures necessary for the conservation of living resources.⁶⁹⁸ This cooperation may entail the establishment of regional or sub-regional fisheries organizations, and the measures adopted must conform to similar criteria as those applicable in the EEZ.⁶⁹⁹

In the case of both the high seas and the EEZ,⁷⁰⁰ however, there is a specific stipulation that none of these provisions restrict the right of States, or the competence of international organizations, to regulate the exploitation of *marine mammals* more strictly, or to prohibit it entirely, and no criteria are specified to limit the exercise of this discretion. States

693. See, e.g., SANDS, *supra* note 320, at 560.

694. UNCLOS, *supra* note 88, arts. 56(1)(a), 61(1).

695. *Id.* art. 61(2)-(4); see also U.N. Conference on Env't and Dev., Rio de Janeiro, Bra., June 3-14, 1992, *Earth Summit: Agenda 21: Programme of Action for Sustainable Development*, ¶ 17.46 [hereinafter *Agenda 21*].

696. UNCLOS, *supra* note 88, art. 62(2).

697. *Id.* arts. 63-64, 66-68.

698. *Id.* arts. 116-17.

699. *Id.* arts. 118-19.

700. See ICRW, *supra* note 1, art. I(2) (explaining that the regulatory regime established by the ICRW applies to "all waters in which whaling is prosecuted").

are to cooperate with regard to conservation, and, in the case of cetaceans in particular, work through appropriate international organizations for their conservation, management, and study.⁷⁰¹ This general position was fully endorsed at the U.N. Convention on the Environment and Development (UNCED), through Agenda 21, under which the responsibilities of the IWC with regard to whaling were specifically recognized.⁷⁰² It will be apparent that, far from calling for uniformity of approach with regard to whales and fish, these provisions clearly recognize potential justifications for diversity of treatment, and the need for international cooperation to establish the precise ramifications of the evolving regime.

Consequently, any notion that whales should be treated in accordance with the same principles as those which govern fish must be reasoned from first principles, and cannot be simply asserted or assumed. Plainly, the case would be strengthened to some extent if the Regional Fisheries Management Organizations could be shown to have achieved an outstandingly successful record of husbandry. Given the enormous utilitarian values of fishery resources, the universal recognition in principle of the need for effective conservation measures if they are to be preserved, the unequivocal establishment of practical and theoretical principles to guide all international conservation efforts, and the untrammelled opportunity for the cooperative development of specific expertise in the technical aspects of fishery management, these arrangements should by rights have emerged as shining examples of the very best that human ingenuity, self-restraint, and organizational acumen could achieve. The reality, unfortunately, has been depressingly at odds with this expectation. Indeed, an eminently plausible assessment of the traditional approach to fisheries management is that it "has tended to be reactive to management problems only after they reached crisis levels."⁷⁰³ Almost twenty-five years ago, around the time of the adoption of the Law of the Sea Convention, R.R. Churchill and A.V. Lowe pointed out four key features of human activities in this area, namely:

a tendency for fish stocks to be fished above biologically optimum levels; a tendency for more fishermen to engage in a fishery than is economically justified; a likelihood of competition and conflict between different groups of fishermen; and the

701. UNCLOS, *supra* note 88, arts. 65, 120.

702. *Agenda 21*, *supra* note 695, ¶ 17.90.

703. David Freestone, *International Fisheries Law Since Rio: the Continued Rise of the Precautionary Principle*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT*, *supra* note 48, at 135, 160.

necessity for any regulation of marine fisheries to have a substantial international component.⁷⁰⁴

Yet, despite the emergence during the intervening years of numerous institutional arrangements to incorporate this international dimension, it is far from clear that the damaging propensities identified by these authors have yet been significantly ameliorated. Many commentators have concluded that fishery commissions and other regulatory systems have enjoyed only "limited success,"⁷⁰⁵ and have proved to be "relatively ineffective in the management of fisheries within their competence."⁷⁰⁶ Crucially, "fisheries within the new jurisdictional zones, whether on the high seas or under national jurisdiction, have continued to decline and are everywhere in trouble."⁷⁰⁷ The FAO, while proclaiming the adoption of innovative and progressive measures by many regional fishery bodies (RFBs) in the course of a general post-UNCED transformation,⁷⁰⁸ coyly concedes that such institutions "are constrained by the unwillingness of Member States to delegate sufficient decision-making power and responsibilities to RFBs, and their reluctance to implement decisions taken" by them.⁷⁰⁹ These failures, of course, mirror those of the IWC itself in its early years, when the fisheries paradigm predominated, and carry important lessons which are to be borne in mind when its future is to be programmed. They certainly do not offer great reassurance that following the Regional Fisheries Management Organization route will ultimately prove the wisest course.

Given, then, that the law of the sea appears to leave States a relatively free hand to determine their policy in relation to the conservation and exploitation of marine mammals, and that the example offered by regional fisheries organizations is less than inspirational, it is appropriate to turn to the regime governing the conservation and sustainable utilization of wildlife generally in the search for principles that offer more compelling guidance to ICRW parties.

704. CHURCHILL & LOWE, *supra* note 403, at 281.

705. SANDS, *supra* note 320, at 587.

706. *Id.* at 534 (citing G. Rose, *International Fisheries Management Commissions*, in GLOBAL BIODIVERSITY: STATUS OF THE EARTH'S LIVING RESOURCES 528, 534 (Brian Groombridge ed., 1992)).

707. INTERNATIONAL LAW AND THE ENVIRONMENT, *supra* note 290, at 684.

708. See FOOD & AGRIC. COUNCIL OF THE UNITED NATIONS [FAO], FISHERY DEP'T, THE CHANGING ROLE OF REGIONAL FISHERY BODIES IN DECISION-MAKING pt. I (2004).

709. See *id.* pt. 3 at 103; see also *id.* pt. 2 at 86.

3. Norms Concerning the Conservation and Sustainable Use of Biological Diversity

As Part II again demonstrates, relevant norms of this kind may derive from a variety of legal sources, of which the most prominent is the Biodiversity Convention itself.

a. The Biodiversity Convention

As we have seen, the Biodiversity Convention is fully applicable to activities carried out under the jurisdiction or control of States beyond the limits of their national jurisdiction, and Article 5 of that treaty requires its Contracting Parties, wherever possible, to enter into cooperative arrangements for the conservation and sustainable use of biological diversity in such areas. Where appropriate, this cooperation is to be pursued through competent international organizations, and the IWC, as noted above, has achieved global recognition as the established forum for such cooperation in the case of the larger cetacean species.⁷¹⁰ Furthermore, as the destructive effects of decades of past exploitation make clear, whaling falls squarely within the category of activities in respect of which regulatory and management strategies are called for under Article 8(l). While the CBD is not intended *ipso facto* to prevail over or replace earlier treaties such as the ICRW, it does take priority over them where the exercise of rights and obligations under those treaties would seriously damage or jeopardize biological diversity.⁷¹¹ Accordingly, there is a powerful case for harmonization of the approaches adopted under the two regimes, in order to avoid any risk that the latter might undermine the conservation objectives of the former, and thereby cause the legal validity of its own regulatory scheme. This is certainly the approach that has been adopted under other major conservation treaty regimes.⁷¹²

This point also appears to be accepted by the normalization documents themselves, which make specific reference to, and expressly invoke, the sustainable use provisions of the CBD. Perhaps the proponents specifically had in mind the exhortation to "[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements"⁷¹³ since this might be thought particularly

710. Since this cooperation is to be pursued "as far as possible," a global forum of all interested parties would appear to be a necessary element.

711. CBD, *supra* note 120, art. 22(1).

712. See, e.g., CITES, Res. CONF 14.6 (June 3–15, 2007), available at <http://www.cites.org/eng/res/all/14/E14-06.pdf>.

713. CBD, *supra* note 120, art. 10(c).

apposite in relation to the traditional practices of coastal whaling.⁷¹⁴ Self-evidently, however, such provisions cannot be disentangled from those concerning conservation, not least because Article 10(a) requires the integration of both elements into the decision-making process. Consequently, the full range of measures envisaged by Article 8 of the CBD must also be treated as potentially relevant, with some likely to assume particular importance. These include the establishment of systems of protected areas and the management of important biological resources both within and beyond their boundaries, and promotion of the protection of ecosystems and the recovery of threatened species through such devices as the development and implementation of management plans and strategies.⁷¹⁵

At the species-based level, comprehensive action plans of the kind envisaged have, indeed, become one of the most widely utilized conservation tools in recent years,⁷¹⁶ largely as a result of the perceived lack of success achieved by the more narrowly focused and impressionistically constructed endeavors of earlier eras. Characteristically, these entail, first, a comprehensive review of population status, distribution, and ecology; secondly, an assessment of perceived threats and other limiting factors; and, thirdly, an analysis of existing conservation measures and their principal strengths and weaknesses.⁷¹⁷ On the basis of such factors, revised conservation needs and priorities can be reliably identified and particular governments or other agencies charged with specific tasks that are required to bring about a revival in the conservation status of the species in question. Although such plans are directed specifically at individual species, planning must of course involve a full appreciation of the wider ecological context and the nature of interactions with other species. Furthermore, the extent to which exploitation of the species in question may be permitted will depend on a careful consideration of all of the other elements in the plan. Sustainable utilization, in other words, has very little meaning if divorced from the broader conservation context.

This point is fully confirmed by the most authoritative current source of guidance on the question of sustainable use of biological resources, namely the Addis Ababa Principles and Guidelines on the Sustainable

714. See IWC, *Resolution on Japanese Community-Based Whaling*, IWC Res. 2004-2 (2004) (on file with IWC).

715. See CBD, *supra* note 120, art. 8(a)-(f).

716. They are, for example, extensively employed, *inter alia*, under the Berne European regional arrangement and the Bonn Convention. See Berne Convention, *supra* note 311; Bonn Convention, *supra* note 205.

717. See generally B. HEREDIA ET AL., *GLOBALLY THREATENED BIRDS IN EUROPE: ACTION PLANS* (1996).

Use of Biodiversity, adopted at the Seventh Meeting of the CBD Conference of Parties in 2004.⁷¹⁸ A number of Underlying Conditions for Sustainable Use were identified, including the obvious point that the availability of biological products is constrained by the intrinsic biological characteristics of species and ecosystems, including their productivity, resilience, and stability. Consequently, a precautionary approach to exploitation must be adopted, and uses favored that maximize sustainable benefits while minimizing risk. Plainly, such considerations will carry most weight where detailed knowledge of ecological conditions is lacking. Equally, "governments, resource managers, and users should take into account the need to accommodate change" in their approach to the utilization of resources.⁷¹⁹ Although exploitation can sometimes serve as a positive spur to conservation, this is specifically acknowledged only in relation to terrestrial species, in "circumstances where the risk of converting landscapes to other purposes is high."⁷²⁰

These Conditions are complemented by fourteen key Practical Principles, which are in turn elucidated and elaborated by accompanying Operational Guidelines and indications of underlying rationale. As might be expected, these guidelines recognize that the task of arriving at appropriate policies and practices in this field requires a complex and delicate balance to be struck between a number of varied, and often competing, considerations.⁷²¹

On the one hand, there are various elements of the guidance which favor the maintenance and possible extension of established forms of exploitation. The Operational Guidelines to the third Practical Principle, for example, call for the avoidance of unnecessary regulation which might foreclose opportunities for the exploitation and sustainable use of biological resources.⁷²² The twelfth Practical Principle urges that the needs of indigenous and local communities be taken into account in the management process, while the second Practical Principle calls specifically for the empowerment of such users.⁷²³ The accompanying Operational Guidelines recommend the protection and encouragement of customary uses of biological resources that are sustainable, in accordance with traditional and cultural practices.⁷²⁴

718. See ADDIS ABABA PRINCIPLES AND GUIDELINES, *supra* note 299.

719. *Id.* ¶ 8(b).

720. *Id.* ¶ 8(c).

721. *Id.* ¶¶ 1, 8.

722. *Id.* Practical Principle 3.

723. *Id.* Practical Principles 12, 2.

724. See *id.* Practical Principle 4 (recognizing the importance of traditional knowledge to sustainable use generally).

On the other hand, there are a great many other considerations to be borne in mind. The tenth Practical Principle calls for the *intrinsic* and other non-economic values of biodiversity to be taken into account, which is scarcely surprising given the heavy emphasis on this point in the preamble to the CBD itself.⁷²⁵ This explicit recognition of the need to protect other life-forms for their own sake, as well as for anthropocentric reasons, inevitably generates other practical constraints on exploitation. Thus, the Operational Guidelines to the eleventh Practical Principle call for the promotion of *more efficient, ethical, and humane use* of the components of biological diversity, while those accompanying the twelfth Practical Principle suggest that one obvious way to bring utilization into a framework of sustainability is to promote alternative *non-consumptive uses*.⁷²⁶ In a similar vein, Agenda 21 called specifically for an expansion of recreational and tourist activities based around marine living resources, as a means of generating alternative sources of income.⁷²⁷ In addition, the third and thirteenth Addis Ababa Practical Principles call for the elimination of perverse incentives that might, for example, contribute to the incidence of illegal, unreported, or unregulated fishing, and of national subsidies that might mask the true costs of management. Accordingly, all costs generated by the requirements of management—monitoring, inspection, reporting, etc.—should be internalized, and harvest levels and quotas set by reference to information provided by the monitoring system, *not* the economic needs of the management system.⁷²⁸ Finally, the ninth Practical Principle recognizes the need for an *inter-disciplinary* approach to be adopted in relation to management, given that social, cultural, political, and economic factors are no less important to sustainable utilization than biological parameters.⁷²⁹ This point is also reflected in Agenda 21, which, recognizing a damaging limitation of focus which is often evident on the part of agencies currently engaged in the management process, also urged the expansion of multidisciplinary education, training, and research on marine living resources.⁷³⁰

Plainly, there is room for a considerable difference of opinion regarding the precise weight to be accorded to these various factors, and the ultimate balance to be struck between them, in any particular context. In the ordinary way, priorities for conservation and sustainable use are to be determined by national agencies, through the adoption and implemen-

725. *Id.* Practical Principle 10.

726. *Id.* Practical Principles 11–12.

727. *Agenda 21*, *supra* note 695, ¶ 17.80.

728. ADDIS ABABA PRINCIPLES AND GUIDELINES, *supra* note 299, Practical Principles 3, 13.

729. *Id.* Practical Principle 9.

730. *Agenda 21*, *supra* note 695, ¶ 17.93.

tation of their own biodiversity plans, programs and policies, although the fact that the conservation of biological diversity is declared to be a “common concern of mankind” means that even in that situation decisions cannot be regarded as completely beyond the bounds of international scrutiny. Compliance with international standards is essential, and it is clear that, in many cases, this will demand major changes of attitude and life-style.

There is no doubt that these points have already been taken on board by CBD parties in many cases. The case is particularly well made, for example, in the *Basic Environment Plan* formulated by the Japanese government shortly after its accession to the Biodiversity Convention. The *Basic Environment Plan* noted that

there is a growing consensus regarding the urgent need to change both our current lifestyles and the prevailing economic system to construct a sustainable future with minimal environmental loads, each member of society sharing a fair burden. These beliefs are expressed on a principle of environmental ethics for human beings living in a finite environment.⁷³¹

Furthermore, in order to achieve the CBD’s goal of sustainable development:

it is necessary for developed countries, including Japan, which have been imposing great burdens on the earth’s environment, to review their behavioral patterns In Japan, people are realizing that their materialistic attitudes are resulting in an environmental crisis and there is a popular movement demanding modifications. It is not easy to change the norms of socioeconomic systems or current lifestyles. It is, nonetheless, necessary.⁷³²

In particular,

The soundness of the ecosystem, in all of the various regions, must be restored and maintained through a wise use of the environment. Everyday life, business activities, and leisure activities, wherever they may be, must be an enriching experience for both nature and humankind. Thus, harmonious co-existence between nature and people will be attained.⁷³³

731. Kankyō kihon keikaku [Basic Environment Plan], Cabinet Decision of Dec. 16, 1994, pt. I, § II, available at <http://www.env.go.jp/en/policy/plan/basic/pt3c5.html>.

732. *Id.* pt. II, § I.

733. *Id.* pt. II, ch. II.

This emphasis on “harmonious co-existence between nature and people” also features prominently in the same government’s *National Biodiversity Strategy*, formulated in 2002, which calls for “a new way of interacting with nature whereby humans contribute to nature,” and looks forward to a time “in which all citizens can enjoy daily interaction with a wide variety of thriving life-forms.”⁷³⁴

It is, however, much easier to articulate such aspirations at a general philosophical level than to implement them in a practical sense, and it is here that scrupulous attention will have to be paid to the detailed standards and criteria that are being formulated at the international level. This point is clearly recognized in the successive formulations of strategy by the Japanese government noted above.⁷³⁵ Understandably, however, the degree of progress individual governments have actually achieved in this regard varies considerably. The Japanese government’s third national report to the CBD, for example, noted that it had not yet initiated a process for application of the Addis Ababa Guidelines, which were indeed still undergoing translation.⁷³⁶ Plainly, these standards will have much to offer with regard to the more detailed ramifications of the general principles of “harmonious co-existence,” “enriching experience,” and “daily interaction” noted above.

In the case of biological entities that inhabit or traverse areas beyond national jurisdiction, additional considerations inevitably come into play. Since whales inhabit the oceans, and undergo substantial migration journeys, it is evident that this is a case in which international cooperation and multinational decision-making will be required, as envisaged by the eighth Practical Principle.⁷³⁷ Decisions over their conservation, management, and protection have to be made in an appropriate forum, with suitable representation of interests, and the Operational Guidelines to the ninth Practical Principle accordingly call for the identification and participation of *all* stakeholders in the planning and execution of management activities,⁷³⁸ a task that was long ago performed by the

734. DEVELOPMENT OF THE NATIONAL BIODIVERSITY STRATEGY OF JAPAN (2002), <http://www.biodic.go.jp/cbd/outline/rev-unedited.pdf> (unedited tentative translation). This aspiration, encapsulated in the Goals of the Strategy, is specifically related to the national land areas of Japan, though there is no obvious reason why it should not in principle apply to maritime areas as well.

735. Kankyō kihonhō [Environment Basic Law], Law No. 91 of 1993, arts. 32–35, *available at* <http://www.env.go.jp/en/laws/policy/basic/index.html>; Kankyō kihon keikaku [Basic Environment Plan], Cabinet Decision of Dec. 16, 1994, ch. 5, *available at* <http://www.env.go.jp/en/policy/plan/basic/pt3c5.html>.

736. *See Third Written Report of Japan to the CBD*, pt. C, art. 10, box 77 (2002), *available at* <http://www.cbd.int/doc/world/jp/jp-nr-03-en.doc>.

737. *See ADDIS ABABA PRINCIPLES AND GUIDELINES*, *supra* note 299, Practical Principle 8.

738. *Id.* Practical Principle 9.

ICRW itself in recognizing the interest in this matter of all the nations of the world, and making IWC membership open to all.⁷³⁹ In this context, moreover, it is clear that, whatever justifications or excuses may be offered by individual States in respect of their tardiness or uncertainty in the implementation of internationally agreed standards, these are less obviously available to international organizations, given the inevitable opportunities within such fora for technical collaboration, the creation and empowerment of subordinate institutions, the exchange of information, and the development of best practice.

In view of the divergence of traditions and perspectives amongst IWC members, the wide range of matters to be considered and the general complexity of the issues involved, it is not to be expected that States will necessarily agree on the appropriate policy outcomes with regard to whaling, and there can certainly be no suggestion that bad faith is necessarily involved in any failure to achieve unanimity on specific measures. Obviously, opinions may legitimately differ regarding the precise weight to be attached, for example, to intrinsic as opposed to anthropocentric values; to related ethical questions concerning humane treatment; to social, political, and cultural, as opposed to purely biological, considerations; and to the extent to which particular activities are being subsidized or artificially sustained for undisclosed or unmeritorious reasons. Much more problematic, however, would be any peremptory attempt to foreclose debate entirely on any of the major issues outlined above, or to refuse even to consider factors which have been authoritatively identified as relevant. Such an approach would appear to be inherently incompatible with the universally recognized obligations to implement treaties, and to endeavor to negotiate solutions to associated environmental controversies, in good faith, in light of accepted norms and by means of established procedures.⁷⁴⁰ These duties would seem to entail recognition of the broad array of principles referred to above, at least on the part of those IWC Member States that are party to the CBD, and, indeed, of others insofar as those same principles find reflection in other treaties to which they are party or in customary international law generally.

739. A further reflection may be found in the provision for the participation in IWC meetings of non-governmental actors.

740. U.N. Dep't of Econ. & Soc. Aff. [DESA], *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, Braz., Princs. 26–27, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>. These duties are, of course, no more than specific manifestations of the principles and purposes embodied in the U.N. Charter.

b. Other Conservation Treaties

As noted in Part II, it is not only conservation treaties of global application which may have a bearing on the future of the whaling issue, since regional arrangements have also to be considered. Of these, the 1979 Berne Convention, covering Europe, was identified as having the greatest potential relevance.⁷⁴¹ Article 6 of the Berne Convention requires both the prohibition of all deliberate killing of species listed in Appendix II, which includes various cetacean species, and the adoption of measures to ensure their protection.⁷⁴² Plainly, these provisions may be understood to require the parties to exercise jurisdiction over their nationals even when they are operating beyond the limits of national territory, for example, on the high seas, but may in addition extend well beyond that.⁷⁴³ Since their duty is expressed in terms of taking "appropriate and necessary legislative and administrative measures to ensure the special protection" of all such species, it is strongly arguable that it requires them to cast their votes in any international fora in such a way as to achieve that goal.

Article 9 of the Berne Convention allows for the creation of exceptions to this regime of protection in defense of certain interests, but only where "the exception will not be detrimental to the survival of the population concerned" and "there is no other satisfactory solution."⁷⁴⁴ The interests in question include the protection of flora and fauna, the conduct of research, or, of reintroduction and repopulation programs, the prevention of serious damage to fisheries, etc., the protection of other overriding public interests, and the selective and judicious exploitation of small numbers of specimens. The use of such powers is subject to close scrutiny by the Berne Convention's Standing Committee, to which regular reports must be made. Even where Appendix II specimens may be taken pursuant to these powers, the use of certain methods and devices of an indiscriminate or otherwise objectionable nature is prohibited.⁷⁴⁵ In relation to mammals, these include aircraft, electrical devices capable of killing or stunning, (semi-)automatic weapons, or explosives, although by virtue of a specific exclusion, the last of these is rendered permissible in the context of whaling.⁷⁴⁶

741. See generally Peter G.G. Davies, *The Legality of Norwegian Commercial Whaling under the Whaling Convention and its Compatibility with EC Law*, 43 INT'L & COMP. L.Q. 270 (1994) (exploring the implications of E.U. membership in the context of the whaling convention).

742. Berne Convention, *supra* note 311, art. VI.

743. Lyster, *supra* note 273, at 147-48.

744. Berne Convention, *supra* note 311, art. IX.

745. *Id.* art. VIII.

746. *Id.* app. IV.

In addition to the deployment of exceptions, the Berne Convention permits the formulation of reservations relating to particular protected species, or proscribed devices in relation to particular species.⁷⁴⁷ These reservations must be notified to the depositary upon signature, ratification, or accession,⁷⁴⁸ or by way of objection when new species are added to the appendices.⁷⁴⁹ On the other hand, the Standing Committee of the Berne Convention has strongly urged the parties to reconsider the need for such exceptions, and some have been abandoned in consequence.⁷⁵⁰ Certain reservations have, however, been made and maintained by the principal European whaling nations, Iceland and Norway.⁷⁵¹ The Convention also permits the specification by States of the territories to which their acceptance applies,⁷⁵² and declarations have been made by some excluding its application to certain of their territories which may be of relevance in the present context.⁷⁵³

As the Berne Convention is increasingly seen as the regional mechanism for implementation of the CBD, and as it now boasts a very considerable number of parties,⁷⁵⁴ including several from beyond the European region,⁷⁵⁵ it can itself be regarded as a valuable source of guidance with regard to the application of contemporary conservation norms, not least because it is a relatively sophisticated legal instrument in terms of its elucidation and development through institutional activities and the ongoing practice of its parties. At the very least, it may offer instructive insights and examples of good practice with regard to issues that remain unresolved within the IWC. There is a clear recognition, for example, of the need to curtail or eliminate certain traditional practices of exploitation, however firmly entrenched, where this is necessary to advance the objectives of the Convention.⁷⁵⁶

In a similar way, although to a lesser extent, the 1940 Western Hemisphere Convention may have a part to play in this context. Its primary significance lies, perhaps, in the extent to which it has foreshadowed a

747. *Id.* arts. XVII(3), XXII.

748. *Id.* art. XXII.

749. *Id.* art. XVII(3).

750. *Id.* Recommendation 4.

751. Council of Europe, <http://conventions.coe.int/> (follow "Reservations and Declarations" hyperlink; then search for reservations by treaty or by State).

752. Berne Convention, *supra* note 311, art. XXI.

753. Denmark, for example, has excluded the application of the Convention to Greenland and the Faroe Islands. See Council of Europe, *supra* note 751.

754. There are currently forty-five, including the European Community, with one additional signatory. See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=104&CL=ENG> (last visited Feb. 11, 2008).

755. *Id.* (including Burkina Faso, Morocco, Senegal, and Tunisia).

756. See Berne Convention, *supra* note 311, Recommendation 5 (providing information on the hunting and trapping of birds).

number of the basic conservation principles which have subsequently been elaborated in, or pursuant to, the CBD. Prominent amongst these are the recognition of the wide range of philosophical motivations for conservation, including those of a non-utilitarian character, and of the resulting practical implications, seen in terms of regimes of strict protection for certain species.⁷⁵⁷ Given the non-participation of the United States in the CBD, its endorsement of such principles through participation in the WHC—and indeed its crucial role in the original formulation of that regime—helps to demonstrate that these represent norms of more or less universal application.

4. Norms Concerning Animal Welfare and the Avoidance of Cruelty

The question concerning the protection and welfare of animals under international law, though one that is frequently mentioned in passing (not uncommonly in dismissive terms), has seldom been the subject of detailed and informed analysis and is, as a result, poorly understood by the international community generally. It is, in fact, too complex a topic to form the subject of full consideration here, and the intention is therefore to accord it separate treatment at a later stage. Suffice it to say for present purposes that the necessity for humane treatment of wildlife specimens is a natural corollary of the recognition, in the CBD and elsewhere, of the intrinsic value of other life-forms,⁷⁵⁸ is specifically mandated in the Addis Ababa Guidelines designed to give effect to the duties of sustainable utilization created by that treaty and has been widely recognized not only in diverse cultural traditions around the world,⁷⁵⁹ but in countless instances of contemporary national legislation

757. For a discussion of these issues, see *supra* Part III.

758. See World Charter for Nature, pmbl., art. I, G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Nov. 9, 1982); see also THE WORLD CONSERVATION UNION ET AL., RESPECT AND CARE FOR THE COMMUNITY OF LIFE 13–17 (rev. ed. 1991) (laying out foundational principles); Michael Bowman, *Biodiversity, Intrinsic Value, and the Definition and Valuation of Environmental Harm*, in ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW 41 (Michael Bowman & Alan Boyle eds., 2002) (offering further analysis); Michael Bowman, *The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law*, in INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY, *supra* note 288, at 5 (providing further analysis).

759. RICHARD D. RYDER, ANIMAL REVOLUTION: CHANGING ATTITUDES TOWARD SPECIESISM 15–54 (2000); Arthur Hertzberg, *Jewish Declaration on Religion and Nature*, 17 ENVTL. POL'Y & L. 89 (1987); Abdullah O. Nasif, *The Muslim Declaration on Nature*, 17 ENVTL. POL'Y & L. 1 (1987); Lungrig N. Rinpoche, *Buddhist Declaration on Religion and Nature*, 17 ENVTL. POL'Y & L. 87 (1987); Lanfranco Serrini, *Christian Declaration on Religion and Nature*, 17 ENVTL. POL'Y & L. 88 (1987); Karan Singh, *Hindu Declaration on Religion and Nature*, 17 ENVTL. POL'Y & L. 89 (1987); see ENCYCLOPEDIA OF ANIMAL WELFARE AND ANIMAL RIGHTS 196–203, 251–55, 283–300 (Marc Bekoff & Carlton A. Meaney eds., 1998).

and in numerous formal instruments adopted at the international level.⁷⁶⁰ Accordingly, it is unquestionably legitimate, and arguably compulsory, to afford it due consideration in the development of policy regarding the exploitation of wild fauna of all descriptions.

The various categories of legal norms identified above accordingly represent the principal external influences in accordance with which the future development of the ICRW must be planned and crafted. Attention must now turn to the mechanisms available within the ICRW for the fulfillment of this task.

C. Mechanisms for Normative Evolution Within the ICRW Itself

As noted in Part II, there are a number of mechanisms that may be available within the confines of individual treaties to facilitate their progressive adaptation to change, and particularly changes mandated by the evolving dictates of the broader legal system. The ICRW is clearly no exception in that regard.

1. Evolutionary Interpretation of Open-Textured Terms

Most notably, the law of treaties, as explained and applied by the ICJ in a series of high-profile cases, permits, and indeed commonly requires, that the interpretation of "generic" or open-textured expressions in treaty texts be undertaken in a flexible and evolutionary fashion. This is based, moreover, on the presumed intentions of the parties themselves, and is designed to ensure that the continuous pursuit of the object and purpose of the treaty can be maintained over the course of time and in light of ever-changing practical realities, social attitudes, and normative demands of the wider legal system. The need for such an approach is, furthermore, perceived to be especially strong in the case of treaties that establish international organizations, the ongoing functional responsibilities of which would render any alternative approach rapidly self-defeating. In the case of the ICRW, there are a number of specific expressions included in the text that positively clamor to be given an evolutionary interpretation if the object and purpose of the ICRW is not to be defeated.

760. See generally THE WTO AND CONCERNS REGARDING ANIMALS AND NATURE (Anton Vedder ed., 2003); Bowman, *supra* note 484; Michael Bowman, *Conflict or Compatibility? The Trade, Conservation and Animal Welfare Dimensions of CITES*, 1 J. INT'L WILDLIFE L. & POL'Y 9 (1998); Alexander Gillespie, *Humane Killing: A Recognition of Universal Common Sense in International Law*, 6 J. INT'L WILDLIFE L. & POL'Y 1 (2003); Stuart R. Harrop, *The Dynamics of Wild Animal Welfare Law*, 9 J. ENVTL. L. 287 (1997).

a. The Preamble and the Object and Purpose of the ICRW

The most obvious of these expressions open to evolutionary interpretation occurs in the very first recital of the preamble, namely the phrase "the great natural *resources* represented by the whale stocks."⁷⁶¹ In everyday parlance, the term "resource," more usually expressed in the plural, is intended to refer to anything that represents a means of support, or of supplying a need or want,⁷⁶² and has no doubt always been understood in this sense. Thus, when the Biodiversity Convention defined "biological resources" to include "genetic resources, organisms, or parts thereof, populations or any other biotic components of ecosystems *with actual or potential use or value for humanity*,"⁷⁶³ it did no more than reiterate this traditional conception of "resources," albeit in a deliberately expansive manner. The crucial point at issue here is that the needs and wants of humanity, despite remaining largely unchanging at the most fundamental level, are unquestionably subject to continuous fluctuation in a more superficial sense, just as the capacity of items found in our environment to satisfy those evolving needs or wants will also vary, depending in part on the comparative potential in that regard of other materials that have been discovered or invented. Indeed, a key aspect of the contemporary justification for conservation lies in the fact that one cannot know at any given moment which uses or values particular biotic entities may turn out to possess or exhibit, and that a precautionary approach to their conservation should therefore be adopted in order to preserve and maximize all possible manifestations of utility.⁷⁶⁴

This sense of continuously reconceptualized utility is only too apparent in the case of whales, the resource potential of which has plainly varied greatly over time and place. For example, whalebone once constituted an invaluable commodity until the greater virtues of plastics and sprung steel became apparent and available for exploitation. In the same way, the other uses to which whales and whale products have traditionally been put have also shown considerable variation, and any viable approach to interpretation of the ICRW must necessarily take account of that fact. Let us suppose, purely for the sake of hypothesis, that all the original IWC Member States had valued whales exclusively for their oil-production capacity: it would plainly not have been legitimate to conclude on that account alone that the exploitation of whales for their *meat*

761. ICRW, *supra* note 1, pmb1.

762. *See, e.g.*, CONCISE OXFORD DICTIONARY 1219 (Judy Pearsall ed., 10th ed. 2002); CHAMBERS' ENGLISH DICTIONARY 1251 (Sidney I. Landau et. al eds., 7th ed. 1990).

763. CBD, *supra* note 120, art. 2 (emphasis added).

764. *See* INT'L UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES, WORLD CONSERVATION STRATEGY: LIVING RESOURCE CONSERVATION FOR SUSTAINABLE DEVELOPMENT § 3 (1980).

somehow undermined the ICRW, or fell outside its scope, simply because it had not been specifically envisaged as falling within its object and purpose by the original negotiators.⁷⁶⁵

Such considerations only serve to confirm the fact that the term "resources" represents a paradigmatic example of the kind of generic, open-textured expression that the ICJ had in mind when laying down the requirement of flexible and evolutionary interpretation,⁷⁶⁶ since it would plainly be counter-productive—indeed potentially absurd—to restrict the understanding of the concept of "resources" for the purposes of a long-running international agreement to uses that were no longer valued, relevant, or possible, while at the same time excluding from its purview forms of utility that were of the utmost contemporary significance. The point is reinforced still further by the preamble of the ICRW, which makes clear that its aim is to safeguard these resources "for future generations."⁷⁶⁷ With that particular objective in mind, what possible motivation could there have been in 1946 for excluding from the scope of prospective IWC regulation the forms of exploitation in which those generations themselves might actually wish to engage, and shackling them in perpetuity to those which, in light of evolving needs, aspirations, and social attitudes, they might find impractical, obsolete, or distasteful?

Consequently, the precise sense in which cetaceans represent "resources" must be subject to continuous review. When seeking to identify and categorize the possible uses or values applicable to any particular biological entity, moreover, no great feat of imagination or ingenuity is required, since the Biodiversity Convention has conveniently catalogued them for us, at least in general terms. A historical review of relevant treaty provisions confirms that, over the course of the last 125 years or so—the period during which the conservation and management of wildlife have fallen within the scope of international regulation—these values have progressively expanded from those reflected in a narrowly materialistic and exploitative view of nature to those embraced by a more sophisticated and eclectic perspective.⁷⁶⁸ They are now seen to include, as

765. In reality, this scenario is unlikely to have pertained, although it is certainly true that whale oil was by far the most important product as far as most of the parties were concerned, as evidenced by the adoption of the "blue whale unit" as the foundation of the regulatory approach adopted.

766. This was specifically confirmed in relation to the term "natural resources" by the WTO Appellate Body. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 46–50, WT/DS58/AB/R (Nov. 6, 1998).

767. ICRW, *supra* note 1, pmb1.

768. See *supra* notes 730–736 (providing recognition of this point in Japanese policy documents); see also BOWMAN, *supra* note 288, at 9–10 (offering a more detailed analysis of these developments); Gillespie, *supra* note 760, at 127–36; see, e.g., Michael Bowman, *Biodiversity, Intrinsic Value and the Definition and Valuation of Environmental Harm*, in ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW, *supra* note 758, at 41

the first preambular recital of the CBD makes clear, “ecological, genetic, social, economic, scientific, educational, cultural, recreational, and aesthetic values.”⁷⁶⁹ It goes without saying that individual life forms will encapsulate these values in varying combinations and to different extents. In the case of whales, it seems clear that they exhibit virtually all of these values simultaneously and to a high degree, and that, in the modern context, the clearest possible recognition of this diversity of values is evident through the activity of whale-watching.⁷⁷⁰ The *aesthetic* impact of whales is manifest initially in their undisputed physical magnificence as the largest creatures that have ever inhabited the earth, and extends to the fascination generated by their extraordinary behavioral repertoire and remarkable adaptation over time to the demands of the marine environment. The ability to experience these phenomena firsthand represents a source of unrivaled *recreational* and *educational* opportunity, while the knowledge that whales have (hopefully) been rescued by the international community from the brink of annihilation following decades of unrestrained exploitation makes them *cultural* icons of enormous significance. All of these factors have contributed to the growth of a billion-dollar industry world-wide from which dozens of countries now benefit *economically*, and consequently *socially*. In addition, their critical role in the marine food-web and aquatic behavioral theatre unequivocally re-emphasizes their vital importance in an *ecological* and *scientific* sense, which in turn serves to enhance still further their appeal for the whale-watching public. Consequently, any attempt to restrict the sense in which they are currently treated as “resources” for the international community to the narrow perceptions explicit in a regulatory agreement concluded in the immediate aftermath of a global conflict from which that community has long ago moved on would appear to be not only misguided in a practical sense, but contrary to established legal principle.

This point is strongly reinforced by the fact that even whale-watching, if pursued in a thoughtless or insensitive fashion, is capable of inflicting significant damage on whales through the pollution of their environment or the disruption of their breeding activities, migration pat-

(providing an indication of the impact of these provisions on the evolution of other areas of international law); ILC, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, U.N. Doc. A/61/10 (2006), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_10_2006.pdf.

769. CBD, *supra* note 120, pmbl.

770. See IWC, *Whale-Watching: Recognition and Development of Whalewatching Issues within the IWC*, <http://iwc.office.org/conservation/whalewatching.htm> (last visited Aug. 29, 2008) (offering an introduction to whale-watching).

terms; or other aspects of their behavioral repertoire.⁷⁷¹ In view of this potential threat to the "proper conservation of whale stocks,"⁷⁷² there seems to be a strong case for bringing whale-watching within the scope of mandatory regulation as soon as possible, and it is difficult to resist the claims of the ICRW to be regarded as the most appropriate vehicle for this task, given its substantial international membership, its long-established involvement in the area of cetacean management, and its formal recognition in numerous other legal instruments in the conservation field. The critical question is whether the ICRW has the inherent capacity to take on this task in its current form, or whether this role necessarily falls outside its remit as currently drafted. In the latter case, a further question would arise regarding the prospects, both legal and political, of amendment of the treaty in order to address these aspects.

Naturally enough, the extent to which the ICRW inherently embodies the adaptability required in order to address the needs and challenges of the twenty-first century largely depends on the evolutionary, trans-temporal dimension of other terms and expressions in the text. As it happens—and contrary, perhaps, to initial expectations—the ICRW's potential in that regard appears to be quite considerable. This potential begins with the very title to the ICRW, and, in particular, the concept of "whaling"—the activity which it seeks to regulate. There is no doubt whatsoever that this term would have been understood by those who drafted the ICRW to refer to the removal of whales from the marine environment for the purposes of human consumption, and thereby to represent a direct parallel to the notion of "fishing," a term that has long been applied to the harvesting of piscine species. Yet this acknowledgement conceals the fact that there is no conclusive etymological or semantic reason why the word "whaling" should have to be restricted to the particular type of exploitation that was most familiar in 1946, and should not be applied instead to *any* form of tracking and pursuit of the larger cetacean species.⁷⁷³ Indeed, given the evident potential of unregulated whale-watching to frustrate the ICRW's objectives of providing for the proper conservation of whales, achieving the optimum level of stocks and safeguarding the resources they represent for the benefit of future

771. See RANDALL R. REEVES ET AL., IUCN/SPECIES SURVIVAL COMMISSION CETACEAN SPECIALIST GROUP, DOLPHINS, WHALES AND PORPOISES: 2002–2010 CONSERVATION ACTION PLAN FOR THE WORLD'S CETACEANS 17–18 (2003), available at <http://www.iucn.org/dbtw-wpd/edocs/2003-009.pdf> [hereinafter 2002–2010 Cetacean Action Plan] (providing an overview of the potentially harmful effects of whale-watching).

772. ICRW, *supra* note 1, pmb1. (seventh recital).

773. In the English language, indeed, verbs formed from the names of animals are routinely employed to indicate a huge variety of actions or activities characteristically done either *by* or *to* the animals in question. Consider, for example, the diverse and divergent connotations of the verbs "to dog," "to rat," "to worm," "to gull," "to fish," "to badger," and "to squirrel."

generations, there would seem to be every reason to adopt an extended, evolutionary, and purposive interpretation of the concept of “whaling” so as to embrace this recreational form of exploitation as well.⁷⁷⁴

As a matter of semantics, there is nothing very surprising or unusual in such a transition, as it is one which has already been undergone by other similar words, such as “birding.”⁷⁷⁵ The original sense in which this word was used, as evidenced by dictionaries first published in the late nineteenth or early twentieth centuries, was to signify “the hunting, shooting, snaring or catching of birds,”⁷⁷⁶ or the robbing of their nests,⁷⁷⁷ but with the progressive legal restriction of such activities over the course of time, the word has come to be more commonly employed to denote the perennially legitimate, *observational* pursuit of birds. Indeed, one current online dictionary offers “watch and study birds in their natural habitat” as its *only* definition of the verb “to bird.”⁷⁷⁸ In the case of “whaling,” it is unnecessary to take matters so far as to exclude the original connotation of the word entirely. Rather, the term can quite legitimately be understood, in full accordance with established principles of evolutionary treaty interpretation, to refer to any activity involving the pursuit and exploitation of whales, whether for consumptive or non-consumptive purposes, or reasons of an alimentary, educational, or recreational nature, with the further consequence that references to “whaling operations” and the “whaling industry” should be understood respectively to embrace all those activities and commercial entities which are associated with any such form of exploitation.⁷⁷⁹ This interpre-

774. Shio Segi makes this very point, albeit obliquely and no doubt inadvertently, stating, “Operators don’t base their whale-watching business around Taiji and its neighboring areas on their love of cetaceans. For these whale-watching companies, *whale watching is nothing but a kind of fishery* and a more economically productive business than dolphin hunting.” Segi, *supra* note 685, at 25 (emphasis added).

775. It is gratifying to note that this same point has also occurred to others, and as long as twenty-five years ago. See Global Conference on the Non-Consumptive Utilization of Cetacean Resources, Boston, Mass., June 7–11, 1983, *Whales Alive: Report of Global Conference on the Non-Consumptive Utilization of Cetacean Resources*, reprinted in BIRNIE, *supra* note 386, at 1012–16.

776. CHAMBERS ENGLISH DICTIONARY (first published 1872, definition retained through 7th ed. 1988).

777. CONCISE OXFORD ENGLISH DICTIONARY (first published 1911, definition retained through 5th ed. 1964).

778. WordWeb Online, <http://www.wordwebonline.com/search.pl?w=bird> (last visited Feb. 5, 2008).

779. This possible interpretation already has been proposed by many commentators, and is evident as far back as Birnie’s work. See, e.g., BIRNIE, *supra* note 386, at 57–58. The author would like to record his appreciation to Edward Bates, a former post-graduate student at the University of Nottingham, for first drawing it to his attention in a seminar some years ago. At the time, the author’s response, to his discredit, was to doubt whether the Vienna Convention on the Law of Treaties permitted such an interpretation. However, prolonged subsequent re-

tation is, indeed, further facilitated by the fact that the process that is identified in the preamble as having precipitated the decline in whale populations in the first place is not actually whaling as such but rather (*over-*)fishing,⁷⁸⁰ and that it was this activity specifically from which all whales were in the future to be protected.⁷⁸¹ This represents almost an open invitation to bring other—*i.e.*, non-lethal and non-consumptive—forms of "whaling" within the scope of IWC regulation, thereby creating an opportunity for steering exploitation away from forms that have proved unacceptably destructive in the past, should the parties decide that to be necessary.

Some IWC insiders are evidently of the view that this proposed transformation of the meaning of the concept of "whaling" and associated terms has already occurred,⁷⁸² arguing that the Commission has for some time asserted its jurisdiction and responsibility over non-lethal exploitation through the adoption of resolutions on the topic and the establishment of a whale-watching study group.⁷⁸³ As a matter of strict law, however, this conclusion seems premature, as the ICRW accords various powers to the Commission with regard to "whales and whaling,"⁷⁸⁴ and the developments referred to are readily explicable by reference to their bearing on the former ("whales") without the need to treat them as expanding the scope of the latter ("whaling"). The developments in question were in any event vigorously opposed by those members committed to the resumption of commercial whaling,⁷⁸⁵ diluting their claim to be regarded as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."⁷⁸⁶ Nevertheless, they certainly represent a significant practical shift in the focus of the IWC, and can justly be seen as an important preliminary step toward what would be an unambiguous

flection has led the author to conclude that, to the contrary, the Convention positively requires such an interpretation. The same conclusion is encountered in the modern literature.

780. ICRW, *supra* note 1, pmb1. As far as the author is aware, this expression is still only used to connote extractive harvesting activities (or the metaphorical equivalent).

781. *Id.*

782. In this vein, José Truda Palazzo, Jr., a member of the Brazilian delegation to many IWC meetings, has suggested that "[d]espite the steady stream of acrimonious statements by IWC parties who wish to harvest whales, it is quite clear that the IWC as a management body has imbued the term 'whaling' with contemporaneous meaning and has taken responsibility for ensuring that all uses of whales are sustainable." Palazzo, *supra* note 95, at 69, 78.

783. *Id.* at 71.

784. See *infra* Part IV.B.3.a.ii (offering a brief discussion of these powers).

785. Palazzo conceded this point. Palazzo, *supra* note 95, at 70 (citing, in particular, a paper submitted to the forty-eighth meeting of the International Whaling Commission by the government of Japan, Robert L. Friedheim, *The Executive Summary of the International Legal Workshop*, IWC/48/27 (1996), available at http://luna.pos.to/whale/icr_legal_sum.html).

786. Vienna Convention on the Law of Treaties, *supra* note 21, art. 31(3)(b).

indicator of a revolutionary change, namely the bringing of whale-watching within the scope of formal regulation under the terms of the Schedule.

Although such a revolution might seem thusfar to be eminently desirable, it would no doubt still be unwise to adopt these more progressive interpretations of terms like “resources” and “whaling” if such an adoption would undermine the overall coherence of the preamble or diminish the prospects of achievement of the object and purpose of the treaty as there expressed. Precisely such concerns were in fact articulated some years ago by Professor W.T. Burke in *Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary*, in which he suggested that

[t]he difficulty with these and similar interpretations is that they turn the terms of the ICRW completely upside down and defeat the major purpose of the original agreement. Where the fundamental goal of the initial treaty was to conserve whales in order to permit a sustainable harvest, the purpose would now be to protect whales against any harvest. Optimum utilization, reasonably understood by the parties to mean actual harvest at a conservative level, would now mean no harvest ever.⁷⁸⁷

It may be doubted, however, whether this attempted reaffirmation of the traditional fisheries perspective faithfully reflects the stated object and purpose of the ICRW. There is, in reality, no clause in the preamble that specifically declares the “harvesting,” or even the “sustainable harvesting,” of whales to number amongst the *objectives* of the agreement. Rather, the objective was to afford whales some degree of protection *against* the harvesting that it was *taken for granted* would occur, there being no other form of utilization that was likely to have been in the contemplation of the negotiators at the time. Had it ever been suggested to the parties that alternative, recreational forms of exploitation, potentially more beneficial to humans and significantly less threatening to the maintenance of cetacean population levels, might at some point emerge, it is entirely possible (allowing even for their immediate concerns about postwar food shortages), that they would have acquiesced in their incorporation within the scope of optimum utilization. Far from turning the ICRW on its head, therefore, an evolutionary approach to interpretation would actually set it on its feet, significantly enhancing its fitness to undergo the long march from its 1946 origins into an unpredictable future, and its capacity to serve a continuously useful purpose through every stage of this journey.

787. Burke, *supra* note 532, at 323.

The one clause that might at first glance seem to sit uneasily with this argument, and thereby lend support to Burke's skepticism, is the assertion in the third preambular recital that "increases in the size of whale stocks *will permit increases in the numbers of whales which may be captured*,"⁷⁸⁸ since this clause might conceivably be read as restricting the scope and intendment of the ICRW to traditional, fishing-style activities exclusively. On closer examination, however, it is clear that there is little force in that argument, for a number of reasons. First, as noted already in Part III, even in this clause, the phraseology used actually avoids characterizing the capture of an increased number of specimens as an objective in the strict sense, still less as *the sole or principal* aim of international regulation; rather, it is presented in the guise of an *opportunity* generated by the ultimate achievement of what are actually declared to be the objectives, namely the protection of whales from overharvesting so as to achieve an optimum level of stocks. No doubt this was an opportunity that featured prominently in the motivations of many of the negotiating States at the time, but that does not itself render it part of the object and purpose *of the treaty* as such.

Secondly, and in any event, the fact that the harvesting of whales was the particular form of exploitation originally envisaged by the treaty in no way warrants the conclusion that it is the *only* one that can *now* be construed to fall within its scope. Indeed, the very point of the evolutionary approach to interpretation of generic terms is to allow the extension of their ambit to embrace content that may have been unforeseen at the time of the treaty's adoption.

Thirdly, the incorporation of non-lethal methods of exploitation does not itself lead to the automatic exclusion of this longer-established form of utilization. It would be extremely difficult to argue, for example, that all traditional harvesting activities now actually fall outside the scope of the ICRW or are inherently incompatible with its object and purpose.⁷⁸⁹ Rather, it would be for the parties themselves, through the decision-making processes that the ICRW establishes, to decide the precise balance to be struck between the different forms of exploitation at any given time.

Finally, it is not to be overlooked that the third recital is itself capable of evolutionary interpretation, so that the word "captured" might be construed to incorporate a figurative, as well as literal dimension. It is common enough, after all, to speak of wildlife specimens as "captured"

788. ICRW, *supra* note 1, pmb1.

789. Though naturally there may well be disagreement as to the extent, if any, to which it should currently be permitted.

on film or in the memory,⁷⁹⁰ and that is no doubt precisely the objective of many participants of whale-watching expeditions. It may, indeed, be arguable that the notion of “capture” has *always* been given an extended meaning for the purposes of the ICRW.⁷⁹¹ In light of these considerations, the very most that could reasonably be claimed is that the proposed reinterpretation of the concept of “whaling” produces a trace of mild incongruity with the third recital—there is certainly no element of outright incompatibility or contradiction. The better view is that there is no incongruity at all.

In all other respects, moreover, the formal absorption of whale-watching within the agreed remit of the IWC greatly increases the coherence of the preamble and the prospects of successful attainment of its objectives. The explanation of this conclusion lies in the fact that there are a number of other key terms that also require flexible and progressive interpretation if they are to accommodate contemporary needs, aspirations, and external legal norms, and that in each case the potential of the ICRW will be enhanced by a more inclusive approach toward the notion of whaling. Perhaps the most important of these is “conservation,” the current ramifications of which have been explained in earlier sections of this Part.⁷⁹²

In point of fact, practice under the ICRW has throughout its history been to accord an evolutionary meaning to the concept of “conservation,” at least in terms of the means and mechanisms needed to render it a practical reality. Thus, the IWC has conceived it successively by reference to the “blue whale unit” approach, to species-by-species and stock-by-stock assessments, and then by reference to the New, and ultimately the Revised Management Procedure (RMP).⁷⁹³ The RMP has, of course, necessarily to be understood and applied within the context of a wider Management Scheme, but even that may conceivably fall short of the more integrative, holistic, and multi-disciplinary approaches required under modern conservation thinking, as reflected in the Biodiversity Convention and other contemporary instruments. Thus, the preamble to the CBD makes clear that conservation theory is currently grounded not merely in anthropocentric, utilitarian concerns, but in a moral recogni-

790. Thus, one definition of the word “capture” is “to succeed in representing (something . . . elusive) in a fixed or permanent form.” CHAMBERS ENGLISH DICTIONARY, *supra* note 419, at 253.

791. For an exploration of this point, which turns on the ICRW’s own definition of the concept of a “whale catcher” in Article II(3), see *infra* Part IV.C.1.b.

792. See *supra* IV.B.2–3.a.

793. For information regarding the Revised Management Procedure (RMP), see IWC, Revised Management Procedure, <http://www.iwcoffice.org/conservation/rmp.htm> (last visited Aug. 29, 2008).

tion of the intrinsic value of all living things.⁷⁹⁴ The Addis Ababa Guidelines confirm that this is a matter to be taken seriously, and one that finds formal reflection, *inter alia*, in the requirement that consideration be given to non-consumptive and non-lethal uses, as well as in the need for the application of humane standards in exploitation.⁷⁹⁵ The potential contribution of whale-watching in all of these respects is too obvious to require explanation, and serves again to underline the extent to which its exclusion from the formal purview of the ICRW has contributed to the treaty's growing dysfunctionality.

Of particular importance in that context is the fact that the ICRW calls not merely for "conservation," or even "effective conservation," but for "*proper* and effective conservation,"⁷⁹⁶ and it is clear that the concept of "propriety" is one that is not to be under-valued or ignored in this process. It is, furthermore, plainly another element of the ICRW formula that, in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, has constantly to be revisited and reconceptualized so as to keep abreast of modern thinking, insofar as the substantive provisions of the ICRW plausibly allow for that possibility.⁷⁹⁷ In light of the many values of whales identified in the discussion above, there can be little doubt that the treatment of whale-watching as a variety of whaling for the purposes of the ICRW would be likely to assist greatly in ensuring due recognition of all relevant factors and full compliance with contemporary conservation norms.

Finally, these same considerations provide support for the contention that the "*orderly* development of the whaling industry"⁷⁹⁸ might very well lie in a movement away from the traditional, extractive/consumptive exploitation of whales—*i.e.*, "fishing"—and toward other forms of whaling activity in the wider sense. This impression is strongly reinforced by the fact that the degree of opposition to lethal whaling is so strong in certain quarters as to have given rise to attempts to physically prevent it, thereby prejudicing the good order of maritime navigation, as IWC Resolutions 2006-2 and 2007-2 have recently confirmed.⁷⁹⁹ "Orderly" development can therefore best be achieved through activities that do not arouse such intense antipathy, but that can at the same time avoid any risk of precipitating "widespread economic or nutritional distress," as the preamble

794. CBD, *supra* note 120, pmb1.

795. ADDIS ABABA PRINCIPLES AND GUIDELINES, *supra* note 299, Practical Principles 6, 10, 11.

796. ICRW, *supra* note 1, pmb1. (sixth recital). "Proper conservation" also appears, of course, in the final recital. *Id.* pmb1. (seventh recital).

797. Vienna Convention on the Law of Treaties, *supra* note 21, art. 31(3)(c).

798. ICRW, *supra* note 1, pmb1.

799. See IWC Res. 2006-2, *supra* note 660; IWC Res. 2007-2, *supra* note 660.

demands.⁸⁰⁰ Indeed, the financial—and hence social and nutritional—benefits that flow, directly or indirectly, from whale-watching have the potential to totally eclipse the returns obtainable from more traditional forms of exploitation.

Furthermore, the relevance of whale-watching to the overall object and purpose of the ICRW is far more obvious than is that of the practice of “culling” whales, which the normalization documents appear to assume without argument to fall within its scope.⁸⁰¹ For, although culling entails the physical removal of whales from the marine environment—an activity clearly envisaged in a general sense within the overall scheme of the ICRW—it has little or nothing to do with the original objectives of the ICRW itself, being designed essentially to protect *fish* stocks, rather than *whale* stocks. Thus, it could be argued that any quota allowed for the purposes of culling should logically be determined on a quite different scientific basis from that appropriate for ordinary harvesting.⁸⁰² An attempt was, no doubt, at one time made to establish a causal link between the ICRW objective of protecting all whale species and the activity of culling those that might be regarded as over-abundant by claiming that the proliferation of minke whales was a causal factor in the failure of population recovery in larger *cetacean* species. This argument appears effectively to have been torpedoed, however, by the revelation of the massive undisclosed exploitation of these species by the Soviet fleet, referred to in Part III, which provided a vastly more convincing explanation.⁸⁰³

Nevertheless, it is at least arguable that a progressive and evolutionary approach to the interpretation of expressions like the “*proper* conservation of whale stocks” and the “*orderly* development of the whaling industry” would, from a modern, holistic, and “ecosystem-based” perspective, positively favor consideration of the impact of whale populations on conservation programs relating to other marine species.⁸⁰⁴ Consequently, it might be advantageous to treat culling as one particular manifestation of the activity of “whaling.” On the other hand, it should obviously not actually be authorized until such time as a sufficiently cogent and coherent case could be advanced to persuade the requisite majority of the parties that it was necessary to modify the Schedule to

800. See ICRW, *supra* note 1, pmbl.

801. See IWC Res. 2006-1, *supra* note 2, pmbl. (seventh recital).

802. That is, the quota for any species would be determined not by reference to its impact on population levels of that species itself, but rather by—or in addition to—its impact on population levels of the fish species on which it preys.

803. See Debora MacKenzie, *Whalers Change Tack on Southern Sanctuary*, NEW SCIENTIST, Mar. 5, 1994, at 4.

804. In fact, the IUCN has described the “concept of multi-species or ecosystem management” as “intuitively appealing.” 2002–2010 Cetacean Action Plan, *supra* note 771, at 16.

allow for it, and that all the essential attendant safeguards had been established.⁸⁰⁵ If, however, a plausible claim can be advanced for treating the culling of whales as a form of whaling for the purposes of the ICRW, the case for the recognition of whale-watching—which, though less similar in practical terms to the activities that have been the traditional focus of regulation under the ICRW, is in fact far more directly relevant to the achievement of its objectives—begins to appear almost irresistible.

Yet, notwithstanding the force of all these considerations, it probably still would be inappropriate to rely on a progressive and evolutionary interpretation of the preamble as a means of normalizing the ICRW and bringing it into line with contemporary conservation aspirations and standards, unless assurance could be obtained that the *substantive provisions* of the ICRW were equally capable of application in this revised and revitalized sense. It is to this last question that we should now turn.

b. The Substantive Provisions of the Convention

As it happens, the ICRW also defies expectation in terms of the malleability and adaptability of its substantive provisions to present circumstances. In particular, many of its provisions, whether relating to the conferral of powers on the Commission or the imposition of duties on its Member States, are expressed in very generalized terms, readily capable of flexible application to new forms of whaling activity. Under Article IV(1), for example, the Commission is authorized to

- (a) encourage, recommend, or if necessary, organize studies and investigations relating to whales and whaling;
- (b) collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon;
- (c) study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.⁸⁰⁶

By virtue of Article IV(2) of the ICRW, the IWC may publish "such reports as it deems appropriate, as well as statistical, scientific, and other pertinent information relating to whales and whaling," and under Article VI it is empowered to "make recommendations to all or any Contracting Governments which relate to whales and whaling and to the objectives and purposes of this Convention."⁸⁰⁷ Under Article III(4), it may establish

805. See *supra* Part IV.B.1.c; see *infra* Part IV.C.1.b (offering a more in-depth discussion).

806. ICRW, *supra* note 1, art. IV.

807. *Id.* arts. IV(2), VI.

“such committees as it considers desirable to perform such functions as it may authorize.”⁸⁰⁸ There is nothing in the drafting of these provisions, when read in light of an updated conception of the ICRW’s overall object and purpose, that would prevent the deployment of such powers in relation to forms of whaling that the original negotiating States did not specifically envisage. Indeed, they have, it would seem, already been extensively used in that way.⁸⁰⁹ In a similar fashion, the various duties of the parties themselves to collect and submit statistical and scientific information in order to ensure the application of the ICRW and the punishment of infractions⁸¹⁰ could equally readily be applied on this broader front.

Yet these are, in a sense, relatively ancillary matters within the overall scheme of the ICRW, and all aspirations to normalize, or “modernize,” the application of the Convention must first be scrutinized in light of its preliminary provisions, which are designed specifically to determine its functional ambit. Indeed, Article I(2) might seem to provide a potentially formidable constraint in this regard. Article I(2) states,

This Convention applies to factory ships, land stations and whale catchers under the jurisdiction of the Contracting Governments, and to all waters in which whaling is prosecuted by such factory ships, land stations and whale catchers.⁸¹¹

The fact that land stations and factory ships are both defined⁸¹² as places where “whales are treated wholly or in part” clearly presupposes (without placing any limitations on the precise purposes for which they are being treated) the actual physical appropriation of the whales in question, while this might also seem to be implicit in the notion of a “whale catcher.” From this perspective, forms of exploitation of cetaceans that do not involve their physical removal from the water might seem at first sight to fall outside the substantive purview of the Convention.

Such a conclusion would, however, ultimately be unwarranted in light of Article II(3), which defines a “whale catcher” very broadly as “a ship used for the purpose of hunting, taking, towing, holding on to, or scouting for whales.”⁸¹³ While opinions may differ as to the precise

808. *Id.* art. III(4).

809. Consider, for example, the ICRW’s use in connection with the conservation of small cetaceans.

810. *See* ICRW, *supra* note 1, arts. VII, VIII(3)–(4), IX.

811. *Id.* art. I(2).

812. *See id.* art. II(1)–(2).

813. *Id.* art. II(3). The 1956 Protocol extended the scope of this provision to include helicopters and other aircraft as well. 1956 Protocol, *supra* note 193, art. I.

degree of flexibility implicit in the term "hunting" in this context,⁸¹⁴ it is surely beyond dispute that no element of physical appropriation is implicit in the activity of "scouting for" whales, and that this term is, without any need for strained or artificial construction, readily applicable to contemporary whale-watching operations. Undeniably, in the circumstances of 1946, there would have been little profit or purpose in scouting for whales were it not with a view to their subsequent harvesting, but in the changed environment of the twenty-first century, whales are obviously sought out on a regular basis for a variety of reasons, many of which respond essentially to educational or recreational motivations. Accordingly, there is nothing in Articles I or II that precludes the adoption of an expanded and modernized reading of the notion of "whaling" or of the substantive scope of the Convention generally.

On the other hand, given that it is the ICRW's Schedule that constitutes the device through which whaling activities are subjected to ongoing functional regulation, there would still be little virtue in regarding whale-watching as falling within the purview of the ICRW unless the Schedule represents a viable mechanism for the regulation of this activity specifically. This in turn depends on the proper construction of Article V, which lays down the principles governing amendment of the Schedule, and hence of the elaboration of this regulatory scheme.⁸¹⁵ Although this question properly falls within the ambit of the present Section of this Part, being one which concerns the adaptability of the substantive provisions of the ICRW in light of contemporary needs, it will be convenient to postpone its consideration to the following Section concerning amendment of the Schedule generally.⁸¹⁶ Before proceeding to that discussion, it is desirable to consider briefly the possible applicability of the ICRW to the separate question of cetacean conservation in its broadest possible sense.

Hard as it is not to sympathize with the desire that may be felt in certain quarters to redirect the focus of the IWC toward the management and conservation of cetaceans in a general sense, it is much less clear that the ICRW as currently drafted represents a suitable vehicle for the performance of such a task. Clearly, it is not entirely without potential in that respect, as the general powers that it confers both on the Commission and on the parties concerning the collection and dissemination of information regarding whales can readily be deployed to develop a clearer and more comprehensive picture of the current status of whale

814. Thus, dictionary definitions certainly include within their ambit such activities as "pursuing" or "searching for" something, which do not necessarily imply subsequent physical appropriation.

815. ICRW, *supra* note 1, art. V.

816. See *infra* Part IV.C.2.

stocks and the principal threats to which they are subject. Even under the original conception of the treaty, such activities would have been highly desirable, if not essential, since it would scarcely be possible to establish appropriate and reliable quotas for the taking of protected species without the fullest possible information on all aspects of their abundance, distribution, behavior, and reproductive capacity. Furthermore, the very widely drawn powers of the Commission, noted above, to make recommendations on matters which relate to whales and whaling and to establish committees for the performance of designated functions provide significant additional mechanisms for advancing these objectives in whatever direction the IWC might see fit. These powers have, of course, already been utilized—although not always without protest on the part of certain members—to strengthen the general conservation agenda of the IWC, most notably through Resolution 2003-1, concerning the Berlin Initiative.⁸¹⁷ The law of treaties presents no impediment to the launching of such developments, and would encourage them insofar as they can be expected to advance the object and purpose of the ICRW as currently conceived.⁸¹⁸

Yet such developments fall a long way short of establishing a comprehensive conservation regime for cetaceans, and the prospects of doing so within the current institutional framework do not appear especially bright. Specifically, there is no warrant within the text of the ICRW as presently drafted for the imposition of general conservation obligations on the Member States. Furthermore, there must also be grave doubts as to whether the existing mechanism for the generation of new duties—*i.e.*, amendment of the Schedule—is adequately geared to the undertaking of such a task. Accordingly, if such developments were judged at any time to be desirable, they would seem to require amendment or supplementation of the ICRW by some means. Before considering that possibility, however, it is appropriate to examine the question of amendment of the Schedule in more detail.

2. Amendment of the Schedule

As noted above, the Schedule to the ICRW represents the principal mechanism both for the imposition of detailed substantive obligations on the Member States, and for the modification and refinement of these obligations over time. Accordingly, it represents a vital engine for the

817. IWC, *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission*, IWC Res. 2003-1 (2003) (on file with IWC).

818. Admittedly, this is a question on which opinions may legitimately differ. See William C.G. Burns, *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans?*, 6 J. INT'L WILDLIFE L. & POL'Y 255 (2003) (offering further discussion).

adaptation of the ICRW to emerging needs, and hence for the process of normalization and revitalization of the entire regime. It is, indeed, in the unwillingness of many member governments to set new quotas for the harvesting of the more abundant cetacean species that the "dysfunctionality" of the ICRW is said by the pro-whaling nations to lie. In particular, Resolution 2006-1 declares that the moratorium was intended only as a temporary measure, and is no longer needed in view of the development of a "risk-averse procedure," the RMP, which should in the future enable viable quotas to be fixed with confidence.⁸¹⁹ The clear implication is that the refusal to do so represents a lack of good faith on the part of the delegations in question.

The obvious difficulty with this view is that, as seen above, the full range of matters to be considered under the rubric of the modern conceptions of conservation—especially the "proper and effective" variety—and optimum utilization extend far beyond those embraced in the RMP, and even, arguably, the wider Revised Management Scheme. Consequently, it is well within the scope of a *bona fide* exercise of discretion for IWC members to take the view that zero quotas are still required, albeit for reasons subtly different from those that predominated at the time the moratorium was established. In other words, even if the RMP can be seen as a reasonably reliable mechanism for the determination of sustainable harvesting levels, it does not help to resolve the more fundamental question of whether such consumptive use should be pursued at all, in light of other forms of exploitation that are arguably in closer harmony with the full range of factors that must now be taken into consideration pursuant to the duties arising under the CBD. From that perspective, the true source of dysfunction might seem to lie in the current failure of the ICRW to embrace and address in parallel all modern manifestations of whaling on a full and formal basis.

This view would undoubtedly be strengthened if it could be shown that the ICRW is indeed capable in principle of addressing the regulation of whale-watching in an effective fashion. Plainly, its potential in that regard is delimited by the provisions of Article V, which establishes the legal parameters for amendment of the Schedule.⁸²⁰ The general principles to be applied for that purpose are set out in Article V(2)(a), and require that they be "necessary" in order "to carry out the objectives and purposes" of the ICRW and "to provide for the conservation, development, and optimum utilization of whale resources."⁸²¹ The first question here concerns the precise implications of the word "necessary," which is

819. IWC Res. 2006-1, *supra* note 2, pmb1. (fifth recital).

820. ICRW, *supra* note 1, art. V.

821. *Id.* art. V(2)(a).

plainly capable of interpretation in accordance with highly divergent standards of strictness—*i.e.*, to connote anything from “absolutely indispensable” to “justifiable by reference to any *bona fide* assessment of need.” As might be expected, this is a term that occurs in a great many international agreements, and it is true that, within the jurisprudence of certain treaty bodies, it has been given an extremely strict interpretation. Thus, Thomas Schoenbaum notes that the test traditionally applied by the WTO Appellate Body to determine whether a unilateral trade measure can be justified as being “*necessary* to protect human, animal or plant life or health” within the meaning of Article XX(b)⁸²² of the 1994 General Agreement on Tariffs and Trade (GATT) is based on the insistence that “no GATT-consistent alternative is available and provided it entails the least degree of consistency with other GATT provisions.”⁸²³

Something of the flavor of this approach is perhaps evident in the observation of Professor Burke in relation to the ICRW that “[t]he implication of a requirement that a [measure] is necessary to carry out objectives is that other actions have been unable to achieve the conservation and development objectives set out in the ICRW preamble.”⁸²⁴

Yet, this argument is open to a number of serious objections. The first is that, taken literally, it requires demonstration of the failure of existing conservation arrangements as a precondition to the introduction of a new measure covering similar ground. A strict application of such an interpretation would obviously risk the total defeat of the objectives of the ICRW before revised measures aimed at securing them could be contemplated. This is hardly an attractive or plausible proposition. Secondly, the approach adopted under the WTO regime has itself encountered considerable criticism, the gist of which is that it fails to strike an appropriate balance between the various goals and interests contemplated by that treaty.⁸²⁵ It is unquestionably the case that it differs markedly from that adopted under certain other treaty regimes. The

822. GATT, *supra* note 508, art. XX(b). Note also the reference to measures “necessary to protect public morals” in Article XX(a). *Id.* art. XX(a).

823. Thomas Schoenbaum, *International Trade and Environmental Protection*, in INTERNATIONAL LAW AND THE ENVIRONMENT, *supra* note 290, at 698, 702 (citing Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 164–75, WT/DS135/AB/R (Mar. 21, 2001)). Note, however, that this approach to interpretation had been established in GATT jurisprudence since at least 1989. See Report of the Panel, *United States—Section 337 of the Tariff Act of 1930* (Nov. 7, 1989) GATT B.I.S.D. (36th Supp.) at 345.

824. Burke, *supra* note 532, at 316.

825. See, e.g., DANIEL C. ESTY, GREENING THE GATT 40–46, 52–52, 225–37 (1994); Anne-Marie de Brouwer, *GATT Article XX's Environmental Exceptions Explored*, in THE WTO AND CONCERNS REGARDING ANIMALS AND NATURE, *supra* note 760, at 37–38, 48–49, 58–59; Stuart R. Harrop & David Bowles, *Wildlife Management, the Multilateral Trade Regime, Morals and the Welfare of Animals*, 1 J. INT'L WILDLIFE L. & POL'Y 64, 65–75 (1998).

European Convention on Human Rights (ECHR), for example, requires that governmental interference with certain of the fundamental freedoms guaranteed therein must be justified on the grounds that, *inter alia*, it is "necessary in a democratic society" for the defense of specified interests.⁸²⁶ The European Court of Human Rights has held that the term "necessary," while going beyond what is merely "admissible," "useful," "reasonable," or "desirable," certainly is not synonymous with "indispensable." Rather, it implies only that the measure in question must "correspond to a pressing social need" and be "proportionate to the legitimate aim pursued." Furthermore, States are to be allowed a certain margin of appreciation, which varies in accordance with the subject-matter of the restriction, in their application of these provisions.⁸²⁷ This clearly does not entail proving, as a matter of course, that alternative measures have not, or could not have, sufficed. It is far from apparent, therefore, why this requirement should be assumed to be appropriate with respect to the ICRW. Indeed, the case for so doing is immeasurably *weaker* than under the ECHR, under which it has already been implicitly rejected, because in that instrument the standard of "necessity" is employed as the criterion of acceptability of *unilateral* action taken by States in *derogation or restriction* of the ECHR's primary objectives, which one would naturally expect to require the closest scrutiny. In the ICRW, by contrast, the standard of necessity serves rather to condition the power of the parties to take *collective* decisions *in pursuit of* the aims and objectives of the treaty, where the justification for a strict interpretation is not clear at all. If anything, indeed, one would expect, on the application of ordinary principles, that an *expansive* view of the Commission's decision-making powers would be appropriate. At the very

826. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 124, arts. 8(2), 9(2), 10(2), 11(2); *see also* Wibren van der Burg, *The WTO and Public Morals: Inspiration from the ECHR*, in *THE WTO AND CONCERNS REGARDING ANIMALS AND NATURE*, *supra* note 760, at 101 (providing a fuller comparison of these two regimes).

827. *See, e.g.*, United Communist Party of Turkey v. Turkey, 26 Eur. H.R. Rep. 121, 149 (1998); Otto-Preminger Inst. v. Austria, 19 Eur. H.R. Rep. 34, 46 (1994); Silver v. United Kingdom, 5 Eur. H.R. Rep. 347, 376–79 (1983); Handyside v. United Kingdom, 1 Eur. H.R. Rep. 737, 754–55 (1979). *See generally* HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996); *The European Court of Human Rights Seminar on the Doctrine of the Margin of Appreciation Under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice*, 19 HUM. RTS. L.J. 1 (1998). It is fair to point out that the Human Rights Committee, by contrast, does not currently implement the "margin of appreciation" approach in its interpretation of the same expression in the 1966 International Covenant on Civil and Political Rights. Länsmann v. Finland, Communication No. 671/1995, CCPR/C/58/D/671/1995 (1995). It is unclear, however, that this has resulted in any significantly greater propensity to treat governmental action as having failed to meet the criterion of necessity. *See* CASES AND MATERIALS ON INTERNATIONAL LAW, *supra* note 35, at 714–19 (offering a sample of cases).

least, the IWC should be treated as the arbiter of its own powers, so that action taken purportedly for the fulfillment of its objectives would normally be presumed to be *intra vires*.⁸²⁸ It is true that the ICRW allows for such decisions to be taken by a three-fourths majority vote, but it also allows for dissentient States to opt out of the effect of such decisions, reducing still further the need to adopt an exaggeratedly strict interpretation of the constraints imposed by the notion of necessity.⁸²⁹ The idea, indeed, that a group of States would have solemnly established a system that permitted the adoption only of measures that were absolutely indispensable to fulfillment of the treaty's objectives, and then allowed all of its participants to exempt themselves entirely from their effects, strains credulity. Burke's failure overtly to address this issue of the context in which the word "necessary" appears—a cardinal requirement of the Vienna Convention, and indeed any credible regime of treaty interpretation—accordingly represents a fatal weakness in his analysis.

Whatever view is taken on this particular question, it is plain that certain of the other objections raised by him with specific reference to the legality of the Southern Ocean Sanctuary can have no application in the present context. That is, however plausible it may have been to claim that the existence of the moratorium on commercial whaling cast doubt on the "necessity" for creation of a sanctuary, such considerations have no possible relevance to the desirability of incorporating within the Schedule a range of controls on the conduct of *non-consumptive* forms of exploitation, which are not currently the subject of formal regulation at all. This is a matter to be considered from first principles, and by reference to the fundamental objectives of the ICRW, as viewed in light of evolving theories of conservation. Given (i) the contemporary conception of conservation and sustainable utilization as reflected in the Biodiversity Convention and related instruments; (ii) the need to "contemporize" the object and purpose and basic concepts of the ICRW in accordance with established principles of treaty law; (iii) the current scale of whale-watching and the likely expansion of this activity in the future in view of its substantial revenue-earning potential; and (iv) its manifest capacity for inflicting significant damage on whale populations unless adequately regulated, the "necessity" of bringing it within the scope of IWC regulation can scarcely be doubted. Furthermore, since this is a form of exploitation that can, if properly controlled, actually

828. See, e.g., P.W. Birnie, *Opinion on the Legality of the Designation of the Southern Ocean Whale Sanctuary*, IWC/47/41 (1995), available at http://www.highnorth.no/Library/Management_Regimes/IWC/op-on-th.htm (offering a contrasting opinion); see also *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) (discussing the legal principles on which this opinion was based).

829. ICRW, *supra* note 1, art. III.

avoid direct depletion of numbers entirely while simultaneously fulfilling a vital educational role with regard to conservation efforts in the future, its claim to be treated as a practical manifestation of "optimum utilization" is extremely strong.

As regards the other factors which condition the legitimacy of amendments, they are no less appropriate to the regulation of whale-watching, the permitted incidence of which should also be based on scientific findings,⁸³⁰ and take into consideration the interests of both consumers and providers, as required by sub-paragraphs (b) and (d) of Article V(2) of the ICRW.⁸³¹ The conception of "science" in this context is plainly also one which has to be given an evolutionary interpretation in order to ensure that implementation of the ICRW may keep abreast of current thinking. In that context, it is not at all clear that Resolution 2006-1, while correctly asserting the need for "science-based policy and rule-making,"⁸³² has fully taken on board the need for continuous review of the range of scientific expertise required to sustain the process of "proper and effective conservation," which should now certainly extend well beyond population dynamics to embrace all relevant aspects of cetacean behavior and welfare. An even more significant deficiency of Resolution 2006-1 is that it fails expressly to recognize that, alongside science, "social, cultural, political, and economic factors are equally important"⁸³³—a factor, by contrast, explicitly recognized in the ICRW itself in its requirement that the interests of the industry and its consumers be taken into consideration.⁸³⁴

In addition to these general parameters for Schedule amendment, the substantive focus of permissible adjustments to the conservation regime is specified in some detail by the provisions of Article V(1).⁸³⁵ The final question, therefore, is whether these constraints are meaningfully applicable to the process of whale-watching, as opposed to the more traditional forms of exploitation for which they were essentially devised. Fortunately, the resolution of this issue is greatly facilitated by the fact that General Principles for the Managing of Whale-Watching were

830. That is, scientific findings in the expanded sense indicated in the text above.

831. ICRW, *supra* note 1, art. V(2).

832. IWC Res. 2006-1, *supra* note 2.

833. ADDIS ABABA PRINCIPLES AND GUIDELINES, *supra* note 299, Practical Principle 9, Rationale at 16.

834. ICRW, *supra* note 1, art. V(2)(d). For the sake of completeness, it may be observed that whale-watching poses no threat of incompatibility with sub-paragraph (c), concerning the impermissibility of restrictions on the numbers of factory ships or land stations, since such facilities are not required at all.

835. *Id.* art. V(1).

agreed to by the IWC Scientific Committee in 1996.⁸³⁶ Consequently, there is an existing body of norms that can be assessed for their suitability for formal translation to the Schedule, if ever the parties should consider this desirable. Once again, the substantive aspects of these guidelines do for the most part seem to fall squarely within the range of matters that, in accordance with Article V(1), may be the subject of regulation for the purpose of “conservation and utilization of whale resources.”⁸³⁷ Of prime relevance in that regard is item (e), concerning “time, methods and intensity of whaling,” to which the bulk of the whale-watching guidelines are currently devoted.⁸³⁸ There may, however, also be relevance in the provision for fixing (a) protected and unprotected species;⁸³⁹ (b) open and closed seasons;⁸⁴⁰ (c) open and closed waters, including the designation of sanctuary areas;⁸⁴¹ (d) size limits for each species;⁸⁴² (f) types and specifications of gear and apparatus and appliances that may be used;⁸⁴³ (h) statistical and biological records;⁸⁴⁴ and (i) methods of inspection.⁸⁴⁵

It should therefore be apparent that there is, in fact, a very close correlation between the regulatory mechanisms established in this provision

836. IWC, *General Principles for Whale-Watching* (1996), available at <http://www.iwcoffice.org/conservation/wwguidelines.htm> [hereinafter *General Principles for Whale-Watching*].

837. ICRW, *supra* note 1, art. V(1).

838. The guidelines begin by referring to “measures to regulate platform numbers and size, activity, frequency and length of exposure in encounters with . . . whales,” and almost all of what follows could be construed to fall within this general rubric. *General Principles for Whale-Watching*, *supra* note 836, art. 1.

839. The guidelines stress the importance both of “sound understanding of the behavior of cetaceans” and recognition that “cetacean species may respond differently” to encounters. When coupled with the exhortations for new operations to “start cautiously, moderating activity until sufficient information is available on which to base any further development” and for all operators to “monitor the effectiveness of management provisions and modify them as required to accommodate new information,” this could conceivably lead to the designation of certain species as unsuitable targets for whale-watching. *Id.* arts. 1–3.

840. The guidelines expressly provide for the creation of “closed seasons . . .” *Id.* art. 1.

841. *Id.* (stating “. . . or areas where required”).

842. Some guidelines deal specifically with the special requirements of calves and juveniles, of which size may be a key indicator. *Id.* art. 3.

843. Various provisions relate generally to the design and operation of “vessels, engines and other equipment,” while specific reference is made, for example, to the “shrouding of propellers.” *Id.* art. 2.

844. The guidelines specify as an ideal the undertaking of “an early assessment of the numbers, distribution and other characteristics of the target population/s in an area,” as well as identifying a need for “scientific research and population monitoring and collection of information on operations, target cetaceans and possible impacts, including those on the acoustic environment, as an early and integral component of management.” *Id.* art. 1.

845. This element was added by the 1956 Protocol but does not currently seem to be reflected in the Guidelines governing whale-watching. Of course, a case for the institution of some form of inspection over such activities could easily be made, though the need is plainly far less acute than in the case of harvesting whales. 1956 Protocol, *supra* note 193.

to govern traditional forms of whaling and those specified by the Scientific Committee as necessary for the regulation of its modern recreational counterpart. Consequently, there is unlikely to be any significant practical difficulty in the application of the ICRW regime to this contemporary form of exploitation of cetacean resources. If, however, it should prove to be the case that regulatory measures of a kind not currently specified were required for the effective governance of whale-watching, the position would not be completely clear. On the one hand, it might be claimed that the necessary changes could simply be incorporated in the Schedule regardless, since Article V(1) does not expressly declare the list of mechanisms it identifies to be exhaustive.⁸⁴⁶ On the other hand, it may be that the parties have customarily regarded them as such, since when it was desired to add a reference to *inspection* to the original list,⁸⁴⁷ it was thought necessary formally to amend that provision to include it by means of the 1956 Protocol.⁸⁴⁸ However, the most that could be required in the situation now envisaged would be the proposal and adoption of a similar amendment.

One relatively minor point of incongruity which might require consideration here concerns the fact that while the scope of the ICRW, as amended by the 1956 Protocol, extends to both ships and aircraft used in whaling, the IWC Scientific Committee's General Principles for Whale-Watching are expressed rather to apply to "platforms."⁸⁴⁹ To the extent that this notion is itself defined to include both vessels (with or without engines) and aircraft, the substantive scope of the two forms of regulation would appear to be co-terminous, but a possible problem may arise from the fact that a "platform" is also stated to include any "person in the water" who is engaged in whale-watching.⁸⁵⁰ In all likelihood, any such person will actually have entered the water from a ship or aircraft, and therefore the overall activity in question will plainly still fall within the scope of Articles I-II, but if it is the case that persons may feasibly enter the water by other means—directly from the shore perhaps, or from an offshore installation—then such situations might arguably, on a strict interpretation, fall beyond the current purview of the ICRW. Whether such considerations are of any practical significance must be determined by those with direct experience of the activities in question.

It can therefore be seen that there should be very little legal impediment to the deployment of the procedures governing amendment of the

846. See ICRW, *supra* note 1, art. V(1).

847. That is, an item could be added to the list of mechanisms specified in Article V(1).
Id.

848. See 1956 Protocol, *supra* note 193.

849. See *General Principles for Whale-Watching*, *supra* note 836.

850. *Id.* at n.1.

Schedule so as to incorporate provision for the regulation of whale-watching. A more controversial issue, however, concerns the political prospects of utilizing them to that end. As to this question, little can usefully be said here. One group of IWC members is known to be favorably disposed in principle toward the development of whale-watching as a form of exploitation, though it does not necessarily follow that they would support bringing the practice within the scope of formal IWC regulation. The current existence of soft law guidelines, however, gives a reasonably clear indication of the kind of measures that might be envisaged, and even if these were to be transformed into hard law, they would be unlikely to impose obligations so rigorous as to impose intolerable burdens on the States concerned. In any event, everyone concerned should recognize the imperative need to ensure that such activities be pursued in a sensitive and sustainable manner.

A second IWC faction has declared its support for the process of normalization, though they equally may not see this as entailing a move toward the incorporation of recreational activities within the ICRW regime. In an ideal world, there would be agreement that a proper application of the law of treaties points strongly in this direction, but it would be naïve to suppose that a consensus to that effect will be forthcoming. Consequently, the matter would have to be put to the vote in accordance with Article III(2), which provides that amendments to the Schedule require for their adoption a “three-fourths majority of those members voting.”⁸⁵¹ The matter is only capable of resolution by IWC members themselves, and the sole purpose of this Article has been to ensure that the relevant legal issues have been canvassed fully in advance.

A further question revolves around the need to make separate provision in the Schedule for the process of culling. On the one hand, it might be argued that this could be dealt with simply by reference to the fixing of quotas in the ordinary way,⁸⁵² but the counter-argument would be that the case for culling rests on considerations that are quite distinct from those that might justify the allocation of a quota for commercial or subsistence harvesting. Possibly, therefore, a different regime might need to be constructed. One significant factor here is that, whereas the impulse to cull allegedly overabundant or “nuisance” species appears to have been an almost automatic, reflex reaction amongst humans throughout history,⁸⁵³ truly effective solutions to such problems may well lie in en-

851. ICRW, *supra* note 1, art. III(2).

852. See IWC Res. 2006-1, *supra* note 2, pmb. (seventh recital).

853. Such an approach was a prominent feature of several early conservation treaties, such as the 1900 Convention for the Preservation of Wild Animals, Birds and Fish in Africa, and the 1902 Convention on the Protection of Birds useful to Agriculture, but was abandoned

tirely different directions, some of which may prove to be profoundly counter-intuitive.⁸⁵⁴ Thus, various experiments have confounded widespread assumptions by revealing predators actually to be vital *guarantors* of biological diversity within the ecosystems they inhabit with the result that removing them is deleterious in that regard.⁸⁵⁵ In certain cases, indeed, experience suggests that the most effective way to reduce apparently burgeoning populations of particular predators may be to ensure the reintroduction and conservation of still larger carnivores.⁸⁵⁶ It has recently been suggested that predator-prey interactions in large vertebrates generally have not as yet been the subject of sufficiently extensive research to produce precise prescriptions for action,⁸⁵⁷ and that fishery management bodies have also made rather limited progress on this topic.⁸⁵⁸ It may be, for example, that it is the relative abundance of *prey* which essentially determines the numbers of *predators*, rather than the converse. In any event, culling obviously cannot be authorized simply on the basis of general observations concerning the quantity of fish consumed by cetaceans, since, as various commentators have already pointed out,⁸⁵⁹ the effect of such consumption could vary greatly. Some cetaceans may predominantly consume fish that are not actively exploited by humans at all, or target species that actually prey on those that are so exploited, which would render a policy of culling in such

or significantly attenuated in successor treaties. Thus the concept of "nuisance" species did not feature in either the African Convention on the Conservation of Nature and Natural Resources, *supra* note 302, or the International Convention for the Protection of Birds, *supra* note 432. For discussion of this point, see Lyster, *supra* note 273, at 65, 113.

854. Note in this regard the effects of the recent controlled experiment on the culling of badgers in the United Kingdom, where the practice was found not to be cost-effective, and in some cases actually exacerbated the problems it was intended to solve. See David Miliband, *Written Ministerial Statement on the Publication of the Report of the Independent Scientific Group on Cattle TB* (June 18, 2007), available at <http://www.defra.gov.uk/corporate/ministers/statements/dm070618.htm>.

855. EDWARD WILSON, *THE DIVERSITY OF LIFE* 176–82 (1992).

856. Consider, for example, the relationship between coyotes and wolves in the United States, or otters and mink in the United Kingdom.

857. See, e.g., PEDRO BARBOSA & IGNACIO CASTELLANOS, *ECOLOGY OF PREDATOR-PREY INTERACTIONS* (2005).

858. ECOSYSTEM PRINCIPLES ADVISORY PANEL, *ECOSYSTEM-BASED FISHERY MANAGEMENT* (1999); PAM L. GROMEN, *TAKING THE BAIT—ARE AMERICA'S FISHERIES OUT-COMPETING PREDATORS FOR THEIR PREY?* (National Coalition for Marine Conservation 2006); Dep't of Fisheries & Oceans, Canada, *Atlantic Fisheries Policy Review* (2001–2004), available at http://www.dfo-mpo.gc.ca/afpr-rppa/home_e.htm; see also Duncan E.J. Currie, *Ecosystem-Based Management in Multilateral Environmental Agreements* (Mar. 1, 2007), available at http://assets.panda.org/downloads/wwf_ecosystem_paper_final_wlogo.pdf.

859. See Jock W. Young, *Do Large Whales Have an Impact on Commercial Fishing in the South Pacific Ocean?*, 3 J. INT'L WILDLIFE L. & POL'Y 253 (2000) (providing an overview of the issues and reference to various technical studies); see also Erik J. Molenaar, *Marine Mammals: the Role of Ethics and Ecosystem Considerations*, 3 J. INT'L WILDLIFE L. & POL'Y 31 (2003); 2002–2010 Cetacean Action Plan, *supra* note 771.

instances at best pointless and at worst counter-productive. And while the culling of cetaceans may eliminate a number of live predators, will it not also remove what in due course, in the posthumous form of their carcasses, might have represented a bounteous resource capable of providing sustenance for other marine species for decades?⁸⁶⁰

Accordingly, while it might in theory be possible to develop such a comprehensive understanding of the marine ecosystem as to permit the determination of a harvesting quota for each and every species that was appropriate for the preservation of an ideal ecological balance, there is little reason to suppose that such a system is remotely achievable at present. As the IUCN/SSC Cetacean Specialist Group has recently pointed out with regard to the concept of multi-species or ecosystem management, “the onerous data requirements, the inherent complexity and dynamism of natural marine ecosystems, and the inadequacy of knowledge about functional relationships among organisms, make such management extremely difficult to achieve in practice.”⁸⁶¹

Thus, while the needs of food security must be taken seriously, there is currently room for considerable skepticism as to whether the available evidence justifies the conclusion that it is under threat from whales, since there are so many complex factors at play in the ongoing maintenance of marine biodiversity. It is, of course, hardly the place of lawyers to dabble in such controversies, though it may be to them that the task ultimately falls of establishing legal mechanisms or procedures in accordance with which the relevant problems may be addressed. Since the IWC does not appear to have developed a solution as yet, it may be that the most profitable approach would be to consider those which have been adopted under other treaties in the conservation field.

The Berne Convention, for example, does allow for derogations from such protection “to prevent serious damage to . . . fisheries . . .,” provided that certain strict conditions are satisfied.⁸⁶² These include close monitoring of the action in question by the Berne Convention’s Standing Committee, together with demonstration in advance that it “will not be detrimental to the survival of the population concerned” and that “there

860. Graham Lawson, *The Deep: Long Dark Teatime of the Zombie Worms*, NEW SCIENTIST, Nov. 12, 2005, at 50 (“For the nutrient-poor ocean floor, a dead whale is an absolute bonanza, delivering a package of nutrients that would take up to 4000 years to accumulate at background rates.”); see, e.g., Thomas G. Dahlgren et al., *Fauna of Whale Falls*, 51 DEEP SEA RES. I 1873 (2004); Craig R. Smith & Amy R. Baco, *Ecology of Whale Falls at the Deep-Sea Floor*, 41 OCEANOGRAPHY & MARINE BIOLOGY: ANN. REV. 311 (2003) (providing original research).

861. 2002–2010 Cetacean Action Plan, *supra* note 771.

862. Berne Convention, *supra* note 311, art. IX. Note also that many IWC Member States are parties to the Berne Convention, which, as seen above, requires them to extend strict protection to various whale species included in its Appendix II. *Id.* app. II.

is no other satisfactory solution."⁸⁶³ This suggests that the onus of proving that such measures are in fact necessary should, in full accordance with ordinary principles, fall on the proponents of culling. Again, it will be for individual IWC members to determine, in the exercise of their discretion in good faith, whether they find the arguments advanced sufficiently convincing to warrant the establishment of a quota for this purpose.

3. Amendment of the Convention

Although the potential for normalization and modernization of the ICRW through the mechanisms of (i) a flexible and progressive approach to the interpretation of its terms generally, and (ii) further amendment of the Schedule, has been shown to be considerable, it is patently not unlimited. Any additional changes that are considered desirable would have to be effected through the more fundamental process of amendment to the ICRW itself. Notwithstanding the lack of any specific provision establishing a procedure for effecting such changes, the ICRW, like any other treaty, is susceptible to revision by means of an amending protocol, for which the one adopted in 1956 provides an obvious precedent.⁸⁶⁴ The changes in question might range from a relatively minor adjustment of the basis on which amendments to the Schedule might in the future be made to a full-scale overhaul of the Convention's entire approach to conservation.

The precise nature of the substantive content of the amendment in question would constitute a key determinant of the procedural rules that would be needed to govern such matters as participation and entry into force. Thus, if the amendment were designed to bear on the current "core" business of the IWC—*i.e.*, the regulation of direct exploitation of cetaceans (whether consumptive or not)—it would almost certainly be necessary to follow the precedent of the 1956 Protocol in requiring acceptance by all current ICRW parties to enable the Protocol to be brought into force.⁸⁶⁵ The practical difficulties involved in achieving such a level of support should never be underestimated, however, as the annals of international relations reveal numerous examples of well-intentioned amending instruments that remain suspended in apparently permanent limbo through failure to surmount such hurdles. Even when the amendment in question commands widespread support in principle, the forces of inertia are often such as to preclude the practical expression of such

863. See generally *id.* art. IX; Bonn Convention, *supra* note 205, art. 3(5)-(7) (providing a similar scheme).

864. See 1956 Protocol, *supra* note 193.

865. See *id.* art. III(2).

support through the formal deposit of an instrument of acceptance.⁸⁶⁶ Consequently, it might be unwise to expect that such a change could easily or expeditiously be achieved. The process would naturally be far more complex still if the proposed amendment was in any way controversial, and it might, indeed, be unwise to expect that any such change would ultimately be feasible at all. Of the range of matters within this category that seem to be most urgently in need of reconsideration, five come immediately to mind: they concern (i) the biological scope of the ICRW, in terms of species covered; (ii) aboriginal whaling; (iii) scientific whaling; (iv) the amendment procedures themselves, and specifically the power to exclude their effect by registering an objection; and (v) the current restriction of the substantive focus of the ICRW to direct exploitation (even if the notion of “whaling” were henceforth to be interpreted in the expansive fashion proposed in the earlier part of this Part).

As to the first, relatively few problems of strictly legal significance are apparent. Controversy currently revolves around the issue of whether the regulatory competence of the IWC extends to all cetaceans or is restricted to the larger species.⁸⁶⁷ This in turn depends on the meaning to be attributed to the expression “whales” as employed throughout the Convention. On the one hand, it is argued that the Annex of Nomenclature attached to the Final Act of the Washington Conference should be treated as definitive of the ICRW’s intended scope.⁸⁶⁸ Since it included only the names of certain species, which were, for the most part, the so-called great whales, other, smaller, cetaceans necessarily fall outside the scope of its jurisdiction.⁸⁶⁹ Traditionally, formal regulation has generally been limited to the species identified in the Final Act (although the IWC has recognized the importance in principle of protecting smaller whales, dolphins, and porpoises and has formulated some recommendations in that regard). The alternative view is that the term “whales” is neither very precise scientifically nor defined in the ICRW, and that the Final Act has no normative implications, being intended only as a guide to the proper use of nomenclature. Consequently, it is open to the IWC to embrace small cetaceans within its regulatory powers.

Key points here are that although the Final Act is not itself a treaty, it is capable of being regarded as, or as containing, an “agreement relating to the treaty which was made between all the parties in connation with

866. See Bowman, *supra* note 196, pt. VI (exploring such issues in other contexts).

867. See Patricia W. Birnie, *Small Cetaceans and the IWC*, 10 GEO. INT’L ENVTL. L. REV. 1, 23–24 (1997) (offering a more detailed discussion); Alexander Gillespie, *Small Cetaceans, International Law and the IWC*, 2 MELB. J. INT’L L. 257, 267–79 (2001).

868. IWC, *supra* note 1, annex (Nomenclature of Whales).

869. See *id.*

the conclusion of the treaty" and therefore as forming part of the "context" within which the terms of the treaty must be understood.⁸⁷⁰ Even on this basis, however, the true purport of the Annex has still to be determined. Was it seeking to provide a definitive list of species to be covered by the ICRW, or merely to provide a uniform scientific nomenclature to avoid uncertainty over the identification of some of those that undoubtedly were? As intriguing a question as this may be on the theoretical level, it has little practical significance in the present context for the simple reason that, if the political will were present to bring small cetaceans within the ICRW's formal purview, precisely the same action would suffice to achieve that result regardless of what view was taken regarding the underlying legal question. That is, either (a) a consensus resolution that small cetaceans should be regarded as "whales" for ICRW purposes, or (b) an amendment to the Schedule simply introducing regulatory measures in relation to such species, would be all that was required either (i) to confirm that small cetaceans had been legitimate subjects of regulation all along, or (ii) to revise the ICRW so as to render them such for the future. Although the same result could undoubtedly be achieved by formally amending the ICRW so as to include for the first time a definition of the expression "whales," the practical difficulties likely to be involved in making such a change would render this an unnecessarily cumbersome approach. Since the modification in question is so very trivial by comparison to the quite dramatic changes of course which have been effected by resolution in other international institutions, there could be no plausible impediment to proceeding here by the least complicated and logistically burdensome route. Consequently, the only significant dispute is one of policy rather than law.

As regards the question of aboriginal whaling, it has already been noted that the exceptional establishment of quotas for the benefit of indigenous populations has long been a feature of the IWC system and, despite the existence of some opposition in principle, is arguably justifiable in light of the special recognition accorded in international human rights law to the members of such populations, and indeed of minorities generally.⁸⁷¹ At the same time, the logic and fairness of the actual application of the relevant principles under the ICRW has been called into

870. Vienna Convention on the Law of Treaties, *supra* note 21, arts. 31(1), 31(2)(a); *see* AUST, *supra* note 91, at 72-74, 188-91; ILC Commentary, *supra* note 84, at 221, ¶ 13 (providing further discussion).

871. It is to be noted in this context that the retention of a power to create such quotas would still require them to be voted on and approved in the ordinary way.

question both by States and by independent commentators.⁸⁷² Is there truly, for example, a clear justification for the marked difference in treatment accorded to, on the one hand, the Makah tribe of the United States or the whaling communities of St. Vincent and the Grenadines, and, on the other, the Japanese coastal communities of Abashiri, Ayukawa, Wadaura, and Taiji? Given that the law of biodiversity, as reflected in the Addis Ababa Guidelines, declines to draw any sharp distinction between the interests of indigenous and local communities, urging instead that regard be paid to both,⁸⁷³ a strong case may be made for further reflection on these issues, and possibly for the consideration of some novel approach to categorization of the relevant activities—under the more comprehensive rubric of *artisanal* whaling, for example, as has been proposed in certain quarters.⁸⁷⁴ The issues in question are such that opinions as to the way in which they should properly be resolved may well diverge widely, without necessarily impugning the good faith of the participants in any way. Thus, even if the aboriginal whaling exemption were to be broadened or reconceptualized in some way, it might still be relevant to consider whether the primary motivation for exploitation was essentially nutritional or cultural in nature, and whether—in the latter case—a purely token quota might suffice. Furthermore, it would be appropriate to consider in either case the extent to which the relevant need could be satisfied through participation in the activity of whale-watching, or receipt of a share in the profits thereby generated.⁸⁷⁵ The crucial point for present purposes, however, is that since the current nomenclature and classificatory system is not actually specified in the text of the body of the ICRW, but in the Schedule, it will not require any amendment of the ICRW itself to effect such changes as might be thought desirable, and the matter need not be pursued further at this juncture.

The situation is quite different in the case of the next two controversial issues identified above, both of which are the subject of specific provisions in the text.⁸⁷⁶ As regards the “scientific whaling” exemption, the ICRW is by no means unique amongst species conservation agree-

872. See C. Baker, *The Makah and Japan: Evaluating Cultural Rights to Whale in the New Millennium* (2007) (unpublished LL.M. dissertation, University of Nottingham) (on file with author) (offering a current review of the literature and commentary on the issues).

873. ADDIS ABABA PRINCIPLES AND GUIDELINES, *supra* note 299, Practical Principles 2, 4, 6, 9, 12, 14.

874. See Baker, *supra* note 872.

875. Thus, for example, the imposition of a levy on the activity of whale-watching might be deployed in order to meet the nutritional needs of communities formerly dependent on whaling.

876. See ICRW, *supra* note 1, arts. V, VIII.

ments in making such provisions,⁸⁷⁷ but is nonetheless fairly clearly out of line with the generality of currently extant instruments in the degree of latitude it allows to States Parties, as a result of the absence of specified restrictions of a substantive or procedural kind on the exercise of the power in question. The Wadden Sea Seals Agreement, by contrast, limits the scope of such authorizations to designated institutions performing research into the conservation of the population in question and to situations in which the information sought "cannot be obtained in any other way,"⁸⁷⁸ while the Bonn Convention requires that any exception allowed be "precise as to content and limited as to space and time," and that any such taking "should not operate to the disadvantage of the species concerned."⁸⁷⁹ The Berne Convention not only requires that such exceptions be restricted to situations in which they "will not be detrimental to the survival of the population concerned" and "there is no other satisfactory solution," but imposes strict reporting obligations in all such cases so that their utilization may be closely monitored.⁸⁸⁰ Even the 1950 International Convention for the Protection of Birds required that "all necessary precautions" be taken to prevent abuses.⁸⁸¹ By simply adopting, almost verbatim, a provision from the 1937 Regulation of Whaling Agreement,⁸⁸² and maintaining it unchanged for sixty years, the ICRW has certainly created a potentially damaging loophole in its own conservation regime.

It would nevertheless be mistaken to assume, however (as some commentators appear to do),⁸⁸³ that the absence both of specific restrictions on the ability to issue permits for scientific research, and of any express regulatory powers on the part of the Commission itself,⁸⁸⁴ leaves

877. Cf. African Convention on the Conservation of Nature and Natural Resources, *supra* note 302, art. 8(1); Western Hemisphere Convention, *supra* note 300, arts. 4, 5(1); International Convention for the Protection of Birds, *supra* note 432, art. 7; Convention for the Conservation of Antarctic Seals art. 4(1)(b), June 1, 1972, 29 U.S.T. 441, 11 I.L.M. 251; Berne Convention, *supra* note 311, art. IX; Bonn Convention, *supra* note 205, art. 3(5)(a); Agreement on the Conservation of Seals in the Wadden Sea art. 6(2), Oct. 16, 1990, available at http://www.cms.int/species/wadden_seals/sea_text.htm; Agreement on the Conservation of Population of European Bats art. 3(1), Dec. 4, 1991, available at http://www.eurobats.org/documents/agreement_text.htm [hereinafter EUROBATS].

878. See Agreement on the Conservation of Seals in the Wadden Sea, *supra* note 877.

879. Bonn Convention, *supra* note 205, art. III(5).

880. Berne Convention, *supra* note 311, art. IX.

881. International Convention for the Protection of Birds, *supra* note 432, art. 7.

882. Regulation of Whaling Agreement, *supra* note 435, art. 10.

883. See BURKE, *supra* note 10, at 297; Sumi, *supra* note 12, at 317, 336-40.

884. Article VIII(1) requires each party making use of such powers "to report at once to the Commission all such authorizations which it has granted." ICRW, *supra* note 1, art. VIII(1); see CHERFAS, *supra* note 386, at 176-89; Alexander Gillespie, *Whaling under a Scientific Auspice: The Ethics of Scientific Research Whaling Operations*, 3 J. INT'L WILDLIFE L.

IWC members with a completely free hand to authorize the taking of whales under this provision. In reality, there are a number of norms that must be complied with in this context.⁸⁸⁵ First, the powers in question are only available “for purposes of scientific research,” and it is beyond dispute that this phrase, like any other, must be interpreted and applied in good faith and in accordance with the ordinary meaning of the words as seen in light of the overall object and purpose of the ICRW. In view of the many doubts that have been raised regarding the current Japanese research program, for example, there can be no guarantee that this test will necessarily be satisfied in its case. The fact that meat from whales harvested under this power commonly finds its way into Japanese restaurants is not in itself indicative of bad faith, since Article VIII(2) requires that they be processed and disposed of in accordance with the directions of the government in question,⁸⁸⁶ and there has been a long tradition within the whaling community of requiring that the fullest possible use be made of all whales taken.⁸⁸⁷ Nevertheless, should the matter ever fall for determination by an international court or tribunal, it would certainly be relevant to take account of this factor when identifying the dominant motive of the State concerned and determining whether any abuse of right had occurred. A separate, albeit related, ground for review would be based on the extent, if any, to which the authorization tended to undermine the overall object and purpose of the ICRW—*i.e.*, the proper and effective conservation of whale stocks and the need to maintain good order in the development of the whaling industry. Again, these are questions the answers to which cannot be predicted with absolute confidence. However, in view of the fact that Article VIII is plainly intended to create an exception to the overall conservation regime—and one of a potentially devastating character—it would be no surprise to see it given the narrowest possible interpretation.⁸⁸⁸ Certainly, it would be relevant to consider the extent to which the taking in question complied with any principles or procedures laid down by the Commission governing the exercise of such powers generally, and whether it was consistent with

& POL'Y 1, 34–40 (2000); Sumi, *supra* note 12, at 336–40 (discussing IWC attempts to establish a regulatory scheme).

885. See Gillespie, *supra* note 884, at 34–36; Peter H. Sand, *Japan's "Research Whaling" in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)*, 17 REV. EUR. COMMUNITY & INT'L ENVTL. L. 56 (2008); Triggs, *supra* note 380, at 46.

886. ICRW, *supra* note 1, art. VIII(2).

887. See Convention Between the United States of America and Other Governments Respecting Whaling, *supra* note 414, art. 11.

888. The recognition of a principle concerning the narrow interpretation of exceptions is evident from the practice and jurisprudence of bodies as diverse as CITES, the WTO, and the European Court of Human Rights.

any relevant norms emerging from other sources governing the taking of protected species for scientific reasons. It is certainly conceivable, in light of norms emerging from conservation treaties generally, that a *prima facie* case of necessity might have to be made out before a permit could be regarded as having been validly issued "for purposes of scientific research."⁸⁸⁹ In any event, an exercise of such power under the ICRW will only maintain consistency with the CBD to the extent that it causes no risk or harm to biological diversity, and its application to endangered or vulnerable species must therefore automatically be open to question.

For these reasons, it is clear that Article VIII as currently drafted represents a source of great uncertainty and controversy within the ICRW regime, and must be regarded as a major cause of its dysfunctional nature. It is therefore ripe for amendment with a view to eliminating these deficiencies. The precise nature of the safeguards to be incorporated would obviously have to be the subject of negotiation, although, as noted above, there are a number of existing precedents from which ideas may be drawn. The majority of species covered by those instruments are, however, essentially terrestrial in character and many are not necessarily even migratory. Given the fact that whales represent a truly international resource and that an international institution, the IWC, has been created and dedicated to their conservation, a strong case could be made in principle for total removal of the unilateral power to undertake lethal research, and for entrusting the responsibility for authorizing and supervising any such projects as were deemed necessary to a suitable organ of the IWC itself. Non-lethal research might be permitted subject to appraisal of its potential intrusiveness and harm to individuals and to the maintenance of cetacean populations.

Naturally enough, an insuperable obstacle to the implementation of such a reform is likely to lie in the absence of the political will to achieve it, although if presented as part of some kind of package deal involving a number of substantive changes, it is just conceivable that agreement might be forthcoming. Even then, however, the practical difficulties entailed in securing the deposit of instruments of ratification or approval by over seventy States must be regarded, on the basis of available evidence of state practice, as formidable. It would be possible to circumvent these difficulties through the adoption of an instrument for the purposes of which consent to be bound could be expressed by signature alone, but this, too, would be dependent on the availability of unanimous support for such an approach.

889. See ICRW, *supra* note 1, art. VIII.

Many of these difficulties are also evident with regard to the power to register objections to Schedule amendments, the dysfunctional tendency of which is also considerable. The risks inherent in the creation of this power were, of course, specifically the subject of adverse comment by certain States during the Washington Conference, and fully apparent in the decision-making processes within the Commission during its troublesome early years.⁸⁹⁰ On the other hand, the judgment that, without this power, certain key players might not have been willing to participate in the ICRW at all may well have been correct. It is, furthermore, certainly not possible to claim that such a provision is significantly out of line with comparable treaties, however widely or narrowly the notion of comparability is conceived. In other areas in which it has become common to establish regulatory commissions to manage natural resources—fisheries or freshwater supplies, for example—the allocation to them of powers of conclusive decision is sufficiently unusual to attract the specific attention of commentators,⁸⁹¹ while even treaties which relate to “wildlife” as popularly understood quite frequently allow for the exclusion of conservation obligations in relation to particular species.⁸⁹² In all such cases, the deployment of such powers naturally serves to weaken the effectiveness of the operation of the agreement in question to some extent, and, for that reason, States are requested to review the need for such exceptions from time to time. Nevertheless, this diminution in effectiveness, however regrettable in itself, is generally regarded as a price worth paying to secure the participation of the States in question.

In the situation in which the ICRW currently finds itself, however, when the moratorium has seen the establishment of zero quotas for commercial operations generally, the opt-out power may simply create an unwelcome dimension of uncertainty which could serve as an additional disincentive to change. In particular, the adoption of any harvesting quota in the future might run the risk of triggering a fresh series of objections from States that thought it unduly low, in which case the legal consequences of such actions would have to be considered. Under the general law of treaties, any State that declines to accept an amendment to an agreement normally remains bound by that agreement in the form in which it existed prior to that amendment, *i.e.*, in its original form, as modified by any earlier amendments that have been

890. See *supra* Part III.

891. See INTERNATIONAL LAW AND THE ENVIRONMENT, *supra* note 290 (providing information on the International Joint Commission created by the 1909 Boundary Waters Treaty between Canada and the United States).

892. See CITES, *supra* note 209, arts. 15(3), 16(2), 23; Berne Convention, *supra* note 311, arts. 17(3), 22(1) (precluding the making of general reservations).

accepted by that State.⁸⁹³ The application of this rule would duly result in any IWC member that objected to a new quota remaining bound by the pre-existing quota of zero. However, the rule itself—like most rules under the Vienna Convention—is residual only, and yields to a clear contrary intention.⁸⁹⁴ In the case of the ICRW, it might just be arguable that the logic of a scheme that involves the elaboration of the minutiae of regulation in a Schedule, and the convening of annual meetings to review its contents and reconsider quotas, is indeed indicative of a contrary intent, to the effect that the force of each successive version of the Schedule is completely spent as soon as a revised version comes into effect. From that perspective, the objecting States would not be bound by any restriction. This would plainly be a very worrying outcome, and a major disincentive to change of any kind. Consequently, if this latter approach is not regarded as the correct one, it might be desirable for that point to be clarified as soon as possible.

Even if the Vienna Convention approach is applicable, however, certain problems remain. In particular, if a quota was at any time established that was shown on the basis of subsequent experience to be unreasonably high, the power to object might still be employed in such a way as to defeat any later attempt to bring harvesting levels down again. This possibility also tends to militate in favor of preserving the status quo. In that sense, the opt-out provision may lead to a paralysis that really serves the interests of no one, with the possible exception of any State that currently maintains a valid objection to the moratorium.⁸⁹⁵ It would, however, doubtless be unwise to assume that this would necessarily lead to the emergence of general support for the idea of amending the Convention so as to remove the power of objection, as the instinct to preserve individual sovereignty over such matters as a matter of principle is extremely strong. In any event, the formidable practical obstacles involved in securing the adoption and entry into force of such an amendment amongst so many States would still have to be overcome.

Paradoxically, if it were desired to effect some rather more radical transformation of the international regime governing the conservation of large cetaceans, with a view to addressing the many threats to their well-being and prospects of survival apart from direct exploitation, this might prove, by comparison, rather more straightforward in practical terms.

893. Vienna Convention on the Law of Treaties, *supra* note 21, art. 40(4).

894. *Id.* art. 40(1) (emphasis added) (stating that "[u]nless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs").

895. That is, Norway and the Russian Federation. The position of Iceland must be regarded as controversial. Whether such States would be prepared to trade in the power of objection in return for the possibility of some above-zero quotas being set in the future remains unknown.

The reason is that, provided such a development did not in any way undermine the existing ICRW regime, but merely represented a supplement to it in the sense of establishing novel duties of protection against threats of a different sort, it could be concluded and brought into force solely amongst those States that were minded to subscribe to such a regime. Under Article 41(1)(b) of the Vienna Convention, even the existing provisions of a multilateral convention may be modified amongst a subset of the parties provided that

the modification in question is not prohibited by the treaty and:
(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.⁸⁹⁶

Consequently, the mere imposition of *additional* obligations that, in fact, served to advance the ICRW objective of proper and effective conservation of cetaceans should be free of serious legal impediment.

The precise scope and content of any such agreement would be very much at large, although many of the more significant threats to cetaceans have already been catalogued in the relevant literature.⁸⁹⁷ Alongside direct exploitation and whale-watching, they include incidental mortality in fisheries, the indirect effects of industrial fisheries, competition and culling, live capture for research or entertainment, disturbance from military or industrial operations, chemical pollution, disease and exposure to biotoxins, and climate change and ozone depletion.⁸⁹⁸ A number of instruments have already been noted that have an impact on such matters, most notably the recent SPREP Memorandum of Understanding concerning the Conservation of Cetaceans and their Habitats in the Pacific Islands Region,⁸⁹⁹ although this is not of a legally binding character. The Berne Convention, by contrast, plainly does import hard law obligations, and it is also the case that these overlap with those of the ICRW in the sense that they address the harvesting of cetaceans along with other threats to their security.⁹⁰⁰ While not of themselves incompatible with the ICRW regime, these duties regarding direct exploitation arguably do impose certain constraints on the exercise of voting discretion within the

896. Vienna Convention on the Law of Treaties, *supra* note 21, art. 41(1)(b).

897. RANDALL R. REEVES ET AL., DOLPHINS, WHALES AND PORPOISES: 2002–2010 CONSERVATION ACTION PLAN FOR THE WORLD'S CETACEANS (IUCN/SSC Cetacean Specialist Group 2003).

898. *Id.* (especially ch. 2).

899. *See supra* note 308 and accompanying text.

900. *See* Berne Convention, *supra* note 311.

IWC by Berne Convention parties, although seemingly in a fashion that enables them to maintain consistency with contemporary attitudes to conservation, rather than the converse.

There could certainly be no legitimate objection or legal impediment to the creation of further regional conventions for the conservation of cetaceans, or indeed to the adoption of an instrument of potentially global application. Such an instrument might, moreover, assume any one of a variety of forms and stand in almost any kind of legal relationship to the ICRW itself, and to other existing treaties. It could, for example, be adopted under the aegis of the Bonn Migratory Species Convention, either as an AGREEMENT under Article 4(3) thereof, or alternatively as either a legally binding treaty or a less formal Memorandum of Understanding under Article 4(4).⁹⁰¹ Ideally, perhaps, the first of these options would be preferable, as the treaty in question has much in common with existing instruments in that category.⁹⁰² Alternatively, it might be concluded as a protocol to the ICRW itself, although the attractions of this approach are undoubtedly weakened by the obvious incongruity of creating an instrument designed to address such a wide spectrum of conservation issues in the form of an appendage to one narrowly focused on particular aspects of the human exploitation of cetacean species. More logically, the ICRW would henceforth operate as a protocol to the proposed convention, although the practical difficulties involved in re-constituting an existing treaty so as to bring it within the umbrella of a newly adopted instrument are probably so formidable as to preclude this option from the outset.⁹⁰³ Perhaps, then, the optimum solution would be to designate any novel conservation instrument as a treaty *supplementary* to the ICRW, or indeed to create it as a completely independent entity. The choice between these various approaches might ultimately depend on the extent to which it appeared desirable to rely on the existing institutional capacity and long experience of the IWC itself.

4. Other Mechanisms of Adjustment

In the previous Section, attention was repeatedly drawn to the often under-estimated practical difficulties involved in securing the adoption and entry into force of formal instruments of amendment to existing

901. Bonn Convention, *supra* note 205, art. 4(3)–(4).

902. See Agreement for the Conservation of African-Eurasian Migratory Waterbirds, June 16, 1995, reprinted in 6 Y.B. INT'L ENVTL. L. 306, 907 (1995); EUROBATS, *supra* note 877.

903. It will be remembered that such a possibility was considered, but rapidly abandoned, in relation to the Biodiversity Convention. See Burhenne-Guilmin & Casey-Lefkowitz, *supra* note 288; Désirée M. McGraw, *The CBD—Key Characteristics and Implications for Implementation*, 11 REV. EUR. COMMUNITY & INT'L ENVTL. L. 17 (2002).

treaties. On the other hand, other less cumbersome mechanisms may be available, and are very widely utilized by treaty bodies operating in the environmental field or elsewhere. In particular, the adoption of resolutions concerning the interpretation and implementation of treaty provisions is ubiquitous, and such measures are commonly treated as having decisive effect for the purposes of the law of treaties without close attention being paid to whether they should properly be regarded as subsequent practice or agreement as to the interpretation of the treaty, or actual amendments of it by virtue of practice. It might well be that any desired modification of the approach to aboriginal whaling or small cetaceans, for example, could be achieved by this means.

It should also not be overlooked that there may be other mechanisms available within the law of treaties, or international law generally, that could be pressed into service to facilitate the achievement of objectives that might emerge from the normalization process. For example, even though States might not be prepared to forgo for all time the ability to issue scientific permits or object to Schedule amendments, it might be that they would be willing to refrain from the exercise of such powers on a temporary basis. Thus, even without formal amendment of the ICRW, it should be possible to make the establishment of any particular harvesting quota conditional on an undertaking by some or all IWC Member States to refrain from the exercise of such powers, either totally or to a specified extent, during the currency of that quota. The notion that a purely unilateral undertaking by a State, if given due publicity and ostensibly intended to be binding, may be enforceable against it is supported by the highest judicial authority,⁹⁰⁴ and where it is clearly intended to be relied on, and particularly if it is given in return for some advantage or concession,⁹⁰⁵ any lingering doubts as to its binding character can surely be dispelled. Where the undertaking is to refrain from the exercise of certain treaty powers, it could conceivably be rendered inescapable by a variety of legal mechanisms,⁹⁰⁶ including the notions of

904. See, e.g., *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253, 267 (Dec. 20); SHAW, *supra* note 35, at 114–15.

905. See *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

906. Most of these notions might be regarded as particular illustrations of a more general principle of international law to the effect that no State may be permitted to benefit from its own inconsistencies (*allegans contraria non audiendus est*), which is itself an application of the still broader principle of good faith. See *Temple of Preah Vihear (Cambodia v. Thail.)*, 1962 I.C.J. 6, 23–32 (June 15); *Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, 1960 I.C.J. 192, 213–14 (Nov. 18); ILC Commentary, *supra* note 84, at 239; see also *Vienna Convention on the Law of Treaties*, *supra* note 21, art. 45.

waiver, estoppel, the establishment of "a series of bilateral engagements,"⁹⁰⁷ or the selective suspension of treaty provisions.⁹⁰⁸

Of course, the decision as to whether any particular quota should in fact be established would remain dependent on all the other considerations that have been outlined above, and there is no guarantee that the necessary majority could be mustered in support of any particular proposal at any particular time. The suggestion here is only that appropriate means could almost certainly be found to counter some of the possible adverse effects of adopting any quota that might at some point seem acceptable in principle.

V. CONCLUSIONS

The above discussion suggests that the "normalization" of the Whaling Convention in light of current economic, social, and cultural circumstances, evolving conservation policy and contemporary legal norms will require a great deal more than simply the abandonment of the moratorium on commercial whaling and the reestablishment of harvesting quotas. Indeed, it may well lead in another direction entirely. The array of factors that must be taken into consideration is, in fact, so broad and diverse that opinions as to the proper course to follow may well diverge sharply. Consequently, allegations of bad faith on the part of States that decline to follow a course of action favored by another faction will not easily be sustained.

From the outside, the failure of the IWC to assume full responsibility for the regulation of all contemporary manifestations of cetacean exploitation appears to be the major cause of its current dysfunction, coupled with a marked tendency to pay insufficient regard to strictly legal, as opposed to purely political, considerations. In particular, the imperative of adopting a dynamic, evolutionary approach to treaty interpretation, with a clear eye on the vital need to preserve the overall integrity of the international legal system, would appear to be paramount. It may be that consumptive and non-consumptive exploitation can co-exist in the future, but it might equally be concluded that successful pursuit of the latter depends in no small measure on preserving the iconic status of whales, which may be undermined by a resumption of commercial harvesting. Furthermore, the lack of any clear current necessity for the killing of whales, and the almost inevitable infliction of

907. Military and Paramilitary Activities (Jurisdiction and Admissibility Phase) (Nicar. v. U.S.), 1984 I.C.J. 392, 418 (Nov. 26).

908. See Vienna Convention on the Law of Treaties, *supra* note 21, arts. 44, 57, 58 (offering guidance on the question of suspension).

suffering involved in the process, may legitimately lead to a determination in good faith that the interests of *proper* conservation and *orderly* development of the industry militate against any such resumption.⁹⁰⁹

APPENDIX

International Whaling Commission—Resolution 2006–1 *St. Kitts and Nevis Declaration* June 2006

EMPHASISING that the use of cetaceans in many parts of the world including the Caribbean contributes to sustainable livelihoods, food security and poverty reduction and that placing the use of whales outside the context of the globally accepted norm of science-based management and rule-making for emotional reasons would set a bad precedent that risks our use of fisheries and other renewable resources;

FURTHER EMPHASISING that the use of marine resources as an integral part of development options is critically important at this time for a number of countries experiencing the need to diversify their agriculture;

UNDERSTANDING that the purpose of the 1946 International Convention for the Regulation of Whaling (ICRW) is to “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry” (quoted from the Preamble to the Convention) and that the International Whaling Commission is therefore about managing whaling to ensure whale stocks are not over-harvested rather than protecting all whales irrespective of their abundance;

NOTING that in 1982, the IWC adopted a moratorium on commercial whaling (paragraph 10 e of the Schedule to the ICRW) without advice from the Commission’s Scientific Committee that such measure was required for conservation purposes;

FURTHER NOTING that the moratorium which was clearly intended as a temporary measure is no longer necessary, that the Commission adopted a robust and risk-averse procedure (RMP) for calculating quotas for abundant stocks of baleen whales in 1994 and that

909. See ICRW, *supra* note 1, pmb1.

the IWC’s own Scientific Committee has agreed that many species and stocks of whales are abundant and that sustainable whaling is possible;

CONCERNED that after 14 years of discussion and negotiation, the IWC has failed to complete and implement a management regime to regulate commercial whaling;

ACCEPTING that scientific research has shown that whales consume huge quantities of fish making the issue a matter of food security for coastal nations and requiring that the issue of management of whale stocks must be considered in a broader context of ecosystem management since ecosystem management has now become an international standard;

REJECTING as unacceptable that a number of international NGOs with self-interest campaigns should use threats in an attempt to direct government policy on matters of sovereign rights related to the use of food security for national development;

NOTING that the position of some members that are opposed to the resumption of commercial whaling on a sustainable basis is contrary to the object and purpose of the International Convention for the Regulation of Whaling;

UNDERSTANDING that the IWC can be saved from collapse only by implementing conservation and management measures which will allow controlled and sustainable whaling which would not mean a return to historic over-harvesting and that continuing failure to do so serves neither the interests of whale conservation nor management;

NOW THEREFORE:

COMMISSIONERS express their concern that the IWC has failed to meet its obligations under the terms of the ICRW and,

DECLARE our commitment to normalising the functions of the IWC based upon the terms of the ICRW and other relevant international law, respect for cultural diversity and traditions of coastal peoples and the fundamental principles of sustainable use of resources, and the need for science-based policy and rulemaking that are accepted as the world standard for the management of marine resources.