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Introduction: Preserving Whales in a World of Sovereign States

RICHARD A. FALK*

When editorialists for mainstream media warn us about impending environmental danger in a manner they would have derided as "alarmist" or "doomsday prophesy" a few years ago, then we should appreciate that we have reached the dawn of a new phase of international relations. Indicative of this trend was the decision by *Time* magazine to depart from their usual practice of identifying the man (or woman) who influenced history most in the past year, and instead to decide that the endangered planet was itself "the person" of the year in 1988.

Even more significant than this symbolic event, powerful in its capacity to subliminally shape and rearrange our hopes and fears, was the tone of the *Time* cover story:

Let there be no illusions. Taking effective action to halt the massive injury to the earth's environment will require a mobilization of political will, international cooperation and sacrifice unknown except in wartime. Yet humanity is in a war right now, and it is not too Draconian to call it a war for survival. It is a war in which all nations must be allies.¹

The same message has been delivered in a measured convincing manner by the Final Report of the Brundtland Commission.² One dimension of this disturbing narrative of predatory human behavior is the accelerated assault upon the habitat of many species of animals and plants.

It is against this broader background of heightened ecological consciousness that our concern about whales takes shape. Perhaps, earlier and more poignantly than with any other endangered species, except possibly humanity itself, the fate of the various species of great whale has touched our imagination, both arousing our awe and stirring our fears. The magnificence of the whale as a part of nature is valued for its sake, but also as a representative of the destiny of all that is wild and wonderful in nature, and more subtly, as a foretaste of what lies ahead for the human species and for the survival of life itself.

It is hardly surprising, then, that conservation concerns and protective measures associated with whaling should have started decades before

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1. *TIME*, Jan. 2, 1989, at 18.

2. World Commission on Environment and Development, *Our Common Future* (1987).

any general environmental consciousness took shape. As a result, there is a rich corpus of prescriptive materials, as well as a long record of regulatory efforts. For most international lawyers, however, protection of the endangered species of whales remains to this day a quaint undertaking at the outer margins of their concerns. Almost no leading casebook or general text on the subject has even a single indexed reference, and this despite the existence of a rather comprehensive treaty regime that has been operating for many years and established the earliest institutional presence on a global level of any environment effort in the form of the International Commission for the Regulation of Whaling back in 1946. Only recently, however, has this rich body of international environmental experience begun to interest the professional international law expert as a matter of some significance. Much credit for encouraging a growth of overall awareness among international lawyers about resource and ecological policy belongs to Sudhir Chopra, a contributor to this symposium and a guiding, inspiring, energetic influence in the scholarly community and through his crusading efforts to find ways to put these ecological issues on the program of the American Society of International Law at its Annual Meeting.

The articles that make up this symposium provide a fascinating introduction to the subject of international law and whaling, exhibiting many of the complexities and tensions that bedevil the regulatory enterprise. Almost nothing turns out to be simple if studied carefully, from various angles, and the proper mode of legal response to the threats posed by commercial whaling to the survival of these remarkable animals is no exception. All aspects of the subject remain contested — what needs to be done, what form of regulatory effort is likely to be effective, what is the fundamental basis of our concern — sustaining whales because of their intrinsic worth or maximizing their utility as a human resource to be harvested to the extent the yield can be sustained and the survival of the particular species of whale is not an issue.

To begin with, there are the ethical and meta-ethical questions discussed so perceptively in Mr. Chopra's article. The concerns about whaling extend now well beyond the issues of conservation, and involve fundamental questions of animal rights and matters of the appropriate relations between human activity and nature. Christopher Stone has been developing an important framework to enable lawyers and citizens to think about such issues, and has recently proposed the adoption of "moral pluralism" to affirm the subsisting moral character of relations with animals (as well as with such other aspects of nature as mountains, rivers, forests), and yet retain a basis to draw distinctions about the degrees of moral duty and the extent of animal rights.³

If we shift gears from developmental absolutism driven by market forces and by the urge to take from nature whatever is useful for human

3. C. STONE, *EARTH AND OTHER ETHICS* (1987).

activity to ecological consciousness driven by an ecological ethos of species survival it would seem evident that endangered animals of such eminence as the great whales should be unconditionally protected against human predation, now and forever. But no, the case becomes more complex even when one is considering the plight of particular species of whales faced with a prospect of extinction. As Nancy Doubleday sensitively explores the issues in her contribution, the claims of indigenous peoples in the Arctic to go on with subsistence whaling of the bowhead whale are indeed strong, possibly decisive, even in face of the jeopardized circumstance of the bowheads. After all, the Inuit methods of whaling by crafted net were sufficiently inefficient to be ecologically sound — that is, their whale hunt was never of a magnitude to bring danger to the bowhead population as a whole. Motivated by limitless horizons of profits and spurred on by indefinitely expanding human needs and wants, commercial whaling by the factory vessels of distant countries has over-exploited the species. What shall we tell the Inuit now that both their own existence and the Bowhead whales destiny hang by a slender thread over the precipice of the future?

Another dimension of the subject is represented by “the whale war,” the conflict between national legislation in the United States and Japanese (and possibly Icelandic) whaling practices. Perhaps it is more accurate to use the terminology of war to describe the relations between Japan and such militant environmental groups as Greenpeace. In February of 1989 a Greenpeace vessel, *Gondwana*, obstructing a Japanese whaling expedition collided with a 20,000 ton Japanese vessel that was being used to harpoon minke whales in Antarctic waters. A Japanese official has charged Greenpeace with “terrorism on the high seas,” and called for “international pressure to prohibit such activity.”⁴ Greenpeace tactics are definitely more adversarial and provocative than those relied upon by anti-whaling governments, including the United States, but still far short of terrorism.⁵ Professor Kazuo Sumi’s extensive exploration of these issues deepens considerably our awareness of some complexities that lie just beneath the surface of the controversy. Sumi shows, for instance, that historically the Japanese whaling industry was much more practical in using all parts of the whale in a productive manner, whereas United States whalers made use only of the oil. For that reason Americans long ago abandoned whaling for commercial purposes as a result of the availability of less expensive petroleum products. Sumi insists that for some local Japanese communities the place of whaling is almost as integral to cultural identity as it is for the Inuit. In effect, prohibiting whaling is to encroach upon Japanese culture. Provocatively, but not unfairly, Sumi asks whether America would cut back on hamburgers to save tropical forest lands now being cleared to permit large cattle herds to graze, and pro-

4. See N.Y. Times, Feb. 5, 1989, sec. 1, at 8.

5. For delimitation on terrorism, see R. FALK, *REVOLUTIONARIES AND FUNCTIONARIES* 1-39 (1988).

duce the meat needed to enable McDonalds to continue serving billions of Big Macs around the world. By implication, American conservation concerns would be less conveniently salient if it had not regarded whales from such a single-use and wasteful perspective. And even these concerns, Sumi argues, are inconsistently expressed: otherwise, why allow the Inuit people to hunt for the Bowhead, a seriously endangered species, which allegedly being distressed by Japanese "scientific" programs carried to collect samples from among the abundant Minke. In the background of these criticisms is a fundamental clash of perspectives. Sumi is a pure functionalist, arguing that the only valid basis of constraint relates to considerations of maximum sustainable yield, and that such a yardstick should be calibrated to the circumstance of each species of whale. Further, he believes in a positivist sense of legal obligation, restricting the discretion of the state only to the extent that it has given its formal consent. Therefore, since the International Whaling Commission has no enforcement powers, its policies should not be implemented by coercive legislation at the domestic level of the sort relied upon by the United States. In effect, the American legislative program for the protection of whales, discussed extensively in both the contributions by Dean Wilkinson and Gene Martin, is viewed as an "illegal" and provocative interference with Japanese sovereign rights.

These authors take an opposite view of the overall issue, faulting the U.S. Government for its lack of commitment. They regard existing international regulatory efforts as half-hearted, ineffectual, and subject to industry manipulation. They criticize the entire operating record of the International Whaling Commission (IWC) as fundamentally flawed. They also criticize the IWC's earlier broad-brush effort at catch restrictions across the spectrum of whale species by relying on a single unit of assessment, Blue Whale Units (BWU's), indirectly encouraging whalers to take great whales regardless of how depleted their species stock. More recently, it has been contended, the IWC has quotas and policies that reflect pro-whaling lobbying pressures. These authors are not satisfied by a moratorium on commercial whaling now in force through 1991. There are too many loopholes, including a certified exemption for "research whaling" that has been exploited by Japanese whaling interest to hunt for whales by the hundreds. As a consequence, Wilkinson insists on the need for vigorous domestic legislative efforts reinforced by judicial action to punish countries that persist in whaling, disguising their commercial operations under claims of "research" and "science." Sumi rejects this characterization of research whaling, contending that its scale and character is in conformity with the spirit and letter of the IWC framework. In any event, the controversy is vividly depicted in this symposium, and seems not only interesting in its own setting but significant as an indication of how differing national policies on environmental and conservation questions can become a serious source of international conflict.

The U.S. legislation, the Pelly Amendment to the Fisherman's Protective Act in 1971 and the Packwood-Magnuson Amendment to the

Fishery Conservation and Management Act in 1979 are the legislative tools being relied upon by the U.S. Government and invoked by environmental activists. As the symposium discloses, activists and environmental groups are not satisfied with the implementation of this legislation by the Executive Branch, contending that diplomatic considerations involving U.S.-Japanese relations block vigorous enforcement. The legislation is itself quite path-breaking, using economic leverage to reinforce the obligations of a foreign country to respect international regulatory standards. The legislative devices used here — excluding an offending country from fishing within the United States 200 mile exclusive economic zone and imposing an import embargo on marine products are potentially significant. The effect of such sanctions is definitely situational. Their literal use is impractical if a country has no fishing off its coasts or if it has no coasts or if it uses for itself all of the fishing resources in the 200 mile zone or if it fails to import marine products or if the offending country fails to export. Additionally, there are problems of retaliation in other settings, and the weight of non-conservation aspect of foreign policy. Is it, for instance, really worth alienating the Japanese Government for the sake of whales? Is not foreign policy and international relations made of sterner stuff? Could we imagine George Kennan or Henry Kissinger upholding the national interest by declaring “war” on Japanese commercial whaling? Can realists be made to incorporate these ecological concerns into their calculations of power and interest? Nevertheless, given the weakness of the regulatory structure at a global level, the acute risks of irreversible damage to whale stocks of endangered species, and the seemingly irresponsible failure by some countries to adhere voluntarily to IWC guidelines, the case for action at the national level seems currently to be overwhelming. Must we wait for the extinction of the great whales before we rid ourselves of anachronistic standards of deference to some rigid conception of sovereign rights? Besides, discretionary aspects of U.S. economic policy can be used validly to induce other countries to forego “illegal” practices.

In the end, much depends on our assessment of the danger and the depth of our attachment to this particular class of animals. When three Gray Whales were trapped in Arctic ice floes last year, the world rescue operation, although expensive, seemed like a kind of priceless pedagogy on the importance of international cooperation in the Ecological Age. Such a pedagogy needs to be assimilated by the discipline of international law. We require a jurisprudence that accentuates the rising importance of the global commons and of reforming our normative attitudes toward non-human species of life.⁶ This symposium on whales is one indication that the legal profession is finally being awakened to these new urgencies. It is a late hour on the biological clock that controls cetacean destiny, but hopefully not too late.

6. See R. FALK, *REVITALIZING INTERNATIONAL LAW* (1989).

