

## Marine mammals

## Some more equal than others

### Improved status of marine mammals necessitates difficult societal choices

**W**e all know that commercial fisheries are in a sorry state worldwide. What is perhaps less well known to the general public, however, is that, in some parts of the globe, populations of certain marine mammals are in excellent shape or are recovering rapidly.

Marine mammals include such species as whales, seals, dolphins and porpoises. For example, the population size of the northwest Atlantic harp seal was recently estimated at around 5.2 million. States like Canada and Norway, therefore, permit a certain number of marine mammals to be hunted each year. Within the International Whaling Commission (IWC), the abundance of species like the minke whale has led to calls to lift the moratorium on commercial whaling for that species. Japan, one of the most adamant pro-whaling States, hopes this will be accomplished at the 54th Annual Meeting of the IWC, which takes place in May 2002, in Shiminoseki, Japan.

The improved status of certain populations of marine mammals has also generated extra interest due to the growing support for ecosystem-based fisheries management (EBFM), which necessitates that account is taken of predator-prey relationships and the interaction between marine mammals and commercial fisheries.

Marine mammals and humans are both significant predators in the marine environment. Fluctuations in abundance (effort) of both have impacts. This is easily seen after decades of excess (human) fishing capacity on the world's fish stocks. Likewise, increased abundance of marine mammals means higher consumption of prey species. Especially when a commercial fishery also targets

these species, it will not take long before the question arises whether, in the face of increased abundance, preferential treatment (ban on hunting) of marine mammals is still warranted. This question leads to heated debate when preferential treatment is not just a pure conservation necessity but mainly or exclusively based on ethical values. In many cultures, a 'Flipper' or a 'Willy' simply has a lot more charisma than, say, a herring. Or, to quote some famous words by George Orwell, "All animals are equal, but some animals are more equal than others".

Increased abundance of marine mammals can have direct and indirect economic consequences. Indirect effects include interference with fishing or fishing gear, introduction of diseases and, in places with extreme aggregations, eutrophication due to excessive introduction of nutrients (excrements). As regards direct effects, it is hard to deny that these *could* be caused by predation on commercially exploited fish species. It is, therefore, no surprise that pro-whaling States emphasize the need for EBFM and the significance of predator-prey relationships. The real question is, however, to what extent their point is well taken and if these direct economic effects can automatically be presumed.

#### Different effects

Potentially, the impact of these direct and indirect effects could be limited by a resumption of hunting for marine mammals. But culling alone should not be the only argument in favour of hunting. To not use the meat, blubber, skins, fins, tails and other parts would be a waste of resources, even if their economic value is often not so high. This is not to say that non-lethal uses of marine mammals, such as whale watching, have no economic value. Even just the knowledge that

whales are left undisturbed would, in some societies, have a value that could be measured in economic terms. Whether the (potential) benefits to commercial fisheries and profits from hunting weigh heavier than other 'considerations' is a very subjective issue.

**A** prominent 'consideration' in many Western States is the powerful charisma of marine mammals. They are often perceived as a higher form of life compared to other animals and as having 'inherent or intrinsic value'. Western movies have probably helped to strengthen this charisma and so have various environmental non-governmental organizations in trying to protect species from extinction. But it is relatively new.

Whereas humans have, no doubt, admired marine mammals in the past, this has not stopped Western States, in particular, from hunting many species to the brink of extinction and some past that. Awareness of the limits to earth's plenty changed mindsets but the charisma of marine mammals and other animals, which has developed since then, is probably mainly attributable to the changed nature of modern societies. The trek from the countryside to cities, and industrial production (and fishing) processes has meant that fewer and fewer people deal with animals directly. While most people eat meat or fish, they depend

on others to produce and kill. In particular, in Western societies, some may feel guilty because of shared responsibility for this production and killing, but only few of these become vegetarian.

As the great charisma of marine mammals has been translated into preferential treatment, which is maintained despite rebounding numbers, the pro-hunting lobby signals hypocrisy, double standards and discrimination and ask "Why chickens but not seals?". If the focus is just on the marine environment, the appropriate question could be phrased as "Why cod but not seals?". In the ensuing part of the article, this question will be addressed in the context of 'Ethics and International Law'. Recognition of predator-prey relationships in the context of EBFM means that the question could be replaced by the statement "Save the cod, eat a seal". This dimension will be touched upon in the section on EBFM.

#### **Emotive subject**

The debate on the special status of marine mammals is so controversial due to its high ethical content. Whether or not certain animals should be killed simply triggers more emotion than, let's say, whether or not people should be allowed to drive a car without a driver's licence at least in many Western societies. Despite the different subject matter, however, both debates are part of a process of

law-making, which eventually culminates in rules of law. The question that will be addressed here is how this law-formation works in international law.

**O**ne of the main cornerstones on which international law is built is the sovereign equality of States and the ensuing principle that States cannot be bound against their will. At the national level, however, decisions are binding on all nationals of that State. Individuals are usually not directly involved in the domestic decision-making process, but only indirectly by voting during periodic elections.

At the international level, States only rarely delegate such decision-making power to an international body. And if they do, they usually have the possibility to terminate this delegation, for instance, by discontinuing membership of the international body. More or less the same applies to particular rules laid down in treaties. For instance, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the IWC Convention explicitly allow reservations to specific rules. This has allowed Norway to avoid becoming bound by both the moratorium on commercial whaling and by the ban on international trade in certain whale species.

Nevertheless, most States are currently bound to many rules of international law relevant to marine mammals, as these States have voluntarily become parties to international treaties that contain these rules. In addition, on certain norms, the practice of States has become so uniform and widespread that these norms have acquired the status of customary law and bind all States. For example, the prohibition on overexploitation of marine living resources, the duty to co-operate in relation to transboundary marine living resources, the duty to conserve biodiversity and the duty to take measures to prevent species from becoming extinct are binding as customary law on all States. For States parties to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1992 Convention on Biological Diversity, and the CITES Convention, these norms are also binding as treaty-law.

#### **Not uniform**

International law has a dynamic nature. In fact, the very notion of customary law is based on change brought about by the practice of States. It can, therefore, not be ruled out that this practice becomes so widespread and uniform that a prohibition on the exploitation of certain or all marine mammals acquires customary status. But current State practice is far from such uniformity. Some scholars have argued this will change with

respect to whales, among other things by pointing out that, under the UNCLOS Convention, the objective of optimum utilization of marine living resources is not applicable to marine mammals. In response, it could be said that it contains no prohibition on exploitation either. But that the law may change cannot be denied. While it has taken a long time, certain human rights are now universally accepted.

**T**he same goes for individual criminal responsibility for international crimes (for example, genocide). So why not give whales, for instance, a right to life? That is: a right to life for individual whales under international law, quite apart from the protection offered by the customary duty for States to prevent species from becoming extinct. This right to life would effectively translate in a “thou shall not kill” command.

While accepting that this is not impossible, it is, at the same time, submitted that this is not likely to happen soon, primarily due to a lack of logic. Why whales and not other marine mammals? Why marine mammals and not other forms of life? Whereas there are numerous distinctions between different life forms, there are no persuasive objective criteria for determining which animals (life forms?) would be entitled to a right to life and which not. Criteria such as intelligence, complexity of behaviour or consciousness are, after all, very subjective. It is, therefore, unlikely that the international community of States will grant such a right to a single species or a group of species.

Another factor relevant to the likelihood of a customary right to life for whales is that many States see no immediate benefits to them. By way of illustration, it could be argued that, even though it is universally recognized that humans should not kill or eat one another, compliance is, in part, motivated by the benefits and risks of reciprocity. Such reciprocal agreement is, of course, impossible between humans and non-humans. And even if it would be, it would not be such a good ‘deal’ for humans. The current ratio of humans killed by non-humans as opposed to

non-humans killed by humans is outrageously uneven. The issue of benefits will be revisited in the section on EBFM.

In view of this lack of logic and immediate benefits, and in the absence of a threat to extinction, a right to life for whales becomes a matter of principle but one that States are not likely to agree on soon. It is more likely that States will agree on an international minimum standard for the treatment of animals in order to avoid ‘unnecessary suffering’. This will not be easily achieved either as it will be necessary to determine what constitutes ‘unnecessary suffering’ in individual cases and which cost-benefit assessment would be appropriate. In our context, do life and death of marine mammals not compare favorably with intensive pig farming?

In light of the absence of a rule of customary law, the sensitivity of the issue and the sovereign equality of States, it is submitted that States should show a certain measure of respect for one another’s views. Even though killing marine mammals is not prohibited by international law, States that *do* prohibit this within their jurisdiction may regard the kill of marine mammals by other States as disrespect for their views. The similarity with cultural and religious traditions and beliefs such as revering cows is striking.

The need for mutual respect is clearly under threat if States exert pressure on other States to ensure that the latter align their positions to that of the former. The obvious example is the United States (US), whose enactments provide for the imposition of bans on the import of fish products or deny States fishing access to the US maritime zones if these States are “diminishing the effectiveness” of international conservation agreements, such as the IWC Convention. It cannot be denied that unilateral approaches like these are helpful to force States to comply with international or regional conservation efforts.

#### **International law**

However, purely unilateral approaches will often be inconsistent with international trade law. Import

restrictions imposed by the US to prevent by-catch of dolphins in tuna fisheries and turtles in shrimp fisheries were challenged by a number of States, including Mexico, the European Community, India, Malaysia, Pakistan and Thailand. The rulings of the dispute settlement bodies confirmed that the unilateral stance of the US had violated international trade law and that it was to make serious good faith efforts to reach multilateral solutions. If such serious good faith efforts do not lead to multilateral agreement, however, trade sanctions may no longer be in violation of international trade law.

**T**he relationship between other forms of pressure and the need for mutual respect is more difficult. For example, the Norwegian decision to resume whaling in 1993 was seen as complicating its accession to the European Community and of leading to possible boycotts of the 1994 Winter Olympics in Lillehammer. It is difficult to maintain that such measures are inconsistent with international law. An argument that such measures nevertheless reflect a lack of respect can, therefore, only be based on non-legal considerations. For instance, the need to respect sociocultural differences between States, as long as the interests of the international community are not affected. This is not to say, however, that the aforementioned measures may not have legal implications.

The practice of States pressured to align their views with those of others may not count as practice relevant for the formation of customary law. Also, States may be less than enthusiastic in ensuring compliance with rules they have been forced to accept. More in general, it creates an atmosphere of distrust whose impact will not remain confined to the field where the pressure originated.

Ethical clashes and lack of respect for opposing views are also prominent within the IWC. The dual objectives of the IWC Convention are the conservation of whale stocks and the orderly development of the whaling industry. In the 1970s, however, it became apparent that the States then participating in the IWC were incapable of avoiding a threat to

the extinction of various whale species. Several States subsequently acceded to ensure that there would be a moratorium on whaling. Gradually, pro-whaling States were outvoted by anti-whaling States until the moratorium became effective in 1986. But despite improvements in the status of some whale species, anti-whaling States have since then flatly opposed a resumption of whaling, largely for ideological reasons. Certain States have even publicly announced that they would never agree on resumption. In view of the IWC's dual objectives, this has undermined its credibility and legitimacy. But the response of Japan does not show respect for the rule of law either. The objective need for the Japanese scientific whaling programme is at least questionable.

Similar is its strategy of vote-buying by which predominantly Caribbean States are given financial aid in exchange for aligning their votes with Japan. The situation in the IWC is, to a large extent, similar to CITES, where votes on the downlisting of relevant species also depend more on ideology and politics than on science. The credibility and legitimacy of CITES are, therefore, also at stake.

The need for respect does not prevent States from taking individual or collective measures against States that violate international law, for instance, the failure to co-operate, which thereby threatens the conservation of marine mammals or even their extinction. Such measures can include those that would otherwise have been inconsistent with international law (for example, trade sanctions). This is different where measures taken by, or under, the authority of international regulatory bodies are themselves not consistent with international law. It has, for example, been argued that the designation of the Southern Ocean Sanctuary by the IWC exceeded the latter's authority.

#### **Competing bodies**

Under certain conditions, measures like these would entitle States to withdraw from, or continue to operate outside, international regulatory bodies. Other regulatory bodies could be established as competitors. Worth mentioning in this

respect is the establishment of the North Atlantic Marine Mammals Commission (NAMMCO) in 1992, even though its regulatory scope currently hardly overlaps with that of the IWC.

**T**he conservation cause is more likely to worsen than to benefit if States withdraw from, or operate outside, international regulatory bodies, or establish competing bodies. But even though States would be entitled to such action, in practice they often join or remain in the 'club' as a consequence of the various forms of pressure exerted on them, legal or not. Worth noting is that Iceland left the IWC in 1992, became one of the founders of NAMMCO that same year, but expressed its intention to rejoin the IWC in 2001. This reflects not only Iceland's hopes that the moratorium on commercial whaling will soon be lifted but also that the IWC will not dissolve in the near future. Time will tell. The future of the IWC depends on the diligence by which the participating States respect each other's views and legitimate rights and interests in light of the overarching need for conservation.

From a scientific perspective single- or multispecies management are unsatisfactory as they ignore many relevant considerations. These considerations can roughly be divided as related or not related to fishing. Those related to fishing include by-catch,

discards, unobserved fishing mortality and also 'side-effects' of certain fishing practices (bottom-trawling, dredging, dynamiting, poisoning). Non-fishing effects on the marine environment are caused by human activities such as pollution and coastal zone development. Moreover, large-scale climatic and oceanographic processes such as global warming and ENSO (El Niño-Southern Oscillation) also have an impact, although not always human-induced.

As EBFM has a holistic character, the role(s) of marine mammals cannot be ignored. Very famous is the example of sea otters in the North East Pacific, which were hunted down to near extinction at the end of the 19th century. As sea otters prey on urchins, and urchins feed on kelp, this resulted in a large-scale loss of kelp-beds and thereby crucial habitat for fish and invertebrates. Also, whereas the general public is often aware that seals prey on commercial fish species, large whales are thought to eat only zooplankton such as krill. However, toothed whales, such as sperm whales, eat large quantities of squid and the diet of certain baleen whales also includes herring, capelin, cod and haddock.

#### **Poor understanding**

Ecosystems are highly dynamic, like shifting mosaics, with many factors playing variable roles. Current scientific understanding of marine ecosystem

processes is simply not sophisticated enough to make reliable predictions. A realistic approach towards EBFM should, therefore, emphasize the need to broaden scientific knowledge and to gradually take account of more and more ecosystem considerations. Much research is needed to actually prove that a reduction of predators that compete with humans leads to so-called 'surplus yields' for humans. Some Japanese scientists claim that whales consume worldwide three to six times the amount taken in marine capture fisheries. Even if this were correct, this does not mean that without whales this amount would be available for humans, or that it would be commercially interesting.

But one fundamental point that even those supporting preferential treatment for marine mammals must acknowledge is that they *do* play a role. At the same time, it should also be recognized that human activities are the main, if not only, reason for the current status of fish stocks worldwide. Marine mammals should, therefore, not be treated as scapegoats for human failure.

As a concluding remark, it seems that the threat of extinction is currently the only ground for prohibiting the exploitation of marine mammals that enjoys the support of the entire community of States. In view of the appalling conservation history, however, hunting for marine mammals

should be science-based, with a strong emphasis on the precautionary approach, risk assessment and other guarantees, such as a reliable enforcement framework in its broadest sense. Without these, a rehearsal of past tragedies is inevitable. 3

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