

## WHALES ARE MARINE PROTECTED SPECIES

Statement in favor of the whales migrating throughout the Antarctic region, especially  
in the Southern Ocean Sanctuary

### I. INTRODUCTION

We, the undersigned Captains, founded upon principles 21(e) and 24 of the World Charter for Nature, annexed to United Nations General Assembly Resolution 37/7<sup>1</sup>, appear before the international community, in the context of the case concerning Whaling in the Antarctic (Australia v. Japan), **to advocate in favor of the whales migrating throughout the Antarctic region**, especially in the area designated as the Southern Ocean Sanctuary.

We aim at highlighting the international legal status of whales as **marine protected species**. Our arguments are based upon ten years of *in situ* experience, as captains of vessels participating in campaigns organized by Sea Shepherd Conservation Society<sup>2</sup>; and, since 2012, by Sea Shepherd Australia Limited<sup>3</sup>, to defend the whales from whaling in the Antarctic, especially in the area designated as the Southern Ocean Sanctuary.

Arguments will specifically refer to the following species: *Megaptera novaeangliae* (humpback whale), *Balaenoptera physalus quoyi* (fin whale), and *Balaenoptera bonaerensis* (minke whale).

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<sup>1</sup> United Nations. General Assembly. 37<sup>th</sup> session. A/RES/37/7.

Principle 21 (e): "States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall: (e) Safeguard and conserve nature in areas beyond national jurisdiction".

Principle 24: "Each person has a duty to act in accordance with the provisions of the present Charter; acting individually, in association with others or through participation in the political process, each person shall strive to ensure that the objectives and requirements of the present Charter are met".

Online:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/37/7&Lang=E&Area=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/37/7&Lang=E&Area=RESOLUTION)

<sup>2</sup> <http://www.seashepherd.org/whales/>

<sup>3</sup> <https://www.seashepherd.org.au>

## II. THE CASE AND ITS FOCUS ON WHALING; NOT ON THE WHALES

On June 1, 2010 Australia instituted proceedings against Japan before the International Court of Justice. Australia alleged that Japan's continued pursuit of a large scale whaling programme in the Antarctic is in breach of international obligations for the preservation of marine mammals and the marine environment<sup>4</sup>.

States that are parties to the *whaling case*, as it is known by the public, have focused on **whaling**; and, more specifically, in its scientific or commercial nature. In contrast, the **whales**, and their international legal protection, have not been at its center.

*We, therefore advocate for the whales to be given greatest relevance.* They are marine species **protected** by international law and they migrate throughout a **whale sanctuary** established under international law.

## III. THE WHALES

The whale species, to which reference is made, *Megaptera novaeangliae* (humpback whale), *Balaenoptera physalus quoyi* (fin whale), and *Balaenoptera bonaerensis* (minke whale) belong to the taxonomic order Cetacea, Family Balaenopteridae<sup>5</sup>.

These species migrate throughout the Southern Ocean Sanctuary, which was established in 1994 under the International Convention for the Regulation of Whaling<sup>6</sup>. In this area, commercial whaling, irrespective of the status of the whales, **is prohibited**<sup>7</sup>.

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<sup>4</sup> International Court of Justice. Case concerning Whaling in the Antarctic (Australia v. Japan). Order of 13 July 2010, I.C.J. Reports 2010, p. 400.

Online: <http://www.icj-cij.org/docket/files/148/15985.pdf>

<sup>5</sup> International Union for Conservation of Nature. The IUCN Red List for Threatened Species. Version 2013.2.

Online: <http://www.iucnredlist.org/>

<sup>6</sup> International Convention for the Regulation of Whaling, Washington, 2 December, 1946, 161 UNTS 74. [ICRW].

Online: <https://treaties.un.org/doc/Publication/UNTS/Volume%20161/v161.pdf>

<sup>7</sup> ICRW. Schedule. III. 7(b).

#### IV. WHALES AS PROTECTED SPECIES

Historically, whales have been overfished to the extent that certain species have become depleted. This is a reality acknowledged by international law<sup>8</sup> and doctrine, which considers that “the history of man’s depletion of one species of great whales after another is perhaps the most infamous example of human mismanagement of the Earth’s natural resources”<sup>9</sup>.

In recent decades, the international community has also acknowledged that whaling has endangered some species to the brink of **extinction**. As a result, the international community has called upon the protection of these marine mammals through international law. To this end, treaties have been adopted to provide protection to some whale species. In this context, at least three treaties are important:

- a) International Convention for the Regulation of Whaling (ICRW);
- b) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>10</sup> ;
- c) Convention on the Conservation of Migratory Species of Wild Animals (CMS)<sup>11</sup>.

While these treaties aim at different objectives, they share a common goal: **to protect wildlife**, including the whales. These treaties implement a listing system of species requiring different levels of protection. To this end, CITES and CMS use Appendixes. The older ICRW uses a table attached to its Schedule.

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<sup>8</sup> ICRW. Preamble. “The Governments whose duly authorized representatives have subscribe hereto, considering that the history of whaling has seen overfishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further overfishing”.

<sup>9</sup> Bowman, M, et al. (2010). *Lyster’s International Wildlife Law* (2<sup>nd</sup> Ed.). Cambridge University Press. P.150. This opinion first appeared on: Lyster, S (1985). *International Wildlife Law*. Cambridge University Press. P.17.

<sup>10</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 2 March 1973, 993 UNTS 243. [CITES].

Online: <https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14537-English.pdf>

<sup>11</sup> Convention on Migratory Species, Bonn, 23 June 1979, 1651 UNTS 333. [CMS].

## V. CITES AND CMS

Listing parameters in CITES are based upon a species being *threatened with extinction*<sup>12</sup>. CMS follows similar parameters and lists species being *endangered*<sup>13</sup>. These species are listed in Appendix I of each convention.

CITES Resolution Conf. 9.24 (Rev. CoP16) provides a definition of *threatened with extinction* that focuses on: a) population size; and, b) area of distribution<sup>14</sup>. The Resolution further notes:

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<sup>12</sup> CITES. Article II (1): "Fundamental principles: Appendix I shall include all species threatened with extinction which are or may be affected by trade".

<sup>13</sup> CMS. Article III (2): "A migratory species may be listed in Appendix I provided that reliable evidence, including the best scientific evidence available, indicates that the species is endangered".

<sup>14</sup> CITES. Resolution Conf. 9.24 (Rev. CoP16). Criteria for amendment of Appendices I and II.

### Annex I:

A species is considered to be threatened with extinction if it meets, or is likely to meet, at least one of the following criteria.

- A. The wild population is small, and is characterized by at least one of the following:
  - i) an observed, inferred or projected decline in the number of individuals or the area and quality of habitat;
  - ii) each subpopulation being very small;
  - iii) a majority of individuals being concentrated geographically during one or more life-history phases;
  - iv) large short-term fluctuations in population size; or
  - v) a high vulnerability to either intrinsic or extrinsic factors.
- B. The wild population has a restricted area of distribution and is characterized by at least one of the following:
  - i) fragmentation or occurrence at very few locations;
  - ii) large fluctuations in the area of distribution or the number of subpopulations;
  - iii) a high vulnerability to either intrinsic or extrinsic factors; or
  - iv) an observed, inferred or projected decrease in any one of the following:
    - the area of distribution;
    - the area of habitat;
    - the number of subpopulations;
    - the number of individuals;
    - the quality of habitat; or
    - the recruitment.
- C. A marked decline in the population size in the wild, which has been either:
  - i) observed as ongoing or as having occurred in the past (but with a potential to resume); or
  - ii) inferred or projected on the basis of any one of the following:
    - a decrease in area of habitat;
    - a decrease in quality of habitat;
    - levels or patterns of exploitation;
    - a high vulnerability to either intrinsic or extrinsic factors; or
    - a decreasing recruitment.

Online: <http://www.cites.org/eng/res/index.php>

“The vulnerability of a species to threats of extinction depends on its population demographics, biological characteristics (such as body size, trophic level, life cycle, breeding structure or social structure requirements for successful reproduction), and vulnerability due to aggregating habits, natural fluctuations in population size, or residency/migratory patterns. This makes it impossible to give numerical threshold values for population size or area of distribution that are applicable to all taxa”<sup>15</sup>.

CMS also provides a definition of *endangered*: it means that the migratory species is “in danger of extinction throughout all or a significant portion of its range”<sup>16</sup>.

Taking into account a preventive approach, these treaties also provide protection to those species that *may become threatened with extinction* (CITES)<sup>17</sup> or have an *unfavorable conservation status* (CMS)<sup>18</sup>. These species are listed in Appendix II of each convention. In the context of CMS, a specific rule for cetaceans listed in Appendix II requests State Parties to conclude agreements that:

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<sup>15</sup> *Ibidem*. Annex V.

<http://www.cites.org/eng/res/09/09-24R16.php>

<sup>16</sup> CMS. Article II 1(e).

<sup>17</sup> CITES. Article II (2):

“Fundamental principles: Appendix II shall include:(a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and (b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control”.

<sup>18</sup> CMS. Article IV (1):

“Appendix II shall list migratory species which have an unfavourable (*sic*) conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement”.

Article 1 (c) states that for the purpose of this convention:

“Conservation status will be taken as “favourable” (*sic*) when: (1) population dynamics data indicate that the migratory species is maintaining itself on a long-term basis as a viable component of its ecosystems; (2) the range of the migratory species is neither currently being reduced, nor is likely to be reduced, on a long-term basis; (3) there is, and will be in the foreseeable future sufficient habitat to maintain the population of the migratory species on a long-term basis; and (4) the distribution and abundance of the migratory species approach historic coverage and levels to the extent that potentially suitable ecosystems exist and to the extent consistent with wise wildlife management”.

“ [A]t a minimum, prohibit, in relation to a migratory species of the Order Cetacea, any taking that is not permitted for that migratory species under any other multilateral Agreement and provide for accession to the AGREEMENT by States that are not Range States of that migratory species”<sup>19</sup>.

This convention also proclaims conservation of migratory species as a **fundamental principle**; it emphasizes its importance, as well as on the need for a preventive approach, by means of taking action to avoid any migratory species becoming endangered<sup>20</sup>.

## VI. THE ICRW

Due to its resource-oriented perspective, the 1946 ICRW differs from the system implemented by CITES and CMS. The ICRW does not refer to protected species but to “whale resources”<sup>21</sup>. Despite this resource-oriented approach, this convention does refer to a **protection stock**, which excludes listed whales from commercial whaling<sup>22</sup>. It is important to note that, according to this convention’s schedule, a **moratorium** on the taking, killing or treating of whales is in effect; although excluding minke whales<sup>23</sup>. This species, nevertheless, benefits from a **catch limit quota** of zero for the killing for commercial purposes applying to whales from all stocks<sup>24</sup>.

## VII. SPECIES FACING EXTINCTION

What these treaties reflect, in conjunction, is a general understanding that **whales are to be protected**. Furthermore, and of most concern, these treaties reflect that there are species to be protected **from endangerment**, such as humpback, fin and minke whales. These species are currently listed in CITES, CMS and ICRW as *threatened* and *endangered* species; or as otherwise, *protected* ‘stock’.

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<sup>19</sup> CMS. Article V 4 (f).

<sup>20</sup> *Ibidem*. Article II (1).

<sup>21</sup> ICRW. Article V (1).

<sup>22</sup> *Ibidem*. Schedule, III 10 (c).

<sup>23</sup> *Ibidem*. Schedule, III 10 (d).

<sup>24</sup> *Ibidem*. Schedule, III 10 (e).

**Table 1.** Whale species facing extinction

<b>SPECIES</b>	<b>CITES</b>	<b>CMS</b>	<b>ICRW</b>
FIN WHALE <i>Balaenoptera physalus</i>	<b>Appendix I</b>  Threatened with extinction	<b>Appendix I</b>  Endangered (in danger of extinction)  <b>Appendix II</b>  Unfavourable conservation status	<b>Protection stock</b>  Excluded from commercial whaling
HUMPBACK WHALE <i>Megaptera novaeangliae</i>	<b>Appendix I</b>  Threatened with extinction	<b>Appendix I</b>  Endangered (in danger of extinction)	<b>Protection stock</b>  Excluded from commercial whaling
MINKE WHALE <i>Balaenoptera bonaerensis</i>	<b>Appendix I</b>  Threatened with extinction	<b>Appendix II</b>  Unfavourable conservation status	Catch limit quota of zero

The listing of these species clearly reflects a fundamental fact: **they are protected by international law because they are facing extinction, *inter alia*, due to whaling activities.** Out of the three, the most dramatic scenario is for fin whales, which are also listed as **endangered** in the IUCN Red List of Threatened Species<sup>25</sup>. According to this document, an endangered species “is considered to be facing a **very high risk of extinction** in the wild”<sup>26</sup>. It is important to note that, when referring to “major threats” to this species, the Red List expressly refers to Japanese “experimental catches” in the Antarctic<sup>27</sup>.

<sup>25</sup> <http://www.iucnredlist.org/details/2478/0>

<sup>26</sup> [http://www.iucnredlist.org/static/categories\\_criteria\\_3\\_1](http://www.iucnredlist.org/static/categories_criteria_3_1)

<sup>27</sup> <http://www.iucnredlist.org/details/2478/0>

## VIII. STATES AND THE WHALES

As reflected by international law, the reality of extinction is acknowledged by an overwhelming majority of States. Take CITES as example: to date, there are 178 States that are Parties to this convention<sup>28</sup>. Considering that there are 193 member States to the United Nations<sup>29</sup>, CITES numbers reflect that 92.23% of the world agrees that these three whale species are, in fact, **threatened with extinction**.

In contrast, Japan and three other States — accounting for only 2.25% of State Parties — have entered reservations to the listing of these species in CITES Appendix I<sup>30</sup>, meaning these States are to be treated “as a State not a Party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation”<sup>31</sup>.

With similar effects than a reservation, Japan has also lodged an objection regarding the designation of the Southern Ocean Sanctuary, under the ICRW<sup>32</sup>. Japan is not yet a State Party of CMS<sup>33</sup>.

***But this is an issue not only of concern to individual States. It is one of concern to humankind.***

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<sup>28</sup> <http://www.cites.org/eng/disc/parties/index.php>

<sup>29</sup> <http://www.un.org/depts/dhl/unms/whatisms.shtml#states>

<sup>30</sup> <http://www.cites.org/eng/app/reserve.php>

<sup>31</sup> CITES. Article XXIII (3).

<sup>32</sup> <http://iwc.int/convention>

<sup>33</sup> <http://www.cms.int/>



## IX. BIOLOGICAL DIVERSITY: A COMMON CONCERN OF HUMANKIND

The preamble of the 1992 Convention on Biological Diversity refers to biological diversity as “common concern of humankind”<sup>34</sup>. This notion, which has become an expression of the importance of certain environmental matters to the global community as a whole<sup>35</sup>, has been built upon decades of normative evolution towards an improved normative framework and response to the global protection of ecosystems and species as reflected, for example, by the CITES recognition that wild fauna “must be protected for this and the generations to come”<sup>36</sup>. CMS also recognizes that wild animals must be conserved for the good of mankind<sup>37</sup>. Even the older and resource-oriented ICRW recognizes an international interest to safeguard the whales<sup>38</sup>. The notion of common concern is also prevalent in the Antarctic legal framework<sup>39</sup>, which calls upon the preservation of the waters surrounding this continent<sup>40</sup>.

The notion of common concern of humankind, and its inclusion in the preamble of the CBD should be taken into consideration when addressing issues of whaling in the Antarctic region, because whales migrate throughout the oceans of our world, including areas beyond national jurisdiction.

Hence, and in accordance with the World Charter for Nature, the international community should safeguard and conserve nature in areas beyond national jurisdiction<sup>41</sup>.

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<sup>34</sup> Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 1760 *UNTS* 79. [CBD].

<sup>35</sup> See Barbosa, J, “Conclusions of the Meeting” in David J. Attard, ed., *The Meeting of Legal Experts to Examine the Concept of The Common Concern of Mankind in Relation to Global Environmental Issues*. (Nairobi: United Nations Environment Programme, 1991).

<sup>36</sup> CITES. Preamble.

<sup>37</sup> CMS. Preamble.

<sup>38</sup> ICRW. Preamble.

<sup>39</sup> Antarctic Treaty, Washington, 1 December 1959, 402 *UNTS* 71. Preamble

<sup>40</sup> Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, 1329 *UNTS* 47. Preamble.

<sup>41</sup> World Charter for Nature. Principle 21 (d).

## X. PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

Article 3 of the Convention on Biological Diversity proclaims a fundamental principle, characterized by doctrine as “declaratory of customary international law”<sup>42</sup>:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction<sup>43</sup>.

This principle reflects an international perspective towards environmental protection, not only regarding state sovereignty but also regarding the general obligation of States to respect the environment in areas beyond national control<sup>44</sup>, which was first elaborated in the non-binding 1972 Stockholm Declaration on the Human Environment and reformulated in the 1992 Rio Declaration on Environment and Development, which also refers to this principle of international environmental law.

As has been noted, the 1982 World Charter for Nature calls for environmental protection, but focusing on the protection of the natural systems.

The Convention on Biological Diversity has now included this principle in a treaty specific to this subject; thus, reflecting its importance in the context of the international legal framework protecting wildlife species, such as the whales. Furthermore, the Convention on Biological Diversity links this principle to cooperation “in respect of areas beyond national jurisdiction”<sup>45</sup> and, specifically, for the conservation of biological

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<sup>42</sup> IUCN Environmental Law Programme (2010). *Draft International Covenant on Environment and Development. Fourth edition: Updated Text*. Prepared in cooperation with the International Council of Environmental Law. Gland, Switzerland: IUCN. P.57.

<sup>43</sup> Convention on Biological Diversity. Article 3.

<sup>44</sup> See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, pp. 241-42, 1996.

<sup>45</sup> Convention on Biological Diversity. Article 5.

diversity. Authors emphasize application of this principle to issues related to migratory species<sup>46</sup>, such as the whales.

These principles of international environmental law should be read in pursuance to one of the objectives of this treaty: the conservation of biological diversity<sup>47</sup>; but also in the context of the World Charter for Nature, which is one of the first instruments of international law recognizing the **intrinsic value of nature**:

“Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action”<sup>48</sup>.

## **XI. CURRENT EVENTS**

Claiming disputed scientific goals and applying lethal and inhumane methods, one State alone has, for years, granted itself disputed authorization to capture whales that are protected by international law; and to do so in an area designated as a whale sanctuary under international law. For the past ten years, the undersigned have witnessed and condemned these acts.

In spite of growing international awareness and concern, this is still occurring, when humanity has reached the twenty first century and facing an uncertain future in a world that humankind is modifying in an unsustainable way. In addition, the environment in which whales live is rapidly deteriorating by increased plastic pollution, warming seas, increased air pollution and deposition of toxic compounds; increased ship traffic leading to ship strikes and noise impacts; increased use of sonar, leading to mass stranding; and rapidly declining food resources due to overfishing leading to starvation of marine mammals including whales. These threats are increasing with unpredictable but likely dire consequences for whale populations.

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<sup>46</sup> Glowka, L, et al. (1994). *A Guide to the Convention on Biological Diversity*. IUCN Gland and Cambridge. P.28.

Online: <https://portals.iucn.org/library/efiles/documents/EPLP-no.030.pdf>

<sup>47</sup> Convention on Biological Diversity. Article 1.

<sup>48</sup> World Charter for Nature. Preamble.

Therefore, for those species on the brink of extinction, there should be no clear choice other than to eliminate deliberate killing, even if aiming at disputed scientific ends.

Whales are gentle, sentient and sapient beings, capable of communicating among each other. Experts agree about whales' brains having evolved in conjunction with complex cognitive abilities<sup>49</sup>. Whales, however, cannot speak for themselves before the international community. We can.

## XII. STATEMENT

Principle 1 of the World Charter for Nature states that nature *shall be respected and its essential processes shall not be impaired*.

In light of these arguments, the undersigned have appeared before the international community to advocate for greatest legal protection for the whales migrating throughout the Antarctic region, in the context of the *case concerning Whaling in the Antarctic (Australia v. Japan)*.

This statement is made without claiming or assuming any role reserved to parties of the case or to organizations acting in accordance to article 34.2 of the Statutes of the Court and article 43.3 of the Rules of the Court.

**Whales are not only the concern of State Parties of this case, but are a common concern of humankind.** This statement is, therefore, founded upon principles 21 and 24 of the World Charter for Nature; and invokes — without assuming the role of representatives of humankind — a **human duty to safeguard nature**, as well as to ensure that the objectives of the Charter are met, by means of **advocating in favor of the whales** migrating throughout the Antarctic region.

Whales should no longer be killed, neither for commercial nor for scientific purposes.

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<sup>49</sup> Marino, L, et al. "A claim in search of evidence: reply to Manger's thermogenesis hypothesis of cetacean brain structure". *Biol. Rev.* (2008). P. 1-24. doi:10.1111/j.1469-185X.2008.00049.x

Signed by (alphabetical order)

Captain Sid Chakravarty

A handwritten signature in black ink on a light pink background. The name 'Sid Chakravarty' is written in a cursive style, with 'Sid' on the top line and 'Chakravarty' on the bottom line.

Captain Alex Cornelissen

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a horizontal line and a few loops.

Captain Peter Hammarstedt

A handwritten signature in black ink, written in a cursive style that is difficult to decipher.


Captain Lockhart MacLean

A handwritten signature in black ink on a light pink background. The name 'Lockhart MacLean' is written in a cursive style.

Captain Adam Meyerson

A handwritten signature in black ink, written in a cursive style.

Captain Luis Manuel Pinho

A handwritten signature in black ink, written in a cursive style.

Captain Jean Yves Terlain

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a few loops.

Captain Paul Watson

A handwritten signature in black ink, written in a cursive style.