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The Legal Cetacean: A Select Bibliography on Whales and International Whaling

AMY BURCHFIELD *

Introduction

Whales have captivated the human imagination for millennia. Indeed, evidence of the first whale hunting dates back to at least 6,000 B.C.1 These incredible cetaceans have been a source of human food, fuel and tools, and have inspired art, myth and literature around the globe. Legal issues affecting whales are varied and far reaching. Only since the mid 20th century, with the establishment of the International Whaling Commission (IWC) under the terms of the International Convention for the Regulation of Whaling (ICRW) have whales benefited from any type of conservation effort.

Despite the moratorium on commercial whaling in effect since 1986,2 whales continue to be threatened by ship collisions, sonar, and climate change. Although much criticized, research on certain species is conducted under the auspices of scientific whaling. Native peoples struggle to maintain their traditional whaling customs and protect their cultural heritage. Conservation places a value on whales *per se*, and may be supported by commercialized whale watching. Whatever the area, whales are guaranteed to

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1 Petroglyphs of large whales discovered at the Neolithic archaeological site at Bangu-Dae in South Korea show evidence of whale hunting dating between 6,000 – 1,000 B.C. See Lee, Sang-Mog and Daniel Robineau, “Les cétacés des gravures rupestres néolithiques de Bangu-dea (Corée du Sud) et les débuts de la chasse à la baleine dans le Pacifique nord-ouest.” *L’Anthropologie* 108 (2004): 137-151.

fascinate humans for millennia to come, so long as conservation efforts are successful.

The body of legal literature on international whaling is a subset of the broader area of international environmental law. Researchers can find general non-legal bibliographies on whales\(^3\) and sections on whales and whaling within generally-focused international environmental law bibliographies.\(^4\) A recent narrowly-focused bibliography on admiralty and maritime law included a very brief section on whaling.\(^5\) What is lacking in the literature is an extensive bibliography devoted solely to the legal and policy issues concerning whales and whaling. This bibliography is intended to meet this need.


This bibliography was compiled using a number of library catalogs, indexes and databases. For books, the OhioLINK and WorldCat catalogs were most useful. Journal articles were found using primarily Index to Legal Periodicals, Index to Foreign Legal Periodicals, HeinOnline, LexisNexis, and Westlaw. JSTOR and Academic Search Complete were used to a lesser extent. Materials published in the United States predominate, although an

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\(^6\) Research for this bibliography was concluded in September 2008.

\(^7\) Student authored articles are noted as such. The author is encouraged by the number of student authored articles on whales and whale conservation, as this seems to show a real concern among budding lawyers. The future legal protection of whales could depend on their expertise and engagement.
effort was made to include English-language materials published in other countries as well. When the topic of an article was not evident from the title, the article was examined to determine its topic.

1. Major Treaties

The main treaty on whaling is the International Convention for the Regulation of Whaling (ICRW), which established the International Whaling Commission (IWC). The Commission was established to encourage research and to investigate, collect and analyze statistical information on whales and whale stocks (Article 4). Additionally, the IWC adopts regulations for the conservation and utilization of whale stocks (Article 5). Since the adoption of the ICRW, several regional treaties have more specifically addressed issues of particular whale stocks, such as the ASCOBANS treaty governing the conservation of cetaceans in the Baltic Sea and other areas (see below). The United Nations Convention on the Law of the Sea (UNCLOS), while dealing with many other issues besides whales, includes an article specifically highlighting the need for the conservation of cetaceans.


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8 The treaty websites in this section were visited on Oct. 9, 2008.
Article 65 of UNCLOS places special emphasis on cetaceans: “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.”

2. International Whaling Commission

The International Whaling Commission (IWC) was set up under the terms of the 1946 International Convention for the Regulation of Whaling (ICRW). The main duty of the IWC is to review and monitor the standards established in the ICRW. These standards include complete protection of certain species, establishing whale sanctuaries, monitoring whale stocks, and compiling scientific and statistical reports. Membership in the IWC is open to any country that agrees to the terms of the ICRW. The IWC currently has 82 member nations.


### 3. Whaling Policy

The section includes materials dealing with whaling policy in general, or suggesting changes to specific aspects of whaling policy. A focus within the literature is on international and regional cooperation in whaling policy.

**Books**


**Articles**


Carlarne, Cinnamon Pinon, “Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future


4. Conservation & Sustainability

The frequent focus of literature in this area is on individual species and specific marine environments. An emphasis is placed on regional or local approaches to conservation and sustainability. Policy makers can learn from the successes and failures of these individual efforts, and devise improved measures for conservation and sustainability. Environmental governance policies will need to strike a balance between total conservation on the one hand, and a sustainable whaling market on the other. Legal scholarship on whale conservation and sustainability contributes to local, regional, and international policy development.
Books


Articles


Luster, Jeffrey P., “The International Maritime Organization’s New Mandatory Ship Reporting System for the Northern Right Whale’s Critical


5. **Country Materials**

See also *Scientific Whaling*

Japan’s policy of scientific whaling (see next section) has generated a flood of scholarly commentary and criticism. The leading case in this area is *Humane Society International v. Kyodo Senpaku Kaisha Ltd,* litigated in the Federal Court of Australia. A claim was brought against a Japanese whaling company for killing minke, fin and humpback whales in the Australian Whale Sanctuary. The court in *Human Society* ordered the respondent company to be restrained from whaling in the Sanctuary, unless otherwise authorized by law. Scholars have also analyzed the whaling practices of Iceland, Canada, and other nations.


6. **Scientific Whaling**

*See also Country Materials, especially articles on Japan*

Scientific whaling refers to the killing of whales for scientific research purposes. Under Article VII of the ICRW, IWC member states are permitted to issue permits to their nationals for scientific whaling. Since the 1986 moratorium on commercial whaling, Japan, Iceland, and Norway have issued permits for scientific whaling. This practice has encountered avid criticism from other countries and environmental groups. Readers will find many additional articles on scientific whaling in the Country Materials section of this bibliography, especially dealing with Japan.


7. **Aboriginal Subsistence Whaling, Cultural Heritage & Indigenous Rights**

Aboriginal subsistence whaling refers to the traditional hunting of whales by indigenous peoples. The IWC treats aboriginal subsistence whaling differently than commercial whaling. Under current IWC regulations, aboriginal subsistence whaling is permitted for Denmark, the Russian Federation, St. Vincent and The Grenadines, and the U.S. The legal literature in this area often focuses on conflict between environmental concerns and cultural heritage rights of native peoples.

Books


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Articles


8. **Sonar**

The use of sonar for military training purposes pits environmental concerns against national security. In early October 2008, the United States Supreme Court heard oral arguments in a case addressing this issue, *Winter v. Natural Resources Defense Council*. Leading up to the case, a Californian district court had enjoined the U.S. Navy from using mid-frequency sonar during training exercises due to the harm such sonar causes whales and other marine mammals. The Court of Appeals for the Ninth Circuit affirmed the decision. A Supreme Court decision in this case will further define the legal standard that will be applied to acoustic pollution levels in the oceans. Whales and sonar usage is, and is likely to continue to be, a fruitful area for legal discourse.


9. **Climate Change**

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Whales, like all other life on Earth, are affected by climate change. It should be the role of the legal community to translate the science of climate change into effective laws, regulations, and policies to combat this phenomenon. Legal scholarship is in the beginning stages of exploring the impact of climate change and the ways it affects cetaceans.


10. Whale Watching

Whales were once extremely valuable dead. In today’s economy, meat, bone, blubber, and oil from dead whales is less economically essential than in centuries past. With the increasing popularity of whale watching, whales can potentially generate more profit as a living natural resource than as food, oil or raw material. Legal scholarship is beginning to explore what regulations and policy measures should be adopted in order to exploit whale watching in a profitable and environmentally sound manner.
