

# Denver Journal of International Law & Policy

---

Volume 17  
Number 2 *Winter*  
*Symposium - Whales and Whaling: Current  
Problems and Future Prospects*

Article 4

---

January 1989

## Whales: Towards a Developing Right of Survival as Part of an Ecosystem

Sudhir K. Chopra

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

---

### Recommended Citation

Sudhir K. Chopra, Whales: Towards a Developing Right of Survival as Part of an Ecosystem, 17 Denv. J. Int'l L. & Pol'y 255 (1989).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [digitalcommons@du.edu](mailto:digitalcommons@du.edu).

# Whales: Towards A Developing Right of Survival as Part of an Ecosystem

SUDHIR K. CHOPRA\*

## I. INTRODUCTION

Today, the International Whaling Commission ("IWC") is faced with the most difficult problem in its entire history. The issue is whether to allow resumption of commercial whaling in 1990. This situation is further complicated by the following fact: present IWC membership represents a large world public opinion favoring a permanent ban on any type of commercial whaling than the commission has at any time in its history. In the past, the IWC was considered an organization created to protect the interests of whaling nations. Current membership, including many non-whaling states and states which have banned all types of whaling activity, is much larger and endorses the global view favoring protection of whales with an overwhelming majority. However, the presence of whaling states in the IWC eagerly waiting to resume commercial whaling makes it difficult to reach a compromise for development of a globally accepted policy for the conservation and protection of whales. As an option, the whaling states can withdraw from the International Convention for the Regulation of Whaling<sup>1</sup> and resume commercial whaling as permitted by the freedom of fishing principle.<sup>2</sup> Both the Geneva Convention on Fisheries and the Law of the Sea Convention of 1982 allow freedom of fishing on the high seas.<sup>3</sup>

New marine living resources of the Southern Ocean are under a new regime created by the Convention for the Conservation of Marine Living Resources (CCAMLR).<sup>4</sup> The Southern Ocean is an area with large whale

---

\* M.A., LL.B., Lucknow University, India; J.D., Northwestern University; LL.M., Dalhousie University; Ph.D. (law) candidate, University of Tasmania. Mr. Chopra is the Chairman of the Wildlife Law Group of the American Society of International Law and a Foreign Law Consultant in the United States. He is also a member of the U.P. bar in India.

1. See International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72, T.I.A.S. No. 1849, U.K.T.S. No. 5 (1949), Md. 7604; 2 P. BIRNIE, INTERNATIONAL REGULATION OF WHALING 689 (1985). For a detailed analysis of the Whaling Convention, see 1 P. BIRNIE, INTERNATIONAL REGULATION OF WHALING 168-204 (1985); S. LYSTER, INTERNATIONAL WILDLIFE LAW 17-38 (1985); D. JOHNSTON, INTERNATIONAL LAW OF FISHERIES 399-401 (1965).

2. Convention on Fishing and Conservation of the Living Resources of the High Seas (1958), U.N. Doc. A/CONF. 131 L-54, art. 1.

3. *Id.*; United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 116(a), U.N. Doc. A/CONF. 621 (1982) [hereinafter referred to as Law of the Sea Convention]; 21 I.L.M. 1261 (1982).

4. Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), May 20, 1980, 19 I.L.M. 841 (1980), 33 U.S.T. 3476, T.I.A.S. No. 10240, U.K.T.S. No. 48

stocks, and remaining whale-rich areas which fall under the 200 miles exclusive economic zones<sup>5</sup> are controlled by the coastal states. Therefore, major areas of whale stocks are either under conservation regimes of CCAMLR or coastal state fisheries zones. Significantly, some of those coastal states which are looking forward to resumption of their whaling activity. Some of the major coastal states, such as Australia,<sup>6</sup> Finland,<sup>7</sup> and the United States,<sup>8</sup> have not only banned whaling in their fisheries zones, but also condemn such activity at the global level. However, other states such as Japan,<sup>9</sup> the Philippines,<sup>10</sup> and the Republic of Korea<sup>11</sup> are eagerly awaiting the resumption of commercial whaling.

This scenario requires a fresh assessment of not only the developments at the IWC but also evaluation of every other area of international law which directly or indirectly affects whales. Also to be considered are principles embodied in other global conventions which require management of natural resources on the "ecosystem management" approach. This approach requires the management of resources without disturbing the delicate balance between different species of the "whole" ecosystem. Developments under national laws of several countries which effectively protect their marine mammal resources in their 200-mile fisheries zones are equally important to assess the evolution of conservation laws. In addition, the significant role of developing jurisprudence of animal rights, such as right to life, right to survival, and some recognition towards having a legal representation, need to be considered here.

This paper shall amalgamate international legal principles affecting whales with the philosophy of animal rights and environmental ethics. Such an amalgamation is necessary in order to assess if the analysis and aggregate of these principles does help in formulating "a right of survival" for whales "as part of the ecosystem they live in." For the purpose of this paper, the details of each principle of international law will not be discussed. Instead, the paper will identify of some of the more important norms and then go on to analyze them.

---

(1982), Md. 8714. For discussions of CCAMLR, see Lyster, *supra* note 1, at 156-177, and 1 W. Bush, *ANTARCTICA AND INTERNATIONAL LAW* 393 (1982).

5. Law of the Sea Convention, *supra* note 3, arts. 55-58, 65. Also see R. Osterwoldt, *International Law and Politics of Conservation: Two Conventions and the Whales* 231-244 (1984) (unpublished Master of Literature Politics thesis, submitted at St. Anne's College, Oxford University).

6. Int'l Whaling Comm'n, 31st Mtg./opening statement (1979).

7. Int'l Whaling Comm'n, 35th Mtg./opening statement (1983).

8. See *supra* note 6.

9. Int'l Whaling Comm'n, 39th Mtg./opening statement (1987).

10. Int'l Whaling Comm'n, 37th Mtg./opening statement (1985).

11. Int'l Whaling Comm'n, 39th Mtg./opening statement by the Republic of Korea (1987).

## II. BASIC PRINCIPLES RECOGNIZED UNDER INTERNATIONAL LAW RELATING TO WHALES CONSERVATION

Some basic principles developed by the International Whaling Commission and other international conventions which directly or indirectly deal with whales do elaborate as to how human behavior and practices towards whales should be regulated. These basic principals set certain criteria as to how whales should be treated and as to why they should be conserved and protected. No doubt these developments were slow in coming, yet the aggregate of these norms and recommendations does provide a strong basis to argue for the whale's right of survival as part of an ecosystem. These principles in brief can be stated as:

### A. IWC (1946)

(a) It is in the interest of the nations of the world to safeguard for future generations the great natural resource represented by the whale stocks;<sup>12</sup>

(b) That in view of the "history of whaling [which] has seen over fishing of one area after another and of one species of whale after another to [near extinction,] it is essential to protect all species of whales from further over fishing."<sup>13</sup>

### B. IWC and UNCLOS-I (1958)

"Requests states to prescribe, by all means available to them, those methods for the capture and killing of marine life, especially of whales and seals, which will spare them suffering to the greatest extent possible" (emphasis added).<sup>14</sup>

### C. Stockholm Declaration (1972)

That the "natural resources of the earth including . . . flora and fauna and specialty representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations. . . . Man has special responsibility to safeguard and wisely manage the heritage of wildlife." In the light of these principles, the Declaration recommended a ten-year moratorium on commercial whaling.<sup>15</sup>

---

12. International Whaling Convention, *supra* note 1, at 74.

13. *Id.*; See also Article I (2), which describes the scope of the ICRW to include "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."

14. Resolution V, Humane Killing of Marine Life. U.N. Doc. A/CONF. 13/L.56. Full text of Resolution is reproduced in Johnston, *supra* note 1, at 495, 497 (Appendix). This Resolution was passed by the UNCLOS-I in 1958 along with the 1958 Geneva Convention on Fisheries and Conservation of the Living Resources of the Seas. Following year at the 10th meeting the IWC accepted this resolution (Int'l Whaling Comm'n, 10th Mtg (1959) at para. 15).

15. Principle 2 and 24 and Rec. 33 of the Stockholm Declaration of the United Nations

D. *Convention on International Trade in Endangered Species (1978).*

That export, import and transit of certain species of wild animals and plants, trade in which might endanger their survival is prohibited. Almost all whale species are included in the prohibited list.<sup>16</sup>

E. *Agreed Measures for the Conservation of Antarctic Fauna and Flora*

(a) That in view of "the unique nature of [Antarctic] . . . fauna and flora . . . and particularly their defenselessness [sic] and susceptibility to extermination . . . [Treaty parties] consider the Treaty Area as a Special Conservation Area."<sup>17</sup>

(b) That any harvesting in the area covered by the CCAMLR shall be conducted in such a way as to ensure the objective of "maintenance of the ecological relationships between harvested, dependent and related populations . . . and the restoration of depleted populations . . . ."<sup>18</sup>

F. *Law of the Sea Convention (1982)*

That LOS Convention recognizes the "right of coastal state or international organizations, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this [Convention] . . . and that states cooperate with a view to the conservation of marine mammals. . . ."<sup>19</sup>

G. *IWC Meeting (1982)*

That there shall be a "moratorium on the taking, killing, treating of whales, except mink whales. . . . This moratorium applies to sperm whales, killer whales and baleen whales" and that catch limits for the killings for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero.<sup>20</sup>

H. *U.N. Resolution on the World Charter for the Nature (1982)*

"The genetic viability on earth shall not be compromised; the population levels of all life forms . . . must be at least sufficient for their survival, and to this end necessary habitats shall be safeguarded.

Conference on Human Environment, held in 1972 of Stockholm U.N. Doc. A/CONF. 48/14/ Rev. 1, [hereinafter cited as Stockholm Declaration].

16. Convention on International Trade in Endangered Species *opened for signature* March 3, 1973, 27 U.S.T. 1087; 993 U.N.T.S. 243; 12 I.L.M. 1085 [hereinafter CITES] and CITES Proceedings of the 4th Meeting, 1063-69, 1118 (1983). See also LYSTER, *supra* note 1, 239-277.

17. Preamble, Agreed Measures for the Conservation of Antarctic Fauna and Flora, Rec. III-III, 1 BUSH, *supra* note 4, at 146.

18. Article II (3)(b), CCAMLR, *supra* note 4; BUSH, *supra* note 4, at 402.

19. Article 65, Law of the Sea Convention, *supra* note 3.

20. Amended para. 10 of the Schedule of ICRW. For full text, see BIRNIE, *supra* note 1, at 714.

"All areas of the earth, both land and sea, shall be subject to these principles of conservation; special protection shall be given to unique areas, to representative samples of all different types of ecosystems and to the habitats of rare or endangered species."<sup>21</sup>

### I. *World Conservation Strategy (1980)*

Under the heading Global Commons strategy recommends that "moratorium should be extended to all commercial whaling until the consequences for the ecosystems concerned of removing large portions of the whale's populations, and such populations' capacity for recovery can be predicted."<sup>22</sup>

By no means this list of principles and recommendations is exhaustive. There are many other regional and species related agreements, which in one way or the other overlap with objectives and activities of the IWC.<sup>23</sup> Two of these need a brief mention here: the UNEP Guiding Principles for Shared Natural Resources<sup>24</sup> and the Convention on the Conservation of Migratory Species of Wild Animals, 1979.<sup>25</sup> Both the Convention and the Guideline require that the states must protect wild species passing through their territory. This requirement is based on the fact that a concerted effort of all the concerned states is necessary to protect these resources.

### III. ENVIRONMENTALISM, ANIMAL RIGHTS AND ECOLOGY

Although it appears from the previous discussion that conservationism is a relatively new phenomenon, which gained strength in the aftermath of 1972 Stockholm Declaration, that is not true. Long before scholars began to formulate "theories of resource scarcity, propounding the merits of wise use, or advocating techniques of efficient management, primitive cultures were developing different attitudes towards 'nature,' animals and plants."<sup>26</sup> The first known conservation legislation was enacted in England in 1534 to protect the wild fowl.<sup>27</sup> There are many instances of such conservation-oriented laws after the 17th century, developed mainly by Britain and the United States. Earlier international measures for the protection of wildlife can be found in: the 1875 Declaration for the Protection of Birds Useful to Agriculture;<sup>28</sup> the 1902 Conven-

---

21. W. BURHENNE & W. IRWIN, *THE WORLD CHARTER FOR NATURE* 10 (1983).

22. *World Conservation Strategy*, IVCN-UNEP-WWF (1980).

23. BIRNIE, *supra* note 1, at 373-74, 381-82, 386-404, 512-21, 545-48.

24. U.N.G.A. Res. 33, *adopted* 15 December 1978; BIRNIE, *id.* at 373-75.

25. 19 I.L.M. 5-32 (1980); LYSTER, *supra* note 1, at 278-98

26. JOHNSTON, *The Environmental Law of the Sea; Historical Development*, *THE ENVIRONMENTAL LAW OF THE SEA* 17 (D. Johnston, ed. 1981); M. NICHOLSON, *THE ENVIRONMENTAL REVOLUTION; A GUIDE FOR THE NEW MASTERS OF THE WORLD* 132-140 (1970).

27. JOHNSTON, *id.*; NICHOLSON, *id.*, at 141.

28. IV B. RUSTER & B. SIMMA, *INTERNATIONAL PROTECTION OF THE ENVIRONMENT: TREATIES AND RELATED DOCUMENTS* 1561.

tion to Protect Birds Useful to Agriculture;<sup>29</sup> the 1916 U.S.-Canadian Migratory Birds Convention;<sup>30</sup> and the 1936 U.S. Mexican Agreement for the Protection of Migratory Birds and Game Mammals.<sup>31</sup>

The modern conservation movement is based on scientific knowledge and owes its roots to naturalists and biologists. It was not until the 1960s, according to Professor Johnston, that " 'environment,' 'pollution,' 'ecology,' 'quality of life' and related issues became matters of public and political concern."<sup>32</sup> Since the 1960s environmentalism has emerged as "a concept, as a mood, as a perspective . . . and especially as a cause."<sup>33</sup>

The next issue to be considered is whether animals have legal rights. Some scholars say yes, animals do have legal rights. They are protected by laws and refer to anti-cruelty laws which have been in existence for a long time.<sup>34</sup> There is no doubt that anti-cruelty laws can be traced back to 1641 in the United States<sup>35</sup> and 1876 in Britain<sup>36</sup> and many more countries. But these laws do not give any legal rights to animals - they are merely reflections of our sentiments towards animals and at best can be described as recognition by civilized societies of our moral duties towards animals, i.e., it is morally wrong to inflict cruelty and suffering on animals.

The next issue is the sufficiency of these laws. Perhaps not because these laws, as Rollin describes, "take the people who own or use animals as primary objects of moral concern, rather than animals themselves."<sup>37</sup> And in effect these laws are primarily designed to protect human interest. For example, the law may define cruelty with a long list of acts as cruel such as: overworking of animals, torture, torment, depriving of necessary sustenance, unnecessary or cruel beating, needless mutilation, needless killing, but the words like "unnecessary" and "needless" render the whole law ineffective.<sup>38</sup> When it comes to protecting animals from cruelty, we find that words such as "needless" and "unnecessary" make the judgment so very relative and biased in favor of humans that all prohibited acts of cruelty can be justified. The problem here is law is designed to serve humans who own or can own animals as property. So what we have in the

---

29. *Id.* at 1615.

30. *Id.* at 1723.

31. *Id.* at 1723.

32. JOHNSTON, *supra* note 26, at 39; Johnston, *International Environmental Law: Recent Developments and Canadian Contributions*, in CANADIAN PERSPECTIVE ON INTERNATIONAL LAW AND ORGANIZATIONS 555-59 (R. Macdonald, G. Morris and D. Johnston, eds. 1974).

33. JOHNSTON, *supra* note 26, at 39.

34. See generally E. LEAVITT *et al.*, ANIMALS AND THEIR LEGAL RIGHTS (2d ed. 1970). This book provides a survey of American Laws from 1641 to 1970 and of the laws of many other countries.

35. *Id.* at 13.

36. *Id.* at app. viii.

37. B. ROLLIN, ANIMAL RIGHTS AND HUMAN MORALITY 77 (1981).

38. *Id.* at 78.

name of animal cruelty laws are not the laws which grant any legal rights to animals. If we were to grant rights to animals, then they could have legal action instituted on their behalf instead of on behalf of their owner, and have their injuries legally considered rather than the injury to their owner.<sup>39</sup> We can therefore, from the above analysis, safely conclude that so far we have not granted any rights to animals and have neither recognized our duty towards animals. The only recognition so far accorded is we should not in principle treat animals in a manner which can be described as cruel, unless it is necessary.

Now let us compare our own rights and duties. Regan describes two categories: moral agents and moral patients. Moral agents are "those individuals who have the ability to bring impartial moral principles to bear on the determination of what . . . morally ought to be done and, having made this determination, to freely choose or fail to choose to act as morality . . . requires."<sup>40</sup> It is the moral agents who can interact with each other from the moral community because only these individuals owe moral duty to each other. It sounds simple, but it does not work like this because what Regan describes as moral patients are also included in moral community. Moral patients lack the ability to decide between right and wrong, they cannot perform the morally proper act. Examples of this are "infants, young children, mentally deranged or enfeebled of all ages."<sup>41</sup> These people are conscious and sentient and can experience pain and pleasure. Some of the passive animals can be compared to moral patients since both can experience pain and pleasure and since both lack the ability to make moral decisions. In case of humans classified above as moral patients, we have accepted our duty towards them, we do take into account any injury caused to them and recognize not only our duty but their rights to sue and have legal action instituted on their behalf. However, animals have been kept out of this special privilege accorded to moral patients. Singer describes this attitude as one based on speciesism.<sup>42</sup> He further says that our faulty concepts about other animals is due to our speciesist attitudes and that we have always considered ourselves less savage than the other animals. Singer explains this reasoning in these words:

To say that a person is "humane" is to say that he is kind; to say that he is "a beast," "brutal," or simply that he behaves "like an animal" is to suggest that he is cruel and nasty. We rarely stop to consider that the animal that kills with the least reason to do so is the human

---

39. *Id.* at 81.

40. T. REGAN, *THE CASE FOR ANIMAL RIGHTS* 151 (1983). See generally Warren, *The Rights of Non-Human World*, in *ENVIRONMENTAL PHILOSOPHY* 109 (R. Elliott, A. Gare, eds. 1983); P. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* 219-240 (1986); R. ATTFIELD, *THE ETHICS OF ENVIRONMENTAL CONCERN* 140-162 (1983).

41. REGAN, *id.*, at 153. Cf. Stone, *Should Trees Have Standing - Toward Legal Right for Natural Objects*, 45 S. CAL. L. REV. 451 (1972).

42. P. SINGER, *ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS* 223-258 (1975).



animal. We think of lions and wolves as savage because they kill; but they must kill, or starve. Humans kill other animals for sport, to satisfy their curiosity, to beautify their bodies, and to please their palates.<sup>43</sup>

Rachels supports Singer's position and says, "Human activities that involve killing animals - hunting, trapping, meat production, and scientific research - all involve such cruelty "that they need to be rejected for that reason alone."<sup>44</sup> Kant prefers an "indirect duty" owed to animals, anything more than that does not conform to his views on the nature and morality. Kant says:

Animals are not self-conscious and are there merely as means to an end. That end is man. . . . Our duties to animals are merely indirect duties to mankind . . . [man] must practice kindness towards animals, for he who is cruel to animals becomes hard also in his dealings with me. . . .<sup>45</sup>

Regan does not agree with Kant's description of animals as not being self-conscious, which in Regan's opinion has been proven to be contrary. This criteria, if applied to moral patients, in Regan's view will also disqualify them from our direct duty towards them.<sup>46</sup> Rawls, yet another philosopher, is confused about duties owed to animals. Rawls starts with an explicit requirement: that to qualify as a direct object of justice, one "must be capable, to a certain minimum degree, of a sense of justice,"<sup>47</sup> then modifies his position and does not require "the capacity for a sense of justice . . . [as] necessary to be owed duties of justice" but adds a qualifier again and says "we are not required to give strict justice to creatures lacking this capacity."<sup>48</sup> At the same time, Rawls acknowledges that "it is wrong to be cruel to animals and the destruction of whole species can be great evil."<sup>49</sup> Applying Regan's classification of moral agent and moral patient to Rawls' qualifications, "moral patients" along with animals will also be disqualified from receiving "strict justice". Therefore, although Rawls' prescription of qualifications is questionable and at best sometimes favoring some kind of relaxation, his later acknowledgement that cruelty to animals is wrong and destruction of whole species is a great evil does support the position that we owe duties and justice to animals to the degree that we do not cause cruelty and destroy species. He admits that his requirement of qualification "does not follow that there are no re-

43. *Id.* at 235.

44. Rachels, *Do Animals Have Right to Life?*, in *ETHICS AND ANIMALS* 275 (H. Miller, W. Williams eds. 1983); cf. H. McCLOSKEY, *ECOLOGICAL ETHICS AND POLITICS* 64 (1983).

45. 45 E. KANT, *LECTURES ON ETHICS*, 239-40 (L. Infield trans. 1963). See also Rachels, *id.*, at 276; REGAN, *supra*, note 40 at 177-78.

46. REGAN, *supra*, note 40, at 178.

47. Rawls, *Sense of Justice*, 72 *PHIL. REV.* 284 (1963); REGAN, *id.*, at 165.

48. J. RAWLS, *A THEORY OF JUSTICE* 512 (1971); REGAN, *id.*

49. RAWLS, *id.*; REGAN, *id.* at 166. See also Greenwalt, *Religious Convictions and Law-making*, 84 *MICH. L. REV.* 352, 368 (1985).

quirements at all in regard to [animals]."<sup>50</sup>

Rachels theorizes the right to life by differentiating between "having a life" and "being alive". He explains that being alive is merely a biological notion, for example, a person in a coma is alive but does not have a life, a lower animal is alive but does not have a life. To have a life one must have a biographical notion, e.g., apart from being alive this individual has grown, developed certain relations, reacts and acts to environment, can experience pleasure, identify dangers, show emotions, and so on.<sup>51</sup> According to Rachels, then, "an individual has a right to life if that individual has a biographical life" and then goes on to say that by "this criterion, at least some nonhuman animals would have such a right."<sup>52</sup> It seems reasonable that many mammals would qualify under this classification since many mammals including whales, monkeys, dogs, etc. have emotions, they care for each other, and have their own social system, and thus live a biographical life and not a mere biological existence as living beings. What Rachels determines here is based on socio-biological factors, free from human logic and rationale of duties versus rights, barring strict construction of the notion of rights or duties, it seems that at least these animals which can distinguish themselves from a mere biological existence can qualify and do qualify for a right to life. Some authors, however, do not agree with conditions which separate more intelligent animals from the less intelligent ones. They prefer to advocate for animal liberation by "extending to animals the same sort of moral protection for their interests as we already enjoy for ours."<sup>53</sup>

So far we have discussed "loosely" though about the duties owed to animals, if any, and why, and whether they have some kind of rights regardless of whether we recognize it or not. The above discussion provides ample substance and we ought to include at least the more intelligent species in the category of "moral patients" and recognize their right to life. Now we shall look into the importance of protecting representative ecology in order to conserve the ecosystems. Leopold describes ecosystem as a "biotic pyramid" in which plants are dependent on sun, soil and water; insects on plants and sod; birds on plants and insects, and so on. This chain includes all animals which need the smaller ones for their survival. There are food chains which are so interdependent that to destroy any one single layer will ultimately destroy the whole ecosystem.<sup>54</sup>

Stone writes that in order to "be able to get away from the view that Nature is a collection of useful senseless objects," we should "be able to reach heightened awareness of our own, and others' capacities in their

---

50. RAWLS, *id.*

51. Rachels, *supra* note 44, at 280-283.

52. *Id.* at 282.

53. S. SAPONTIZIS, *MORALS, REASON, AND ANIMALS* 174 (1987).

54. A. LEOPOLD, *A SAND COUNTY ALMANAC, WITH ESSAYS ON CONSERVATION FROM ROUND RIVER* 225 (1970).

mutual interplay."<sup>55</sup> Wenz argues against the senseless destruction of ecosystem on the pretext that ultimately protected ecosystems are for human benefit - for further research and better understanding. While he agrees that it is not necessary for ecosystems to have rights, he draws attention to our obligations not to destroy anything that "is good of its kind - so long as the kind in question does not make it something bad in itself."<sup>56</sup> Ralston strongly argues for the importance of ecosystem; he criticizes those who build up their arguments for duties "around an extended pleasure/pain axis."<sup>57</sup> According to him, "ecosystems are not merely affairs of psychological pains and pleasures. They are life, flourishing in inter-dependencies pressed for creative evolution."<sup>58</sup> Ralston points out that the "highest value attained in the system is lofty individuality with its subjectivity present in vertebrates, mammals, primates, and preeminently in persons." Yet he argues that "[e]ven the most valuable of the parts is of less value than the whole."<sup>59</sup> Taking his position as though humans or other species of higher order may have superior rights but not to an extent when exercise of such rights will degrade or endanger the whole ecosystem, these rights are limited only to the extent that one can flourish within the system.

#### IV. DEVELOPMENTS IN INTERNATIONAL AND DOMESTIC LAWS - TOWARDS A JURISPRUDENCE OF CONSERVATION AND PRESERVATION OF SPECIES AND ECOSYSTEM

So far we have separately identified the developments in international law with respect to whales and general duties towards animals as developed in animal rights' literature. In this section an attempt will be made to synthesize the earlier sections. It might be useful to mention here a well respected view that it is "very difficult to formulate with functional precision any modern universal view of the 'goals' of international law whether in terms of human destiny . . . preservation of species, common interest . . . global justice or otherwise."<sup>60</sup> Traditionally, international law has been slow and far behind municipal law in recognizing anything but States as its subject. However, there is considerable evidence, both in theory and practice, that the international law is beginning to recognize individuals as international legal personality.<sup>61</sup> Another signifi-

---

55. Stone, *supra* note 41, at 496.

56. P. WENZ, *Ecology, Morality and Hunting*, in *ETHICS AND ANIMALS*, at 188, 190 (H. Miller, W. Williams eds. 1983).

57. H. RALSTON, *ENVIRONMENTAL ETHICS* 190 (1988).

58. *Id.* See also BLACKSTONE, *Ethics and Ecology*, in *PHILOSOPHY AND ENVIRONMENTAL CRISES* 16 (W. Blackstone ed. 1974).

59. RALSTON, *supra* note 57, at 191.

60. Johnston, *The Foundations of Justice in International Law*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 117 (R. MacDonald, D. Johnston and G. Morris eds. 1978).

61. W. Bishop, "General Course of Public International Law, 1965," 115 *Recueil des Cours*, 268-74 (Vol. II 1965); Lauterpacht, *Subjects of the Law of Nations*, 63 *LAW Q. REV.*

cant development in international law has been the recognition of state responsibility for injuries to another state or individuals as well as "irrelevance of territorial distinctions."<sup>62</sup>

Domestic laws have seen recognition of children's rights, rights of insane, and blacks.<sup>63</sup> Even recognition of the rights of fictitious legal personalities is well documented in legal literature such as: "trusts, corporations, joint ventures, municipalities . . . and nation-states."<sup>64</sup> Professor Stone rightly points out that we have forgotten "how jarring the notion was to early jurists."<sup>65</sup> He further says that "we are inclined to suppose the rightlessness of rightless things to be a decree of Nature, not legal convention acting in support of some status quo."<sup>66</sup> It is obvious that gradual acceptance of the rights of juvenile, insane and many other fictitious personalities to institute cases in their name and be represented by legal guardians or legal representatives does give us a useful example that new entities can be recognized by law, and even though without a mind of their own can be represented through others who shall protect the interests of 'moral patients' and fictitious personalities.

Going back to the norms of ICRW, we find that the Convention recognizes that in the interest of the future generations, whales should not only be saved from extinction but protected.<sup>67</sup> These rights of future generations are now so much protected that not only ICRW but also the Stockholm Declaration<sup>68</sup>, and CITES<sup>69</sup> refer to them. Similarly, the proponents of animal rights give a very high priority to saving the endangered species or even other animals for future generations.<sup>70</sup> It is described as "something which is due to the community of the future from us."<sup>71</sup>

Another aspect recognized by IWC and UNCLOS-I was to spare

438 (1947). See generally, T. SUBRAMANYA, RIGHTS AND STATUS OF INDIVIDUALS IN INTERNATIONAL LAW 27-42 (1984); A. D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECTS 89-122, 123-147 (1987).

62. D'Amato and Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA. L. REV. 1037 (1988).

63. *In re Gault*, 387 U.S. 1 (1967); Voting Rights Act of 1970, 42 U.S.C. § 1973 (1970); Stone, *supra* note 41, at 451.

64. Stone, *supra* note 41, at 452.

65. *Id.*

66. *Id.* at 453.

67. Preamble, IWC, *supra* note 1.

68. Stockholm Declaration, *supra* note 15.

69. Preamble CITES, *supra* note 16, "natural systems of the earth . . . must be protected for this and the generations to come."

70. See generally, RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS (E. Partridge, ed. 1981) [hereinafter cited as RESPONSIBILITIES TO FUTURE GENERATIONS].

71. Golding, *Obligations to Future Generations*, in RESPONSIBILITIES TO FUTURE GENERATIONS, *id.* at 64. See also Fienberg, *The Right of Animals and Unborn Generations*, in RESPONSIBILITIES TO FUTURE GENERATIONS, *id.* at 139; Partridge, *Why Care About the Future*, in RESPONSIBILITIES TO FUTURE GENERATIONS, *id.* at 203.

whales from pain and suffering.<sup>72</sup> This has been given equal importance in both national legislation<sup>73</sup> and philosophical writings. Rawls recognizes that the "capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity."<sup>74</sup> Protection of endangered species as recognized in the CITES has many supporting national legislation<sup>75</sup> and at the same time strongly supported by legal philosophers. Rawls describes destruction of the whole species as "great evil."<sup>76</sup>

Protection of ecosystem has been recognized as a management principle in CCAMLR<sup>77</sup> which will cover whales. Other international measures include Stockholm Declaration,<sup>78</sup> the U.N. Resolution on World Charter for the Nature<sup>79</sup> and the World Conservation Strategy.<sup>80</sup> Although this is a relatively new concept, it has been very widely accepted in international conventions. Convention on Migratory Species<sup>81</sup> is also based on the principle of ecosystem management and covers the exclusive economic zone as well. Since most of the whales stocks are either in the Southern Ocean - now covered under CCAMLR - or in the 200 mile economic zone, they will invariably be regulated under the ecosystem management approach. In addition, this system has a strong support from the philosophers who support environmental ethics. Ralston strongly argues that we cannot destroy species because that will lead to destruction of ecosystem.<sup>82</sup> There is no doubt that it is important to protect whales under the ecosystem management scheme because this approach accords the whales the right to life and survive as part of the whole ecosystem.

The 1982 Law of the Sea Convention<sup>83</sup> has added yet another significant measure for the protection of whales, by not only endorsing the IWC measures but by encouraging the coastal states to adopt even more stringent standards to protect whales. Since most of the whales are in coastal zones, and are now regulated by several conventions of protectionist nature (CITES, Convention on Migratory Species, Law of the Sea and ICRW), it is difficult to say that we still don't have a single norm for the protection of whales. Almost every one of the regulating conventions advances the ecosystem principle which includes whales, with the exception

---

72. See *supra* note 14.

73. See *supra* note 34.

74. RAWLS, *supra* note 48, at 512; REGAN, *supra* note 40, at 153.

75. U.S. Endangered Species Act of 1969, *supra* note 256; U.K. Endangered Species (Import and Export) Act, 1977, *supra* note 290.

76. RAWLS, *supra* note 48, at 512. See also Regenstien, *Animal Rights Endangered Species and Human Survival*, in *DEFENSE OF ANIMALS* 118 (P. Singer, ed. 1985).

77. Article II (3)(b), CCAMLR *supra* note 4.

78. Stockholm Declaration, *supra* note 15.

79. See *supra* note 21.

80. See *supra* note 22.

81. See *supra* note 25.

82. RALSTON, *supra* note 57, at 190-91.

83. Law of the Sea Convention, Article 65, *supra* note 3.

of ICRW. However, the current Moratorium on Commercial Whaling<sup>84</sup> to some extent does reflect the great change in IWC's thinking. What we have now in international law dealing with the whales is a complex web of conventions, resolutions and principles which all endorse saving of endangered species, no cruelty and protection of endangered species by protecting the ecosystem's survival. Whatever we may call it, progressive development in international law, or now, after 16 years of Stockholm, that some of these principles have attained the status of customary law - due to worldwide acceptance in almost all the conventions signed after 1972, it is clear that ecosystem protection is a new widely accepted norm in international law and that whales are covered by this norm wherever they are.

To summarize the whale qualities once again, whales are mammals. Infants are fed and cared for by their mothers; whales are social animals, they live in groups and relate to each other as individuals; whales have exceptionally large brains with well developed area controlling emotions; whales appear to be capable of enjoying life, playfulness and sense of humor of small whales is well known; nervous system of whales and the parts of the brain relating to the perception of pain are essentially similar to our own; whaling kills whales - that is, it kills intelligent social animals; the method of killing is often neither quick nor painless.<sup>85</sup>

If we apply these qualities to earlier discussion, we will find that whales are not only self-conscious, one of the requirements set by Kant,<sup>86</sup> but do have a biographical life as required by Rachels for "the right to life,"<sup>87</sup> because whales are emotional, playful, sociable and relate to each other as individuals. Whales feel pain and do go through a lot of pain and suffering when killed, not only physical but emotional also. They do need to be saved from this unwanted torture, to satisfy the hunting and sporting desires of man. Also, we can say that whales do clearly fit into the "moral patient" category of Regan.<sup>88</sup> Applying any standard, we find that whales do fit into each one of them and yet whales are not fully protected.

Finally, the whales' rights must be assessed through a test prescribed by Professor Stone. This test requires that for a thing to be holder of legal rights, it first should be able to institute legal actions at it's behest; second, that in granting of the legal relief, court must take injury to it into account; and third, relief must run to the benefit of it.<sup>89</sup> In the United States there are now several cases where public interest groups have instituted cases on behalf of whales.<sup>90</sup> In order to give effect to inter-

---

84. See *supra* note 20.

85. T. REGAN, *ALL THAT DWELL THEREIN* 104-05 (1982).

86. KANT, *supra* note 45, at 239-40.

87. Rachels, *supra* note 44, at 275.

88. REGAN, *supra* note 40, at 153.

89. Stone, *supra* note 41, at 458.

90. Although, it must be stated here that the authority to file these cases did not arise

national measures, the U.S. law has made special provisions in the 1967 Pelly Amendment to the Fisherman's Protective Act<sup>91</sup> and the Endangered Species Act.<sup>92</sup> These legislation specifically authorizes institution of a legal action whenever it is found that whales will be endangered due to non-compliance by one of the whaling nations of the IWC recommended whaling measures. It may be said, that while the U.S. has given effect to an international norm through its courts, it has also created a legal framework through which in case of injury. Therefore, legal action can be instituted on behalf of the whales. However, at this time no action has been filed or indeed can be filed in the name of whales or a whale.

The second condition set by Stone relates to injury to it, which in this case is whales. There is no doubt that every time a public interest group brings a case before the U.S. courts, the case is filed only when the interest group has determined that the requirements set forth in Pelly Amendment or that of Endangered Species Act have been met and that in effect will diminish the effectiveness of the standards set by the IWC for the conservation of whales and thus cause injury to whales.<sup>93</sup> The third condition requires that relief must run to the benefit of it, i.e., whales. In all the cases the relief provided for does directly affect whales by protecting them from further taking and killing. There is no reason why it cannot be construed that whales should get direct benefit from any relief granted. In the case of whales, once again we find that nearly all requirements set by various scholarly writings have been satisfied.

#### V. SOME CONCLUDING REMARKS

Not one, but the whole aggregate of international and national laws and the conditions set by the philosophers in regard to our duty towards animals, particularly towards marine mammals, and whales' right to survival can be said to have been met. There is clear recognition in international law especially in the areas where whales generally habit, of the right of ecosystem to exist as a whale and our duty to protect those ecosystems and through them the whales. Whenever an attempt is made to make additions on the list of those who enjoy legal rights, it is met with strong resistance. After all, rights are not created suddenly. It takes time, even though it may appear that rights are there. Even Hugo Grotius says that "it was the Creator's intention, when he gave everything certain natural properties, that it should preserve its existence and should achieve its highest destiny."<sup>94</sup> Hayden sums up our contemporary attitude in

---

from any rights accorded to whales, but rather through legislative action of the United States Congress. The Congress has recognized that the international standard set by the IWC for the protection and conservation of whales is to be enforced.

91. 22 U.S.C. § 1978, Pub. L. No. 92-219, 85 Stat. 786.

92. 16 U.S.C. §§ 1531, 1540(g).

93. *Greenpeace U.S.A. et. al v. United States*, Civil Action No. 88-2158, Aug. 8, 1988, (pending before the U.S. District Court for the District of Columbia).

94. F. DEPAUW, *GROTIUS AND THE LAW OF THE SEA* 23 (1965) Grotius, the creator the

most appropriate words when he writes, "[i]t seems incredible that with all our talents of rationality and skill, all our genius for creative thought and visible achievement, a shameless, reckless waste still rules much of human behavior."<sup>95</sup> There is no dearth of scholarly writings which support conservation and condemn reckless, senseless whaling activity.

We have seen gradual development of international legal principles from rational resource management to conservation, to protection of endangered species, to protection of habitat, to protection of ecosystem. It has been slow in coming, yet it is a forceful movement in the right direction which has evolved beyond the fragmented and isolated conservation measures to a wholesome approach of protecting the whole — the ecosystem, balance of which must always be preserved. Similarly, the animal rights and anti-cruelty movement went through a metamorphosis from cosmetic anti-cruelty laws regulating the pets and other domesticated animals, to protection of higher species (mammals), to protection of endangered species towards the development of animals' right to life and then to protection of their habitat and ecosystem. In many modern writings, these thoughts and arguments have been developed systematically to include the protection of nature.

Man indeed has come a long way; though the progress appears slow, it has been remarkably fast in the last fifteen years. A movement, a philosophy, a framework of international legal mechanisms has developed and gained recognition. It is evident from the IWC's growing membership and its support of global conservationist public opinion to protect whales and to save them from pain and suffering. According to Greenwalt, "[i]t is disputable to use the term 'animal rights' no matter how stringent the duties of human beings."<sup>96</sup> He describes this label as "loose" because as he says, "The category of entities warranting protection might be narrower, or perhaps broader, than all animals."<sup>97</sup> It does not seem to be a sound rational basis to dismiss the viability of the term 'animal rights'. Whether entities warranting protection are more or less than our estimates is no reason to refuse to translate our duties towards animals into animal right.

Man has evolved beyond the stage which Greenwalt is discussing. Man is now in the era where we talk about protecting ecosystems as a whole, rather than individual entities. We no longer confine our moral duties to be limited to threatened species warranting protection. Modern international law supports and subscribes to the principles of ecosystem and habitat protection. Conversely, if Man translates his duties owed to

---

theory of freedom of seas, strong believer in the *res nullius* status of ocean fisheries and one of the supporters of early seventeenth century whaling admits that we ought to preserve the existence of these resources. *Id.* at 63.

95. S. HAYDEN, *THE INTERNATIONAL PROTECTION OF WILDLIFE* 14 (1942).

96. Greenwalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 24 *WM. & MARY L. REV.* 1025 (1986).

97. *Id.* at 1026.



ecosystem, he has indirectly recognized the right to survival of individual entities in the form of a composite right of survival of ecosystem. The only way to deny this right is to withdraw this ecosystem approach from all three facets: international law, domestic laws, and philosophical writings supporting ecosystem approach. Perhaps it is too late now to undo all the developments which have created a new right — that is the right to survive. Customary international law, progressive developments in the area of law, and rational thinking all have now created a new right for the whales of the world — a right to survive as part of an ecosystem.