

# The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans?

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## INTRODUCTION

The fifty-fifth meeting of the International Whaling Commission (IWC) was held in Berlin on 16–19 June 2003. The key development at the meeting was the passage of a resolution, denominated 'the Berlin Initiative', which established a Conservation Committee to guide the IWC's future conservation agenda.<sup>1</sup> The extremely narrow margin of passage, 25:20:1,<sup>2</sup> reflected the high level of controversy that the proposal engendered among the parties and non-government organizations that play an active role at IWC meetings. For example, a statement released by 17 parties to the IWC, fully one-third of its membership, expressed concern that the initiative 'will essentially destroy the already polarized and dysfunctional IWC', and characterized it as an 'attempt to change the fundamental objectives . . . and subvert the purpose' of the Commission.<sup>3</sup> By contrast, supporters of the initiative hailed it as 'a milestone in the evolution of the IWC',<sup>4</sup> and 'a historic day for cetacean conservation'.<sup>5</sup>

This article will seek to assess the implications of the Berlin Initiative for the future of the IWC from both a conservation and political perspective. In this pursuit, the article will aim to (1) briefly outline the history

of the IWC; (2) highlight the major elements of the Berlin Initiative, including the primary conservation issues it seeks to address; and (3) seek to evaluate the impact of the initiative on the future agenda of the IWC.

## THE ROAD TO THE BERLIN INITIATIVE

For many centuries, the primary threat to cetaceans (the taxonomic order encompassing whales, dolphins and porpoises) was commercial whaling operations, which were focused on larger species of whales. Although whaling may date back to as early as 1500 BC, the world's first organized whaling operations were conducted by Norsemen and polar Eskimos who hunted with harpoons for cetaceans about 4000 years ago.<sup>6</sup> The advent of a large-scale industry did not begin until between the twelfth and sixteenth centuries, when the Basques in Europe began to catch and process whales on the high seas.<sup>7</sup> In what was to become a familiar historical pattern, over-exploitation led to the crash of targeted stocks and the virtual cessation of Basque whaling efforts by the end of the sixteenth century.<sup>8</sup> Intensive hunting of bowhead whales off Greenland by Dutch, British, German and French whalers drove both the Greenland bowhead whale and the Biscay right whale to near extinction by the end of the nineteenth century.<sup>9</sup> Several other species, including blue, humpback and fin whales, were severely depleted in the nineteenth and early twentieth centuries,

<sup>1</sup> International Whaling Commission, *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission (IWC/55/4 Rev, 2003)* (hereinafter the Berlin Initiative), available at <<http://www.iwcoffice.org/Resolutions2003/Resolution%202003.htm>>.

<sup>2</sup> Grenada abstained from voting on the resolution, contending that the procedure for passing it was illegal.

<sup>3</sup> High North Alliance, *End in Sight for the IWC?*, available at <[http://www.highnorth.no/iwc2003/read\\_nws.asp?which=309](http://www.highnorth.no/iwc2003/read_nws.asp?which=309)>. See also the statement by Japan's Whaling Commission, Mr Minoru Morimoto, *Scoop* (20 June 2003), available at <<http://www.scoop.co.nz/mason/stories/WO0306/@00302.htm>>.

<sup>4</sup> High North Alliance, *Concept of Conservation Hijacked*, available at <[http://www.highnorth.no/iwc2003/read\\_nws.asp?which=307](http://www.highnorth.no/iwc2003/read_nws.asp?which=307)> (statement of Dr David Kemp, Australian Minister of Environment).

<sup>5</sup> C. Westney, 'Whaling Commission Votes for Conservation', *Nature Science Update* (17 June 2003), available at <<http://www.nature.com/nsu/030616/030616-4.html>>.

<sup>6</sup> S. Suhre, 'Misguided Morality: The Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation', 12 *Geo. Int'l Env'tl. L. Rev.* (1999), 305, at 306; L. Kutner, 'The Genocide of Whales: A Crime Against Humanity', 10 *Law. Am.* (1978), 784, at 788.

<sup>7</sup> J.M. Zimmerman, 'Baldrige/Marazumi Agreement: The Supreme Court Gives Credence to an Aberration in American Cetacean Society', 14 *Env'tl. Aff.* (1987), 257, at 262.

<sup>8</sup> *Ibid.*

<sup>9</sup> E.A. Gardner, 'Swimming Through a Sea of Sovereign States: A Look at the Whale's Dilemma', 12 *Ocean Y.B.* (1996), 61, at 64.

with whaling operations expanding to the last remaining refuge for whales, Antarctica, at the close of the nineteenth century.<sup>10</sup> Between 1.5 and 2 million whales were taken in the southern hemisphere during the twentieth century alone, driving blue, fin and humpback whales to commercial extinction.<sup>11</sup>

The continued decimation of stocks finally compelled most of the world's major whaling nations to convene the International Whaling Conference in 1946, culminating in the signing of the International Convention for the Regulation of Whaling (ICRW).<sup>12</sup>

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 resources,<sup>13</sup>

the ICRW established the International Whaling Commission, comprised of one representative from each party, to, *inter alia*: (1) make amendments when appropriate to the ICRW's Schedule, which sets out detailed regulations for whaling, including the species that may be caught, catch limits for individual species, size limits and catch methods;<sup>14</sup> (2) encourage, recommend and engage in studies related to whales and whaling;<sup>15</sup> and (3) collect and analyse statistics about the trends of whale stocks and the impacts of whaling activities.<sup>16</sup>

The ICRW's history over its first three decades was highly discouraging, with the parties engaged in

commercial whaling operations consistently ignoring the recommendations of the IWC's Scientific Committee and opting for wholly unsustainable quotas on most species of great whales.<sup>17</sup> As a consequence, the stocks of many species continued to plummet, with blue whales in 1968 reaching 1% of their levels from 30 years earlier,<sup>18</sup> and the stocks of several other species, including right, humpback and fin, continuing to decline precipitously.<sup>19</sup> The legacy of these excesses has been tragic. Some Antarctic baleen species have declined by over 96% from pre-exploitation levels,<sup>20</sup> with six of 11 great whale species currently classified as endangered or vulnerable even 30 or more years after exploitation has ceased.<sup>21</sup>

In the 1960s, the IWC began to turn the corner. The diminution of the stocks of great whale species substantially reduced the economic incentive for whaling. This facilitated the adoption of the IWC's New Management Procedure,<sup>22</sup> a management regime that ultimately reduced quotas to less than 20% of catches during the first historical phase of the IWC.<sup>23</sup> Additionally, while membership in the IWC had been remarkably stable for 30 years, between 1979 and 1983, membership increased to 41 member countries, many of which were openly hostile to, or had serious reservations about, commercial whaling operations.<sup>24</sup> In 1982, this culminated in the imposition of a

<sup>10</sup> W.C. Burns, 'The International Whaling Commission and the Regulation of Consumptive and Non-Consumptive Uses of Small Cetaceans: The Critical Agenda for the 1990s', 13 *Wis. Int'l L.J.* (1994), 105, at 107. Andreson states that: '[B]y the end of the 1930s the Antarctic Seas were producing some 85 per cent of the world catch'; see S. Andreson, 'The Whaling Regime', in S. Andreson *et al.* (eds), *Science & Politics in International Environmental Regimes* (Manchester University Press, 2000), 35.

<sup>11</sup> International Whaling Commission, *A South Pacific Whale Sanctuary*, Agenda Paper Submitted by the Governments of New Zealand and Australia (IWC/55/5, 2003), at 5. Between 1930 and 1940, whales accounted for 12–15% of the total biomass harvested from the oceans; J. Cousteau, *Whales* (Abrams, 1988), 118.

<sup>12</sup> International Convention for the Regulation of Whaling (Washington, 2 December 1946), printed in 62 Stat 1716, 161 UNTS 72 (hereinafter ICRW). The founding Member States of the ICRW were Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the Union of South Africa, the Union of Soviet Socialist Republics, the UK and the USA.

<sup>13</sup> *Ibid.*, Preamble.

<sup>14</sup> *Ibid.*, Article V(1). The Schedule forms an 'integral part' of the Convention; *ibid.*, Article I. Amendments to the Schedule require a three-quarters majority of voting members; *ibid.*, Article 3(2).

<sup>15</sup> *Ibid.*, Article IV(1)(a).

<sup>16</sup> *Ibid.*, Article IV(1)(b). The current Schedule to the ICRW is available at <<http://www.iwcoffice.org/Schedule.htm>>.

<sup>17</sup> W.C. Burns, 'The International Whaling Commission and the Future of Cetaceans: Problems and Prospects', 8 *Colo. J. Int'l Envtl. L. & Pol'y* (1997), 31, at 35; G. Smith, 'The International Whaling Commission: An Analysis of the Past and Reflections on the Future', 16 *Nat. Resources Law* (1984), 543, at 543. 'An unprecedented number of whales were killed during that time, reaching a peak of approximately 64,000 in the 1960/61 season'; S. Lyster, *International Wildlife Law* (Cambridge University Press, 1985), 19.

<sup>18</sup> Burns, n. 17 above, at 40.

<sup>19</sup> *Ibid.*

<sup>20</sup> International Whaling Commission, *Whale Population Estimates* (IWC, 2003), available at <<http://www.iwcoffice.org/Estimate.htm>>; J. Carey, 'Embattled Behemoths, Whales', 25:3 *Int'l Wildlife* (1995), 4; International Whaling Commission, 'IWC Scientific Committee Report', *Animal Welfare Inst. Q.* (Summer 1989), at 16.

<sup>21</sup> World Wildlife Fund, *Wanted Alive!* (WWF, May 1998), at 1.

<sup>22</sup> From 1949 to 1972, the IWC used the 'blue whale unit' to establish its annual catch limits. One blue whale unit was equivalent to either one blue whale, two fin whales or 2.5 humpbacks, or six sei whales, or an appropriate combination. Thus, while this scheme regulated the total amount of whales that could be taken annually, it did not limit the take of individual species, contributing to the severe diminution of many great whale species during this period; S. Lyster, 'The International Convention for the Regulation of Whaling', in S. Lyster, n. 17 above, chapter 2, at 25; J.P. Rosati, 'Enforcement Questions of the International Whaling Commission: Are Exclusive Economic Zones the Solution?', 14 *Cal. W. Int'l L.J.* (1984), 114, at 125. The New Management Procedure, adopted in 1976, divided species into 20 different stocks and set quotas on a stock-by-stock basis; see Lyster, n. 17 above, at 25.

<sup>23</sup> R.U. Osterwoltd, *International Law and Politics of Conservation: Two Conventions and the Whales*, M.A. Thesis (St Anne's College, University of Oxford, 1984), at 101; Andreson, n. 10 above, at 39.

<sup>24</sup> *Ibid.*, at 49.

moratorium on commercial whaling, which continues in effect today.<sup>25</sup>

As the IWC noted at its 2003 meeting, while the body's focus for its first 25 years was almost exclusively on commercial whaling, over the past 25 years its agenda has expanded substantially 'to address the multitude of threats that cetaceans face and will be facing to an increasing degree'.<sup>26</sup> As will be developed in the next section, some parties envision that the Berlin Initiative's Conservation Committee will ensure that this agenda is further developed and coordinated in the future.

## THE BERLIN INITIATIVE AND THE IWC'S CONSERVATION AGENDA

### THE BERLIN INITIATIVE RESOLUTION

The Berlin Initiative was submitted in 2003 at the fifty-fifth meeting of the IWC by Mexico, and sponsored by 19 of the IWC's 51 members, representing a cross-section of both developed and developing States.<sup>27</sup> At the outset, the resolution notes that the IWC has devoted an 'overwhelming' share of its efforts in the past 25 years to the conservation of larger whale species severely depleted by commercial whaling operations.<sup>28</sup> This included a focus that extended beyond the regulation of whaling to the wide array of other threats that increasingly imperil cetacean species.

While the term 'conservation' is not expressly defined in the resolution, the drafters listed more than 100 resolutions passed since 1976 that were characterized as 'conservation-oriented'. These range from efforts to prevent so-called 'pirate whaling' by non-IWC Member States, coordination with other regimes that may affect the status of cetaceans, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>29</sup> and the Convention on the

Conservation of Migratory Species of Wild Animals (CMS),<sup>30</sup> resolutions to protect cetacean species beyond those exploited by commercial whalers and resolutions on the funding of high-priority scientific research.<sup>31</sup>

The resolution recognizes the need to establish a mechanism to organize the future 'conservation agenda of the Commission'. To facilitate this, the resolution establishes a Conservation Committee of the Commission, composed of all contracting parties. The Committee is entrusted with the responsibility of preparing and recommending the IWC's future conservation agenda, implementing those items of the agenda tasked to it by the Commission, and making recommendations to the IWC to maintain and update the conservation agenda on an ongoing basis.<sup>32</sup> The Committee is also directed to explore means of coordinating its agenda with other relevant organizations and conventions, including the CMS,<sup>33</sup> the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR),<sup>34</sup> the International Maritime Organization, the International Union for the Conservation of Nature and the United Nations Environment Programme.<sup>35</sup> The Scientific Committee of the IWC is also charged with advising the Conservation Committee on relevant issues and ensuring that appropriate scientific research items under the Scientific Committee's responsibility are incorporated into the conservation agenda.<sup>36</sup>

Recognizing the substantial financial resources that the conservation agenda would call for, the Berlin Initiative calls upon the Conservation Committee to begin exploring the possible establishment of a trust fund. The fund would provide resources to the Commission and the parties for implementation of the agenda, with an emphasis on scientific research and capacity building for scientists and institutions from developing countries.<sup>37</sup>

An annex to the resolution breaks down the IWC's conservation activities to date into several broad categories and seeks to 'provide a perspective for its future development'.<sup>38</sup> These categories will be discussed in some detail in the next section, as they will most likely provide a roadmap for the conservation agenda of the Conservation Committee, as well as the cynosure of conflict between IWC factions in the decades to come.

<sup>25</sup> ICRW, n. 12 above, para. 10(e); International Whaling Commission Schedule (February 1983), at 13. The vote in favour of the moratorium was 25:7. The amendment also provided for ongoing research and a comprehensive assessment of the world's whale stocks by 1990, at which time the parties were to 'consider modifications of [the moratorium provision] and the establishment of other catch limits'.

<sup>26</sup> Berlin Initiative, n. 1 above, at 1.

<sup>27</sup> The sponsors of the Berlin Initiative were Australia, Austria, Brazil, Finland, France, Germany, Ireland, Italy, Kenya, Mexico, Monaco, the Netherlands, New Zealand, Portugal, San Marino, Spain, Sweden, the UK and the USA; *ibid.*

<sup>28</sup> *Ibid.*, at para. 2.

<sup>29</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 3 March 1973).

<sup>30</sup> Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979), printed in 19 ILM (1980), 15.

<sup>31</sup> *Ibid.*, at Annex I.

<sup>32</sup> *Ibid.*, at paras 3 and 4.

<sup>33</sup> *Ibid.*

<sup>34</sup> Convention on the Conservation of Antarctic Marine Living Resources (Canberra, 20 May 1980), at Article II(3)(b) (hereinafter CCAMLR).

<sup>35</sup> *Ibid.*, at para. 6.

<sup>36</sup> *Ibid.*, at para. 7.

<sup>37</sup> *Ibid.*, at para. 8.

<sup>38</sup> *Ibid.*, at Annex II.

## THE CONSERVATION AGENDA OF THE IWC: PAST AND FUTURE

In providing guidance to the Conservation Committee, the drafters of the Berlin Initiative summarized 11 major areas in which the IWC has pursued conservation objectives. These are as follows.

**Scientific Research** For the first few decades of its existence, the IWC premised its management decisions almost exclusively on data collected from whaling operations.<sup>39</sup> This proved to be ill-advised in the face of egregious under-reporting of catches by commercial whalers. For example, a former scientist in the Soviet Fisheries Ministry revealed that the Soviet whaling fleet killed 'a vast number of the world's ostensibly protected whale population' between 1948 and 1973, including taking 48,477 humpback whales rather than the 2710 it officially reported to the IWC during this period.<sup>40</sup> This compelled the IWC to rewrite its catch figures for the last 40 years.<sup>41</sup> As Chayes and Chayes concluded:

the USSR's false reporting was so drastic and pervasive that some experts believe it accounts for the persistent inaccuracy of the IWC Scientific Committee's forecasts of whale populations, on which the catch limits were based.<sup>42</sup>

The resolution also notes that during the first few decades of its existence, the IWC applied stock assessment methods similar to those used in other fishery management bodies. However, ultimately its research agenda became more sophisticated. Pursuant to the imposition of the commercial moratorium on whaling in 1982, the IWC launched a comprehensive assessment, which has included development of new methodologies to assess the status and trends of whale populations, and a major review and evaluation of management objectives and procedures.<sup>43</sup> One of the cornerstones of the assessment is the Revised Management Procedure (RMP), a management framework intended to ensure the sustainability of commercial whaling should the moratorium ultimately be lifted. The RMP seeks to ensure the rehabilitation of depleted stocks by permitting catch quotas only for populations of stocks that are determined to be above 54% of pre-exploitation population levels.<sup>44</sup> The

ultimate objective is for targeted species to reach 72% of their pre-exploitation population levels within 100 years.<sup>45</sup>

The RMP is a component of the Revised Management Scheme (RMS), a comprehensive management regime that also includes an effective inspection and observation scheme, arrangements to ensure that total catches over time are within the limits established under the RMS, and incorporation of the RMS into the ICRW's Schedule.<sup>46</sup> While the parties adopted the RMP in 1994, adoption of the RMS has been thwarted by continued conflicts between the parties over elements of the inspection and observation scheme, including funding and the level of coverage.<sup>47</sup> Pro-whaling nations, such as Japan and Norway, have accused their opponents within the IWC of using such concerns as a pretext to delay the lifting of the moratorium.<sup>48</sup> Moreover, at the 2003 meeting, several pro-whaling States and non-government organizations contended that adoption of the Berlin Initiative would also contribute to the delay of implementation of the RMS, 'possibly forever'.<sup>49</sup> While the Berlin Initiative contends that the RMS will ultimately be adopted, it probably further fuelled the apprehension of whaling parties by characterizing commercial whaling as a 'legacy' industry.<sup>50</sup>

**Small Cetaceans** While the popular press has usually focused on the plight of large cetacean species, many species of 'small cetaceans', loosely defined by IWC parties as smaller species of whales, and dolphins and porpoises,<sup>51</sup> are also increasingly imperiled by

<sup>45</sup> Ibid.

<sup>46</sup> International Whaling Commission, *Resolution of Provisions for Completing the Revised Management Scheme* (IWC/48/42, 1996).

<sup>47</sup> International Whaling Commission, *The IWC and the Revised Management Scheme* (2002), available at <<http://www.iwcoffice.org/RMS.htm>>.

<sup>48</sup> Institute of Cetacean Research, *Japan Appeals for Progress at IWC Meeting* (31 January 2001), available at <<http://www.jfa.maff.go.jp/whale/whatsnew/010131RM.pdf>>; A. Best, 'Claris Charles to the IWC, Go On with the Job', *CTE N.* (18 June 2003), available at <[http://www.ctenews.com/news/tbest\\_news\\_06182003bb.htm](http://www.ctenews.com/news/tbest_news_06182003bb.htm)>.

<sup>49</sup> IWMC World Conservation Trust, *Opening Statement* (IWC/55/OSIWWC, 2003); International Whaling Commission, *Statement of Minoru Morimoto*, Commission for Japan at the Fifty-Fifth Annual Meeting of the International Whaling Commission (IWC/55/26, 2003).

<sup>50</sup> Berlin Initiative, n. 1 above, at 9.

<sup>51</sup> The bifurcation of cetaceans into classifications of 'large' and 'small' is a largely arbitrary distinction based primarily on whether the species have been traditionally exploited by the commercial whaling industry; J.E. Scarff, 'The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment, Part 1', 6 *Ecology L.Q.* (1983), 323, at 373, n. 279. The capricious nature of the distinction is accentuated by the fact that at least one of the so-called 'small' cetaceans, the Baird's beaked whale, is actually larger than minke whales, killer whales and Atlantic bottlenose whales, all of which are regulated on the IWC's Schedule. Small cetaceans range in size from nearly 30 feet, in the case of the killer whale (usually classified as a dolphin), down to the 5 feet of the black dolphin of Chile. See K.S. Norris, 'Dolphins in Crisis', *Nat'l Geo.* (September 1992), 7, at 13.

<sup>39</sup> Ibid., at Annex II, at 8.

<sup>40</sup> D.D. Caron, 'The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures', 89 *Am. J. Int'l L.* (1995), 154, at 171.

<sup>41</sup> Ibid.

<sup>42</sup> A. Chayes and A.H. Chayes, *The New Sovereignty* (Harvard University Press, 1995), at 155.

<sup>43</sup> See also n. 25 above.

<sup>44</sup> International Whaling Commission, 43 *Rep. Int'l Whaling Commission* (1993), 146–52, Annex H and Annex I.

anthropogenic activities. For example, a study presented at the 2003 IWC meeting estimated that over 300,000 cetaceans, the vast majority of them small cetaceans, are killed annually as by-catch in the world's fisheries.<sup>52</sup> Small cetacean species are also seriously threatened by other factors, including direct exploitation,<sup>53</sup> pollution,<sup>54</sup> habitat destruction<sup>55</sup> and climate change.<sup>56</sup>

The issue of whether the IWC has competence under the ICRW to regulate threats to small cetaceans has been a contentious one for more than 30 years.<sup>57</sup> Opponents, such as Japan and Norway, have contended that small cetaceans were not listed in the original 'Nomenclature of Whales', an annex to the ICRW, 'and that to add them subsequently to the Nomenclature would require the consent of all the signatories to the ICRW'.<sup>58</sup> They also argue that that under Article 61 of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>59</sup> coastal States are imbued with the authority to regulate coastal resources,<sup>60</sup> which would encompass most small cetaceans. Some opponents have even questioned the IWC's authority to engage in research on small cetaceans.<sup>61</sup>

<sup>52</sup> A.J. Read, P. Drinker and S. Northridge, *By-Catches of Marine Mammals in US Fisheries and a First Attempt to Estimate the Magnitude of Global Marine Mammal By-Catch*, Fifty-Fifth Annual Meeting of the International Whaling Commission (SC/55/BC5, 2003), at 4.

<sup>53</sup> R. Reeves *et al.*, *Dolphins, Whales and Porpoises* (IUCN/SSC Cetacean Specialist Group, 2003), at 13–14; International Whaling Commission, *Report of the Scientific Committee* (IWC/53/4, 2001), at 12.

<sup>54</sup> J. Harwood, 'Marine Mammals and Their Environment in the Twenty-First Century', 82 *J. Mammalogy* (2001), 630–640; W.C. Burns, 'From the Lance to the Laboratory: The Impact of Anthropogenic Environmental Degradation on Cetacean Species', 10:2 *Seawind* (1997), 2–7.

<sup>55</sup> K. Mulvaney and B. McKay, 'Small Cetaceans: Status, Threats, and Management', in W.C. Burns and A. Gillespie (eds), *The Future of Cetaceans in a Changing World* (Transnational Press, 2003), 200; Reeves *et al.*, n. 53 above, at 18–19.

<sup>56</sup> W.C. Burns, 'Climate Change and the International Whaling Commission in the Twenty-First Century', in Burns and Gillespie, n. 55 above, at 339–382.

<sup>57</sup> A. Gillespie, 'Small Cetaceans, International Law and the International Whaling Commission', 2:2 *Melbourne J. Int'l L.* (2001), 257, at 261–265; W.C. Burns, 'The International Whaling Commission and the Regulation of the Consumptive and Non-Consumptive Uses of Small Cetaceans: The Critical Agenda for the 1990s', 13 *Wis. Int'l L.J.* (1994), 105, at 106.

<sup>58</sup> See Gillespie, n. 57 above, at 258.

<sup>59</sup> United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) (UNCLOS).

<sup>60</sup> *Ibid.*, Article 61, which provides in part: '1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone. 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end . . .'

<sup>61</sup> Letter of W.G. Doubleday, Director General, Fisheries and Oceans Science, Canada to IWC Secretary, Dr Ray Gambell, available from the IWC Secretariat (Ref. No IWC/48/20, Agenda Item 9.1, 1996).

Supporters have countered that the nomenclature is merely a taxonomic guide, and thus does not limit the regulatory purview of the ICRW.<sup>62</sup> Moreover, they contend that under Article 65 of UNCLOS, States are required to work for the conservation, management and study of cetaceans 'through the appropriate organizations',<sup>63</sup> and that the IWC is the competent body in this context.<sup>64</sup>

The Berlin Initiative opts for a different approach, with the parties stating that the IWC should dispense with distinguishing between 'small' and 'large' cetaceans in favour of adopting UNCLOS's division of cetaceans into 'highly migratory species'<sup>65</sup> and 'other species'.<sup>66</sup> In the initiative, the parties advocate that the IWC remain the primary organization for management and conservation of highly migratory species. However, the parties concluded that primary responsibility for other cetacean species should reside with coastal States and regional organizations, such as those established under the CMS.<sup>67</sup> To date, two regional cetacean conservation regimes have been established under the CMS, the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS),<sup>68</sup> and the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS).<sup>69</sup>

Ostensibly, the decision would appear to carve out an important role for other regimes and national governments. However, the definition of 'highly migratory species' under UNCLOS is extremely capacious, encompassing all species of cetaceans other than grey whales, river dolphins and porpoises.<sup>70</sup> Thus, the initiative accords the IWC primary jurisdiction over the vast

<sup>62</sup> Burns, n. 57 above, at 130.

<sup>63</sup> UNCLOS, n. 59 above. Article 65 provides in part: ' . . . States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.'

<sup>64</sup> Burns, n. 57 above, at 132.

<sup>65</sup> Annex I of UNCLOS sets forth those species classified as 'highly migratory' under the treaty, including the following families of cetaceans: *Physeteridae*; *Balaenopteridae*; *Balaenidae*; *Eschrichtiidae*; *Monodontidae*; *Ziphiidae*; *Delphinidae*.

<sup>66</sup> Berlin Initiative, n. 1 above, at 13.

<sup>67</sup> *Ibid.*

<sup>68</sup> (New York, 17 March 1992), printed in R.L. Wallace *The Marine Mammal Commission Compendium of Selected Treaties, International Agreements, and Other Relevant Documents on Marine Resources, Wildlife and the Environment*, Vol. II (Marine Mammal Commission, 1994), 1612.

<sup>69</sup> (Monaco, 24 November 1996), printed in 36 *ILM* (1997), 777. Both ASCOBANS and ACCOBAMS were established under Article IV(4) of the CMS, which encourages the regime's parties to 'take action with a view to concluding agreements for any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdiction boundaries'; CMS, n. 30 above.

<sup>70</sup> UNCLOS, n. 59 above, Annex I.

majority of the world's cetaceans, including most species listed under ACCOBAMS and ASCOBANS. For example, in the context of ACCOBAMS, the only species regularly found in the treaty's Agreement Area that is not classified by UNCLOS as 'highly migratory' is the *Phocoenidae* species, *Phocoena phocoena* – the harbour porpoise. Thus, jurisdictional conflicts may arise between these regimes and the IWC in the future. At a minimum, it is not clear why the IWC would seek primary jurisdiction in regions where the CMS has established regimes to focus upon the unique needs of the cetaceans found in those areas, especially given the extremely limited resources of the IWC to address small cetacean issues.

**Incidental Take of Cetaceans** As indicated above, more than 300,000 cetaceans may be killed annually due to inadvertent capture in fishing operations throughout the world.<sup>71</sup> To put this number in perspective, during the twentieth century, only slightly more than 21,000 whales were killed annually on average in the Southern Ocean, the centre of commercial whaling operations,<sup>72</sup> and less than 2000 were deliberately taken in 2000.<sup>73</sup> By-catch has emerged as the primary threat to two severely endangered species, the baiji and vaquita, and may prove unsustainable for several other populations, including hump-backed and bottle dolphins off the coast of South Africa, striped dolphins in the Mediterranean, and harbour porpoises in the western North Atlantic.<sup>74</sup>

Over the past 20 years, the IWC has, for the most part, restricted itself to a research agenda on this issue. This agenda has included holding workshops on cetacean mortality in fishing nets and traps, the development of methods to improve estimation of by-catch and efforts to improve by-catch reporting by the parties.<sup>75</sup>

The Berlin Initiative concludes that effective management of cetacean by-catch will necessitate a substantial expansion of the IWC's focus. This will include more extensive collaborative efforts with other bodies, including regional fishery organizations, regional conservation regimes, global regimes, such as the Food and Agriculture Organization and the CMS, and coastal States.<sup>76</sup> It will also require improved monitoring protocols, the development of technical methods to reduce incidental takes, and development and implementation of effective regulatory measures.<sup>77</sup>

<sup>71</sup> See A.J. Read, n. 52 above.

<sup>72</sup> Cetacean Bycatch Research Center, *Cetacean Bycatch Facts*, available at <<http://www.cetaceanbycatch.org/status.cfm>>.

<sup>73</sup> Berlin Initiative, n. 1 above, at 13.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*, at 14.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

## Non-Consumptive Utilization of Cetaceans

The term 'non-consumptive' utilization of cetaceans encompasses any activity that does not involve the deliberate killing or critical injury of whales, including whale watching and the taking of whales into captivity.<sup>78</sup> In this regard, the Berlin Initiative focuses on the IWC's activities related to whale watching. The whale-watching sector is one of the fastest growing tourism industries in the world, experiencing approximately 12% growth annually and generating more than US\$1 billion in revenue.<sup>79</sup> By contrast, the killing of whales now produces only approximately US\$50 million in revenue annually.<sup>80</sup>

While proponents have characterized whale watching as a sustainable alternative to the killing of whales that also helps to educate the public about cetacean conservation and ecosystem relationships,<sup>81</sup> strict regulations are required to prevent harassment of, and harm to, whales. The threats posed by whale watching include vessels approaching too closely or at excessive speeds,<sup>82</sup> excessive vessel noise<sup>83</sup> and inappropriate feeding of cetaceans by eco-tourists.<sup>84</sup>

The IWC has contributed to efforts to ensure the sustainability of whale watching by, *inter alia*, assisting coastal States in the drafting of regulations, establishing a sub-committee to address scientific issues related to whale watching and helping States to maximize the educational aspects of whale-watching operations.<sup>85</sup>

In noting that a transition has occurred 'from whaling to whale-watching as the prevalent form of economic utilization of whales', the Berlin Initiative concludes that the IWC's priorities must shift. Eighty-seven countries are engaged in whale-watching operations, which is a much greater number than were ever

<sup>78</sup> R. Barstow, 'Non-Consumptive Utilization of Whales', 15:3 *Ambio* (1986), 155, at 155–156.

<sup>79</sup> B. Morton, 'Whaling: When is Enough, Enough?', 44 *Marine Pollution* (2002), 1–2.

<sup>80</sup> M. Bird, 'Sea Change for Whales', *Time International* (30 June 2003), at 46.

<sup>81</sup> International Whaling Commission, *Report of the Technical Committee, Fifty-Fifth Annual Meeting of the Parties (IWC 50/5)*, at 3; International Whaling Commission, *Resolution on Whalewatching (IWC/48/37, 1996)*; M. McCloskey, *Recreational Whale-Watching*, Global Conference on the Non-Consumptive Utilization of Cetacean Resources (Boston, Massachusetts, June 1983), at 9.

<sup>82</sup> H. Bruce, 'Whale-Watching Latest Threat to Oceans' Giants', *Toronto Star* (LEXIS-NEXIS, News Section, 26 May 1998).

<sup>83</sup> O. Bennett, 'Whales Under Threat from Their Fans', *Daily Telegraph* (27 May 1995), at 17.

<sup>84</sup> International Whaling Commission, *Report of the Sub-Committee on Whalewatching*, Report of the Scientific Committee of the Fiftieth Meeting of the Parties (IWC/50/4), Annex 2, at 2; W. Priesnitz, 'Respectful Whale Watching', 78 *Natural Life Magazine* (2003), available at <<http://www.life.ca/nl/78/whales.html>>.

<sup>85</sup> Berlin Initiative, n. 1 above, at 15.

involved in whaling activities. By implication, the initiative calls for increasing cooperation with non-IWC States engaged in whale-watching operations, or advocates seeking to recruit these States as parties to the ICRW. This appears to have been one aspect of the initiative that particularly angered whaling proponents, since a focus on whale watching could both potentially increase the ranks of non-whaling parties as well as help to reorient the IWC's priorities.<sup>86</sup>

### Highly Endangered Species and Populations

As indicated earlier, commercial whaling devastated the stocks of many species of great whales,<sup>87</sup> reducing, for example, blue whales to perhaps 1% of their pre-exploitation levels,<sup>88</sup> humpback whales to less than 5%<sup>89</sup> and fin whales to approximately 15%.<sup>90</sup> The Berlin Initiative concludes that the IWC in recent years has become increasingly conscious of its duty of care toward such severely depleted species and populations.<sup>91</sup> Its agenda in this context has included developing a research programme for blue whales in the southern hemisphere, including highly endangered species in its comprehensive assessment programme,<sup>92</sup> calling upon Canada to cease hunting of endangered bowhead whales in the eastern Canadian Arctic, calling for efforts to reduce the threats to western North Atlantic right whales, including entanglement in fishing gears and collisions with vessels, and expressing its concern about activities that threatened western North Pacific grey whales, such as oil seismic exploration in their feeding grounds.<sup>93</sup>

The initiative observes that the primary threats to highly endangered species are no longer direct takes but rather other factors, such as by-catch, reproductive failure and collisions with ships. Thus, the resolution concludes that research methods need to be adapted accordingly.<sup>94</sup>

**Whales and Environmental Change** The Berlin Initiative's conclusion that threats to cetacean habitats and environmental change pose 'the greatest

challenge in conserving whale populations for future populations'<sup>95</sup> is unassailable. For example, habitat destruction is a threat to many species, including several small cetacean species that number only in the hundreds or low thousands, such as the Indus dolphin, the Baiji dolphin and the Ganges river dolphin.<sup>96</sup> Climate change may imperil the populations of several great whale species in the Arctic and Antarctic severely depleted by commercial whaling operations, as well as many species in other regions of the world.<sup>97</sup> Pollutants, such as organochlorines and petroleum, have been linked to a host of maladies in cetaceans, including immunosuppression,<sup>98</sup> sterility,<sup>99</sup> premature parturition,<sup>100</sup> depression of reproductive rates,<sup>101</sup> cancer,<sup>102</sup> alteration of growth and bone development,<sup>103</sup> disruption of endocrine systems,<sup>104</sup> and neuro-toxic effects that can lead to disorientation, resulting in beaching.<sup>105</sup>

The Berlin Initiative resolution traces the IWC's growing response to these threats. In the last decade, this has included the establishment of a Standing Working Group on Environmental Concerns, which was instructed to address pressing issues, including potential climate change impacts, pollution, noise

<sup>95</sup> Ibid.

<sup>96</sup> R. Reeves *et al.*, n. 53 above, at 18–19; Whale and Dolphin Conservation Society (WDCS), *Ganges River Dolphins – Distribution and Threats*, available at <<http://www.wdcs.org/dan/publishing.nsf/allweb/D221CD0FEA3754C0802569CB0055B141>>; H.B. Bhaagat, 'Introduction, Distribution, Conservation and Behavioral Ecology of Indus Blind Dolphin (*Platanista indi*) in River Indus (Dolphin Reserve), Sindh, Pakistan', 26:1 *Tigerpaper* (1999), 11, at 14.

<sup>97</sup> W.C. Burns, 'From the Harpoon to the Heat: Climate Change and the International Whaling Commission in the Twenty-First Century', 13 *Geo. Int'l Env'tl. L. Rev.* (2001), 335–354.

<sup>98</sup> R.S. Wells and M.D. Scott, 'Bottlenose Dolphin: *Tursiops truncatus* (Montagu, 1821)', in S.H. Ridgway and R. Harrison (eds), *Handbook of Marine Mammals*, 6th edn (Academic Press, 1999), at 165.

<sup>99</sup> S. Corsolini *et al.*, 'Congener Profile and Toxicity Assessment of Polychlorinated Biphenyls in Dolphins, Sharks and Tuna Collected from Italian Coastal Waters', 40:1 *Marine Env'tl. Res.* (1995), 33, at 40.

<sup>100</sup> Ibid.

<sup>101</sup> G.M. Troisi, 'Bioaccumulation of Polychlorinated Biphenyls (PCBs) and Dichlorodiphenylethane (DDE) Methyl Sulfones in Tissues of Seal and Dolphin Morbillivirus Epizootic Victims', 62:1 *J. Toxicology & Env'tl. Health* (2001), 1, at 6; S. Reich *et al.*, 'Congener Specific Determination and Enantiomeric Ratios of Chiral Polychlorinated Biphenyls in Striped Dolphins (*Stenella coeruleoalba*) from the Mediterranean Sea', 33 *Env'tl. Sci & Tech.* (1999), 1787.

<sup>102</sup> M. Garcia Hartmann, 'Pathology of Marine Mammals', in T. Jauniaux *et al.* (eds), *Marine Mammals, Seabirds and Pollution of Marine Systems* (Presses de la Faculté de Médecine Vétérinaire de l'Université de Liège, 1997), at 141; J.E. Cummins, *PCBs A Global Tragedy* (1994), at 2 (unpublished manuscript supplied to the author).

<sup>103</sup> A. Borrell *et al.*, 'Organochlorine Compounds in Common Dolphins (*Delphinus delphis*) from the Atlantic and Mediterranean Waters of Spain', 114 *Env'tl. Pollution* (2001), 265, at 266.

<sup>104</sup> M.C. Fossi *et al.*, 'The Use of Non-Lethal Tool for Evaluating Toxicological Hazard of Organochlorine Contaminants in Mediterranean Cetaceans: New Data 10 Years After the First Paper Published in MPB', 46 *Marine Pollution Bull.* (2003), 972–982.

<sup>105</sup> Ibid.

<sup>86</sup> See M. Morimoto, n. 3 above.

<sup>87</sup> See n. 11 above.

<sup>88</sup> Ibid., at 5. Estimates for blue whales in the Southern Ocean are now 400–1100; *ibid.*

<sup>89</sup> J. Roman and S.R. Palumbi, 'Whales Before Whaling in the North Atlantic', 301 *Sci.* (2003), 508. A recent genetic analysis estimates that the current population of the humpback whale is no more than 10,000; *ibid.*

<sup>90</sup> Ibid. A recent genetic analysis estimates that the current population of the fin whale is no more than 56,000; *ibid.*

<sup>91</sup> Berlin Initiative, n. 1 above, at 16.

<sup>92</sup> The 1982 amendment to the ICRW's Schedule that imposed the moratorium on commercial whaling mandated a comprehensive assessment of whale stocks; see n. 25 above.

<sup>93</sup> Berlin Initiative, n. 1 above, at 17.

<sup>94</sup> Ibid.

impacts, habitat degradation and direct and indirect effects of fisheries; two major research programmes on pollution (Pollution 2000+) and issues related to the relationship between whales and food supply (SO-GLOBEC) in the Southern Ocean; and the production of an annual 'State of the Cetacean Report'.<sup>106</sup> The initiative concludes that the IWC's work in this context will necessitate expanding the breadth of expertise brought to bear on these issues, mandating increased collaboration with other agencies with relevant expertise, as well as programmes of a longer-term nature.<sup>107</sup>

### Ecosystem Approaches and Interaction with Other Marine Living Resources

In the context of regimes that regulate the harvesting of living resources, the ecosystem management approach emphasizes the need to maintain the viability of the ecological relationship between harvested, dependent and related populations.<sup>108</sup> The approach has been increasingly embraced at both the inter-national and national level<sup>109</sup> in recognition that 'ecosystems function as whole entities and need to be managed as such',<sup>110</sup> and 'ecosystem functioning and resilience depends on a dynamic relationship within species, among species and between species and their abiotic environment . . .'.<sup>111</sup>

Cetaceans can play an important role in the ecosystems of which they are a part. For example, some researchers have contended that cetaceans may consume more prey than all the world's fisheries,<sup>112</sup> with unquestionably momentous implications for the

composition of ocean ecosystems.<sup>113</sup> Moreover, it has been hypothesized that the faeces of some species may play an important role in promoting nutrient cycling in the world's oceans, although this role may have substantially declined as a consequence of the diminution of the populations of great whales due to commercial whaling operations.<sup>114</sup> A recent study by Springer *et al.* concluded that the decline of great whale species in the North Pacific Ocean may have compelled killer whales, which hitherto had relied upon great whales as an important source of prey, to shift their attention to seals, sea lions and sea otters. This increased level of predation may explain the collapse of otter and pin-niped populations in the region in recent years.<sup>115</sup>

Conversely, the diminution of cetacean prey species may have profound implications for cetacean stocks. Consequently, the IWC has collaborated with CCAMLR<sup>116</sup> on issues associated with the harvesting of krill, which is the primary prey resource of many cetacean species in the Southern Ocean.<sup>117</sup>

<sup>113</sup> In recent years, Japanese researchers and government officials have contended that cetaceans compete with fishermen for increasingly scarce fish resources. For example, a pamphlet distributed by the Institute of Cetacean Research at the fifty-first meeting of the IWC contended that 'whales consume six times as much fish as the world's fisheries catch'; M. Donoghue, 'Whales – The New Scapegoat for Overfishing', in Burns and Gillespie, n. 55 above, at 384. See also, K. Shima, *Opening Statement, Fifty-First Meeting of the IWC (IWC/51/OS/JAPAN, 1999)*, at 1. However, as Donoghue has observed, assessment of the ecosystem implications of species' predation is extremely complex and fraught with uncertainty: 'The complexity surrounding trophic (feeding) interactions makes predicting outcomes for even the simplest trophic web very difficult, however, and has only been demonstrated for simplified freshwater systems. Models of multi-species interactions have shown that expected outcomes are rarely met. This is because each trophic level is affected by a mix of competition, predation and environment, the importance of each varying with the species concerned. Potential predatory interactions in even simple food webs make predictions highly uncertain. It is not surprising that there is little scientific consensus on the reliability of multi-species fisheries' models to predict the impact of cetaceans on fish stocks'. See M. Donoghue, above, at 389–390. For example, some researchers have contended that cetaceans that feed on commercially harvested fish species also feed on predatory fish species that feed on commercially fished species. Thus, 'removing whales could then cause an increase in the numbers of predatory fish, which would then in turn consume more of the commercially important species to the detriment of commercial fishermen'; Greenpeace, *Balance in the Ecosystem*, Briefing at the Fifty-Fifth Meeting of the IWC (Greenpeace, 2003), at 1. See also, P. Yodzis, 'Must Top Order Predators be Culled for the Sake of Fisheries?', 16:2 *Trends Eco. & Evolution* (2001), 88–83. Moreover, some researchers contend that there is a minimal overlap between the food webs that support commercial fish and cetaceans. See M. Donoghue, above, at 391–393.

<sup>114</sup> H. Whitehead, *Are Cetacea Ecologically Important?* (1984), at 12, unpublished manuscript supplied to the author.

<sup>115</sup> A.M. Springer *et al.*, 'Sequential Megafauna Collapse in the North Pacific Ocean: An Ongoing Legacy of Industrial Whaling?', 100:21 *Proc. Nat'l Acad. Sci.* (2003), at 12223–12228.

<sup>116</sup> See CCAMLR, n. 108 above.

<sup>117</sup> C. Barbraud and H. Weimerskirch, 'Emperor Penguins and Climate Change', 411 *Nature* (2001), 183, at 185.

<sup>106</sup> *Ibid.*, at 19–20.

<sup>107</sup> *Ibid.*, at 20.

<sup>108</sup> CCAMLR, n. 34 above, Article II(3)(b).

<sup>109</sup> *Ibid.*, Article II(3); ACCOBAMS, n. 69 above, Preamble, Article II(3); Council Regulation (EC) No 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources Under the Common Fisheries Policy, [2002] OJ L358/59, available at <[http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_358/l\\_35820021231en00590080.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_358/l_35820021231en00590080.pdf)>; *Bergen Declaration*, Fifth International Conference on the Protection of the North Sea (Bergen, 20–21 March 2002), at 8, available at <<http://odin.dep.no/archive/mdvedlegg/01/11/Engel069.pdf>>; K.J. Sainsbury *et al.*, 'Design of Operational Management Strategies for Achieving Fishery Ecosystem Objectives', 57 *ICES J. Marine Sci.* (2000), 731, at 731–732; D. Greenfield, C. Mintz and E. Bougeault, 'Recent Legislative and Regulatory Developments of Interest to Oil and Gas Lawyers', 36 *Alberta L. Rev.* (1998), 539, at 542; M.C. Wood, 'Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems', 40 *Ariz. L. Rev.* (1997), 197, at 213.

<sup>110</sup> World Resources Institute, *What is an Ecosystem Approach?* (WRI, 2000), available at <[http://www.wri.org/wr2000/ecosys\\_approach.html](http://www.wri.org/wr2000/ecosys_approach.html)>.

<sup>111</sup> Convention on Biological Diversity, Decision V/6, *Ecosystem Approach*, Fifth Meeting of the Conference of the Parties (UNEP/CBD/COP/5/23, 2000).

<sup>112</sup> J.W. Kanwisher and S.H. Ridgway, 'The Physiological Ecology of Whales and Porpoises', 248:6 *Sci. Am.* (1983), 110–121.

Unlike in most other sections of the Berlin Initiative, the drafters did not draw any conclusions about the implications of ecosystem approaches for the future of the IWC's conservation agenda. This may reflect the fact that the RMP does not mandate an ecosystem approach,<sup>118</sup> severely limiting the IWC's potential application of this management strategy. Or it may be in recognition of the failure of the CCAMLR to implement an ecosystem approach in the face of imposing data requirements and the complexity of natural systems.<sup>119</sup>

**Sanctuaries** Article V of the ICRW authorizes the IWC to establish 'open and closed waters, including the designation of sanctuary areas'.<sup>120</sup> The IWC has established two sanctuaries to date, in the Indian and Southern Oceans, but rejected proposals over the past few years for sanctuaries in the South Atlantic and the South Pacific.<sup>121</sup>

Sanctuaries have been one of the primary sources of conflict within the IWC in recent years. Supporters of sanctuaries contend that they serve several salutary purposes, including assisting recovery of severely depleted species, stimulating coordinated research, helping to develop sustainable and non-lethal uses of cetaceans, and helping to increase public awareness of cetacean-related issues and methods to protect them.<sup>122</sup> However, some of the parties to the ICRW, as well as several legal commentators, have accused sanctuary proponents of bad faith, contending that they are attempting to use the mechanism to preclude commercial whaling in as many parts of the world as possible.<sup>123</sup> Further, they contend that the Southern Ocean sanctuary is *ultra vires* under Article V(2) of the ICRW because of, *inter alia*: (1) the alleged redundancy of sanctuaries in the face of the commercial whaling moratorium; (2) the failure to establish an adequate scientific basis for establishment of sanctuaries; and (3) the failure to take into account the interests of whaling nations and consumers of whale products.<sup>124</sup>

<sup>118</sup> P.J. Clapham *et al.*, 'Whaling as Science', 53:3 *Biosci.* (2003), 210.

<sup>119</sup> S.B. Kaye, 'Legal Approaches to Polar Fisheries Regimes: A Comparative Analysis of the Convention for the Conservation of Antarctic Marine Living Resources and the Bering Sea Doughnut Hole Convention', 26 *Cal. W. Int'l L.J.* (1995), 75, at 88.

<sup>120</sup> See ICRW, n. 12 above.

<sup>121</sup> See Berlin Initiative, n. 1 above, at 21–26.

<sup>122</sup> International Whaling Commission, *A South Pacific Whale Sanctuary*, n. 11 above, at 5–6; International Whaling Commission, *The South Atlantic: A Sanctuary for Whales*, presented by Governments of Brazil and Argentina to the Fifty-Fifth Meeting of the International Whaling Commission (IWC/55/6 Rev., 2003), at 11.

<sup>123</sup> See M. Morimoto, n. 3 above; G. Moulson, 'International Whaling Commission Rejects New Whale Sanctuaries', *Environmental News Network* (18 June 2003), available at <[http://www.enn.com/news/2003-06-18/s\\_5138.asp](http://www.enn.com/news/2003-06-18/s_5138.asp)>.

<sup>124</sup> D.M. Johnston, *The Southern Ocean Whale Sanctuary Designation: Some Preliminary Reflections* (Institute of Cetacean Research), available at <<http://www.intfish.net/iwc2002/links.htm>>; W.T. Burke, 'Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the IWC', 27 *Ocean Development & Int'l L.* (1996), 315–316.

The Berlin Initiative will do little to dispel the concerns of whaling nations in this context. The resolution calls on the IWC to explore the establishment of sanctuaries as a 'policy of supporting coastal States' desires for exclusively non-lethal use of cetaceans migrating into their waters'.<sup>125</sup> It notably fails to acknowledge the need for sanctuary proposals to meet the criteria of Article V(2), reinforcing the fear of supporters of commercial whaling that sanctuary proposals in the future will seek to ensure *de facto* perpetuation of the commercial whaling moratorium even if the RMS is ultimately implemented.

### **Enforcement of Conservation Measures and Monitoring of Compliance**

In recent years, virtually all multilateral environmental regimes and States have acknowledged the need to strengthen the implementation, compliance and enforcement provisions of environmental instruments.<sup>126</sup> The Berlin Initiative emphasizes that the need for effective measures in this context has greatly increased as the IWC's conservation-oriented agenda has expanded.<sup>127</sup> It traces efforts to improve enforcement of the ICRW and IWC resolutions through measures such as the establishment of a register of whaling vessels to take action against whaling by vessels flying flags of convenience and the use of DNA testing, as well as monitoring initiatives, including registries of whale meat stockpiles.<sup>128</sup> However, the initiative proffers no additional suggestions for improving enforcement or compliance efforts in the future to further the IWC's conservation agenda.

### **Management of Lethal Scientific Research: 'Scientific' Whaling**

Article VIII of the ICRW authorizes any party, 'notwithstanding anything contained in this Convention', to grant to any of its nationals 'a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research'.<sup>129</sup> While this provision was used extremely sparingly prior to the imposition of the moratorium on commercial whaling, Iceland, Norway and Japan have conducted extensive whaling operations under the

<sup>125</sup> See Berlin Initiative, n. 1 above, at 26.

<sup>126</sup> International Network for Environmental Compliance and Enforcement (INECE) and Organization for Economic Cooperation and Development (OECD), *INECE-OECD Workshop on Environmental Compliance and Enforcement Indicators: Measuring What Matters*, discussion paper prepared by the INECE Expert Working Group on Environmental Compliance and Enforcement Indicators (INECE, 2003), 3; S. VanDeveer, 'Protecting Europe's Seas', *Env't* (July/August 2000), at 19; G.W. Downs, K.W. Danish and P.N. Barsoom, 'The Trans-formational Model of International Regime Design: Triumph of Hope or Experience?', 38 *Colum. J. Transnat'l L.* (2000), 465, at 472.

<sup>127</sup> See Berlin Initiative, n. 1 above, at 26.

<sup>128</sup> *Ibid.*, at 26–27.

<sup>129</sup> See ICRW, n. 12 above, Article 5.

rubric of scientific research in the ensuing 15 years,<sup>130</sup> taking more than 7500 whales between them.<sup>131</sup> The scientific research whaling provision of the IWC exemplifies what some commentators have alleged is a pattern of bad faith by many parties to the ICRW.<sup>132</sup> Over the past two decades, it has been used by whaling nations as a pretext to keep the commercial whaling industry alive while the battle to lift the moratorium continues to be waged.<sup>133</sup>

Japan's operations in this context have been the most substantial. Since 1987, Japan has invoked Article VIII to kill approximately 6000 minke, Bryde's, sperm and sei whales in the Southern Ocean (including minke whales in the Southern Ocean Sanctuary)<sup>134</sup> and North Pacific.<sup>135</sup> At the 2003 meeting, Iceland, which very recently re-adhered to the ICRW,<sup>136</sup> proposed a scientific

research programme that would authorize the killing of 100 minke, 100 fin, and 50 sei whales each year for 2 years.<sup>137</sup>

ICRW parties conducting scientific whaling operations contend that they are 'making important contributions to the understanding of whale biology . . . relevant to the management concerns that are at the core of the IWC's mission'.<sup>138</sup> However, 'in what has become a ritual',<sup>139</sup> the IWC has continually passed resolutions over the past 15 years calling for the cessation of research whaling operations, on the grounds that such research is not essential for rational management of stocks, does not address critical research needs and that non-lethal techniques can provide commensurate data.<sup>140</sup>

The Berlin Initiative represents the IWC's strongest statement to date on this issue. Citing the Food and Agriculture Organization's Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas<sup>141</sup> as an example, the resolution advances the argument that the definitional scope of treaty non-compliance includes:

any action that undermines the effectiveness of conservation measures adopted by the competent regional or international organization, regardless of whether or not the action is technically legal.<sup>142</sup>

The resolution advances the argument that scientific whaling constitutes such an act, declaring that 'non-compliance with the Commission's policy on scientific whaling is now a greater conservation problem than official commercial whaling'.<sup>143</sup>

This statement may be somewhat hyperbolic. The Scientific Committee did receive alarming data in 2001 indicating that the abundance of minke whales may

<sup>130</sup> British Embassy Berlin, *UK Leads International Opposition to Iceland's Scientific Whaling*, Press Release (10 September 2003), available at <<http://www.britischesbotschaft.de/en/news/items/030910a.htm>>; International Whaling Commission, *Japan's Whale Research Programme and International Law* (IWC/53/10, 2001), at 6.

<sup>131</sup> See International Whaling Commission, *Resolution on Whaling Under Special Permit*, Resolution 2003-2 (2003), available at <<http://www.iwcoffice.org/Resolutions2003/Resolution%202003.htm#Permits>>.

<sup>132</sup> As John Knauss, retired administrator of the National Oceanic and Atmospheric Administration and US Commissioner to the IWC, concluded, 'As an example of good faith international negotiations, the IWC is mostly a disaster'; R.L. Friedheim, 'The IWC as a Contested Regime', in R.L. Friedheim (ed.), *Toward a Sustainable Whaling Regime* (Earthscape, 2001), at 1.

<sup>133</sup> D. Normile, 'Japan's Whaling Programme Carries Heavy Baggage', 289 *Sci.* (2000), 2264; J. Iversen, 'An Angry Rift in the Year 2000: Japan's Scientific Whaling', 19 *Colo. J. Int'l Envtl. L. & Pol'y* (2000), 121.

<sup>134</sup> International Whaling Commission, *Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling*, Resolution 2003-3 (2003). South Korea also launched a very small scientific whaling operation after the imposition of the moratorium, taking 69 minke whales in the Sea of Japan; Whale and Dolphin Conservation Society, *The Challenge of Scientific Whaling*, available at <<http://www.wdcs.org/dan/publishing.nsf/allweb/36EC1A6204AB366C802569070055B0A2>>; R.B. Mitchell, *International Regulation of Whaling: Case Study*, available at <<http://www.uoregon.edu/~rmitchel/cases/whale.shtml>>.

<sup>135</sup> 'Five Go Whaling', *New Sci.* (15 November 2003), at 5; W.C. Burns and G. Wandesforde-Smith, 'The International Whaling Commission and the Future of Cetaceans in a Changing World', 11:2 *RECIEL* (2002), 199, at 202.

<sup>136</sup> Iceland withdrew from the IWC in 1992 after the body refused to accord it a limited commercial catch quota. See Burns, n. 17 above, at 50. At the 2001 meeting of the IWC, Iceland sought to re-adhere to the ICRW; however, its instrument of re-adherence included a reservation on the moratorium on commercial whaling. Many parties deemed this reservation to be incompatible with the object and purpose of the ICRW and Iceland's admission was denied at both the 2001 and 2002 meetings. However, Iceland was subsequently re-admitted at a special meeting of the IWC in 2002; International Whaling Commission, *Final Press Release and Chair's Report*, available at <<http://www.iwcoffice.org/Final%20Press%20Release%202002SM.htm>>. Iceland's reservation provision will permit it to resume commercial whaling if it deems progress to implement the Revised Management Scheme is insufficient by 2006; International Whaling Commission, *Iceland and her Re-Adherence to the Convention after Leaving in 1992*, available at <<http://www.iwcoffice.org/Iceland.htm>>.

<sup>137</sup> See International Whaling Commission, n. 131 above.

<sup>138</sup> See International Whaling Commission, n. 130 above, at 6; D. Hunter, J. Salzman and D. Zaelke, *International Environmental Law and Policy*, 2nd edn (Foundation Press, 2003), 988.

<sup>139</sup> *Ibid.*, at 988.

<sup>140</sup> See International Whaling Commission, n. 131 above; International Whaling Commission, n. 134 above; International Whaling Commission, *Resolution on Whaling under Special Permit in the North Pacific Ocean*, Resolution 2000-5 (2000); International Whaling Commission, *Resolution on Special Permit Catches in the Southern Ocean by Japan*, Resolution 1997-5 (1997); International Whaling Commission, *Resolution on Special Permit Catches by Japan in the North Pacific*, Resolution 1994-9 (1994); International Whaling Commission, *Resolution on Norwegian Proposal for Special Permits*, Thirty-Ninth Report of the International Whaling Commission (1989), Appendix 1, at 30.

<sup>141</sup> (Rome, 24 November 1993), Resolution 15/93 of the Twenty-Seventh Session of the Food and Agriculture Organization Conference, printed in 33 *ILM* (1994), 968.

<sup>142</sup> Berlin Initiative, n. 1 above, at 29.

<sup>143</sup> *Ibid.*, at 29.

have dropped appreciably in recent years in the Southern Ocean, perhaps to as few as 268,000 compared to an estimate of 766,000 a decade earlier.<sup>144</sup> However, even assuming that a major review currently being conducted by the Scientific Committee does not reveal this decline to be in whole, or in part, the result of methodological errors,<sup>145</sup> current levels of scientific whaling are highly unlikely to threaten the viability of Southern Ocean minke stocks. Thus, while those of us who count ourselves in the preservationist camp may bemoan the ethics of scientific research whaling on animal welfare grounds, it is probably untenable to argue that these operations threaten the viability of whale stocks at this point and thus undermines the IWC's conservation objectives.

### Collaboration with Other Organizations

The Berlin Initiative concludes that the IWC's ability to achieve its objectives alone will continue to diminish as its priorities shift from regulation of whaling to conservation. Thus, it emphasized the need for collaboration with other relevant organizations,<sup>146</sup> such as CCAMLR and regional cetacean conservation agreements, such as ACCOBAMS<sup>147</sup> and ASCOBANS.<sup>148</sup> More specifically, the initiative emphasizes the need for the IWC to not only take its own actions, but also to work to ensure that cetacean conservation priorities are incorporated into the agendas of other pertinent regimes. The initiative emphasizes the importance of the conservation agenda in helping to enhance the standing of the IWC in these other forums.<sup>149</sup>

## ASSESSING THE BERLIN INITIATIVE

The parties to the IWC may ultimately come to view the passage of the Berlin Initiative as misguided, because it likely will not enhance the conservation

status of cetaceans, while exacerbating the animus between the regime's pro- and anti-whaling factions.

The Berlin Initiative provides a comprehensive overview of the multitude of perils faced by cetaceans. However, the IWC is clearly ill-equipped to address these issues, and the establishment of a Conservation Committee will do little to alter this fact. First, the IWC lacks the resources to conduct the requisite research to assess accurately these threats and, hence, establish priorities for expending scarce resources on behalf of cetaceans. As a consequence of woeful under-funding to date, and the imposing difficulties attendant to conducting cetacean research:

there are few cases where whale or dolphin populations have been studied for long enough to determine their overall status, let alone identify the key environmental factors which control populations.<sup>150</sup>

Indeed, in most regions of the world there is a dearth of information on the critical life parameters of cetaceans, including their distribution, migration, biology, feeding and reproduction strategies, behaviour and even taxonomy.<sup>151</sup>

The IWC's efforts to conduct critical cetacean research have been hobbled by the failure of its members to provide adequate funding. This has been exemplified most recently by serious under-funding of important research programmes, including the IWC's Arctic research<sup>152</sup> and Pollution 2000+ programmes,<sup>153</sup> as well as its broader environmental change programme.<sup>154</sup> The Berlin Initiative acknowledges the gravity of this issue by calling for the establishment of a trust fund to finance the Conservation Committee's programme.<sup>155</sup> However, past efforts by the IWC to obtain contributions for trust funds have failed abjectly, and other multilateral environmental regimes have not fared much better.<sup>156</sup>

<sup>144</sup> *Ibid.*, at 29. Circumpolar sets of surveys yielded an estimate of minke abundance at 608,000 in 1978/79–1983/84; 786,000 in 1985/86–1990/91; and 268,000 in the 1991/92–1997/98 survey; International Whaling Commission, n. 53 above, at 36.

<sup>145</sup> The Scientific Committee has suggested that the apparent decline in minke abundance in the Southern Ocean may be real, or, alternatively, may be a function of changes in the proportion of the population present in the survey region at the time that the most recent survey was conducted, or attributable to changes in the survey process that compromise comparability of survey estimates; *ibid.*, at 39. The Scientific Committee is currently reviewing available data; International Whaling Commission, *Whale Population Estimates*, available at <<http://www.iwcoffice.org/Estimate.htm>>.

<sup>146</sup> Berlin Initiative, n. 1 above, at 30.

<sup>147</sup> See ACCOBAMS, n. 69 above.

<sup>148</sup> See ASCOBANS, n. 68 above.

<sup>149</sup> Berlin Initiative, n. 1 above, at 31.

<sup>150</sup> P. Thompson and S. Mayer, 'Defining Future Research Needs for Cetacean Conservation', in M.P. Simmonds and J.D. Hutchinson (eds), *The Conservation of Whales and Dolphins* (John Wiley & Sons Ltd, 1996).

<sup>151</sup> B. Öztürk and Turkish Marine Research Foundation, *Black Sea Biological Diversity, Turkey*, Black Sea Environmental Series, Vol. 9 (United Nations Environment Programme, 1998), at 33; A.J. Read, 'Incidental Catches of Small Cetaceans', in Simmonds and Hutchinson, n. 150 above, at 124.

<sup>152</sup> See International Whaling Commission, n. 53 above, at 61.

<sup>153</sup> *Ibid.*, at 60.

<sup>154</sup> See International Whaling Commission, *Resolution for the Funding of Work on Environmental Concerns*, IWC Resolution 1998-6 (1998).

<sup>155</sup> Berlin Initiative, n. 1 above, at 2.

<sup>156</sup> Ramsar Convention on Wetlands, *International Environmental Governance: Multilateral Environmental Agreements*, available at <[http://www.ramsar.org/key\\_unep\\_governance1.htm#sec3](http://www.ramsar.org/key_unep_governance1.htm#sec3)>; United Nations Environment Programme, *Multilateral Environmental Agreements: A Summary* (UNEP/IGM/1/INF/1, 30 March 2001), at 12.

Second, most of the major threats to cetaceans will require the IWC to engender cooperation in other sectors, such as fisheries, coastal development, and the multitude of sectors responsible for environmental change threats, such as climate change and pollution. Unfortunately, to date, the organization has demonstrated very little ability to effectuate these kinds of cross-sectoral policy changes, and given the extremely limited resources that the new Conservation Committee will be able to bring to bear, there is no reason to believe that it will fare any better.

Finally, the establishment of the Conservation Committee may actually interfere with the efforts of the IWC to establish a coherent conservation agenda because it will require coordination of its efforts with the Scientific Committee on many conservation-centred issues, such as environmental change and behavioral research. One can foresee paralysing future turf battles on such issues, especially between members of the Scientific Committee from pro-whaling nations and the Conservation Committee.

At the same time, the Berlin Initiative is likely to drive an even deeper wedge between those parties that advocate a lifting of the moratorium on commercial whaling and those who support keeping the moratorium in place for now, or perhaps forever. As indicated throughout this article, the initiative is redolent with language that could be construed as inimical to resumption of commercial whaling. This virtually ensures that some of the parties with the greatest cetacean research capabilities are likely to refuse to cooperate with the Conservation Committee, further hobbling it.

The aggressive effort in recent years by Japan to recruit new States to join the IWC<sup>157</sup> has borne substantial fruit, stymieing efforts to establish new sanc-

tuaries and helping to move the body toward majority support for lifting the moratorium.<sup>158</sup> This assures continued gridlock at the IWC, precluding it from focusing on what virtually all parties agree is the gravest long-term threat to cetaceans, environmental change.<sup>159</sup>

Ultimately, as Sidney Holt has recently concluded, if the IWC is to overcome its dysfunctionality, both whaling and non-whaling nations will have to stand down from their ultimate objectives and work to craft a reasonable compromise on the issue of commercial whaling:

There may be only one way out of the looming catastrophe: that is for both whaling and non-whaling countries to engage for the first time in serious negotiation. Rigorous, precautionary management rules are needed, backed by a stern regime to secure compliance with the rules. In such negotiations, a few non-whaling countries would need to drop their pretence that a permanent end to commercial whaling can be brought about by vote in the IWC.<sup>160</sup>

A reasonable starting point may be to resuscitate a 1997 proposal by the former Chair of the IWC, Michael Canny. The 'Canny Compromise' proposed the following:

- completion and adoption of the RMS, with catch quotas restricted to coastal areas and harvesting by current whaling nations;
- establishment of inspection and observation procedures that will engender public confidence in our ability to monitor whaling operations;
- local consumption only of harvested whales;
- a phase-out of lethal scientific whaling operations.<sup>161</sup>

Of course, the Canny Compromise would, once again, sanction the commercial harvesting of whales by the IWC. However, it is likely that fewer whales would be killed under the proposal than are currently being taken under the scientific whaling provision of the ICRW.<sup>162</sup>

<sup>157</sup> Japan has been accused by a number of IWC parties and non-government organizations of using overseas development assistance, especially to Caribbean and Pacific Island States, to 'buy' votes in the IWC. See S. Sen, 'Whales Safe for Now, But Not for Long', *Inter Press Service* (LEXIS-NEXIS, News Library, 28 July 2001); D.D. Caron, 'The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures', 89 *Am. J. Int'l L.* (1995), 154, at 171, n. 111. While some Japanese officials have denied this allegation, the head of Japan's fisheries agency, Masayuki Komatsu, acknowledged in an interview with the Australian Broadcasting Corporation in 2001 that Japan gives money to poor nations in the hope of influencing their votes in the IWC; P. Knox, 'The Quid Pro Quos of Global Giving', *Seattle Post Intelligencer* (29 July 2001), at D7. Japanese officials subsequently contended that his words were taken out of context; CNN, *Japan Denies Aid-for-Whaling Report* (19 July 2001), available at <<http://edition.cnn.com/2001/WORLD/asiapcf/east/07/19/japan.whaling/>>.

<sup>158</sup> See S. Sen, n. 157 above. While a three-fourths majority is required to overturn the moratorium on commercial whaling, ICRW, n. 12 above, Article III(2), achievement of a simple majority would provide Japan with an important political victory.

<sup>159</sup> Berlin Initiative, n. 1 above, at 17.

<sup>160</sup> S. Holt, 'Is the IWC Finished as an Instrument for the Conservation of Whales and the Regulation of Whaling?', 46 *Marine Pollution Bull.* (2003), 924, at 925-926.

<sup>161</sup> International Whaling Commission, *Opening Statement of the Government of Ireland*, Forty-Ninth Annual Meeting of the International Whaling Commission (IWC/49/OS/Ireland, 1997).

<sup>162</sup> P.J. Clapham *et al.*, *The JARPN II Program: A Critique*, IWC Scientific Committee (SC/54/026, 2002), at 5; Clapham, n. 118 above, at 212.

While it is difficult to envision acceptance of the Canny Compromise in the vituperative atmosphere of the IWC,<sup>163</sup> ultimately the body must find a way to save itself if it is going to save the whales. Unfortunately, the Berlin Initiative will only likely intensify the conflicts that have virtually paralysed the regime in recent years and further raise the specter of its ultimate demise.

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<sup>163</sup> Japan and Norway have expressed their opposition to the Canny Compromise on the grounds that it would restrict their right under the ICRW to harvest whales from the high seas. Conversely, several anti-whaling nations and non-government organizations have objected to any resumption of commercial whaling; CNN, *Whaling Commission on Verge of Breakup* (CNN, 1998), available at <<http://edition.cnn.com/EARTH/9805/11/iwc.breakup/>>; B. White, *IWC Report: Amid Deadlock, the Chance for a New Role* (Animal Welfare Institute, 1997), available at <<http://www.awionline.org/whales/iwc.htm>>.