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Almost Saving Whales: The Ambiguity of Success at the International Whaling Commission

Ian Hurd

The international regulation of whaling has been a tremendous success. It has reduced whale hunting dramatically from its peak in the 1960s and brought almost all species of whales out of danger of extinction. Today, whaling conservation stands as a—or perhaps *the*—paradigm of a successful international regime. Yet the international organization responsible for this success is itself in such crisis that it may not survive.

The International Whaling Commission (IWC) is the international organization responsible for regulating whale hunting. Created after World War II, it now comprises both the main whaling nations and the main anti-whaling nations, and the split between the two is so stark that for years the organization has been barely functioning. Its opposing blocs of anti- and pro-whaling states have mutually exclusive understandings of what the regime permits and evenly divided power. Their mutual vetoes ensure that the dysfunctional status quo prevails, and the idea of “success” is coming to look increasingly unclear. The rules that the commission designed decades ago remain in place today, but the members cannot agree either to enforce them or to change them. Chief among these rules is the ban on commercial whaling, which has existed since the mid-1980s. Despite this ban, several members continue to openly hunt whales, arguing with technical legal reasoning why the ban does not in fact apply to their behavior. The 2010 annual meeting of the IWC presented what may have been the last chance to confront these differences directly, but it ended in a spectacular diplomatic failure, as I shall describe below.

The problems of the IWC vividly illustrate the larger dilemmas of international law and organization, and so they are of interest to scholars beyond the domain of whales and whalers. These include problems of supermajority decision rules,

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37 changes brought about by new members, contested amendments to the mandate
38 of an organization, and the push and pull of civil-society groups. Disagreement
39 over the substance of the whaling regime has been displaced; it has been recast
40 as a set of disputes over legal technicalities regarding how and when states are
41 allowed to make reservations to treaties and what counts as “scientific” research
42 on whales. The whaling regime has thus become a microcosm of the problems
43 of international law and diplomacy, where a shared commitment to the rule of
44 law coexists with deep disagreements over the meaning of compliance. The case
45 illustrates what can go right and what can go wrong in the design of international
46 institutions, and in the dynamics among state interests, regimes, and activists.

47 48 THE WHALING REGIME

49
50 The IWC’s legal instrument is the International Convention for the Regulation of
51 Whaling (ICRW). This treaty, from 1946, sets out the goal of protecting “all
52 species of whales from further over-fishing.” It gives the commission power to
53 set catch limits, gear limits, and otherwise to “adopt regulations with respect to
54 the conservation and utilization of whale resources.” This includes a “schedule”
55 of whale-hunt quotas for member countries attached to the treaty and renegot-
56 tiated at periodic general meetings, much like the World Trade Organization’s
57 Schedule of Concessions.

58 The regime really came into its own in the beginning of the 1970s, as
59 industrial-scale whaling pushed many species toward extinction. Whaling states
60 had dominated the IWC up to that point, and annual quotas were set very
61 high—so high, in fact, that they sometimes went unfilled. Oran Young has called
62 the IWC in the 1960s “a whalers club unable to make tough decisions about
63 restrictions needed to rebuild stocks.”¹ The power of the club produced dramatic
64 declines in whale stocks and a consequent move by anti-whaling states to join the
65 IWC in order to shift the position of its median voter.

66 With new members, many backed by new anti-whaling nongovernmental
67 organizations, the IWC began using its authority to constrain annual catches to
68 a level below what was already practiced. This turned the right to hunt whales
69 into a scarce commodity and led to a rebound in most whale populations. Most
70 significantly, in 1982 the IWC agreed on a complete moratorium on commercial
71 whaling, declaring that “the catch limits for the killing for commercial purposes of
72 whales from all stocks . . . shall be zero.”

73 The moratorium, which came into effect in 1986, was intended originally as a
74 temporary measure to allow whale stocks to recover and for biologists to agree on
75 sustainable levels of whale hunting. However, since 1986 the members of the IWC
76 have not been able to agree on a procedure to revisit the moratorium or reconsider
77 its usefulness, and so it continues today and sets the context for all contemporary
78 debate about the whaling regime.

79 Whale hunting continues as well, despite the moratorium. Two features of the
80 regime make it possible for hunting to coexist with the ban. First, the moratorium
81 allows governments to issue special permits to their citizens to “kill, take, and treat
82 whales for purposes of scientific research subject to restrictions as to number and
83 subject. . . .”² Second, the convention allows governments that object to amend-
84 ments to the treaty to exempt themselves from those changes simply by lodging
85 an objection to that effect.³ All treaties must somehow deal with the puzzle of
86 institutional change: if changes can be passed by a qualified majority of members,
87 what are the legal rights and obligations of the minority? The IWC solves this pro-
88 blem by permitting objectors to opt out of amendments. Other organizations
89 approach the dilemma differently: the UN Charter, for example, sets a high bar
90 on amendments, but then requires that even dissenters accept the changes; the
91 Rome Statute of the International Criminal Court specifies that dissenters can
92 opt out of changes to some crucial clauses but that most of the treaty can be
93 amended for all members by a two-thirds vote of the states parties.

94 The vast majority of the world’s whaling today is done by a small number of
95 IWC members that argue for its legality by invoking either the scientific research
96 clause or their right to opt out of the moratorium. The main whaling states today
97 are Japan, Norway, Iceland, Denmark (by Greenland and the Faroe Islands),
98 Russia, and the United States. Norway is responsible for the largest whale hunt;
99 it opted out of the moratorium and set for itself a quota of about 1,300 whales
100 in 2011—more than double the level it set ten years ago. Japan has maintained
101 that its whale hunt is a strictly scientific program and has generally killed about
102 1,000 whales per year. However, the 2010 tsunami destroyed much of its whaling
103 capacity, and the government of Japan has not yet decided if it will invest in
104 rebuilding the fleet. The remaining whaling countries have all opted out of the
105 moratorium, with Iceland taking about 250 whales per year, Russia about 140,
106 Greenland about 150, and the Faroe Islands about 500. Both Greenland and the
107 Faroe Islands are represented at the IWC by the delegate from Denmark; and
108 since Denmark itself opposes whale hunting, the delegate must make clear in

109 meetings which territory he or she is speaking for at each moment. The United
110 States allows some aboriginal hunting, which accounts for about 50 whales per
111 year.⁴

112 Major decisions in the IWC require a three-quarters majority to pass. The orig-
113 inal moratorium passed this threshold, but the pro-whaling bloc has since
114 recruited new states to the organization that are willing to vote with them.
115 Today the commission has eighty-nine member states, and membership is
116 about evenly split between the two blocs, meaning that neither side dominates.
117 Political pressure and side payments are used to keep both blocs together. As a
118 result, the status quo wins by default any time the matter is reopened in annual
119 meetings, and the existing moratorium can be neither abandoned nor enforced.

120 The stability of this stalemate was recently tested by an attempted compromise.
121 A diplomatic initiative from 2007 to 2010 sought to convince the two sides to
122 accept lower but nonzero whaling quotas. This was presented as essentially split-
123 ting the difference between the pro and anti positions: the anti states would have
124 to accept giving up the moratorium, while the pro states would accept quotas
125 lower than their current kills as well as a new South Atlantic sanctuary where
126 no hunting could take place.

127 The plan also called for an end to all objections and reservations to the sche-
128 dule. The target was to bring all whaling within the terms of the schedule and
129 the convention. It would end the legally uncomfortable situation of members
130 being able to choose for themselves whether the key rule of the regime applied
131 to their conduct or not. If successful, it would represent a major accomplishment
132 for the IWC, and for the idea of a coherent rule of law in international regimes
133 more generally: whaling practices would once again be entirely within the confines
134 of the treaty and its commission rather than escaping beyond them. The plan,
135 however, proved unsuccessful, and for reasons that bear important lessons for stu-
136 dents of international negotiation.

137 To foster the compromise, the commission organized a series of meetings from
138 2008 to 2010 outside of the regular schedule of annual conferences, where the
139 details were worked out. It invited diplomatic superstars, including the Peruvian
140 diplomat and longtime UN official Alvaro de Soto, to broker the process, and a
141 tentative formula was arranged ahead of the 2010 annual meeting in Agadir,
142 Morocco. As the plan became public, however, activists on both sides came out
143 against the proposal. They turned against their governments, which then turned
144 against their diplomats who had negotiated the plan, who then turned against

145 the commissioner who had shepherded it through. The IWC chairman, Cristian
146 Maquieira of Chile, was forced to resign, and the 2010 meetings ended up repli-
147 cating the same stalemate around the same blocs as previous years' conferences.
148 The status quo had triumphed again.

149 The immediate cause of the failure was that the compromise offended powerful
150 activist groups. It asked the anti-whaling community to give up the moratorium in
151 exchange for reduced levels of whaling. This they were not willing to accept.
152 Media coverage largely interpreted the change as abandoning the moratorium
153 and therefore as a move toward more whaling, and anti-whaling NGOs seized
154 on this view to mobilize opposition to the proposal. Thus, even for a reduction
155 in actual whale killing, they were unwilling to accept a step back from the political
156 symbolism of a zero-hunting rule. Opposition in pro-hunting communities
157 focused on the expansion of the whale sanctuaries in the southern oceans and
158 (to a lesser extent) on the nationalist impulse to resist the further internationaliza-
159 tion of whaling regulation.

160 The ferocity of the opposition to the plan therefore suggests a more deeply
161 seated reason for its failure, and one more conceptually revealing for students
162 of global governance. The compromise placed its bets on a mathematical reading
163 of the anti-whaling position: that is, it assumed that the anti-whaling coalition
164 would be happier to see, for instance, half as many whales killed next year as
165 last. In 2008 hunting killed about 2,000 whales, almost all under "scientific" per-
166 mits or by states that object to the moratorium. The compromise might have
167 reduced this to fewer than 1,000 whales, and legalized it under the category of
168 "commercial" whaling.

169 The anti-whaling groups rightly saw this as allowing the return of legal com-
170 mercial whaling and were therefore strongly motivated to defeat it. They under-
171 stood the change as raising the legal limit from zero to some higher number,
172 rather than as reducing the actual number of whales killed. It was the change
173 in the legal status of the hunt that made it seem a retrograde step, despite the
174 fact that in the eyes of whale-hunting states all their whaling is *already* legalized
175 by the scientific exception or their persistent objection to the moratorium.

176 The collapse of the compromise proves that it is a mistake to think about the
177 dispute as centered on the continuous variable of hunt quotas, where hunters
178 want a high number and conservationists want a low number. Rather, it is better
179 seen in terms of a binary variable defined by the moratorium: it is in place or it is
180 not; commercial hunting is illegal or it is legal. The ban on commercial whaling

181 represents a key victory for anti-whaling activists, and it has been turned into an
182 indivisible social fact, one that is not amenable to compromise. Binary goods make
183 poor material for compromise, as negotiators arguing over indivisible territory
184 have learned many times.⁵ Because the moratorium occupies a position in the
185 negotiations that is above all other questions, the anti-whaling coalition was
186 motivated to defend the formal rule of zero hunting even at the cost of losing a
187 possible chance to reduce numbers in the actual hunt.

188 Absent an exogenous change, it appears unlikely that the IWC will find a way to
189 negotiate its way back to life. The pro-whaling forces have found ways to continue,
190 even to increase, whaling despite the various limits imposed by the IWC. They
191 have constructed a whale-hunting legal scheme outside of the IWC and they
192 can therefore be seen as status quo powers, relatively happy with the current
193 arrangement.

194 The anti-whaling coalition therefore finds itself in the more urgent position,
195 seeking to change the existing system. They have a number of tactics to work
196 with. The Sea Shepherd environmental group has had success with direct action
197 against whale-hunting ships, for instance, forcing a Japanese fleet to abandon
198 its Southern Ocean hunt in February 2011 (a success that ironically led to the
199 vessels being available to help ferry supplies for tsunami relief).

200 A very different channel is being used by the government of Australia, which
201 filed a dispute with the International Court of Justice (ICJ) in 2010 claiming
202 that Japan violated its commitments under the ICRW treaty by, among other
203 things, abusing the category of “scientific research.” While the ICJ can only con-
204 sider cases in which all parties agree to its authority, Australia’s case can go for-
205 ward because both Japan and Australia have previously agreed to the court’s
206 compulsory jurisdiction, under Article 36(2) of the ICJ Statute.

207 Anti-whaling activists have been very successful in creating an international
208 norm against whale hunting. This, as Charlotte Epstein reports, is a striking
209 example of norm entrepreneurialism.⁶ It has overturned centuries of tradition
210 in which whale hunting was accepted as a normal mode of exploiting oceans.
211 However, it is possible that this norm has reached its peak, and the minority
212 who remain unconvinced in Japan, Norway, Iceland, and elsewhere retain dom-
213 estic political influence that goes beyond both their numbers and their economic
214 impact.

215 This implies that the future of the anti-whaling movement may lie in the dom-
216 estic politics of the pro-whaling countries. In all these countries, whale hunting is

217 sustained by government subsidies. It is essentially a nationalized industry. These
218 subsidies presumably continue because the governments believe that some voters
219 value them. Competing opinion polls produce competing results on public support
220 for whaling in Japan, Iceland, and Norway, and it is impossible to know the impor-
221 tance of the industry in broader society. There is some support in the whaling towns
222 of Japan and Norway, for instance, and some diffuse nostalgia for whaling as a com-
223 ponent of a “traditional” way of life. Budget priorities, as in post-tsunami Japan, and
224 changes in public opinion could drive these countries to end their whaling indus-
225 tries, building on the pressures already created by the IWC.

227 WHALING AND INTERNATIONAL LAW

228
229 The whaling regime today is characterized by (1) a comprehensive ban on com-
230 mercial whaling, which is supported by about half of its members, and (2) the
231 two paths by which the ban can be circumvented legally. Is this a success?

232 By most measures, one should probably conclude that it is. In 1961, some
233 66,000 whales were hunted, according to official statistics; in 1989, 326 whales
234 were killed. The number is increasing, however, and in 2008 about 2,000 whales
235 were killed. Nevertheless, anti-whaling has established itself as the dominant dis-
236 course on the subject: it has created a powerful norm of anti-whaling, which has
237 led to great reductions in yearly catches and the adoption of a legal ban on com-
238 mercial whaling, and has set the baseline for future negotiations at zero hunting.
239 At the same time, as noted above, this has had the effect of pushing pro-whaling
240 states to the fringes of the regime, where they find legal resources to justify behav-
241 ing in anti-regime ways. Thus, the practice of whaling has increasingly moved out
242 of the ambit of the IWC and into a semi-unregulated space outside of the regime.
243 It is increasingly a unilateralist practice, consciously avoiding the rules of the mul-
244 tilateral regime.

245 Ultimately, the centralizing force of the IWC has had a decentralizing effect: the
246 legal regime on whaling has become increasingly fragmented and particular rather
247 than coherent and unified. States’ legal obligations depend on the specific
248 interpretation and scope that they have agreed to. At one level this reflects the nor-
249 mal condition of international law, where states are only obligated to comply with
250 rules to which they have consented. But it shows that the effort to codify and for-
251 malize legal obligations can lead to more diversity of practice rather than less.
252 Legalization may not help organize the world; in this case, it helps disorganize it.

253 Nevertheless, the IWC remains a powerful legitimating device for both sides, as
254 evidenced by the way that both sides try to use its name in defense of their posi-
255 tions. It makes it possible for the Sea Shepherd group to claim that its interference
256 with Japan's whale hunt in the Antarctic Ocean is a defense of international law,
257 that Japan's behavior is illegal under the IWC, and that Sea Shepherd is enforcing
258 the rules on behalf of the IWC. On the other side, it also provides the language
259 that Japan uses to justify its behavior—that is, that there is a legal difference
260 between scientific and commercial whaling, and that its behavior is “research”
261 rather than “hunting.”

262 The IWC case also highlights the subtle means by which international law
263 shapes state behavior. A legal skeptic might use the case to illustrate how self-
264 interested states are capable of evading legal obligations, and this might be con-
265 sidered evidence of the weakness or irrelevance of international law. But such a
266 view is too simplistic, since it requires ignoring the ways in which states are mak-
267 ing use of the rules to justify and legalize their behavior. The pro-whaling states
268 reveal themselves to be intensely interested in how the rules are written and in
269 finding means to fit their behavior within them. The effect of the law is evident
270 in all the ways that states have adapted their language and their policies as a con-
271 sequence: some have given up whaling altogether; others have reconstituted their
272 hunts as scientific; and still others made the effort to redefine their legal obli-
273 gations by opting out of the moratorium. It is clear that these changes are not
274 all in the direction anticipated by the designers of the ban, but nonetheless they
275 show the complex ways that international law interacts with state behavior.

276 More directly, the whaling regime has increased the social and political costs of
277 whaling. Many whaling states have been offered strong incentives from the United
278 States to abandon the practice. And many non-whaling small states, in turn, have
279 been offered inducements to vote with pro-whaling governments in the IWC.
280 Thus, whale hunting is an increasingly expensive proposition, both politically
281 and financially. Internationally, it appears that the social status of whale hunting
282 has fallen since the 1970s, and in no country does whale hunting have broad pop-
283 ular support (with the possible exception of the Faroe Islands). In 1973, the Food
284 and Agriculture Organization helped modernize and expand whaling in
285 Indonesia, but it is hard to imagine any UN organization today engaging in
286 that kind of support.

287 A gap between compliance and law is usually called noncompliance or rule
288 breaking. But in international law the matter is not so clear. Governments are

289 active agents in making, interpreting, and limiting international law, and they are
290 therefore equipped with various tools to structure their legal obligations around
291 their desired policies. It is not self-evident what counts as “rule following” in inter-
292 national law or what counts as “rule breaking.”

294 CONCLUSION

295
296 The problems of the IWC provide important lessons for students of international
297 cooperation and organizational design. The member states have come to be
298 divided into two camps defined by opposing views on fundamental questions
299 about the purpose of the organization. As a result, every new attempt at delibera-
300 tion and compromise seems to end up sharpening the disagreement between the
301 two. Theorists of deliberation generally believe that talking about problems helps
302 to resolve them, or at least helps to reveal the possible path to a compromise. The
303 IWC, by contrast, proves that the opposite is also true: deliberation sometimes
304 makes clearer that the parties really do have irreconcilable differences.

305 If the end is coming for the IWC, the important question for the future of
306 whales is what replaces it. It seems unlikely that it will be a return to the status
307 quo ante, of an entirely unregulated whale-hunting regime. More likely we are
308 going to see new groups of anti-whaling states that seek to enforce regional con-
309 servation measures, such as the southern sanctuary. This might lead to more high-
310 seas confrontations between the defenders of the sanctuary and whaling fleets, and
311 these mini-crises might in fact be a path toward renewed multilateral negotiations.

312 The IWC has successfully managed the historical transition from open whale
313 hunting to highly restricted hunting. It has stopped all but the most highly motiv-
314 ated whale-hunting countries. This success has made its life more difficult, since it
315 has left the hardest part of the problem for last. Its current condition of paralysis
316 may signal that it has reached the limits of pro-hunting states’ willingness to
317 reduce their kills and of anti-hunting states’ willingness to tolerate the hunters’
318 use of the IWC to legalize their hunts. If that is the case, a revival will not
319 come from inside the organization—it will have to wait for an external change
320 to shift the positions of its leading governments.

322 NOTES

323 ¹ Oran Young, *Institutional Dynamics: Emergent Patterns in International Environmental Governance*
324 (Cambridge, Mass.: MIT Press, 2010), p. 124.

325 ² ICRW Art VIII(1). Government can also allow whale hunting if it is “used exclusively for local con-
326 sumption by the aborigines.” ICRW Schedule, para. 2. The United States is the main user of this
rule, permitting around fifty whales a year to be killed.

327 ³ ICRW Art. V(3).

328 ⁴ These figures are based on official statistics or permits and do not account for either unauthorized hunt-
ing or misrepresentation by the governments.

329 ⁵ On how negotiations make some goods indivisible, see Stacie E. Goddard, *Indivisible Territory and the
Politics of Legitimacy: Jerusalem and Northern Ireland* (Cambridge: Cambridge University Press, 2010).

330 ⁶ See Charlotte Epstein, *The Power of Words in International Relations: The Birth of an Anti-Whaling
Discourse* (Cambridge, Mass.: MIT Press, 2008).

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