IUCN Environmental Policy and Law Paper No 19

LEGAL MEASURES FOR THE CONSERVATION OF MARINE MAMMALS

International Union for Conservation of Nat-ire and Natural Resources
Gland, Switzerland
1982

Legal Measures for the Prevention of "Pirate" Whaling

Dr. Patricia Birnie

An IUCN publication in the context of IUCN/WWF project No 2011.

ISBN 2 88032 087 9

IUCN gratefully acknowledges the financial support of the World Wildlife Fund in the elaboration of this study and the Center for Environmental Education, Inc. in its publication.

Preface

This project has been commissioned because of the concern about the exploitation of whales by operations outside of the regime established by the International Convention for the Regulation of Whaling.

The issue is serious since at the hands of the so-called "pirate" whalers even severely endangered species, totally protected under the International Whaling Convention have been taken, while less threatened species have also been exploited in an indiscriminate fashion with no consideration given to quotas for species and areas.

From the legal perspective the problem is also significant in that established international rules as elaborated by the Whaling Commission have been Ignored and might ultimately be thwarted by these actions of a few irresponsible individuals using the flags of those States which in good faith could only defend their non-membership in the IWC on the ground that they are and ensure remaining non-whaling nations.

There have been several exposes on the problem. Nevertheless, until now a study of legal approaches to the problem, identifying existing mechanisms for dealing with the issue and proposing new tools and concepts has been missing. Dr. Patricia Birnie has thoroughly investigated these legal aspects and has arrived at a series of recommendations which, although directed to the problem of "pirate" whaling, will also be of use for controlling the exploitation of other living resources outside of an existing regime.

On behalf of IUCN, I would like to express heartfelt thanks to Dr. Birnie for carrying out this extensive work and appreciation to the many experts who provided assistance to her. A further special word of thanks is due to the Philip Morris International Club (Munich) which earmarked funding to IUCN/WWF for the particular purpose of implementing this project.

Wolfgang E. Burhenne
Chairman IUCN/CEPLA

The Author

Patricia Birnie is a lecturer in Public International Law at the University of Edinburgh, U.K. She graduated with a B.A. in Jurisprudence from Oxford University, U.K., and as a Ph.D. at Edinburgh University. Her thesis was on The development of the International Regulation of Whaling: Its Relation to the Emerging International Law for the Conservation of Marine Mammals'. She is also a barrister-at-law (Gray's Inn). Her special interest is the Law of the Sea and she has written and lectured widely in this field, her most recent publication being 'The Maritime Dimension', R. Barston and P. Birnie (eds), Allen and Unwin (1980). She recently acted as a specialist adviser to a U.K. parliamentary committee investigating fisheries and prevention of vessel-source pollution and is currently completing a book on "The International Organization of North West European Waters".

Acknowledgements

The Reporter wishes to express her sincere thanks to the Director, Professor John Norton Moore and to the Staff of the Center for Oceans Law and Policy in the School of Law of the University of Virginia, Charlottesville, U.S.A., for their co-operation and support in the writing of this Report and for the facilities which made its production possible. She would also like to express special gratitude to the International Union for Conservation of Nature and Natural Resources (IUCN), the World Wildlife Fund and the Center for Environmental Education for their financrai support of this publication and to Dr. Françoise Burhenne-Guilmin of the IUCN Environmental Law Centre, Bonn, Federal Republic of Germany, and Mr. Daniel B. Navid of IUCN, Gland, Switzerland, for their many helpful comments and to all who have so kindly co-operated in the making available of the materials on which this Report is based.

Patricia Birnie

Table of Contents

Foreword

This Report is concerned with the legal measures which might be used to prevent and deter so-called "pirate"whaling. It describes and gives examples of measures available in both national and international law, as well as indicating ways in which the international law could be developed to make possible new and effective measures.

For those who are not familiar with the role of public international law, its relation to national law, and its relevance to "pirate" whaling, the following brief introduction will, it is hoped, provide some insight into the problems which are the subject matter of this Report.

International law can be said to have two branches: public and private international law. Private international law is concerned with resolution of conflicts between the laws of different state legal systems on particular issues which arise from time; it is not relevant to this Report. Public international law (hereafter referred to as international law), on the other hand, is the system governing relations among states, international organizations and other entities and groups such as dependent and non-self-governing peoples. It can also lay down principles and rules of general application, such as those concerning human rights, genocide, self-determination and protection of the human environment, including its living resources. International law is generally sub-divided into customary law — the law evidenced by state practice insofar as it is based on a sense of binding obligation — and treaty law — in which the obligations are enshrined in and derived from a formal written instrument. In both cases states are regarded as having given their consent to be bound: in the case of customary law either expressly or impliedly (for example, by lack of protest); in the case of treaty law expressly, by ratification or deposit of other formal means of acceptance of the relevant instrument.

Another source of international law derives from the application of the general principles of law applied in state practice, including national courts, and to some extent as developed by international tribunals. Secondary sources of law, to which reference can also be made, are the decisions of courts, both national and international, on issues of international law, and the writings of the most highly qualified publicists. From all these sources international law can be developed at the regional as well as the global level, or on a functional multi- or bi-lateral level. Some states regard international law, once formed, as automatically part of their national legal system, to be applied without need for further national enactment; others, though recognizing the supremacy of international law, consider that it cannot be applied nationally unless it has been enacted or otherwise adopted into national law.

All these decentralized methods of making international law have to be employed because there is no world government or world parliament with international legislative powers. Although the United Nations now has 157 member states (i.e. most of the over 160 states in the world to-day belong to it), and though it provides the only permanent global forum, in the form of the General Assembly, this body has no powers to bind its member states to take action, except in a very limited field

unrelated to the subject matter of this Report. It can only recommend courses of conduct to its members in the form of Resolutions, though these can include that the members should adopt further treaties or apply new general principles. However, subsequent state practice evidencing that states accept the Resolutions as binding is still required before they can be regarded as much more than normative in the development of international law.

As, moreover, no world police force exists to enforce these laws once adopted, enforcement also necessarily has to be decentralized: international law is left to be enforced by states themselves by national means, though they can, of course, improve its effectiveness by concerting their actions on an international or regional basis in various ways, as will be demonstrated in this Report. The need for reciprocity to ensure that all states may benefit from a stable international legal order is a powerful factor influencing states to comply with the international law, once they have accepted it. As necessary, and to the extent that national laws do not already conform to it, every state must enact or apply or both, the international law into its national legal system so that it becomes binding upon and can be enforced as appropriate against its own nationals — whether at home or abroad, whether on land, in the air or on ships flying the national flag on the high seas. It can also then be enforced against foreign nationals who enter the national jurisdiction, including maritime jurisdictional areas as appropriate, subject to certain international safeguards. These powers are important to the resolution of the problem of "pirate" whaling.

There are many world problems, including "pirate" whaling, which can be solved only on the basis of existing and developing international law. The scope of such problems has increased in the wake of recent rapid developments in technology, communications and knowledge but the methods of dealing with them legally have also correspondingly increased. The great increase in the number of independent sovereign states involved in the international legal processes that has accompanied the above developments, has also had an effect on the development of international law. All these events have particularly affected the problem of protecting the marine environment and its living resources. Fortunately, most states have come to perceive that migratory species, and especially highly migratory species such as whales, which traverse in their migrations the maritime jurisdiction of many states, can be preserved from over-exploitation only by concerted action on the part of all states concerned.

Many states have responded to this need and have developed international and national laws and regulations to protect the whales; their effective enforcement is crucial to the continued conservation of these species. Although some of the relevant laws have emerged over a long period of time, the detailed, flexible and amendable regulations that are vital for their continuing conservation have been developed through the International Whaling Commission, a body established by the International Convention for the Regulation of Whaling in 1946, the role of which is described in this Report.

Starting with a membership of only 12 whaling states, the Whaling Commission now consists of 35 states, some whaling, some not. Unfortunately, however, from

time to time, a few states have allowed vessels registered under their flags to engage in whaling operations outside this regulatory framework; these are the activities popularly known as "pirate" whaling, a term more fully explained in **this** Report. Although the Whaling Commission's regulations are the primary source of international regulations to conserve whales, many other relevant conventions **exist** or are in process of negotiation, such as the new Law of the Sea Treaty, which includes provisions to protect these species but is still the object of discussion at **the** UN's Third Conference on the Law of the Sea.

The object of this Report is to illustrate the many ways in which states, by utilizing the processes of national and international law, by implementing and applying and enforcing the existing network of laws and treaties and principles and by developing new ones, as appropriate, to fill existing gaps, can so deter the would-be "pirate" whalers that this pernicious activity will be eliminated for all time.

Patricia Birnie
December 1981

Introduction

A. "Pirate" Whaling Distinguished from Piracy

It is important to make clear at the outset of this Report that so-called "pirate" whaling is not to be equated with piracy proper either as defined in customary international law[1], as codified in the 1958 Geneva Convention on the High Seas[2] or as proposed in the Draft Convention on the Law of the Sea[3], negotiated by the Third United Nations Conference on the Law of the Sea (hereafter referred to as UNCLOS III), all of which restrict piracy to illegal acts of violence and to similar and associated acts committed on the high seas (or in some other place outside national jurisdiction) for private ends, by the crew or passengers of a private ship or aircraft against ships, aircraft, persons or property. The offence does not extend to animals such as marine mammals or even to large cetaceans and in any case the acts concerned must be illegal. For the reasons given below, the activities of "pirate" whalers on the high seas cannot, however undesirable, be regarded as illegal under present international law. Thus, unless new law is developed on lines suggested in this report, legal measures available to prevent "private" whaling must be limited to uses of national laws, within a framework of existing international conventions, which will have the effect of deterring this activity by indirect means. This report gives examples of the methods open to states in this respect, and it is hoped that by publicizing the range of possible legal measures all states will be encouraged both to adhere to relevant International conventions and to enact the necessary national laws.

If the offence of piracy proper is committed the seizure of the pirate ship can be carried out by *any* state detecting the offence subject to certain restrictions, but the arrest, even so, can be executed only by warships, military aircraft or official government ships; the pirates must be brought to trial in the courts of the seizing state under appropriate national laws; pirate vessels cannot be forcefully attacked, still less sunk, unless they violently resist seizure.

The universal offence of piracy proper is unique in international law. It took many years to evolve, and for no other offence can any state seize or harrass vessels on the high seas. This unusual universal power of arrest became acceptable only when all states, recognizing that the activity undermined both their national interest and that of the international community as a whole in freedom of navigation on the high seas (a freedom later codified in the High Seas Convention)[4] expressly or tacitly conceded to all other states the otherwise exclusive national right of the state under whose flag a vessel is registered to exercise jurisdiction over it. In the absence of any global authority with powers or means to prevent piracy, all states found it necessary to concede universal jurisdiction in order to eliminate this dangerous activity. Accordingly, every state should have on its statute books the laws necessary to enable it to prosecute and adequately penalize pirates in its national courts, whatever the flag under which the offence was committed. So far the community of states has not treated so-called "pirate whaling" (as defined below) in the same way. This Report will explore the ways in which International law might be developed to make "pirate" whaling into a similar universal offence but at the

present time there is no doubt that It cannot be so regarded. What then is "pirate" whaling and how seriously should it now be regarded in the light of the recent decline in its incidence?

B. A Definition of "Pirate" Whaling

There are no treaties defining or even referring to "pirate" whaling, let alone equat-Ing It with piracy proper. "Pirate" whaling is a term used in common parlance, because it provides a pithy and picturesque description of an activity which does have some similarities to piracy — many of the whales concerned are taken on the high seas, by violent means, and outside laws accepted by most states concerned in whaling — but the term has no juridical content and it does not render this activity illegal. In spite of the fact that most states which still engage in, or have in the past engaged in whaling (as well as several that have never done so) are now parties to the 1946 International Convention for the Regulation of Whaling[5] (hereafter referred to as the ICRW) it is still only a minority of states (currently 35 of the over 160 states that make up the global community) that have ratified this treaty. From time to time, a few states which are not party to the ICRW have exploited, both on the high seas and in areas under the national jurisdiction of other states, stocks regulated by the International Whaling Commission (hereafter referred to as the IWC) established by this convention; a rival commission, the South Pacific Commission[6], instituted by Chile, Ecuador and Peru In 1954 to regulate whaling off their coasts, still also exists, although both Chile and Peru In 1979 became parties also to the ICRW. Some fisheries commissions now have powers which could be extended to regulation of at least the smaller whales[7]. There is thus no universal treaty establishing the offence of "pirate" whaling, nor is there yet sufficient evidence in state practice to support the view that all states accept that whaling on the high seas outside the regulations of the ICRW, or outside any other of the treaties relating *inter alia* to whales which are described in this Report, Is an offence against international customary law, although support for such a view is growing, as evidenced by the large increase in the number of states party to the ICRW and in the progress in national laws protecting cetaceans, exemplified in this Report.

For purposes of this Report "pirate" whaling is regarded as including all whaling which takes place outside the regulatory scope of the IWC; it thus includes both whaling on the high seas and in areas beyond the national jurisdiction of the flag states concerned by vessels operated directly on behalf of and with the full and open support of the state under whose flag they are registered and also whaling by companies and nationals using a foreign flag as a "flag of convenience", *i.e.* the vessel and its crew have little or no connection with the flag state. Use of this "flag of convenience" system is accepted as legitimate in international law and has been codified In the Geneva High Seas Convention[8], which though requiring that there should be a "genuine link" between the vessel and the registering state does not lay down any criteria for determining the linkage. This permits even states party to the ICRW (should they wish to avail themselves of this loophole) to evade the IWC's regulations by registering their vessels under the flags of non-party states. It should be noted that the IWC now seeks to deter its members from engaging in such practices damaging to the IWC's regulatory system by recommending that its mem-

ber states do not transfer vessels or aid in other ways whaling operations by non-member states. The relevant resolution is reproduced in Appendix I.

Although these practices are declining, the evidence summarized below indicates the various ways in which "pirate" whaling has taken place and in which it may resume. Many of these enterprises have been detected and monitored as a result of painstaking research, amassing and presentation of evidence by Non-governmental Organizations[9] and by concerned members of the IWC[10]. It is obvious that such activities are, even if not clearly illegal, highly undesirable both from the point of view of those concerned totally to protect whales as a unique species, and those interested in conserving them for purposes of commercial or subsistence exploitation. Unlicensed activities seriously undermine stocks otherwise protected and even though some non-member states have from time to time provided information on their activities, such operations make categorization of stocks under the IWC's New Management Procedures (described later in this Report) unreliable because they are in these circumstances based on incomplete data.

Unfortunately, "pirate" whaling on the high seas in whatever form, and whaling by flag ships within their own national jurisdiction, takes place in conformity with existing international law which provides for freedom of fishing on the high seas for all states and cannot, without their consent, restrict coastal states' exclusive rights to regulate fisheries within their national jurisdiction, be this limited to a territorial sea of up to 12 nautical miles or a functional fisheries zone of up to 200 nautical miles.Moreover, all the support services which facilitate "piratical" operations — registration of companies, bank loans, insurance, investment of private capital, enlisting of crews — are similarly based on freedom of action under international law though they can be restricted or prohibited in most cases by national laws, as will be illustrated later in this Report.

To sum up and to express the definition of "pirate" whaling used in this Report in succinct terms, this popular term is interpreted widely throughout as covering all commercial whaling operations which take place outside the scope of IWC regulations, whether the flag ship concerned is operating under a flag of convenience or has a close and direct link with its flag state. This goes further than the definition used by the People's Trust for Endangered Species (PTES) their report which confines it to flag of convenience operations outside IWC regulations on the high seas but not so far as Frizzel who states that "the word 'pirate' has changed meaning a bit in the twentieth century acquiring a new and more gentle ring. We have pirate radio stations, and pirate recordings, anything flouting international law is often referred to as a pirate operation"[11]. The present report regards operations which do not observe IWC regulations as "piratical" even if they are not clearly contrary to international law, as has been pointed out above.

C. Recent Evidence of "Pirate" Whaling

One of the most notorious and earliest of operations flouting IWC regulations occurred in its early days when in the 1950s a vessel named the "Olympic Challenger" plundered whale stocks off the west coast of South America under a Honduras and

then a Panamanian flag until detected and arrested within Peruvian jurisdiction[12]. Another vessel, a former Dutch whale catcher boat, which became surplus in 1960, began whaling outside IWC regulations under the name of the "M.V. Run"; it was modified as a factory catcher ship and registered under the flag of the Bahamas in 1968. By 1972 it had changed its name to the "M.V. Sierra" and was registered under a Somali flag. Five years later, in 1975, it was still engaged in these activities but had re-registered under a Cyprus flag. In 1978 it was joined by the Tonna (previously known as the Shungo Maru and the Southern Fortune). The changes of ownership and activities of these vessels have been scrupulously researched and reported upon in detail by the People's Trust for Endangered Species (PTES), as have been also the various changes of flag, company registration arid areas of operation. These reports also put forward evidence indicating that members of the mixed crews from time to time involved have included nationals of Norway, Japan and South Africa, all of which were at the relevant time members of the IWC, and also from Spain, which has recently also joined the IWC. The PTES suggested, in the light of the evidence they had unearthed, that a Register of Whaling vessels should be compiled the better to enable concerned states to identify vessels registered under flags of non-IWC states and to monitor their activities and changes of ownership. Such a Register, it was suggested, would also enable and encourage IWC member states to enact the national legislation necessary to prevent transfers of vessels to non-member states and to enable the private sectors of industries, such as shipping agencies and insurance companies, to deny their services to such enterprises.

In the absence of sufficient states taking these and other legal measures to prevent "pirate" whaling, the scope of which measures will be illustrated in the present Report, private persons regrettably resorted to violent and illegal measures to end and deter existing operations. The Sierra was rammed at sea and subsequently, in February 1980, destroyed by explosives in Lisbon harbour in which it was laid up following this ramming. Two of Spain's catcher boats were similarly damaged by private persons who took the view that Spain, although it had by then become a party to the ICRW, was not strictly observing IWC regulations and was therefore engaged in "pirate" whaling; giving a somewhat wider interpretation of this term than is used in this Report, which confines the term to whaling under flags of non-member states, since any proved violations of IWC regulations by its members should properly be dealt with by that body. In 1979 South Africa, a member of the IWC, seized and proceeded successfully against the "M.V. Susan" and "M.S. Teresa", which had been engaged in unregulated whaling and it was suspected were about to be transferred to a foreign flag.

In addition to these "flag of convenience" operations several states until the late 1970s were still whaling on their own account outside the IWC; these included China, Chile, North and South Korea, Spain, Taiwan (not a recognized state) and Portugal. Of these only Portugal is at the time of writing still engaged in these activities outside the IWC: all the others (except Taiwan which was not accepted by the IWC as a Contracting Government when it applied for admission in 1981) have now adhered to the ICRW. In 1976 Taiwan permitted whaling operations to be undertaken under its protection; however, although the fleet had expanded to four vessels by 1979, in 1980 Taiwan changed its policy and itself arrested these "pirate" whalers.

D. Is "Pirate" Whaling Still a Serious Problem?

As so many of the former "pirates" have now either been rendered ineffective by use of both legal and illegal means, and as most whaling states have now become parties to the ICRW (in some cases possibly in response to pressure exerted or exertable indirectly under the laws of other states concerning access to fisheries and markets for fish which are detailed later in this Report) it must be asked if this study is still apt, timely and worthwhile. It is submitted that it most certainly is for several reasons.

First, the reasons which have made "pirate" whaling attractive in the past are still valid and are likely to provide even more attractive inducement as the increasing protection of whales in time results in recovery of stocks. The appeal of unregulated whaling has always been its profitability, even if only a few modest expeditions are carried out. Small, unrestricted operations, even on depleted stocks, are economic since every whale sighted is taken, whether or not it has been categorized by the IWC as a Protected Stock; the "pirate" discards the less valuable parts of the whale; he does not discriminate between the sexes and does not hesitate to take whole pods. Such indiscriminate whaling is capable of exterminating whale populations, particularly of endangered species. "Pirate" operations are, of course, profitable only if there is a market for their products; hence one of the most effective ways of deterring them is to close all markets inside and outside IWC member states to products derived from such enterprises. This Report, therefore, will be concerned to explain and illustrate the ways in which this can legally be done. Unless the necessary laws are adopted on a wide scale the possibility of short term, small but highly destructive operations being resumed from time to time must always be a real one.

The PTES report evidences the devious means resorted to by some commercial interests, which makes detection of their operations difficult for some time because of the meticulous research' required[13]. Recently whale meat derived from the "pirate" operations of a state which was not an IWC member was sent to Japan, which has laws banning such imports (in conformity with the recent IWC Resolution on this subject) via South Korea, which is a member of the IWC and whose whale products therefore Japan can legitimately import. Both states reported to the IWC that they had now taken the measures necessary to ensure that this would not recur.

As one commentator who has studied this subject has remarked: "Is "Pirate" Whaling really over? No-one knows for sure, and we will not be certain for a long time. The profitability of this enterprise is attested to by the growth of the Taiwanese fleet, which began in 1976, had two ships in 1978 and four a year later. There are other secret routes available, and a clever operator could run a ship out of sight of the numerous conservationists for a long time .... as long as illegal meat can be smuggled in for a profit on the continuing legal market, there will be opportunity for "Pirate" Whaling[14].

Secondly, the IWC is an organic institution. It has recently gone through a period of growth during which both more whaling and non-whaling states have become members. However, the ICRW, though it provides for accession by any Contracting

Government whose application is acceptable, also provides for withdrawal. Its changing compositions, the changes in the law of the sea which have already resulted from the negotiations and progress towards consensus at UNCLOS III — in particular the unilateral adoption by many states of 200 nautical mile exclusive Fisheries Zones — and the further changes to come if the UNCLOS Convention enters into force, could well encourage some Contracting Governments to withdraw from the IWC, as Canada did in 1981. Any whaling conducted outside national jurisdiction by such states following withdrawal would automatically become "pirate whaling" within the definition adopted by this Report, even if legally it remains a freedom of the seas. It is thus important also to deter such withdrawals.

Finally, although "pirate" whaling activities ar not *prima facie* illegal they are clearly in conflict with the duty now established in customary international law to conserve whales.

E. The Duty to Conserve Whales

It is clearly established in customary international law that all states have a duty to conserve the living resources of the sea, if only to ensure a renewable yield[15], a duty confirmed in Article 1(2) of the Geneva Convention on Fishing and Conservation of the Living Resources of the high Seas[16] which states that "All States have the duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas". The duty is not, however, confined to those areas. The Draft Convention on the Law of the Sea[17] produced by the Tenth Session of UNCLOS III not only reiterates in Article 117 that "All States have the duty to take, or to co-operate with other states in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas" but adds, in Article 61, that in its exclusive economic zone "The coastal state, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation" and that "As appropriate, the coastal state and competent international organizations, whether subregional, regional or global, shall co-operate to this end." Most coastal states have now asserted their jurisdiction over fisheries in zones adjacent to their coasts up to a distance of 200 nautical miles from the baselines of their territorial seas. These extensions have been justified by many states as being based on the consensus arrived at UNCLOS. As the consensus in favour of 200 miles fisheries jurisdiction related to the articles of the EEZ which included the above duty to conserve there is a strong case for saying that whether specifically included in the unilateral declarations or not coastal states have a duty to conserve the oceans' living resources; customary law requires it. Article 65 of the UNCLOS Convention, moreover, concerning marine mammals, specifically requires states "to work through the appropriate International Organizations for their conservation".

Most, but not all states concerned to regulate whaling for whatever purposes, are now parties to the ICRW. Others, particularly those concerned exclusively with conservation of whales and not engaged in exploitation, may also already be, or may become, parties to other relevant agreements such as the Convention on International Trade in Endangered Species[18] (hereinafter referred to as CITES) or the Con-

vention for Conservation of Migratory Species of Wild Animals[19] or they may be parties to regional fisheries conventions for various species in the course of which some whales may be taken directly or indirectly. Most states are also members of, or participate in the work of, international organizations which have a general interest in conservation, such as the United Nations Environment Programme (UNEP) or the International Union for Conservation of Nature and Natural Resources (IUCN), and which have endeavoured to encourage the laying down of general principles or guidelines for the management and conservation of whales amongst other species. The provisions of the constituent conventions of these organizations or the regulations and resolutions promulgated by them or both, in conjunction with the current international law concerning maritime jurisdiction, provide a broad international legal framework for application and enforcement of measures for the conservation of whales adopted by national states and by the IWC. The states most concerned to deter "pirate" whaling will, of course, be those which are already members of the IWC, but it is assumed that all states, whether they are members of the IWC or not, now have an interest in conserving these unique species and that this interest exists whether whales are found in, or migrate through, waters under their fisheries jurisdiction or not and even if states are landlocked. It is hoped that the information and analysis given in this Report will be of interest and use to all states. Moreover, most of the treaties and national laws described already are applicable to other species of marine mammals or could be made so by express provision or adaptation.

The purposes of this Report are, therefore, twofold: first to identify the powers conferred on states in existing international law to apply and enforce not only international conventions directly relevant to regulation and conservation of cetaceans but also other aspects, such as, *inter alia,* the law concerning international trade, vessel registration or port entry, which might indirectly be used to promote observance of internationally agreed conservatory measures; secondly to include selected examples of existing national law for application and enforcement of measures directly concerned with cetaceans and of measures which are already used, or might appropriately be used, indirectly to improve observance of the IWC's internationally agreed regulations for conservation of whales. As the number of examples that could be drawn from both international and national law is so wide, viewed from this perspective, it is fully appreciated that the report can do no more than give a selection of them, although most relevant international conventions are covered and techniques indicated. It is hoped, however, that it will serve not only as a guide to the measures that might conceivably be taken if states so wished but that it will also serve to stimulate further ideas and suggestions in this field which might form the subject matter of a supplementary report.

PART 1: Measures Permitted under International Law

I. International Principles

A. The United Nations Conference on the Human Environment[20]

The UN Conference on the Human Environment (hereinafter referred to as the UNCHE) was held in Stockholm in June 1972. It adopted a Declaration of 26 Principles on the Human Environment which, although cast in the form of recommendations and not *per se* legally binding, have been endorsed by the UN General Assembly, and have in some instances had a normative effect on the development of international environmental law. At the least they can be said to encourage the taking of the actions recommended and In some cases the Principles have already been included in international treaties which have developed and Interpreted them. To the extent that such treaties have relevance to prevention of "pirate" whaling they are described in the following sections.

The UNCHE also adopted an Action Plan and various resolutions some of which are of importance to the development of a duty both to refrain from such activities as "pirate" whaling and to prevent it as far as possible. Relevant principles and Recommendations include:

> ***Principle 2*** **which asserts that "The natural resources of the earth, including the air, water, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning and management as appropriate."**
>
> ***Principle 4*** **which states that "Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat which are now gravely imperilled by a combination of adverse factors."**
>
> ***Principle 21*** **which recognizes that "states have in accordance with the Charter of the United Nations and the principles of international law the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities under their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."**
>
> ***Principle 25*** **which provides that "States shall ensure that international organizations play a co-ordinated, efficient and dynamic role for the protection and improvement of the environment."**

These principles create standards against which states should in good faith measure their conduct and their environmental policies and which they should seek to introduce into international law by means of conventions and custom. Relevant recommendations in the Action Plan are:

> ***Recommendation 32*** **that Governments give attention to the need to enact international conventions and treaties to protect species inhabiting international**

waters or those which migrate from one territory to another;

Recommendation 33 that Governments agree to strengthen the International Whaling Commission; and

Recommendation 99 (3) that a plenipotentiary conference be convened as soon as possible to prepare and adopt a Convention on export, import and transit of certain species of wild animals and plants.

As will be seen from the measures described below the International Whaling Commission by adoption of New Management Procedures and various resolutions has acted on these recommendations; the United Nations Environment Programme established by the UNCHE has made the oceans one of its priority areas for action and developed, *inter alia,* principles for shared natural resources; and the Convention on Trade in Endangered Species, on Conservation of Migratory Species of Wild Animals, Conservation of Wildlife and Natural Habitats and on Conservation of Antarctic Marine Living Resources have also developed from these principles.

B. UNEP's Draft Principles for the Conduct of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States[21]

These fifteen principles, which were prepared by an inter-governmental group of experts established by the United Nations Environment Programme at the request of the United Nations General Assembly (A/28/3129), were subsequently adopted by the UNEP Governing Council (UNEP/GC.6/17, 10 March 1978) and noted by the General Assembly in 1978 (A/RES/33/87, 19 January 1979, adopted 17 December 1978). They develop some of the principles laid down in general terms in the 1972 Stockholm Conference Declaration on the Human Environment outlined above.

In noting the report of the UNEP Group of Experts, the General Assembly "recognized the right" of states to provide specific solutions on a bilateral or regional basis and did no more than invite the Secretary General of the United Nations to transmit the report to Governments for consideration. The principles cannot therefore be said to be legally binding by virtue of these actions alone. Their legal significance depends on the extent to which they can be said already to have become part of customary law either before or after the report, or on their use in international treaties. Opinions vary on the extent to which at least some of the principles have already become legally binding through these processes. As yet there is insufficient evidence In the form of state practice and conventions to enable any final pronouncement on this question. The principles are, moreover, deliberately framed broadly, in terms that do not seek to prejudice whether or to what extent the conduct enjoined by them is prescribed in international law. For some states (some of which made express reservations to this effect, as recorded in the Report of the Group) the principles remain as recommendations and require conclusion of further bi-lateral or multi-lateral agreements between states to give them legal effect. Others, however, considered that most of the principles might be said to be legally binding, though it should be noted that as the Report does not define the term "shared natural resources" there is always scope for argument, in the absence of a

specific agreement identifying the resources in question. It is clear, however, that most species and many stocks of whales are shared natural resources for these purposes and, though some states take the view that the right of states to conserve and utilize natural resources within their frontiers is unaffected by these principles, subsequent treaties, as will be indicated later in this Report, are endeavouring to provide means for states formally to restrict these rights, if Indeed they can be said to exist. These treaties, as will be seen, go a long way to recognizing the legal force of several relevant principles both in the Stockholm Declaration and the UNEP Draft Principles for Shared Natural Resources.

The fact remains that the principles can be normative, that states can act upon them, and that their conduct can be legally justified *vis a vis* other states at least in international areas of the oceans, by reference to the UNEP principles. The Explanatory Note attached to the Principles (UNEP/1G.12/2,7 February 1978, p. 10, emphasis added) expressly states that they are "Principles of *Conduct* for the guidance of states" with respect to harmonious utilization of natural resources shared by two or more states to encourage co-operation in, amongst other things, management. As the General Assembly has sent the principles to governments for consideration and further action at their discretion they must now at least be considered in good faith by all governments, including those not members of the United Nations and those not parties to the International Convention for Regulation of Whaling. In interpreting the following UNEP Principles it should be noted that the Group of Experts did define the term "significantly affect" as used in the principles as referring to "any appreciable effects on a shared natural resource" and as excluding "de minimis" effects.

The fifteen principles state, in Principle 1, the necessity for states to co-operate in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more states: they should do so with a view to "controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources, though such co-operation must take account of the sovereignty, rights and interests of the states concerned". Principle 2 expounds that to ensure effective international co-operation for these purposes states should try to conclude bilateral and multilateral agreements "to secure specific regulation of their conduct in this respect *applying as necessary the present principles in a legally binding manner"* (emphasis added) or should try to enter into other agreements, which might include establishing institutional structures to enable consultation on the environmental problems of protection of shared resources. Principle 3 recognizes states sovereign rights to exploit their own natural resources pursuant to their own environmental policies but couples this right with states' responsibility to ensure that activities within their jurisdiction or control do not damage either the environment of other states or of areas beyond national jurisdiction, and with recognition of the need for states to avoid and reduce adverse environmental effects beyond their national jurisdiction of any use of shared natural resources within it in order to protect the environment — especially if such use causes environmental damage which could have repercussions on the use of the resources by another state sharing them, threatens the conservation of shared natural resources, or endangers the health of another state's population. This Principle has clear and important application to exploitation of

whales outside the regulations of the International Whaling Commission. All members of the UN, and other concerned states, should consider most seriously the means to give effect to these Principles; one means by which they could begin to do this would be by becoming party to the international conventions described in this Report.

Principles 4, 5, 6 and 7 concern respectively the need for environmental assessment, exchange of information, and advance notification to other states of any use of shared natural resources "on the basis of the principle of good faith and in the spirit of good neighbourliness". Principle 8 relates to carrying out, when useful, joint scientific studies and Principle 9 to transmission of information on emergencies. Principle 10 is particulary relevant to whaling outside the regulations of the International Whaling Commission: it states that "states sharing a natural resource should, when appropriate, consider the possibility of jointly seeking the services of any competent international organization in clarifying the environmental problems relating to conservation or utilization of such natural resources." The International Whaling Commission would be a particularly appropriate organization for such states to consult; so also would the UNEP itself, the IUCN (International Union for Conservation of Nature and Natural Resources), the Secretariats of the 1973 Washington Convention on International Trade in Endangered Species and of the 1979 Bonn Convention on Conservation of Migratory Species of Wild Animals (when established), amongst others. Their functions and powers are described later in this Report. This Principle underlines further the need for all whaling states to participate in these bodies.

Principle 11 deals with dispute settlement procedures, and makes it clear that the relevant provisions of the UN Charter and the UN General Assembly Declaration of Principles Concerning Friendly Relations and Co-Operation Among States[22] do apply to environmental disputes, adding, *inter alia,* that "It is necessary for the States party to such a dispute to refrain from any action which may aggravate the situation with respect to the environment to the extent of creating an obstacle to the amicable settlement of the dispute". Principle 12 recognizes the responsibility of states to fulfil their international obligations in regard to conservation and utilization of shared natural resources and also that they are subject to liability in accordance with applicable international law for environmental damage caused to areas beyond their national jurisdiction resulting from violations of these obligations. Though this Principle does not further identify the nature and extent of the liability — this is left to be decided by states by national and international means — liability is at least recognized potentially to ensue from responsibility for damage both to areas inside other states' national jurisdiction and to areas beyond national jurisdiction.

Principle 13 concerns the need for assessment of the external effects of domestic activities: States should take into account, when considering the permissible activities within their domestic policies, potential adverse environmental effects arising from use of shared natural resources; it makes no difference whether such effects occur outside or within national jurisdiction. Principle 14 encourages states, as far as legally possible and as appropriate, to make available to foreigners adversely affected by national use of shared natural resources their domestic remedies.

All the above principles must not only, as a matter of law and good faith, be interpreted in accordance with their expressed purpose of guiding conservation and harmonious utilization of shared natural resources, but are also required by Principle 15 to "be interpreted and applied in such a way as to enhance and not to affect adversely development and the interests of all countries, and in particular of developing countries".

II. International Conventions: Global

1. Measures under the ICRW

a) Fulfilment of the Purposes of the ICRW

As already stated most states engaged in whaling operations are now parties to the ICRW and must therefore comply not only with the articles of that Convention but also with the regulations laid down in the Schedule[23] attached to it which are an integral part of it. Regulations are adopted to promote both conservation and utilization of whales and also to further the other purposes of the ICRW's Preamble.

The Vienna Convention on Treaties, which recently came into force, lays down that treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose"*[24] (Article 31). Treaties should be interpreted, as long as this does not contradict their provisions, to make them effective rather than ineffective; thus interpretation should be liberal not literal. This applies also to the Whaling Convention and its objectives.

The Preamble sets out the aims of the ICRW, and, amongst other things, recognizes specifically the interest of all the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks and that past over-exploitation of one species of whale after another has rendered essential the protection of all species from such excesses. The Preamble makes it clear that a major purpose is *"to establish a system of international regulation"* for the whale fisheries to ensure proper and effective conservation and development of whale stocks and that the basis of the system is intended to be the principles set out in the ICRW.

The parties to the ICRW (and, of course, all other relevant conventions) should, in the light of the international law on treaty interpretation referred to above, interpret the treaty in such a way that the treaty is made effective in the context of this purpose and there is no international legal barrier to adopting a liberal interpretation of the treaty provisions, which remains consistent with the object and purpose of the treaty and conforms to any express provisions. Moreover, treaties which institute a continuing regime, with international organs such as the IWC, carrying out continuing functions under that regime tend to be regarded as dynamic constitutional instruments, which can adapt to changing circumstances by a process of interpretation rather than as a rigid and immutable pronouncement of rights and duties. Conventions can thus be adapted by liberal interpretation[25]. The measures to be taken

under Article IX by the ICRW (see later in this section) or recommended under Article VI can be interpreted in this way.

The established doctrine of "implied powers" confers on appropriate organs such as the IWC such powers as may be implied from their general powers, insofar as these conform to the treaty's object and purpose. There is moreover a presumption in treaties such as the ICRW which do not confer binding powers on any independent tribunal to adjudicate on differences arising concerning interpretation of the treaty, that the organs themselves can interpret the treaty and decide the extent of their powers; and that this falls fully within their competence[26]. It is not therefore impossible that some of the measures, which are at present merely recommended in the form of resolutions may, at some future date, be made mandatory by amendment of the Schedule if consistent with the above qualifications.

The ICRW's objects and purposes are given effect not only by the provisions of the main Convention but, *inter alia,* by means of amendment of regulations provided in the Schedule; the amendments are adopted by the Commission, which is composed of one member for each contracting government of the ICRW, by the procedures described below. In practice they are made at the annual meeting of the IWC and occasionally at interim Special Meetings. The Schedule, as will be seen, now provides total protection for most species of great whales by prohibiting their capture, and protects other species by limiting the number that can be taken and fixing other conditions.

b) Scope of the ICRW

i) Subject Matter of Regulations arid Recommendations

(a) Regulations Permitted by the ICRW

Article V (1) of the main Convention permits regulations fixing:

> (i) protected and unprotected species; (ii) open and closed seasons; (iii) open and closed waters including designation of sanctuary areas; (iv) size limits for each species; (v) time, method and intensity of whaling including fixing the maximum catch of whales to be taken in any one season — a power now exercised under the IWC's New Management Procedures — hereinafter referred to as the NMP), which are discussed below, by means of fixing quotas for individual species, in specific areas and sub-areas (sometimes further sub-divided in relation to sex); (vi) types and specification of gear and apparatus and appliances which may be used; (vii) methods of measurement; (viii) catch returns and other Statistical and biological records.

It is important in considering the measures which states might take to ensure that the regulations specified for the above purposes are observed by non-member states of the IWC to take into account certain specific restrictions on amendments laid down in the ICRW: the amendments must be based on scientific findings (Article V(2)(b)) for which purpose the IWC has established a Scientific Committee of scientists nominated by member states assisted by representatives of international organizations approved by the IWC (at present FAO, UNEP and the IUCN). The ICRW also prohibits restriction of the number or nationality of factory ships and land sta-

tions and allocation of specific quotas to any factory or ship or land station or any group of factory ships or land stations (Article V(2)(c)). In considering national measures to inhibit "pirate" whaling states must therefore observe these limitations, as modified by the IWC's NMP, if they are party to the ICRW.

Under the New Management Procedures (NMP)
Since the 28th Meeting of the IWC in June 1976, the IWC has operated the above provisions under its New Management Procedures under which the Scientific Committee is required to classify stocks of whales into one of three categories, namely:

Sustained Management Stocks (SMS):
(a) *Categorization:* stocks not more than 10% of MSY (Maximum Sustainable Yield) level below MSY level and not more than 20% above that level. When a stock has remained at a stable level for a considerable period under a regime of approximately constant catches it is classed as a SMS in the absence of positive evidence that it should be classified under some other category.

(b) *Catch level:* for stocks between the MSY stock level and 10% below that level, the permitted catch shall be not more than is indicated by a straight line from zero at the lower limit to 90% of MSY stocks at MSY level, with a limit of 90% for stocks above MSY level.

Initial Management Stocks (IMS):
(a) *Categorization:* stocks more than 20% of MSY stock level above MSY.

(b) *Catch level:* permitted catch must not be more than 90% of MSY as far as this is known and shall not be allowed to begin until a satisfactory estimate of stock size is available.

Protection Stocks (PS):
(a) *Categorization:* stocks which are below 10% of MSY stock level below MSY level.

(b) *Catch level:* no catches are permitted on stocks so classified.

Present Catch Limits
At the 33rd Meeting of the IWC, in July 1981, the IWC established total catch limits for the 1981/82 pelagic season and for the 1982 coastal season for both commercial whaling and for aboriginal subsistence whaling. As the precise numbers permitted on other than PS stocks are likely to vary at each subsequent meeting it is neither necessary nor desirable that they be cited in this Report. It is, however, essential for purposes of enforcement to appreciate which stocks ar classified as PS and for which areas and for which species quotas are imposed. These are as follows:

(a) Totally protected from all commercial whaling: blue, right, humpback, gray whales.

(b) Commercial whaling subject to catch limits in specific areas on: sperm, fin, sei, Bryde's minke and bottle nose whales. The areas regulated are the Southern Hemisphere, the North Pacific, the North Atlantic and the Northern Indian Ocean. It should be noted that no catches at all are permitted in the last named

area and that catches of fin, sei and bottle nose whales were banned in the Southern Hemisphere and North Pacific, and of Bryde's whales in the North Atlantic and that the catch of Bryde's whales in the Southern Hemisphere includes both the Northern Indian Ocean and Peruvian stocks, the boundaries of which extend north of the Equator. Zero quotas were set in 1981 also for sperm whales although the North West Pacific quota is still under discussion.

(c) Aboriginal/Subsistence whaling is permitted, subject to catch limits for gray whales of the North Pacific Eastern Stock (off Siberia), for humpback whales of the North Atlantic Stock (off Greenland) and for bowhead whales of the Bering Sea Stock (off Alaska).

Details of these procedures and their application can be obtained from the annual reports of the IWC.

It is clearly easier for states to survey and enforce a complete ban on taking, which requires only that states observe whether whaling vessels are taking any whales at all of a particular species or from a particular stock of a particular species, than it is to check and enforce catch limits which require evidence that the number prescribed has been observed, which may require boarding and inspection of vessels, or harbour or landing or market checks, or all these activities. As, however, "pirate" whaling is an activity which takes place mainly on the high seas and completely outside the above limitations this problem does not arise since member states of the IWC and other concerned states will want to ensure that no catching of any of the above species in any of the above areas takes place by non-members or vessels registered under their flags. The limit to which states can go under international law in enforcing IWC regulations on non-member states rather than merely surveying their activities is assessed in the Section of this Part of the Report dealing with national jurisdiction zones, as evidenced by the national laws cited in Part 3.

(b)Recommendations

States should be aware of the difference in legal status between amendments to the Schedule, which require a three quarter majority of the Commission members voting for adoption but which, once adopted, are binding upon states which do not register a formal objection to them within a prescribed period (Article V(3)), and recommendations, which can be adopted (in the form of resolutions) by a simple majority of those Commission members voting, but which are not subject to objection procedures, being recommendatory in form (Article VI). The latter do not *perse* legally bind member states although it is generally accepted, in what is a controversial field of international law, that at the very least all member states must consider them in good faith and that this is especially so in the case of those states voting for them. Some commentators also consider that such resolutions can operate as a legal defence of conduct against other states that would otherwise be regarded as contrary to international law, even though the resolution concerned does not positively require such conduct as a matter of legal obligation and the state acted against might neither have voted in favour nor have participated in the process of adoption of the resolution, e.g., it was not a member state of the organization concerned[27].

The ICRW permits the IWC to make recommendations to its Contracting Governments on any matters which relate to whales and whaling and to the objectives and purposes of the Convention. A number of resolutions have been adopted which raise complex problems for national enforcement. One resolution for example calls on member states to take all practicable steps to prevent the transfer of factory ships, whale catchers or gear, or apparatus or appliances used in the conduct of whaling operations and to discourage the dissemination by its citizens of expertise of assistance necessary to the conduct of whaling operations in any form including training, designing ships or land stations, and giving financial aid to any nation or entity whatever which is not a member of the IWC. Another calls on IWC members to take all necessary steps, including such amendments to their laws and regulations as may be required, to prevent the import into their countries of whale products from the non-member nations and a third calls for consideration of national legislation prohibiting whaling by non-member states within the fishery conservation zones of member states. A list of relevant resolutions is given in Appendix I. The problems and practices of states in implementing these resolutions are dealt with later under appropriate sections of this Report, notably in Part III on National Laws. The resolutions do not have direct legal effect *per se* on non-member states but any legitimate actions thereunder by member states will of course have considerable indirect impact on the conduct and interests of non-members. These resolutions could only be said to have become directly binding on non-member states if such states, expressly, or impliedly (by their acts or omissions) accepted them as such, or if they could be said to have received such widespread acceptance amongst other states concerned in their subject matter that they have become part of customary law. Even though there has been, so far as this rapporteur is aware, no formal protest by any state affected, or potentially affected, it is doubtful if it can be said that the above resolutions have had this effect in the light of current state practice as reviewed in this Report although several IWC members are acting on all or parts of them and introducing them into their national law as evidenced in Part III of this Report. There is evidence both at the international level, as more states become party to the CITES (which Is discussed below), or enact comprehensive national legislation (such as the Marine Mammal Protection Acts of the USA and New Zealand), and other relevant Acts, that this may increasingly become the case. Meanwhile, states will have to make their own final judgment of the considerations to be borne in mind in evaluating the legal status of particular recommendations.

ii) Subjects and Area of Application and Enforcement

(a) Application

Subject

The ICRW applies under Article 1(2) to factory ships, land stations, and whale catchers under the jurisdiction of the contracting governments.

Area

The same Article applies the ICRW to *all* waters in which whaling is prosecuted by the above factory ships, land stations, and whale catchers. Its area of application is thus much wider than most, if not all, other fisheries conventions. It applies not only on the high seas, but in extended zones of fisheries jurisdiction (in the absence of any amendment to the Convention following the provisions of the UNCLOS texts

concerning such zones), in the territorial sea and even in internal waters, if whaling should ever take place there. It also applies on land, i.e. to land stations. It must, however, be noted that the ICRW does not define whaling and there is some scope for argument in this respect. There is, however, as stated earlier, no formal bar to states adopting the widest possible interpretation of this activity. The ICRW does define some terms (including "factory ship", "land station", and "whale catcher") and the Schedule assigns specific meanings to, *inter alia,* species and types of whales referred to therein including "small-type whaling" which it interprets in the limited sense of whaling for certain specified types of small whales — but it does not interpret "whaling". Although the application is wide it is limited by Article 1(2) of the ICRW to the vessels and land stations of contracting governments operating in the above areas. However, when considered in relation to the fisheries jurisdiction permitted under international custom and convention, application of IWC regulations to non-member states can, if national states so provide in their national laws, be made in accordance with the particular powers allowed to coastal states in each specific zone of jurisdiction. These powers are considered later in relation to each specific jurisdictional area. There is, moreover, nothing in the Convention to prevent member states from introducing more stringent regulations to protect cetaceans in their extended Fisheries Zone (as confirmed in the UNCLOS Draft Convention, Article 65).

(b) Enforcement

Measures under the ICRW

The above remarks also apply generally to the scope of enforcement of the ICRW. Article IX of the Convention requires Contracting Governments themselves to "take appropriate measures to ensure the application of its provisions and to punish infractions against both persons or vessels under their jurisdiction". This leaves enforcement exclusively to national means and to correspond in scope to the subjects and areas referred to above, again taking into account any powers conferred on coastal states under international customary and treaty law. These powers vary considerably according to the locus of the offence — on the high seas, in the fisheries zone, the territorial sea, or in ports or harbours, as described in this Report. Again, insofar as the coastal state has enacted IWC regulations into its national laws, it can enforce these within its jurisdiction even on non-member states of the IWC subject to the general international law requirements. It can, of course, also enact national laws which are more stringent than the international law, as has the USA in its Marine Mammal Protection Act, and enforce these, though this Report is limited to preventing whaling activities outside the standards set by IWC regulations and recommendations. It is apparent that the main problem lies in enforcing these against non-member states of the IWC which contravene IWC regulations on the high seas. A major purpose of this Report will therefore be to examine to what extent coastal and other states can use their existing powers of fisheries and other jurisdictions, such as over trade, to inhibit such activities.

It should be noted that the enforcement article of the ICRW is broadly framed, i.e. it requires "appropriate measures" to ensure application of the ICRW and does not define the measures concerned. Moreover the measures are to be taken against both vessels *and* persons. Coupled with the resolutions concerning measures other than direct measures against the offending vessels and persons themselves, it is

clear that though traditional measures for enforcement of fisheries jurisdiction — such as visitation and search of vessels at sea and arrest and prosecution of those found to be violating fisheries laws, and punishment of nationals serving on flag ships of states concerned — will continue to be a main tool of enforcement, measures under the ICRW need not be confined to these. This view is supported by the further measures approved, and in some instances required, by recent international conventions affecting cetaceans amongst other species, and by recent action of the IWC and some of its member states.

Inspectors and Observers

(a) *Inspectors.* The ICRW (Article IX) requires Contracting Governments to appoint national inspectors on their whaling vessels; such inspectors could play a useful role in gathering information on and reporting on any "piratical" activities which occur within sight of the vessels to which they are appointed, and have in the past, when "pirate" whaling was more prevalent, done so with some success e.g. in relation to the notorious operations of the "Olympic Challenger" in the 1950s.

(b) *International Observer Scheme.* In addition, the ICRW was amended by Protocol to enable member states, by international agreements (usually bilateral) to appoint international observers (with powers to observe only, not to inspect) on each others vessels and a series of such exchanges have been arranged. The observers are chosen by the national states concerned but formally appointed by the IWC itself to which they report, as well as to the governments concerned. They too have opportunities to note and report on "piratical" operations but since both such operations and pelagic whaling have declined the opportunities to make use of these observers in the strategy to deter the "pirates" is now negligible. Details of the functioning of the inspection and observers schemes are obtainable from the IWC's Annual Reports.

Collection of Laws of Member States Concerning Whaling and Penalties Imposed Thereunder

The IWC early requested contracting Governments to forward to the IWC Secretariat details of their relevant national laws and of the penalties imposable under these laws[28] with the objective of facilitating comparison of the standards set by laws and for penalties and verification of their conformity to the objections established by the convention, and as an aid and guide to other states desirous of improving or updating their relevant laws. This compilation is potentially especially useful to the new member states (the number of which is growing; it is now 35) and to those considering adhering to the Convention and assessing its legal Implications for them. Its usefulness, however, is considerably undermined by the fact that some members have not deposited any information on their laws, others have not kept the Information up to date, as is revealed in "Whaling Laws of Member States Filed with the IWC." As some recent laws reproduce new techniques for prevention of "pirate" whaling it is important that *all* parties to the ICRW comply with this[29].

Recent Additional Measures Taken by the IWC to Deter Whaling Opertlons Outside its Regulations

(a) Register of Whaling Vessels of IWC member states

At its 31st Meeting in 1979 the IWC agreed that its Secretary should communicate with all member nations to obtain the information necessary to draw up a register of whaling vessels subject to IWC quotas and regulations, in order to make it easier for Contracting Governments of the ICRW to take appropriate action against whaling operations of vessels flying flags of convenience. The Secretary sought information for all whaling vessels, catchers and factory ships belonging to or operating from member Governments, concerning the vessels including: Lloyds Register number; National Register Number; National Shipping Classification Society Code; Ship's Name; Owner; Year of Building and/or Conversion for Whaling; Country of Building and/or Conversion for Whaling; Builder; Flag; Earlier Names; Gross Registered Tonnage; Length/Breadth; Type of Vessel (Factory, Catcher, Factory/ Catcher, Fishing/Whaling vessel).

If such a register could be made fully complete it would make it easy for states, whether members or not (since the information would be available in the IWC published Annual Report), to detect and report upon, or take measures against, as appropriate, any whaling vessels operated by non-members. Unfortunately not only were replies not received in time for a formal register to be compiled but by the date of the 32nd Meeting only 9 of the 21 member states to whom the request was applicable during 1979/80 had replied[30]. Full compliance should be encouraged to achieve the desired objective.

The above register is supplemented by a requirement in paragraph 28 of the 1980 Schedule to the ICRW that notification shall be given in accordance with the provisions of Article VII of the ICRW with regard to all factory ships and catcher ships, covering certain statistical information, viz:

(a) the name and gross tonnage of each factory ship, and
(b) for each catcher ship attached to a factory ship or land station
    (i) the dates on which each is commissioned and ceases whaling for the season
    (ii) the number of days on which each is at sea on the whaling grounds each season
    (iii) where possible the time spent each day on different components of the catching operation
    (iv) the gross tonnage, horsepower, length and other characteristics of each; vessels used only as tow boats should be specified.

Only one state had, however, by the 32nd Meeting supplied even part of this information which would also be conducive to identification of operations outside the IWC regulations. Again it is in the interest of concerned states to supply such information to the IWC as soon as possible and for all states with an opportunity to observe and take measures against such operations to keep themselves informed of such details and convey them to vessels flying their flag and nationals with opportunities to take measures against whaling vessels of non-member states.

(b) Register of Whaling Vessels of Non-Member States

The IWC has no mandate to compile such a register nor has it passed any resolution urging its member states to contribute relevant information. A non-governmental organization, the People's Trust for Endangered Species, however, produced an

unofficial report in 1979 on "Whaling under Flags of Convenience Outside the Jurisdiction of the International Whaling Commission"[31] and a "Preliminary Draft of an International Register of Whaling Vessels"[32], which included vessels of member states and non-member states. It would seem to be advantageous, to the extent that the information contained therein concerning whaling vessels of non-IWC states is accurate, verifiable and current, for the IWC itself to include, to the extent possible, such information in its own register when complete.

(c) Working Group on all Aspects of Whaling under Flags of Convenience
At the 32nd Meeting of the IWC New Zealand proposed amendments to Paragraph V of the Schedule of the ICRW which would require (not merely recommend as in the present resolutions) members to forbid: import of any whales or products thereof from any nation or entity under the jurisdiction of such a nation which is not a member of the IWC; transfer of whaling vessels and equipment, dissemination of whaling information and expertise or rendering any other type of assistance designed for or likely to be used for whaling to any nation or entity under the jurisdiction of such a nation which is not a member of the IWC; any national of an IWC member nation to offer his services or to make available his expertise to any vessel belonging to any national or entity under jurisdiction of such nation which is not a member of the IWC, and in addition, in conformity with its obligations under Article IX of the ICRW, to take the necessary appropriate measures to enforce these prohibitions. New Zealand argued that since such measures had not at present been made part of the ICRW they lacked legal force and were thus not being uniformly enforced by member states. New Zealand, therefore, recommended adoption of legally binding measures.

Although all members of the IWC supported the principle behind the proposal some members expressed the possibility of national legal difficulties arising from such action because of the potential conflict with other international treaty obligations. No specific treaties were mentioned in this connection and it is hoped that the discussion of some relevant international treaties, which follows this section, will go some way to removing some of the doubts expressed concerning the alleged limitations on the above actions presented by such related treaties. The IWC at the 32nd Meeting did not adopt the New Zealand proposal but adopted instead a resolution requiring members to act in accordance with the proposal and agreed to consider further the inclusion of binding regulations in the Schedule at the next Meeting.

2. Washington Convention on International Trade In Endangered Species of Wild Fauna and Flora 1973 (CITES)

a) Purposes

This Convention which by January 1982 had 79 states parties, offers a vital new tool for application and enforcement of measures to deter or eliminate "pirate" whaling. Its effectlvity moreover Is not restricted to the number of states which are party to it (which is in any case considerable) since even states which are not parties must provide to states parties the documentation required under the Convention which governs for its states parties trade in all species of wild fauna and flora which are threatened In various degrees and these species, of course, can, and do, include cetaceans, whether taken in "pirate" whaling operations or not. The Convention is

applicable to cetaceans, if threatened within its terms and practical effect has been given to this by inclusion of all large cetaceans on one or other of its Appendices. Though trade under the Convention includes trade in live animals it is trade in products that is the principal work of CITES. Its potential to deter "pirate" whaling is, therefore, great. The only loophole for continuing trade is trade conducted exclusively between non-parties as will be seen from the following description of the Convention's scope and operation.

b) Scope of Subject Matter of Regulation

Species requiring protection are assigned under Article II to one of three appendices.

i) Species assigned to Appendices

Appendix I: The most endangered species are assigned to Appendix I, *i.e.* all species which are or may be threatened with extinction or may be affected by trade and thus require the most stringent regulation.

Appendix II: This covers two types of less endangered species; viz

> "(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. The latter include any species which are so similar in appearance to those referred to in (a) as to be nearly indistinguishable from them. "Trade" is widely defined as "export, re-export, import and introduction from the sea" (Article 1(c)), which adds to CITES importance in deterring "pirates".

Appendix III: This is composed of species identified by any state as being 'subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other parties in the control of trade."

ii) Specimens of Species

Article II of the Convention also prohibits trade in "Specimens" of the species listed in the Appendices except to the extent and in the manner provided by the Convention. "Specimen" is assigned a different meaning in Article I of the Convention according to which Appendix it appears in and whether or not the species is an animal. The whole animal is always included whether alive or dead but "Specimen" includes "any recognizable part or derivative thereof" provided that in the case of animals such part or derivative is specified in Appendix III. It has been agreed for the time being by the parties that species listed in Appendix III should also be subject to the specification that all readily recognizable parts or derivatives thereof are to be included. It might be thought that difficulty in recognizing parts of species listed would render ineffective this provision but in practice, as described below under the section dealing with enforcement, this does not seem to have been an unworkable addition given sufficient state vigilance, supported by appropriate educative and administrative facilities.

The scope, and therefore effect, of the Convention is limited, however, as will be seen below by a number of restrictive definitions and other qualifications. Appendices I and II are amendable by a 2/3 majority of states parties voting at the biennial conferences of the parties and are subject to reservations. They enter into force 90 days after the meeting except for states making reservations to particular listings (a postal procedure is provided for amendment between meetings). Appendix III can be amended only if the party originally placing a species on it withdraws it.

At the time of writing following the 3rd Meeting of the Conference of the Parties at New Delhi in 1981 all cetaceans have been listed on Appendix I or II. Appendix I now includes the gray, blue, humpback, right, sei, fin and sperm whales; it now includes all whales categorized by the IWC as Protection Stocks and more; all other species have been placed on Appendix II. Reservations have been made by Canada, Japan, Norway and the USSR on some stocks of fin and sei whales on Appendix I; Canada also entered a reservation for the Californian grey whale and Japan and Norway for sperm whales.

The transfer of the fin, sperm and sei whales from Appendix II to Appendix I was effected at the New Delhi Meeting in 1981 by adoption of a proposal of the Federal Republic of Germany. A compromise proposal made by the USA that only the populations of these species which were not covered by IWC quotas should be transferred was rejected because several parties thought it would be unworkable since it is impossible to delimit stocks effectively on a geographical basis and would also be impossible to distinguish the trade products concerned; precise population data are also lacking. At the time of writing the transfer of all three species to Annex I goes further than the IWC's categorization of these species since even at the 33rd IWC Meeting in 1981 not all populations of these species were categorized as PS.

The New Delhi Meeting also agreed that to improve CITES' systems of security and to prevent evasions of regulations all parties would use a serially numbered adhesive security stamp, produced by the Secretariat, on each original permit and certificate; it would be validated by the signature of the issuing officer written across the face of the stamp and on the permit. It was further agreed that for wildlife products of exceptional value the use of special security paper to enhance detection of forgeries should be considered.

This Meeting, in addition, adopted a Resolution on enforcement directing all Parties to ensure compliance with all provisions of CITES, to take strict measures to penalize violations, and to inform each other of the facts relevant to illegal taking and traffic. Both exporting and importing Parties were directed to assume special duties of care under this Resolution.

The work done for CITES on the manual facilitating products identification, standardized nomenclature, and an index to species included in legislation was singled out for special approval at this Third Meeting, as was the work of the Standing Committee which meets between the biennial conferences, the terms of reference of which were enlarged to give it authority *inter alia* to represent the Parties between Meetings, and to provide guidance and advice to the Secretariat on im-

plementation of CITES. Another permanent Committee of Technical Experts will also aid and improve implementation of CITES.

c) Area of Application

The Convention does not contain provisions directly concerning the area of application but some provisions are specifically related to species in particular areas, and species is defined to include "any species, sub-species or geographically separate population thereof" which enable species to be regulated even if they are not endangered on a global scale of distribution.

In defining "trade" (regulation of which is the purpose of the Convention), Article 1(c) gives a restricted definition — "Trade means export, i.e. export, import and introduction from the sea" — and then proceeds, at 1(e), to give a further restricted definition of "introduction from the sea" limiting its application to "transportation into a State of specimens of any species which were taken in the marine environment *not* under the jurisdiction of any State" (emphasis added). It should be noted that not all interested states approved even this limited extension for various reasons. First, because of alleged potential conflicts with states' claims in relation to territorial sea limits, a problem exacerbated since the conclusion of CITES by declarations by most coastal states of 200 mile fisheries jurisdiction, as explained below, which concerns states' powers in various zones of maritime jurisdiction. Secondly, because of possible conflict also with states' rights and duties under other conventions such as the ICRW or Fisheries Conventions, discrepencies between which are pointed out, as appropriate, in this Report.

These reservations, as well as practicalities, have no doubt contributed to the failure of states party to CITES effectively to apply other provisions in Article III (5) which require some regulation of "introduction from the sea" of specimens of Appendix I species. This regulation is considered further later since it is potentially an exceptionally effective method for deterring "pirate" operations.

d) Organs

i) International: The Secretariat

There is no Commission as such since the Conference of the Parties fulfils a role comparable to that of, for example, the IWC, but there is a full-time Secretariat, headed by a Secretary General, which is enabled by the Convention to carry out a number of functions and tasks which in practice are an important method of enforcing the Convention. The Convention (Article XII) required UNEP to provide a. Secretariat; UNEP contracted the task to the International Union for Conservation of Nature and Natural Resources. The Secretariat not only arranges and services the biennial meetings of the parties but, *inter alia,* can undertake such scientific and technical studies in accordance with the programmes authorized by the conferences "as will contribute to implementation" of the Convention.

A particularly important and effective role for the Secretary-General is created by Article XII(e), *i.e.* that the Secretariat can study the reports which Article VIII(7) requires parties periodically to submit to it, which must include a biennial report on legislative, regulatory and administrative measures taken to enforce the Convention's provisions. It should also be noted that, when not contrary to national law, the information in the reports under Article VIII(6) must be made publicly available, thus

enabling vigilant and concerned members of the general public to play an informed role in monitoring implementation of the CITES' since the report must also list the names and addresses of exporters and importers; the number and type of permits and certificates granted; the States with which such trade occurred; the numbers or quantities and types of specimens, and names of species included in the Appendices. Having studied the report the Secretary General can "request from parties such further information with respect thereto as he deems necessary to ensure implementation". Coupled with the opportunity created by Section (e) of the same Article, which allows him to invite the attention of Parties to *any* matter pertaining to the aims of CITES, this gives the Secretariat, if parties co-operate, a very wide chance to monitor and encourage effective observance of the Convention. As the Secretariat increasingly becomes the repository and evaluator of such vital information it can, in conjunction with the national authorities required to be established by the Convention, which are described below, supply to States parties the evidence vital to detection of violations of the Convention. It can, for example, establish that the country of origin given for a specimen is incorrect and thus prevent fraud. It has to be remembered, however, that the Appendices now cover a large number of species of flora and fauna and cetaceans receive no priority in the Secretariat's activities. The responsibility for application, therefore, falls mainly on the national authorities described below, aided by administrative support from the Secretariat which is, *inter alia,* developing a manual to aid identification of species and products, and guidelines on all means of transportation of specimens.

ii) National: Management Authorities

Each state must establish a "Management Authority" which grants permits and certificates for the purpose of the CITES regulatory methods described below, on the basis of advice from a national "Scientific Authority". Selected examples of the legislative mechanism for designating or establishing such authorities are given in Part 3. The authorities generally are distinct from fisheries authorities and government departments dealing with fisheries. Management authorities can, and do, cooperate with each other in order to establish a network for detection of frauds. For example, they can inform another state which might be offered products which have already been refused by them. National authorities can also fill out gaps in the CITES provisions by drawing up check lists of listed products for customs officers to use, since, in order to avoid any limitation on the listing of products, there is no international list. The European Economic Community in its recent Regulation controlling trade in whale products provided a list for use by all their member states, based on their national lists. Details of these EEC developments are given in Part II of this Report. Management Authorities, moreover, provide the Secretariat with information in their periodic reports on permits issued. This, when published by CITES, can be compared to import figures issued by Customs authorities and any discrepancies between the two can serve as an indicator of violations of CITES. This provides states parties with an important new enforcement tool.

e) Method of Regulation: Import and Export Permits and Certificates

As already stated, the CITES prohibits trade in species and specimens listed in the Appendices except to the extent and in the manner provided in the Convention (Articles III-IV).

Appendix I: These species can only be traded in if there exists both an export permit (or a re-export permit if export is from a country other than the country of origin) from the exporting state and an import permit from the importing state. The exporting state has to certify that the Convention's criteria have been complied with to prevent further danger to that species. If an Appendix I species is taken from a marine environment not under the jurisdiction of any state only a certificate authorizing its "introduction from the sea is required", a phrase whose definition has already been referred to. The certificate can be granted only, *inter alia,* if and when a re-issuing state's Scientific Authority advises that its introduction will not be detrimental to the survival of the species concerned and is not to be used primarily for commercial purposes.

Appendix II: Trade in Appendix II species is subject to permits based only on export licences. In the case of Appendix II species an exception is made in Article XIV(4) of considerable importance to the effectiveness of the powers available under CITES to states to take trade measures indirectly to deter "pirate" whaling. If a state party to CITES is also party to any other treaty or Convention or international agreement which also provides for protection of species included in Appendix II that state is relieved of any obligations imposed on it by CITES insofar as specimens of these species are taken by vessels registered in that state, as long as they are taken in accordance with the provisions of the other instrument. Article 14 defines, therefore, the criteria required to establish that species are "legally taken", in relation to those taken under other conventions, for purposes of delivering export permits or establishing importation from the sea. Such species if taken legally under other Conventions are still required under Article 14(5), however, to be covered by a certificate from the state introducing them, *i.e.* a document verifying that they have been taken in accordance with the law prevailing under the other treaty. This enables states to participate in both conventions and thus give effect to the trade restrictions required by CITES to protect Appendix I species.

The problem that used to arise has now been avoided by the new listings for Appendices adopted at CITES 1981 Conference in New Delhi. That was the problem that not all the species categorized in the IWC's Schedule as Protected Stocks could immediately be listed on the CITES Appendix I because of the delays inherent in the procedures for amendment related above (as provided by Article XV) since even the postal procedure involves communication by the Secretariat of proposed amendments to the parties, consultation with concerned inter-governmental bodies, including obtaining any relevant scientific data from them, and is open to an objection procedure which can delay it still further; if no objection is received within a specific time the amendment enters into force within 90 days (except for states making reservations); if an objection is received the entry into force is further delayed. The IWC meanwhile was meeting annually and revising its categorizations of species. The problem was exacerbated by the fact that the IWC and CITES apply different critera for listing or categorizing species on their Schedule and Appendices respectively, though there is some correspondence. The IWC uses the criteria laid down in its New Management Procedures, which are related to receipt of advice from Its Scientific Committee on the state of stocks in relation to their ability to maintain a maximum sustainable yield as modified by the procedures, whereas the CITES test is the threat to species arising from trading in them. Nonetheless, the

CITES and the IWC do exchange information and resolutions and the IWC had requested the CITES to ensure that trade in Protected Stocks was controlled. Insofar as CITES could not keep up with the IWC listings of PS stocks they at first remained on CITES Appendix II and therefore subject to the exemption referred to above whereby states which are parties to both CITES and the IWC need not observe the CITES criteria for establishing "legal taking".

It remains important for states which are anxious to improve the IWC's ability fully to achieve its purposes of conservation and utilization by international regulation within an international system to participate fully in both Conventions with a view to ensuring maximum co-ordination of the measures taken and maximum activation of the CITES procedure for its application to specimens introduced from the sea. Individual states parties to either Convention can, of course, always apply higher standards and more stringent protective measures nationally than is required by these conventions.

Appendix III Species: Trade in Appendix III species is subject to export permits from the state listing them and import of specimens of these species from other states can occur only on production of a certificate of origin or a certificate from any state of re-export. Since a resolution adopted at the Conference of the Parties on June 28th, 1979, in Costa Rica, an importing state must report the origin of a species on the re-export certificate.

Export permits for Appendix I species can be granted by the Management Authority referred to above only if an import permit is submitted and if it determines that the specimen has been lawfully obtained and, in the case of living species, that their health and treatment are protected. (As live whales are not traded in at present the latter provison has no practical effect for this Report but if, as seems possible, some of the smaller species are increasingly taken without being added to the regulatory schedules of the IWC these provisions of CITES may become important.) The same considerations apply to re-export permits. Various factors are laid down which must be observed to ensure proper handling and treatment and both export and import permits require a determination that their issue will not be detrimental to the species survival. Import permits also require determination by the Management Authority that the species taken will not be used purely for commercial purposes.

In the case of certificates enabling importation from the sea, if this requirement is ever put into practice, the Management Authority has the same responsibilities as for import permits and the Scientific Authority must advise that the import will not be detrimental to the species survival.

CITES provisions for Appendix II species are similar except that no import permit is required and there is thus no need to determine whether the trade is commercial or non-commercial but the Scientific Authority in each state must monitor the export of Appendix II species and must recommend to its Management Authority suitable measures to be taken to limit the grant of export permits for any such species whenever it determines that the export of specimens of any such species should be limited in order to maintain the species throughout its range at a level consistent with its role in the ecosystem in which it occurs and well above the level at which that species might be eligible for inclusion in Appendix I. States can thus observe

the trade in these species and take measures if necessary.

Export from a state of species which it has listed on Appendix III requires an export permit from that state, following determination by its Management Authority that the specimen was lawfully obtained and that it will be shipped, if alive, in a humane manner. The importing state must insist on a certificate of origin and if the state of origin is responsible for the inclusion of that species in Appendix III must also require an export permit. In the case of re-export a certificate from the state of re-export is required.

f) Exceptions

Article VII provides for exemptions to the above requirements, subject to detailed qualifications. Exceptions include:

(i) Species acquired before the species concerned become subject to CITES;
(ii) Species that are personal or household effects;
(iii) Species loaned, donated or exchanged by scientists or scientific institutions registered by their state's Management Authority.

g) Enforcement

i) On Parties to CITES

Parties are required by Article VIII to take "appropriate measures" to enforce the provisions of the Convention and to prohibit trade in specimens in violation of it, including penalizing trade in or possession of such specimens, or both, and provision for confiscation or return to the State of export of such specimens. To expedite passage of specimens parties may designate ports of exit and entry at which specimens must be presented for clearance. As already mentioned, parties must keep records of trade in specimens listed in the three Appendices and report periodically on implementation, transmitting to the Secretariat annual reports of the information required by the CITES, biennial reports on legislation and on regulatory and administrative measures taken for enforcement. The Secretariat's resultant importance in the enforcement process has already been outlined. The CITES relies, however, primarily on national enforcement and adherence to it requires states if possible and, if they want to promote its maximum effectiveness, to enact innovative national legislation, rather than merely to enact the CITES provision as they stand into their national law, and also to establish and support administratively sound Management Authorities which keep closely in contact with both the CITES Secretariat and each other. Models for these developments are described in Part 3. It is important that implementing legislation ensures that "mixed" products (e.g. different kinds of oil including whale oil) are covered and are not regarded as "non-recognizable" and therefore outside legal control, and also that flexibility is retained e.g. by use of orders rather than Acts only so that national law can quickly take account of the changes in CITES listings. Transfer of knowledge on appropriate legislation and on administrative mechanisms for both application and enforcement are of great importance and it is hoped Part 3 of this report will contribute to this. Regional co-operation, such as that recently undertaken within the European Economic Community (EEC), can also improve effective application and enforcement, as illustrated by relevant EEC Regulation outlined in Part 2. There is considerable scope for states to develop and supplement CITES and thus increase

its impact by enacting detailed and well-drafted national legislation, including lists of products regulated and adequate descriptions and for ensuring its enforcement by provision of vigilant supervision and training and education for this purpose.

ii) On Non-Parties to CITES

A limited application to non-parties is enabled by Article X which provides that "comparable documentation" (which is not defined in the Convention, the details of. which are therefore left to states party to determine) may be required, of all non-party states for import or export or re-export to such States parties as have agreed that such documentation will be required. This partially stops the loophole whereby states could import from one state and re-export to another but, of course, it does not control or affect trade exclusively between non-parties. Other means will have to be resorted to to deter such trade; options include denial of various economic opportunities to states which trade in ceteceans or their products e.g. by refusing them fishing opportunities, or refusing to trade with them in other products. These measures, which are not without problems and difficulties, are outlined in Part 3, Section 2.

h) Remaining Problems

This treaty is obviously one of the most important, if not the most important, instruments in eliminating or reducing "pirate" whaling, and harvesting etc. of other marine mammals listed on its Appendices but its success in achieving this purpose depends on wide-spread ratification, especially, in the case of the former activity, by any state whose nationals might engage in import, export or re-export trade in whales or whale products, to the end that neither states currently whaling outside IWC regulations, nor states which might in the future consider doing so, would find any market for their goods in other states. But "pirate" whaling could still occur in states which can use all the products domestically. There are other limitations in CITES as a means of finally outlawing "pirate whaling" activities. States cannot rely exclusively on either adherence to the IWC or to CITES, or both, as representing the full extent of the methods necesary or open to them if they want to achieve this end. The IWC itself does not, as we have seen, impose any *obligation* on its members not to trade in whale products since, although it has passed resolutions recommending this course of conduct in general terms, these are not per se binding on member states for the reasons already given. Moreover the resolution in question requires only that IWC member states do not allow their nationals to trade with non-member states, thus as long as trade is confined within the IWC membership it is not contrary even to the recommendations of the IWC.

A final problem, which because of the dormant state of the relevant CITES provisions, exists for the present in theory rather than practice, concerns the effect of recent extensions by most coastal states of their fisheries jurisdiction to 200 miles. CITES, as already explained, requires cerificates for the "introduction (of species) from the sea" to be issued by the Management Authority of the introducting state and interprets this phrase as "transportation into a state of specimens of any species which were taken in the marine environment *not under the jurisdiction* of any state" (emphasis added). No guidance is given in CITES on the meaning of the words underlined so it is left to states to determine, taking account of current developments in international law, whether areas under their jurisdiction include

areas now subject only to the extended fisheries jurisdiction as well as, as at present, the territorial sea. The Draft Convention on the Law of the Sea (Informal Text) does not include the proposed Exlusive Economic Zone in either its definition of the territorial sea or of the high sea but merely states that provisions concerning the latter area apply to all parts not included, inter alia, either in the former or the EEZ. This leaves the jurisdictional status of the EEZ sui generis and ambiguous in relation to the use of the term "jurisdiction" in the CITES Article 1(b)(e). It seems likely that states will assume that the EEZ or Fisheries Zone is subject to their jurisdiction for CITES purposes and that certificates are required for introduction from the sea only from areas beyond 200 miles. If the 200 mile zone is regarded as an area under its jurisdiction but not equivalent to territory the coastal state might consider that it could allow introduction for commercial purposes of specimens which otherwise would be protected because of their listing on the Appendices, without prior determination of the effect of their introcution on the species survival, although the better view would be that import from the EEZ is subject to CITES provisions. In any event this definition in CITES clearly already excludes whales taken from land stations, which are thus also left to be otherwise regulated. A resolution passed by the CITES Conference of Parties in Costa Rica called on states to take note of the defintion of "introduction from the Sea" and to apply it to "the areas concerned", without itself pronouncing on the limit of the maritime aras in question. In practice, however, no state has so far issued any certificates for species originiating from this area. It is obviously Important to the deterrence of "pirate" whaling that CITES parties should activate this provision as soon as possible and the larger the number of parties the more effective this provision will be as a control on "pirate" whaling.

3. The Bonn Convention on the Conservation of Migratory Species of Wild Animals 1979

a) Introduction

This Convention which was concluded in Bonn on 23 June 1979, is not yet in force. It requires ratification by 15 states to bring it into effect and by 26 November 1981 had been ratified only by India, Netherlands, Nigeria and Portugal, though signed by 28 states. It covers all migratory species throughout the world including specifically marine mammals. Article XII, which will be discussed more fully below, makes clear that it does not affect either the attempts of the United Nations Conference on the Law of the Sea to codify and develop the law or present and future claims of states concerning the law of the sea. References to national jurisdiction are therefore to be interpreted in the light of any limits provided in a law of the sea treaty or established by customary law, as described in this part of the Report.

The Bonn Convention derives from, and is intended to develop, both the Principles laid down by the UN Stockholm Conference on the Human Environment (UNCHE) and the Action Plan which that conference adopted which, *inter alia,* recommended conclusion of treaties to protect species inhabiting international waters, and the United Nations Guiding Principles for Shared Natural Resources, outlined earlier, which also develop the Stockholm Principles in general terms. The Convention provides for both national action for endangered species, listed (as in the CITES

system) on an Appendix as requiring immediate protection, or subsequent international action, if their status for conservation purposes does not require immediate action or on another Appendix, which requires states within whose jurisdicton species whose conservation status is regarded as unfavourable or which would benefit from international agreements are found to conclude international agreements with other states concerned for their protection. These provisions are innovatory and important but the Convention is a framework Convention, drafted in quite general terms. It now urgently requires sufficient ratification (i.e. by 15 states) to bring it into force, followed by as wide ratification and application as possible to develop and apply its terms and provisions. The Convention will be effective only if states become party, conclude a large number of bilateral and multilateral agreements under it, and enact any necessary national legislation.

b) Objects and Purposes

The Preamble recognizes that wild animals are an irreplaceable part of the earth's natural system, which must be conserved for the good of mankind. The Preamble does not *per se* require conservation of these species. It recognizes that development of this duty is to be left to the Agreements to be negotiated pursuant to the Convention's principles. The Preamble does, however, "acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever possible and appropriate" to avoid endangering migratory species. It also recognizes that man holds these species for future generations and has an obligation to ensure that this legacy is conserved and, if used, used wisely. It asserts that states must be the protectors of migratory species passing through national boundaries and that this requires concerted action by all states within the national jurisdictional boundaries of which such species spend any part of their life cycle. The Preamble also takes cognizance of the "ever-growing value of wild animals from an environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic point of view".

c) Definition of Terms

Some of the terms and their definitions in the Convention break new ground. Definitions are given in Article I. "Migratory species" are broadly defined as "the entire population or any geographically separate part of the population of any species or lower taxon of wild animals a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries." This makes the Convention potentially applicable to many species of whales since crossing the boundary of the territorial sea, or of an Exclusive Economic of Fisheries Zone, and qualifies the species as migratory: there is no need to apply any scientific or further behavioural test.

The "conservation status" of a species, which affects its categorization and therefore its method of protection, means the sum of the influences acting on the species that *may* affect its long-term distribution and abundance: states do not have to wait for these effects to be evidenced before protecting the species concerned.

Definitions are also given of "favourable" and "unfavourable" conservation status. The former term takes account of the evidence that the species is maintaining itself

on a long-term basis "as a viable component of its eco-systems", that its range is not being reduced on a *long-term basis,* that its habitat will remain sufficient to maintain it on the same basis, and that its distribution and abundance approach historic coverage and levels to the extent now possible. The latter status derives from failure to meet the above conditions. For a species to qualify as endangered — the more urgent category — it must be in danger of extinction throughout all or a significant part of its "range", which itself is defined as *all* the areas, land or water, that it inhabits, stays in temporarily, crosses (or overflies), at any time on its normal migration route. These definitions are far-reaching in their implications and enable states parties to offer protection on a much wider basis, and therefore to a much greater number of species of cetaceans, than do the criteria applied by the IWC for categorization of species under its New Management Procedures. Nonetheless, some important terms are not defined, e.g. "significant" and "normal", and will require to be interpretated by subsequent practice.

Most importantly, in the context of measures to deter "pirate" whaling, the "range state" (a list of which is to be established by the Convention Secretariat) is defined to include any state or other party to the Convention (which includes regional economic integration organizations of the kind represented by the European Economic Community (EEC) which have competence to conclude or apply agreements covering this subject) that exercises jurisdiction over any part of its range; this specifically, and vitally for the purposes of this Report, includes the **flag** vessels of those parties which are engaged outside national jurisdictional limits (which, as stated, are left to be determined by an UNCLOS Treaty or by custom) in taking that migratory species. Moreover, "taking" in this context means, under the Convention, not only taking in the usual sense, *i.e.* hunting, fishing, capturing and even deliberately killing, but also simply harrassing these species or attempting to do any of these things. A state which becomes party to the Convention thus has both incentives and power to take measures to protect cetaceans whether or not it is a party to the ICRW, as long as the whales concerned have been listed under the Appendices to the Convention. It will be important, as is the case with CITES Appendices, for parties to both the Bonn and the ICRW to ensure that, as far as possible, the listings of endangered and protected species correspond in relation to the degree of protection required.

d) Scope of the Convention

There is no geographical limit to the Convention: as long as the territorial area in question is part of the "range" of a "migratory species", as both terms are defined in the Convention, it comes within the Convention's scope. A species is subject to the Convention if it fulfils the relevant definition and conditions given for its listing on the appropriate Appendix to the Convention. Any state can become a party to the Convention: it does not have to be a "range state" of a species covered by the Convention, although most, if not all, states will fall into the latter category also.

e) Subject Matter of the Convention

It is a fundamental principle of the Convention, laid down in Article II, that parties not only acknowledge the importance of migratory species being conserved but that they also acknowledge the importance of range states agreeing to take action to this end and to co-operate whenever possible and appropriate. The measures pro-

posed include:

(i) endeavouring to provide immediate protection for the migratory species included in Appendix I;
(ii) endeavouring to conclude international agreements covering the conservation and management of migratory species listed on Appendix II.

The Appendices are subject to the following conditions and requirements:

(i) *Appendix I — Endangered Migratory Species:* Article III lays down the criteria for listing migratory species as endangered (and for removing them from the list).

(ii) *Appendix II — Species with an Unfavourable Conservation Status and Species which would Benefit from Agreements.* Article IV lays down the criteria for the above listing; it provides also that the species may be listed on both Appendices. Appendix II species include not only species with an unfavourable conservation status but also those which have a conservation status which would benefit significantly from the international co-operation that could be achieved by conclusion of an international agreement.

f) Measures to be taken under the Convention

i) For Appendix I Species: Range states have various duties under Article IX including to try to conserve and restore habitats, prevent or reduce obstacles impeding migration, control factors endangering the species and, of particular relevance to this Report, they must prohibit the taking of animals which belong to this species subject to specific exceptions (such as taking for scientific purposes, or meeting the traditional needs of subsistence users, or if extreme circumstances require it), but these must be both limited in space and time and specific in content and the Secretariat must be informed of them.

The Conference of States Parties (described later) can recommend the taking of appropriate further measures to benefit the species.

ii) For Appendix II Species: Article IV requires Range States of such species to try to conclude agreements to benefit the species giving preference to those with unfavourable conservation status. They are also encouraged to take action with a view **to** this for populations, or any geographically separate part of them, of any species or lower taxon of wild animals members of which periodically cross one or more national boundaries.

iii) Guidelines for the Agreements: These are set out in Article V. They should aim at covering more than one species and should describe their range and migratory route.

(a) *National Authorities:* Most important, in the light of the CITES progress referred to in the previous section, is the provision that each party should designate a specific national authority to implement the agreement and should, if necessary, establish appropriate machinery to assist in carrying out the Agreement's aims, to monitor its effectiveness, and to prepare reports for the conference of the parties which will generally meet at least triennially.

(b) *Special Provision for Cetaceans:* Especially relevant to prevention of "pirate" whaling is the provision that parties to the convention should, at 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 multilateral agreement" (the ICRW is now the only agreement to which this substantially applies although the South Pacific Commission still exists also for Chile, Ecuador and Peru)[33] and should provide for access to the Agreement of states that are not Range States of that migratory species. Wide ratification of this Convention and a determined effort by the parties to put this provision into effect could do much to eliminate whaling outside the IWC control, whether or not parties to the Bonn Convention are also parties to the ICRW. In effect the Bonn Convention could thus be used by its parties to afford the Protection Status accorded to whales by the IWC even though the Bonn Parties concerned are not parties to the ICRW.

This provision is supplemented by others which propose that the Agreement should encourage exchange of information about the species concerned and threats to them, and in particular that procedures be established for co-ordinating action to suppress illegal taking. The guidelines are open-ended: they specifically do not require that the Agreements be limited to the provisions itemised. Finally they propose that the Agreement should make provision for the general public to be made aware of its contents and aims. Such publicity could be a powerful factor in directing public attention to the threat posed to already endangered species by "pirate" whaling and could counteract any existing public toleration of such activities. Range states, moreover, should inform the Conference of the Parties, through the Secretariat, on measures they are taking to implement the Convention.

g) Organs

These consist of:

i) The Conference of the Parties: This has a number of competencies germane to enforcement of the Convention. It must review the implementation of the Convention, including the progress made towards conservation, especially of the Appendix I and II species; receive and consider reports; decide on any additional measures that should be taken to implement the objects of the Convention; and make recommendations to the parties for improving the effectiveness of the convention.

The Conference can amend the Convention, following certain procedures, by a two thirds majority of parties present and voting. Any amendment enters into force after a prescribed period, following acceptance by two thirds of the parties, but only for the parties so accepting. Amendment of the Appendices is effected by similar procedures, by the same vote, but parties in this case can enter reservations to amendments: reservations are not permitted to the main Convention.

ii) Secretariat: This is to be provided by the Executive Director of UNEP but/as in the case of the CITES, he can be assisted by suitable inter-governmental, non-governmental and national agencies. Following the success of the CITES Secretariat, supported by the IUCN, it seems likely that similar services will be provided for the Bonn Convention, and that the Secretariat could develop a similarly important central role within the network of information which enables the most effec-

tive enforcement. This possibility is reinforced by the provisions for the Secretariat's functions. It can, amongst other things, maintain liaison with and promote liaison between the parties, the standing bodies established by the Agreements, and the international organizations concerned with migratory species; promote conclusion of Agreements and keep a list of them; and provide general public Information. Particularly important, if an active Secretary General is appointed, will be the responsibility he is given in the Convention to obtain from any appropriate source reports and other information which will further the objects and implementation of the Convention and to arrange for the appropriate dissemination of such information. The Secretariat can also draw the Conference's attention to any matter relevant to the Convention's objectives, and prepare reports, not only on the work of the Secretariat but also on the implementation of the Convention.

iii) A Scientific Council: This will be composed of qualified experts and will give the necessary scientific advice.

h) Effect of the Bonn Convention on Other International Conventions and Other Legislation

The Bonn Convention, in Article XII, specifically disclaims that it has any effect either on the attempts of the UNCLOS to codify and develop the law of the sea generally, or on the present and future claims and "legal view" (sic) of any state concerning the law of the sea generally and the extent of coastal and flag state jurisdiction in particular. Nor will the Bonn Convention affect rights and obligations deriving from any existing treaty (such as, for example, the ICRW under which a state party might still legitimately take whales to the extent and in the manner permitted under its regulations). The effect of this disclaimer does not inhibit the usefulness of the Bonn Convention as an instrument for deterring "pirate" whaling. Questions of national jurisdictional limits will be determined by UNCLOS or by the development of international customary law. The UNCLOS Draft Treaty Text, as will be seen from the outline later in this Report, requires in Article 65 that, in the case of cetaceans in particular, states *shall* co-operate through the appropriate international organizations. The system for co-operation established by the Bonn Convention, which provides the triennial Conferences, a Secretariat and a Scientific Council described above as well as a network of international co-operative agreements and relevant national laws, will, although the Article is intended to direct states to co-operate through the IWC, once it comes into effect, provide additional means by which all states (coastal and non-coastal) can carry out this co-operative duty and promote international co-operation generally. The Bonn Convention, moreover, provides optional dispute settlement procedures should states be unable to settle any interpretative problems by negotiation.

i) Conclusion

The Bonn Convention is an important new instrument within the strategy for deterring "pirate" whaling since:

i) It enables Range States to emphasize, and give effect to, the international interest in conserving cetaceans by listing individual endangered species on Appendix I and applying and enforcing national measures within their national jurisdiction to completely prohibit taking (as widely defined in the Convention)

of them.

ii) It enables Range States to conclude Agreements to conserve and protect species listed on Appendix II. The Agreement can include procedures for co-ordinating action to suppress illegal taking, e.g. by means and to the extent permitted under national laws enacted to give effect to the Convention and the Agreements concluded. They can also exchange information on "substantial threats" which term, as it is not defined, could be widely interpreted to include the threat from "pirate" whaling.

iii) Emergency action is permitted and required for Appendix I species and emergency procedures can be provided for Appendix II species.

iv) The Agreements for Appendix II species can also provide for stimulation of general public awareness of the threat that "pirate" whaling poses for migratory species.

There are a number of general terms in the Convention which require further definition, *e.g.* the "significant portion" of a range, "endangerment throughout its range" which renders a species subject to listing on Appendix I, and "normal migration". It is, therefore, of the utmost importance that states concerned to protect whales should become parties to this Convention and begin as soon as possible to apply in state practice these and other ambiguous terms and make this Convention serve its purposes.

4. Convention on the Conservation of Antarctic Marine Living Resources 1980[34]

a) Introduction

This Convention, which was concluded in May 1980, has not yet entered into force; it requires 8 ratifications to do so and by 26 November 1981 had been ratified only by Australia, Chile, Japan, South Africa and the USSR, though signed by 15 states. It was negotiated by the states party to the 1959 Antarctic Treaty[35] and states invited to participate in the negotiating meeting, *i.e.* states with a demonstrated interest in the Antarctic either through harvesting or research activities in the area. Its objective is not to regulate whaling or to protect cetaceans as such but to provide a mechanism for regulation of the catching of krill, the staple food for some species of whale. To this end it introduces an ecosystem approach to management new to international conventions; it is a broad convention for conservation of the Antarctic environment and ecosystem. "Pirate" whaling in the area could disrupt the objective of ecosystem management; the treaty's provisions, although they make no specific reference to this activity could have some effect in deterring it; for example, if as will be seen, any harvesting and associated activities in the area must be conducted in accordance with the Convention, the inspectors and observers provided for under this treaty might also be useful in detecting "pirate" whalers, though it is most unlikely that any such enterprises will take place in Antarctica in the forseeable future.

b) Objects and Purposes

The Preamble recognizes the importance of safeguarding the environment and protecting the integrity of the ecosystem of the seas surrounding Antarctica and notes

the concentration of marine living resources in these waters, the increased interest in using them and the urgent need to conserve them, which calls for international co-operation and the active involvement of all States harvesting them. It expresses the belief that it is in the interest of all mankind to preserve the Antarctic waters for peaceful purposes and to prevent their becoming the scene or object of international discord. However, it also purports to recognize the prime responsibilities for the protection and preservation of the marine Antarctic environment of the 1959 Antarctic Treaty Consultative Parties (i.e. 14 states only). The treaty is open, therefore, under Articles XXVI and XXIX, only to these states, and any State which participated in the Conference which negotiated the treaty, or which is interested in research or harvesting activities relating to the marine living resources to which the Convention applies.

Finally the aim is to establish "suitable machinery" for, *inter alia,* "recommending, promoting, deciding upon and co-ordinating" the measures necessary for conservation of the living organisms. Conservation (which includes "rational use") is expressed in Article II to be the main objective.

c) Scope and Subject Matter Relation to ICRW

Unlike the ICRW or the other Conventions referred to the Antarctic Convention has a specific geographical scope:

Article 1: applies it to the marine living resources South of 60° South latitude and in the area between that and the Antarctic convergence which forms part of the Antarctic marine ecosystem, defined as "the complex of relationships of Antarctic marine living resources with each other and with their physical environment". These resources are defined as the populations of fin fish, molluscs, crustaceans and "all other species of living organisms" in the area. Cetaceans are not specially mentioned but are potentially covered by this definition and are a vital component of the Antarctic ecosystem. However, Article VI expressly provides that nothing in the Convention shall derogate from the rights and obligations of the Contracting Parties under the ICRW.

Quite apart from any regulations under the ICRW, Article ll(3) of the AMLR Convention provides that "any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention" and with three specific principles of conservation:

(i) Prevention of decrease in size of any harvested population below the level which enables its stable recruitment.

(ii) maintenance of the ecological relationships between harvested, dependent and related populations of the area's living resources and restoration of depleted populations to the above level.

(iii) prevention of changes in the ecosystem which are not as far as possible reversible in the longer term, taking account of the effects of direct and indirect harvesting and the effects of associated activities on the ecosystem amongst others.

d) Organs

i) A *Commission* is established consisting of three categories of members: (a) parties participating in the diplomatic meeting which adopted the Convention; (b) states acceding to it later (which must also fulfil the necessary conditions); (c) regional economic integration organizations whilst their own members are qualified to become parties. An unusual provision concerns the voting procedures: decisions on matters of substance are to be taken by consensus; other are taken by simple majority of the members of the Commission present and voting.

As already stated above the Commission has powers important to enforcement in that it can draw the attention of a non-party state to the activities of its nationals which defeat the Convention's objectives, as well as drawing the Contracting Governments' attention to similar activities of their nationals and any failures of their own concerning compliance with the Convention's obligations.

In addition the Commission must seek to co-operate with Contracting Parties which may exercise jurisdiction in adjacent marine areas in relation to conservation of any stocks of associated species common to both that area and the area which may be under national jurisdiction, with a view to harmonizing the conservation measures.

Among specific duties and powers of the Commission set out in Article IX(1), which are relevant to discouragement of "piratical" activities in the area are: ensuring collection of catch and effort statistics on harvested populations; compiling data on the status and changes in populations and on factors affecting harvested and dependent species; analyzing, disseminating and publishing this information; identifying conservation needs and *analyzing the effectiveness of conservation measures;* formulating, adopting and revising conservation measures on the basis of the best scientific evidence; *implementing a system of observation and inspection provided for by the Convention;* and any other necessary activities to fulfil the Convention's aims.

The conservation measures which can be taken are spelt out in detail in Article IX(2). They include designation of species and regional quotas; description of protected species; determining the size etc. of species that can be harvested and open and close seasons and areas for this activity; regulation of effort employed and harvesting methods. Finally *the Commission can take such other conservation measures as it considers necessary including those concerning the effects of harvesting and associated activities on components of the marine ecosystems other than the harvested population.* All conservation measures in force must be recorded and published by the Commission.

Clearly, even though the measures concerned will relate directly only to fin fisheries and other species of living organisms referred to in Article I, regulation of whaling being left to the IWC, the measures have a considerable indirect effect on the latter's measures, and the establishment of a strong system of regulation, observation and enforcement in the Antarctic for the former purposes will, especially as it will include several states not party to the ICRW, enable watch to be kept on any whaling activities which are highly likely to take place in areas of krill concentration. It also enables, and indeed requires, close co-operation between the Antarctic Commission and the IWC to achieve their common purposes. The exchange of infor-

mation will be a powerful additional tool in inhibiting any recurrence of whaling in an area in which, at present, so far as the IWC is concerned, all stocks except minke whales, are now completely protected.

This is reinforced by the provision that the Commission is required to take full account, *inter alia,* of measures and regulations both established *and recommended* by existing fisheries commissions (which would include the IWC) responsible for species which may enter the Convention area, to avoid inconsistency between the rights and obligation of Contracting Parties under the Antarctic and the other relevant conventions. Article Xlll(b) allows the Commission to set up such subsidiary bodies as may be necessary to perform its function: a useful flexible provision to meet future situations such as consideration of measures necessary to prevent taking of species by non-party states.

Members of the Commission can object to specific conservation measures within 90 days; if a member does so the measures concerned do not bind it. Otherwise measures become binding 180 days after notification by the Commission.

ii) *A Scientific Committee* of suitably qualified persons from each contracting Party is provided for in Article XIV as a consultative body to the Commission. It can seek the advice of other scientists and experts who would, of course, include those concerned in the IWC's equivalent Committee and its Secretariat. Article XX requires members of the Commission to supply "to the greatest extent possible" the information required by the Committee. They must in any case provide information on steps taken to implement the Convention. They also agree to take advantage, in their harvesting activities, of opportunities to collect data needed to assess the impact of harvesting. This could include information on "pirate" whaling, *inter alia.*

iii) *A Secretariat* is to be established under Article XVII. Unlike those of the Bonn and CITES Conventions its role is not specified and is likely to be less central to enforcement. The Antarctic Convention merely provides that the "Executive Secretary and Secretariat shall perform the functions entrusted to them by the Commission" (Article XVII(3)). Nonetheless, as the experience of the IWC shows, even a functional secretariat becomes a useful bank of information on the subject matter of regulation and of the provisions, machinery and techniques established by the governing Convention.

e) Measures

i) General Resources

All Parties to the Convention agree that they will not engage in any activities in the area which are contrary to its principles and purposes but the Convention does not pronounce in any way on the status or legitimacy of any claims to territorial sovereignty or coastal state jurisdiction in the area. There is thus some ambiguity concerning the enforcement of the measures, and, therefore, the means necessary to carry out the treaty obligations in this respect, which will not be resolved by an UNCLOS Treaty, which cannot perforce deal with the question of whether any state has sovereignty in the Antarctic treaty area or can be regarded as a coastal state therein for jurisdictional purposes.

Contracting parties of the new Antarctic Convention which are *not* parties to the

1959 Antarctic Treaty must agree to ensure that their activities in the area also conform "as and when appropriate" to the Agreed Measures for Conservation of Antarctic Flora and Fauna recommended by the 14 Antarctic Treaty Consultative Powers.

Article XXII requires Contracting Parties to "exert appropriate efforts", consistent with the UN Charter, "to the end that no-one engages in any activity contrary to the objective of this Convention". This places a clear obligation on parties to take all measures legally possible against "pirate" whaling states. Measures possible are described below, in Section III, and in Part 3 of this Report.

Enforcement, subject to the general "watchdog" role of the Commission outlined above, is left to national means. Under Article XXII each party *must* take "appropriate measures within its competence" to ensure compliance with the provisions of this Convention" and with the conservation measures adopted, transmitting information to the Commission on measures taken and sanctions imposed for violations. As the parties are subject to the duty referred to above to prevent, as far as legally possible, anyone violating the Convention's objectives these reports will presumably require that information on acts against "pirate" whalers be included. Such sharing of information is likely to lead to opportunities for common strategies to deter such activities and is yet another benefit deriving from this Convention.

Not only does the need to conform to conservation measures require that any "pirate" whaling in the area must be discouraged but Article X requires the Commission (to be established under the Convention) to draw the attention *of any non-party states* to activities of their nationals or vessels which affect implementation of the Convention's aims, and of contracting states to any activity affecting implementation by a contracting party of the Convention's aims, or a Contracting party's own compliance with its obligations under the Convention.

ii) Observation and Inspection Scheme

Establishment of a future scheme of observation and inspection is required by Article XXIV of the Convention but a scheme is not established by it. Instead the Convention lays down only the basic principles upon which the scheme is to be based, viz:

(a) Contracting parties must co-operate to ensure effective implementation of this system, "taking account" only of existing international practice. As practice in relation to fisheries enforcement varies this leaves the details of inspection unsettled and open-ended. Recent practices are exemplified in Part 3 of this Report. The System, however, *must* expressly include (Article XXIV 2(a)) boarding and inspection by observers designated by members of the Commission and procedures for flag state prosecution and sanctions based on evidence obtained from such boardings. This follows the kind of inspection scheme established according to the former NEAFC (North East Atlantic Fisheries Convention) and ICNAF (International Convention for Northwest Atlantic Fisheries) rather than that of the IWC and is thus an advance on the IWC System in some respects (see below). Report of prosecutions and sanctions are to be included in the information supplied to the Commission by the Parties.

(b) The observers and inspectors will be appointed by and responsible to the designating member state *not* the Commission itself (it should be noted that the IWC itself formally appoints its observers) but the members in turn must report to the Commission; in any case the existence of such a scheme will militate strongly against "pirate" whaling in the area when coupled with the broad scope of the measures which members are obliged to enforce and the ecosystem approach and objectives of the Convention.

(c) Observation and inspections should also take place *on board* vessels engaged in scientific research and harvesting, through observers and inspectors appointed in the same way as above and operating under terms and conditions established by the Commission (the IWC requires only national "inspectors" to be carried).

f) Dispute Settlement

Procedures for settling disputes on interpretation and application of the Convention are provided for, offering states a wide choice of means. Parties must consult amongst themselves with a view to using various techniques ranging from arbitration to judicial settlement or any other chosen means. If the dispute is not so resolved, it can, if the parties agree, be referred to the International Court of Justice or to arbitration (as provided in an Annex). In any disputing parties must continue to seek a peaceful settlement.

g) Amendment and Withdrawal

The Convention can be amended at any time but only if *all* the members of the Commission agree to this. The amendment then enters into force for all parties formally signifying their acceptance of it, but any party which does not notify its acceptance within a year from the date of entry into force is deemed to have withdrawn from the Convention. The benefits of remaining within the Convention are considerable in view of all the above provisions, the Convention's objectives, and the attitude towards, and measures that can be taken against, non-members. This provision is therefore a strong incentive to parties to conform to any amendments accepted by the Commission. Parties, however, are free to withdraw in any event, as they are from the ICRW, on giving the prescribed notice under Article XXXI.

h) Conclusion

The broad ecosystem objectives of this treaty, in conjunction with its specific disclaimer of derogation from any party's obligations under the ICRW, the Commission's ability to draw non-parties attention to activities of vessels of their nationals which impair the Antarctic Convention's objectices, the requirement that it seeks to co-operate with parties which may have jurisdiction over common stocks in order to harmonize conservation measures, that parties undertake as far as consistent with the UN Charter to ensure that no-one engages in *any* activity contrary to the Antarctic Convention's objectives, and the fact that these obligations are backed by a Commission with wide powers, to which parties must report on their national measures, and that these provisions will be backed by a system of observation and inspection, which will take place both on board and at sea, makes this treaty, linked

as it is with the ICRW, of vital importance to prevention of any recurrence of "pirate" whaling in this area of major importance for whales. It will, however, be essential to its effectiveness for this purposes that *all* states harvesting and researching in the area become parties, as soon as possible, so that the above system can be put into effect immediately. It will also be essential that the inspection and observation scheme be instituted and put into effect as soon as possible so that the long delays experienced in this respect in the IWC, which did so much to' enable "pirate" whaling in this area in the past, are avoided.

III. Regional Conventions

A. Relating to Whales and Other Living Resources

1. Berne Convention on the Conservation of European Wildlife and Natural Habitats 1979[36].

a) Introduction

This convention, as its title makes clear, aims specifically at habitat protection but indirectly enables and requires measures which could deter "pirate" whaling since Article I (1)'s object is to conserve specially "those species and habitats whose conservation requires the co-operation of several states, and to promote such co-operation". Particular emphasis is given, by Article 2, to endangered and vulnerable species; it includes migratory species specifically. This Convention was opened for signature on September 19, 1979 and, having now achieved the five ratifications necessary for the purpose, will enter into force in 1982. The five ratifications included, as required, at least four Member States of the Council of Europe. It has a restricted but flexible membership: Article 19 opens it only to member states of the Council of Europe and such non-member states as have participated in the elaboration of the Convention and, on the terms of Articles 19 and 20, to other states invited by the Committee of Ministers. The Convention, like the CITES and Bonn Convention already discussed, requires parties to protect species listed on three Appendices, the degree of protection varying in relation to the listings in the cases of Appendix I and Appendix II.

b) Purposes

The Preamble recognizes that wild fauna (and flora) constitute a "natural heritage" that needs to be preserved and handed on to future generations and that they play an essential role in maintaining biological balances though many species are seriously depleted and some even are threatened with extinction. It regards conservation of natural habitats as a vital component of their protection, which should be taken into account in setting the goals of national programmes. It stresses that "international co-operation should be established to protect migratory species in particular". The specific conservatory aims of Article 1 have been outlined above.

c) Scope

The Convention applies in the territories of states parties, which would include their territorial sea (subject as detailed in Section III of Part 1 of this Report to the requirements of international law that the measures applied and enforced therein do not unduly interfere with the right of innocent passage). As the Convention is broad-

ly aimed and drafted in wide terms requiring its parties to "take requisite measures", *inter alia* (as discussed below), to maintain populations of wild flora and fauna, parties would be able to take measures not only within their territory but also on any vessel registered under their flag and also against their own nationals to the extent permitted by international and their own national law. The Convention, as will be seen, specifically includes regulation of internal trade; international trade is left to regulation under CITES. Also to the extent that the measures require an exercise of fisheries jurisdiction they could be applied and enforced within any 200 mile fisheries zone declared for this purpose so far as is consonant with the development of customary law and any subsequent obligations assumed under an UNCLOS Convention, the situation concerning which is discussed at the end of this Part of the Report.

An additional provision in Article 21(1)(ii) declares that states may, at the time of signature or when ratifying, accepting, approving or acceding to the Convention *specify the territories or territories to which it shall apply.* Moreover, any Contracting party can, in the same circumstances, by declaration to the Secretary General of the Council of Europe (though the declaration is withdrawable) apply the Convention to any territory it specifies and for whose international relations it is responsible or on whose behalf it is authorized to give undertakings. These provisions have very important implications for prevention of "pirate" whaling since they enable the measures required and enable by the Convention potentially to be applied in all the dependent or otherwise associated territories of states parties, though they can, under Article 21(2), make reservations to the Appendices in respect of particular territories.

d) Measures

Article 2 requires Parties to take the measures necessary to maintain the population of wild fauna or flora or to adapt it "to a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally." This very broadly drafted article will require considerable state practice to interpret, develop and apply it.

States party are also required to take steps to provide national conservation policies for wild fauna and their habitats, especially of endangered ones; their planning and development policies and anti-pollution measures must also take account of the conservation factors and they must provide education and dissemination of information on the need for the conservations provided for in the Convention. At a more specific level parties must, under Article 4, take the appropriate legislative and administrative measures necessary to conserve the habitats of species, especially those listed in Appendices I (flora) and II (fauna): giving special attention to protection of areas important to migratory species listed in Appendices II and III and appropriately located for migratory routes, breeding, feeding and other purposes. Parties promise to "co-ordinate as appropriate" their efforts to afford the above protection in frontier areas. In any event Article 12 allows the parties to adopt *stricter* measures for conservation of wild flora and fauna and their habitats than those provided, as described above and below, in the Convention.

The Appendices

i) Appendix II, under Article 6, lists fauna requiring strict protection. Appendix I, Article 5, which lists equivalent flora, is relevant for purposes of this report only in the sense that the measures required enable the widest possible monitoring of activities in areas which might attract "pirate" whaling. Article 6, as well as requiring the general measures referred to above, particularly prohibits for these species all forms of deliberate capture and keeping and deliberate killing, as well as all deliberate damage to or destruction of breeding or nesting sites, and, *inter alia,* any deliberate disturbance of wild fauna during certain significant seasons. In addition, the possession of and internal trade in these animals, live, dead or stuffed, or any recognizable part or derivative of them, is prohibited but only "where this would contribute to the effectiveness of the provisions" of Article 6. This enables to some extent application of the CITES enforcement techniques (though not necessarily for the same species) by states which are not parties to that Convention. They may, of course, become parties to both in which case whichever imposes the greater obligation in a particular case, or both, if the obligation is complementary, would be applicable. Some marine mammals protected by the ICRW are listed on this Appendix, *i.e.* some Mysticeti viz. of the Balaen opteridae: Sibbaldus (Balaenoptera) musculus; Megaptera novaengliae (longimana hostosa); and of the Balaenidae: Eubalaena glacialis; Balaena mysticetus.

ii) Appendix III lists species of fauna needing protection, but not such strict protection as that required for Appendix II species. In addition to the necessary general legal and administrative measures already referred to, Article 7 stipulates that any exploitation of wild fauna so listed must be regulated to keep the population out of danger taking account of the requirements referred to above for Appendix II species. Measures specifically must include closed seasons or other means of regulating exploitation or both; temporary or local laws on exploitation (if appropriate) to restore populations to satisfactory levels; regulation of sale, keeping for sale, transport for sale or offering for sale of live or dead animals. Thus even states not party to the ICRW would be enabled and required by this Convention to take a wide range of measures to protect several species of cetaceans from unregulated exploitation. *All* species of cetacea not listed on Appendix II are automatically listed on this Appendix (an approach similar to that now adopted under the CITES Convention). States not party to CITES would also be required, though in much less specific terms than under that Convention, at least to include regulation of trade amongst the measures used to eliminate, *inter alia,* "capture, keeping and deliberate killing" of species and for protection of Appendix III species. Moreover, under Article 8, both in the case of all Appendix III species and exceptions made for Appendix II species (for the purposes refered to below), parties must also prohibit "the use of all indiscriminate means of capture and the use of all means capable of causing local disappearance of, or serious disturbance to populations of a species". Various specific exceptions of *(inter alia)* Appendix I species to Article 4-7 are, however, allowed under Article 9, provided there is no other satisfactory solution and the exception will not be detrimental to the survival of the population concerned. It is most unlikely that "pirate" whaling activities would come within these exceptions, although the range of exceptions listed (for protection of fauna and flora; pre-

venting damage to fisheries etc.; in the interest of public health; for research, education, re-population, re-introduction for breeding; a selective, supervised take and use of a small number) are much wider that the permitted exceptions under the ICRW under scientific permits or for use by aborigines, since *ipso facto* "pirate"whalers are working outside the rules of that Convention. Reports on exceptions and on fulfilment of the conditions laid down in the Convention must be made every two years. Some reservations to Appendices I-III are permitted under Article 22, and to the methods of killing etc. listed in Appendix IV.

iii)Special Requirements: Migratory species are, by Article 10, subject to special provisions: parties promise to co-ordinate their protective efforts especially for species listed on Appendices II and III whose range extends beyond their own territories and also to ensure that the measures specified in paragraph 3(a) of Article 7 are "adequate and appropriately disposed" to protect Appendix III species in the required manner.

The need for co-operation between parties is stressed in Article II, "whenever appropriate" and in particular where it would increase the effectiveness of other measures (matters left to be decided between the parties concerned) parties must let the Standing Committee established by the Convention, which is described below, know which species are completely protected on its territory though not included in the Appendices.

e) Organs

A Standing Committee of all the Parties (whose meetings are convened by the Secretary General of the Council of Europe and which will meet at least every two years) in which each party has one vote, is established by Article 13. Council of Europe member states may send observers even if not party to the Berne Convention. They can even be expressly invited to do so if the Standing Committee unanimously agrees. Other specified bodies, if appropriate and technically qualified in the subject matters of the Convention, can also send observers to particular Meetings of the Committee.

The Committee, under Article 13, is responsible for application of the Convention and can, amongst other things, review its provisions and Appendices; make recommendations concerning the measures to be taken and those appropriate for public information; make *any* proposal for improving the effectiveness of the Convention, including for conclusion of agreements with states that are *not* Contracting Parties, that would enhance the effective conservation of species or groups thereof. The Committee must report on its meetings to the Committee of Ministers.

f) Amendments

i) Of the Convention

Under Article 16, proposed amendments, after appropriate circulation by the Secretary-General of the Council of Europe (as detailed in Article 15) and examination by the Standing Committee, require a 3/4 majority of Contracting Parties for adoption if they relate to Articles 1-11; for Articles 12-24 they also require further submission to the Committee of Ministers for approval, or if so decided, for comment only. Contracting Parties still need finally to adopt them and they enter into

force 30 days after parties inform the Secretary General that they have done so.

ii) Of the Appendices
After the required circulation by the Secretary General of the Council of Europe of proposed amendments, Article 17 provides that the Standing Committee can adopt them by a two thirds majority of votes cast. Three months thereafter, unless a third of the parties notify objections, the amendment enters into force for those which have not notified objections.

g) Dispute Settlement Procedures
These are provided for in Article 18. They include first, friendly settlement facilitated by the Standing Committee of difficulties relating to execution of the Convention; if this and negotiation fail arbitration can be resorted to at the request of one party (unless agreed otherwise).

h) Conclusion
The broad scope of the measures provided for in this Convention make it potentially an important instrument in the strategy to deter "pirate" whaling. Its potential is enhanced by the possibility of its application to territories other than the metropolitan territory of the Contracting Party, including territories for whose international relations it is responsible or on whose behalf it can formally give undertakings. It is important that not only should all member states of the Council of Europe ratify the Convention but that they should apply it to all their relevant territories and that the Committee of Ministers of the Council of Europe use the opportunity provided in Article 20 to extend the membership as widely as possible. It is also of importance that the exercise of the power to make reservations to the Appendices is kept to a minimum and that the stress in the Convention on the need for co-operation between states and co-ordination of measures, particularly in relation to migratory species and in frontier areas, which would include maritime frontiers, is given effective expression, especially by means of co-operative agreements for deference of "pirate" whaling. Possible subject-matters of such agreements are discussed of Part 1 of this Report.

2. The African Convention on the Conservation of Nature and Natural Resources 1968[37]

a) Introduction
This convention which was initiated by the OAU (Organization of African Unity), specifically applies to, amongst others, some species of marine mammals which are listed in its Annexes *(i.e.* Pinnepedia: Mediterranean monk seal; Sirenia: Dugong, West African manatee) but at present its annex does not include any species of cetaceans. It is possible, however, as is explained later, for other species of marine mammals to be added by application of a simple procedure.

b) Purposes
The Heads of State of Independent African States declare in the Preamble that they are "fully conscious of the dangers which threaten irreplaceable assets such as, *inter alia,* water and flora and fauna resources" and express their desire to undertake individual and joint action for the conservation, utilization and development of these resources by "establishing and maintaining their rational utilization for the

present and future welfare of mankind." It is, moreover, stated in Article II of the Convention that it is a fundamental principle that Contracting States shall undertake to adopt the measures necessary to conserve such resources "in accordance with scientific principles and with due regard to the best interests of the people." The Convention specifically defines natural resources for its purposes as including fauna and also categorizes the measures necessary to secure its purposes.

c) Scope

i) Parties

The Convention, although it is not specific on this point, clearly is intended to apply only to the continent of Africa — the Preamble is set out in the name of the Heads of State and Government of Independent African States and confirms their duty to harness the natural resources of "their" continent; Article I establishes an "African" Convention; various articles allot administrative roles to the OAU; Article XXII opens to Convention to accession only by any independent and sovereign African State though this would include any islands which are part of such states or which are independent African states and members of the OAU.

ii) Geographical area

Again this is not made specific but various articles imply that the Convention will apply to territorial and other waters subject to the appropriate jurisdiction of the coastal states. Article VII provides that for certain purposes "contracting states shall manage aquatic environments", *i.e.* including their coastal waters, which clearly requires application to any waters over which coastal states have jurisdiction for these purposes such as the territorial sea and the existing zones of extended fisheries jurisdiction. Article X provides for establishment of conservation areas and requires them to be maintained, and existing ones to be expanded, where applicable, in territorial waters. Parties must also assess the need to establish additional conservation areas in order both to protect ecosystems which are most representative of their territories, particularly those peculiar to them, and to ensure conservation of all species, particularly those listed, or likely to be listed in the Annex to the Convention. States must also, as necessary, establish protective zones round such areas "within which the competent authorities shall control activities detrimental to the protected natural resources." Clearly if the African Convention parties add cetaceans to its annex this article will enable and necessitate the taking of appropriate measures against "pirate" whalers in such areas. "Conservation area" is specifically defined in Article III(4), different measures being required to protect different types of area.

d) Measures

i) Laws to prevent mass destruction: Contracting States must, under Article Vll(2) enact adequate legislation, *inter alia,* to prohibit any method of hunting, capture and fishing which is liable to cause mass destruction of wild animals. If cetaceans were added to the Annex this provision could be used to enable parties to take measures against "pirate" whalers whether or not the parties concerned are parties to the ICRW.

ii) Management measures: The species to be protected are listed in the Annex to the Convention under Class A or B according to the degree of protection against

specific methods of capture, hunting or fishing required. In the case of faunal resources generally parties must manage wildlife populations both inside and outside designated areas, on the basis of scientific principles, for an optimum sustainable yield, and manage aquatic environments, including coastal waters, to minimize deleterious effects of water uses which might adversely affect aquatic habitats. They must also adopt "adequate legislation" on hunting, capture and fishing under which unauthorized methods are prohibited and also methods "liable to cause a mass destruction of wild animals" (Article VII(2) (c)).

iii) The Annex: Article VIII records the Contracting States recognition of the importance and urgency of according special protection to animals threatened with extinction, or which might later fall into this category, and to the habitat necessary to their survival. These threatened species, listed according to the degree of protection to be afforded, are placed correspondingly in Class A or B. Class A species must be totally protected throughout the entire territory of the state, hunting, killing and capturing being permitted only if authorized by the state concerned because required by national interest or for scientific purposes. Class B species are also protected but may be hunted, killed or captured under special authorization. A provision important to future prevention of "pirate" whaling is contained in Article VIII(2): the competent authority in each Contracting State must examine the need to apply the above measures to species not listed in the annex in order to conserve indigenous fauna, placing additional species as necessary in the appropriate Annex class.

iv) Conservation areas: These are defined as "any protected natural resources area" and divided by Article III into "strict nature reserves" in which any form of hunting or fishing is strictly forbidden; "national parks" in which killing, hunting and capture of animals is prohibited except for scientific and management purposes (including any appropriate aquatic environments); "special reserves" of various kinds in which hunting, killing or capture is permitted only under direction or control of the relevant authorities.

v) Regulation of trade: For animal species not subject to Article VIII Contracting States must regulate trade in them and transport of specimens of them in order to prevent trade in specimens and trophies which have been illegally captured or killed or obtained. When Article VIII does apply parties must also apply the above measures and in addition must make export subject to an authorization on a standard form indicating their destination. The authorization is to be given only if the trophies have been obtained legally. Import and transit of specimens and trophies is also subject to presentation of an authorization; those exported illegally can be confiscated in addition to imposition of other penalties.

vi) Establishment of national conservation agencies: This is required by Article XV. If possible a single agency empowered to deal with all matters covered by the Convention must be established; failing this co-ordinating machinery must be established. The advantages of such focal points for administration and responsibility have already been pointed out in discussion of the CITES and other conventions and examples of state practice on these matters are included in Part 3 of this Report.

vii) Inter-state co-operation: Contracting states are required by Article XVI to co-operate whenever this is necessary to give effect to the Convention and whenever national measures affect the natural resources of any other state. They are also required to submit to the OAU the text of their relevant laws, decrees, regulations and instructions which implement the convention, reports on the outcome of its application and other pertinent information.

viii) Conservation education: A provision particularly important to deterrence of "pirate" whaling is contained in Article XIII. Contracting States must "ensure that their people appreciate their close dependence on natural resources and that they understand the need, and rules for, the rational utilization of these resources" by including these principles in educational programmes at all levels and making them the object of information campaigns "capable of acquainting the public with, and winning it over to, the idea of conservation". Obviously this provision is apposite to deterrence of "pirate" whaling if the Convention is extended to whales: not only would such education discourage the nationals of states party from participating in such activities at sea but it would also inhibit them from trading in products of such operations and should help to create the hostile climate of public opinion against such activities which will best promote detection, identification and arrest of offenders.

e) Organs

The Convention does not establish a Commission for its operation or administration but an appropriate organ of the OAU is accorded various functions under it. Under Article XXIV the OAU, in addition to being the focal point for receipt of details of national laws and the measures taken under them (as outlined above) is responsible for convening any meetings necessary to deal with other matters, relating to the Convention, such as its revision and amendment, as described below.

f) Revision and Amendment

i) Revision of the Convention

Five years after entry into force of the Convention any party can request revision of part or the whole of the Convention by notifying the appropriate organ of the OAU (Article XXIV(1). Under Article XVI(3) the OAU must organize a meeting if the request is made by at least three Contracting States and approved by two thirds of those states which it is proposed should participate in the meeting. Revision of the Convention is currently under discussion.

ii) Revision of and Additions to the Annex

Article XXIV(3) lays down a much simpler procedure than the above for alteration of the Annex. It can be revised or added to if one or more of the Contracting Parties so requests the OAU's appropriate organ and the revision or addition comes into effect only three months after approval by that organ. It would thus be a simple matter to add any species of whales requiring protection and to extend to them all the measures provided by the Convention.

g) Conclusion

The African Convention for Conservation of Nature and Natural Resources enables Contracting Governments to take a wide variety of measures which would help to

prevent "private" whaling operations ever occurring on that continent, but for it to be effective for this purpose whales requiring protection would have to be added to its Annex. The Convention required four ratifications to enter into force; it entered into force on 9 October 1969 and now has 22 parties amongst states acceding to the OAU. Six other states claim to be parties but do not appear to have deposited formal instruments. It is imperative that it should receive wide ratification since the co-operative and educational requirements as well as the enforcement measures required would be a valuable instrument in the strategy to deter "pirate" whaling.

3. The Permanent Commission of the Conference on the Use and Conservation of the Maritime Resources of the South Pacific (PCSP) 1952[38]

Having established a 200 n.m. Maritime Zone at a Conference in Santiago in 1952, Chile, Ecuador and Peru (hereafter referred to as the CEP states) acting as a provisional Commission, at the same time adopted regulations governing whaling in the South Pacific. The relevant declarations refer not to specific species but to "the marine fauna of the waters", a comprehensive term including all marine mammals. As Chile and Peru are now members of the IWC to the extent that IWC regulations are more stringent than PCEP ones, as is generally the case, the former will prevail over the latter and will have to be applied in the relevant zones.

The PCSP has met regularly since 1952. Its membership is open to all signatory states but only the CEP states have signed the instrument. The PCSP's objectives include conservation and protection of the zone's resources and their rational use. The Commission's primary role is to co-ordinate the laws of three coastal states for regulation of exploitation but it can initiate studies and resolutions. It has adopted permits for exploitation and laid down regulations under them. These can Include provisions for open and closed seasons and areas; protected species; gear and other equipment used; regulation of hunting and fishing generally to ensure that the quotas fixed annually by the paries do not endanger the preservation of the South Pacific's marine resources.

The Commission can review the whaling rules prescribed and decide on amendments; keep a register of land stations, whaling units, ships or vessels, crews and technical staff engaged in whaling and can issue permits for whaling and determine the baleen whale catch in the South Pacific. It can at its Annual Meeting determine the quota for sperm whales which may be hunted by foreign vessels and fix permit fees for them. The PCSP exchanges information and personnel and aims to improve statistics, regulations and co-ordination of studies.

The PCSP's organs consist of a Conference of Representatives of the 3 Ministers of Foreign Affairs which meets biennially to lay down its policies; a Secretariat, the executive organ, which is advised by two committees (a Legal Committee and a Committee for the Coordination of Scientific Investigations and Work Methods). Each Foreign Ministry has established a national section to ensure co-ordination of the PCSP's activities. The PCSP and its Secretariat can exchange information with other regional organizations and they collaborate with the FAO, and presumably now with the IWC, through these and other national means. Before becoming a

member of the IWC, Chile and Peru generally sent observers to its Annual Meetings.

Both the periodic conference and the PCSP itself work by unanimous vote, the former adopting agreements and the latter resolutions. Resolutions have immediate binding effect unless objected to within 10 days, in which case the objecting state is not bound until the objection is withdrawn.

Regulations in force before Chile and Peru joined the IWC already included a ban on hunting baby or nursing whales and females accompanied by young; a requirement that work contracts for captains etc. on vessels must contain clauses linking pay to the size, not number, of whales caught; a ban on pelagic whaling in the zones; catch quotas for baleen whales other than protected species (gray and right whales were fully protected except for those taken for local consumption); minimum size limits.

Enforcement is by national means in each national zone; vessels may enter zones of other parties only if requested to do so. The IWC, however, has considered negotiation of an observer scheme for the land stations, following Chile's and Peru's membership. An Interesting agreement, which so far as can be ascertained has never been implemented, was concluded in 1954. It provided for establishment of special courts in each state to try cases involving violations of Conference regulations; any fines imposed would be transferred to the PCSP which would distribute them equally among the signatory states after a deduction of 10% towards the PCPS budget.

Conclusion

The PCSP presents many interesting features for regional co-operation among IWC members and others. It could be built on to develop co-operative enforcement and exchange of information on "pirate whalers". Other regional groupings could usefully study its approach.

4. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere 1940[39]

This was one of the first purely conservatory treaties, negotiated between 21 American states. Its secretariat functions are performed by the Organizations of American States (OAS). It is limited to American States but is unlimited In its area of application.

It creates national sanctuaries to protect and preserve in their natural habitat representatives of all species of the native fauna in sufficient numbers and over areas extensive enough to assure that they do not become extinct through any agency within man's control.

Species which are regarded as of special urgency and importance for preservation are listed in an Annex by the state concerned. Species listed include the blue whale (listed by Argentina and the USA); and the right, bowhead and gray whales (listed by the USA). Various workshops have recently been held under the auspices of the OAS and revived interest in the Convention has been expressed. Its importance as a regional means of deterring unlicensed exploitation may thus increase. As has already been pointed out, policing of areas in which no species can be taken is easier than enforcing quotas in a given area.

B. Unrelated to Living Resources but Providing a Model for Regional or Multilateral Measures to Deter "Pirate" Whaling

1. European Agreement for the Prevention of Broadcasting Transmitted from Stations outside National Territories 1965[40]

a) Introduction

Before the adoption of this convention there had existed in Europe an activity similar to that of "pirate" whaling, namely so-called "pirate" broadcasting from installations and vessels stationed on the high seas, outside territorial waters and therefore generally beyond the scope of the national jurisdiction of the states to which the broadcasts were delivered. These broadcasts conformed neither to the regulations and licensing systems of such states nor to the requirements of the International Telecommunications Union (ITU) which allocates frequencies internationally by means of Radio Regulations annexed to the International Telecommuniation Convention. They also violated other national laws and international principles concerning copyright and represented a potential interference with space research.

There are thus many similarities with the "pirate" whaling problem. The activities defeated the purposes of the international system of regulation, based on international allocation under amendable regulations, took place outside territorial jurisdiction and on vessels or installations whose states of registration did not effectively control the activities *(i.e.* they acted as "flags of convenience") and were regarded, therefore, by the states adversely affected as an unreasonable use of the freedom of the high seas even if not *prima facie* positively illegal under international law.

European States affected did not attempt in this instance to extend extra-territorially their national legislation to these activities, although they were having effect within their territories, since in general they supported the primacy of flag state jurisdiction. Instead they resorted to an international agreement, negotiated within the Council of Europe, which co-ordinated and obligated use of means already existing within their national jurisdiction.

States parties agreed to collaborate to prevent "the establishment and use of broadcasting stations on objects affixed to or supported by the bed of the sea outside national territories." Article I included ships within this category.

b) Measures under the Convention

i) Each contracting party undertakes, under Article 2, "appropriate steps" to make punishable under Its national laws not only the establishment or operation of the above broadcasting stations but also:

ii) "Acts of collaboration knowingly performed"

This is a particularly important extension as the acts of "piracy" cannot take place or be long sustained without support and co-operation from persons based on land. Moreover, the acts of collaboration are defined in Article 2(2) as:

"(a) the provision, maintenance or repairing of equiment;

(b) the provision of supplies;

(c) the provision of transport for, or the transporting of, persons, equipment or supplies;

(d) the ordering or production of material of any kind, including advertisements, to be broadcast;

(e) the provision of services concerning advertising for the benefit of the stations."

Although these measures are specific to broadcasting it does not require a great stretch of imagination to contemplate the ways in which they could be adapted to similar regional agreements to inhibit "pirate" whaling by denying to such vessels all support services. Although the resolutions passed by the IWC go some way in this direction in recommending to member states of the IWC that do not transfer vessels, equipment, personnel or know-how to non-member states, the above measures go further in preventing maintenance and repair, supplies, transport of personnel, materials of any kind, advertising, etc. Moreover, the IWC Resolution does not advocate co-operative mandatory agreements for even its more limited purposes.

iii) Article 3 requires parties under their own laws to apply the terms of the Agreement to both nationals and non-nationals to the following extent, *i.e.* ,to:

"(a) its nationals who have committed any act referred to in Article 2 on its territory, ships or aircraft, or outside national territories on any ships, aircraft or any other floating or airborne object;

(b) non-nationals who, on its territory, ships or aircraft, or on board any floating or airborne object under its jurisdiction have committed any act referred to in Article 2;"

but neither Article 2 nor Article 3 is exclusive: Article 4 says that nothing in the Agreement prevents parties from either punishing as offences acts other than these listed in Article 2 or applying these provisions to persons other than those specified in Article 3, or both.

c) Conclusion

It would be possible for either member states of the IWC, or non-member states or both to enter Into regional or global agreements on the lines of the European Pirate Broadcasting Agreement suitably adapted for deterrence of "pirate" whaling. Such an agreement or agreements would enable the wider application of such measures that is necessary effectively to prevent "pirate" whaling. This European agreement has proved completely effective for the purpose of eliminating "pirate" broadcasting in the area to which it relates because its techniques were subsequently enacted into the national laws of *all* the parties to it *and* effectively enforced.

IV. Enforcement of Fisheries Jurisdiction

A. Introduction

Most of the Convention referred to in Section I and II require states parties to take measures against offending vessels and persons either:

— within their jurisdiction, or
— on vessels flying their flag.

Article IX of the ICRW itself requires a Contracting Government, for example, "to take appropriate measures to ensure the application of the provisions of the Convention and the punishment of infractions against them carried out by persons or vessels under its jurisdiction". The provisions apply, under Article I, to factory ships, land stations and whale catchers under the jurisdiction of Contracting Governments and to all waters where whaling takes place. The Convention can, and must, thus be enforced by the flag state on its own vessels anywhere and on its nationals either if they commit an offence within the territorial or fisheries jurisdiction of the state concerned or, if the state so provides, when they commit an offence outside national jurisdiction, the sanction being imposed if and when the offender returns within the physical jurisdiction of that state. States can also apply their whaling laws and impose sanctions against foreign vessels and persons if they commit offences within the territorial or fisheries jurisdiction of that state.

Regulation of whaling, however, is not confined to states parties to the ICRW. Any state can take measures to prevent or restrict this activity. It can either subject itself to the obligation to take measures by becoming a party to the ICRW or to one or more of the relevant conventions referred to in Section I or II, to the extent required by them, or it can act unilaterally within its own jurisdiction to the extent permitted under present international law. It can thus also impose stricter enforcement than is required by existing conventions. It is important, therefore, to establish the limits imposed on this jurisdiction at the present time by existing international law, and also to consider the extent to which the development of the law of the sea by the UNCLOS III, as now evidenced by the Draft Convention (Informal Text) produced by that conference, may further extend or restrict this.

It should be noted that none of the Conventions or the regulations made under them, can be effectively enforced unless states do enact the appropriate legislation. It is vitally important that all states concerned to eliminate "pirate" whaling should ensure that they do have on their statute books the laws necessary to enable them to take enforcement measures against offenders and, if necessary, to prosecute them. A review of national laws concerning the elimination of piracy *proprio sensu*[41] revealed that although this was universally recognized to be an international crime many states acknowledging the universality of the offence nonetheless had in fact no municipal laws concerning it; this in some cases prevented them taking any action against pirates. Moreover, states that did have relevant laws did not in all cases have acts dealing exclusively with piracy; some relegated it to sections or subsections of more general acts, which did not expedite or encourage, the punishment of the pirates. Examples of comprehensive national acts to protect marine mammals generally, adoption of which would prevent similar lacunae

leading to failure to prosecute "pirate" whalers or offenders against marine mammal protection laws, are included In Part 3.

Whaling has until recently been generally regarded as a form of fishing and it is to the international law of fisheries, therefore, that we must first turn for guidance on the extent of national jurisdiction over whaling, though, as will be seen in Part 3 of this Report, in view of the existence of whaling under flags of convenience and by states not party to the ICRW or other relevant conventions, techniques of enforcement other than, and additional to, fisheries measures may need to be used to eliminate "pirate" whaling. Nonetheless, enforcement of fisheries jurisdiction is of vital importance within the overall strategy for this purpose. If *all* states regulated whaling and effectively exercised the powers available to them in this respect, "pirate" whaling would cease and the use of additional techniques would become unnecessary as the following analysis of fisheries jurisdiction reveals.

B. Coastal State Jurisdiction over Whaling

1. Measures Now Permissible Under International Law

a) Under the 1958 Geneva Conventions and Customary International Law

i) In Internal Waters and the Territorial Sea

(a) Material Scope of Jurisdiction

In its internal waters and territorial sea as defined in the Geneva Convention on the Territorial Sea[42] and as accepted in customary law, a coastal state has full authority both to prescribe and to enforce its laws concerning exploitation of living resources. Foreign whaling can be completely controlled in these areas. Vessels equipped for whaling can be banned from entering internal waters and ports and harbours though in the territorial sea they may have a right of innocent passage, as defined in the Article 14(1) of the Territorial Sea Convention, as long as they do not engage in any whaling activities. Article 14(5) states that "passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal state may make and publish in order to prevent these vessels from fishing in the territorial sea." Correspondingly Article 17 requires that foreign ships exercising the right of innocent passage (which cannot be hampered) "shall comply with the law and regulation enacted by the coastal state in conformity with these Articles and rules of international law." Examples of measures taken by states to give effect to this jurisdiction are given in Part 3.

(b) Geographical Scope of the Jurisdiction

The Territorial Sea Convention set no clear limit for the territorial sea. Although a majority of states now claim a limit of 12 nautical miles from their baselines, some continue to restrict themselves to 3 miles, whereas a few persist in asserting this form of jurisdiction up to 200 miles in spite of objections from other states. It seems likely in the light of current practice, the developing law as evidenced by the series of Texts produced by the UNCLOS, and the fact that the Territorial Sea Convention provided a limit of 12 nautical miles from the baselines for a zone contiguous to the territorial sea, in which a limited functional jurisdicton can be exercised for purposes unrelated to fisheries jurisdiction, that a limit of up to 12 miles is now accepted in customary international law, though some states, notably the UK and the USA, in the absence of a treaty establishing a fixed limit continue to regard 3 miles

as the legal maximum.

ii) Proposals in the UNCLOS III Draft Convention (Informal Text)
(a) Material Scope of the Jurisdiction
The UNCLOS Text confirms the coastal state's sovereignty over its territorial sea and territorial waters, and adds in Article 2(1), "in the case of an archipelagic state," over its archipelagic waters also. The terms "archipelagic state" and archipelago," as defined in Article 46, and the permission in Article 47 of the use of straight baselines for connecting the islands in the archipelago and those delimiting the archipelagic waters, coupled with the extension of geographical scope referred to below, allow a considerable extension of jurisdiction over fisheries by such states which can be used to prevent unregulated whaling.

(b) Geographical Scope of Jurisdiction
Article 3 of the Text provides that "every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention," which vary slightly, but not substantially, from those laid down in the Geneva Convention.

b) Beyond the Territorial Sea: Fisheries Zone (FZ) and Exclusive Economic Zone (EEZ)
i) Under the Geneva Convention and Customary Law
(a) The Geneva Convention and the Freedoms of the Seas
The Geneva Conventions neither set a specific limit for the territorial sea nor did they provide for the coastal state to exercise jurisdiction over fisheries in the areas beyond it. The High Seas convention, purporting to codify the customary law, defined "high seas" to include all parts of the sea that are not included in the territorial sea or the internal waters. It regarded this area as open to all nations and recognized freedom of fishing for all states upon it, though requiring that all states exercise this freedom with "reasonable regard" to the interests of other states in the exercise of this and other freedoms of the high seas. The Convention on Fishing and Conservation of the Living Resources of the High Seas, which does not purport to codify or evidence the customary law (and has not been widely ratified), though also accepting the freedom of fishing also provides, in Article 6, that "A coastal state has a special interest in the maintenance of the productivity of the living resource in any area of the high seas adjacent to its territorial sea", that it has a right to take part in any system of regulation to conserve such resources in that area whether its nationals fish there or not, and that a State whose nationals fish in that area shall, at the adjacent nation's request "enter into negotiations with a view to prescribing by agreement the measures opposed to the coastal state's and may start negotiations with the latter towards agreed conservation measures."

At the very least, therefore, this Convention, for its ratifying states, fully justifies the exercise of diplomatic pressure on states whose nationals undermine conservation measures in the areas referred to, in order to secure the conservation agreements necessary to maintain stocks at levels that would sustain exploitation. However, as outlined below, the law has now developed considerably beyond this limited possibility.

(b) Customary Law

Following the failure of UNCLOS I and II to provide for either fixed territorial sea or fisheries limits, states resorted to the practice proposed by some states at these conferences of extending their jurisdiction for fisheries purposes only, in a limited zone beyond the territorial sea, however the latter was delimited. These zones were as a general rule at this period confined to a maximum of 12 miles from the baselines of the territorial sea but a few states asserted jurisdiction in fisheries or other zones of up to 200 miles.

During the 1970s, following the progress of the UNCLOS III negotiations and the provisions included in all its series of negotiating texts for extension of coastal state jurisdiction over fisheries (which are described below), the overwhelming majority of coastal states followed the example of the few which had done so earlier and unilaterally asserted jurisdiction over all living resources in zones of up to 200 nautical miles measured from the territorial sea baselines. The method of declaration and the extent and content of the jurisdiction claimed have varied from state to state and do not correspond fully to the concept of the EEZ as proposed in the UNCLOS texts. The new jurisdictional areas are, however, generally limited to exercise of fisheries jurisdiction. To the extent that these claims coincide in extent and content they can now be said, in view of their many similarities, large numbers, and the lack of protest from other states, to evidence the uniformity of practice and sense of legal obligation required for their acceptance as new customary international law. This applies only, however, it must be emphasized, to the extension of fisheries jurisdiction. Only a few states claim the 200 mile zone as an EEZ, or as a territorial sea, and the last has been protested and the former in practice limited to exercise of fisheries jurisdiction only for the time being, pending the conclusion of the UNCLOS.

The legal status of the zones in the form of EEZ's remains unclear; many states regard the area as still high seas and therefore subject, *inter alia,* to freedom of navigation; others consider that the area has assumed a new character of its own, *i.e.* that it is *sui generis* and that former freedoms exist only to the extent positively to be provided by treaty or agreement, *i.e.* in the UNCLOS Convention. On the first interpretation vessels equipped for "pirate" whaling but not engaged in whaling could not be stopped by the coastal state except to verify their flag, since the High Seas Convention, Article 22, provides that, except when acts of interference derive from powers conferred by treaty, a warship which meets a foreign merchant ship on the high seas Is not justified in boarding her unless there is "reasonable ground" for suspecting that the ship is, in reality, of the same nationality as the warship. Even then a procedure is laid down of progressive measures: first a boat commanded by an officer may be sent to the suspect ship and its documents can be checked; if suspicion still continues the ship can be examined, subject to "all possible consideration" in practice. If suspicion is unfounded, and the suspect ship has not committed an act justifying suspicion of the above activities, damage or compensation must be paid.

Extensions of fisheries jurisdiction as such, however, have enabled enforcement of coastal jurisdiction over whaling in vast new areas. If all 135 coastal states take ad-

vantage of this opportunity approximately thirty-two per cent of the world's 105.3 million square nautical miles of sea will become subject to national jurisdiction, *i.e.* about 33.6 million square nautical miles. This jurisdiction greatly enhances the opportunity to eliminate "pirate" whaling and it is therefore vitally important that all states with the opportunity to do so should not only extend their fisheries jurisdiction to the extent legally and geographically possible but that they should enact the laws necessary effectively to prevent this activity in these zones.

A very thorough analysis of the variety of new powers claimed an exercized by coastal states has been made by FAO[43]. States seeking guidance on the general trends of recent laws in this field should study this report. Examples of individual state's laws are given also in Part 3 of the present Report. The FAO report reveals that by 1981, 99 coastal states had extended their fisheries jurisdiction beyond 12 miles, the great majority to 200 miles from the baselines of their territorial sea. In brief, though, as already stated, a few states continue to assert their jurisdiction in the form of a territorial sea, some have followed the framework of one or other of the UNCLOS Texts, and yet others have merely extended the limits of their existing fisheries jurisdiction. Some states have proceeded by introducing detailed and specific new provisions for enforcement. Some states in their 200 miles zone now control both catch effort and ecologically dangerous methods of fishing, based on a licensing system, regulating entry into the zone for fishing purposes, provided for either in the legislation asserting the zone, or, more often, in detailed fisheries laws for the zone. As there is as yet no global international treaty specifying the precise measures that can or are required to be taken to enforce fisheries jurisdiction states must, in the absence of an UNCLOS or other treaty, look to general state practice, the general conformity with it, and lack of protest by other states in order to ascertain the measures legally acceptable and necessary. The examples given in Part 3 will, it is hoped, aid states In this respect. Measures required and approved under both past and existing international fisheries agreements for conservation of specific species, areas, or stocks also give important guidance as to what is internationally tolerable and required and are briefly reviewed below.

ii) Illustrative Enforcement Measures Permitted Under Selected International FisheriesAgreements

In spite of the fact that there exist a number of international treaties relating to fisheries several of which establish commissions, many of these do not provide for regulation of fisheries or enforcement. Of those that do, only the ICRW has specific relevance to "pirate" whaling. However, the methods of fisheries enforcement that have from time to time been established by treaty have greatly influenced state practice in these matters and offer an important guide to it. The recent spate of national laws establishing 200 mile zones reflect these measures and techniques which provide for the following activities: surveillance; stopping and boarding; inspection reporting; arrest, seizure or detention of persons and vessels; application of laws including enactment of penalties and sanctions, following due legal process. It should be noted that all these activities require operation of effective administrative procedures. The detailed powers exercisable under these several headings, approved in custom and treaty, are summarized below and their usefulness to deterrence of "pirate" whaling is assessed. The illustrations are based on a summation of the measures permitted, *inter alia,* under such agreements as

the former ICNAF (International Convention for North West Atlantic Fisheries) and NEAFC (North East Atlantic Fisheries Convention) Joint Enforcement Schemes; the US-Brazil bilateral agreement on shrimp; the Japan-USSR Convention concerning the High Seas Fisheries of the Northwest Pacific Ocean; the International Convention for the High Seas Fisheries of the North Pacific Ocean; the North Pacific Fur Seal Convention; the King Crab Agreement between the USA and the USSR; the Fraser River Sockeye Salmon Convention; the North Pacific Ocean and Bering Sea Halibut Convention between the USA and Canada; the Protocol to the ICRW establishing an Internatinal Observer Scheme. These and other treaties are described by, amongst others, A. *Koers* in "The International Regulation of High Seas Fisheries"[44], and W.T. *Burke, et al.,* "National and International Law Enforcement in the Ocean"[45]. Both give full references and other details of these treaties, as also does an FAO report on conventions relating to marine mammals[46].
to marine mammals[46].

(a) Powers of Surveillance

States can deploy vessels, platforms and aircraft for surveillance purposes within their territorial sea and FZ's to collect information generally on the activities of foreign vessels, to monitor observance of regulations and to act, by means of their mere presence, as a deterrence against violations. For the purpose of deterring "pirate" whalers regular and alert surveillance Is important. Measures to facilitate surveillance can include provision to the IWC, by states parties to the ICRW, of lists of their authorized whaling vessels, detailing features which enable ready identification. The IWC has not so far adopted or recommended the use of a recognizable IWC pennant or other marker for vessels whaling under its auspices but this would be permissible and would facilitate identification of the "non-pirates." Exchange of information between ICRW parties on vessels whaling and whaling vessels sighted could also aid surveillance. The IWC's current efforts to compile a full register of member states whaling vessels is a step to be encouraged and supported. To date it has not received the full support necessary for it to be effective.

Some international agreements preceding the widespread adoption of 200 mile zones provided for a limited amount of joint enforcement on the high seas which necessarily implied mutual surveillance of activities of national and foreign vessels participating in the schemes. Although the ICRW now provides for international observers on the terms discussed later it does not currently provide for Joint Enforcement, but there is no reason why this should not be adopted by Protocol as was the International Observer Scheme. It is not possible, particularly with rising fuel costs, for individual states to keep watch on all vessels on the high seas or even in the FZ and any pooling of the responsibilities and resources improves surveillance. Negotiation of a mutual surveillance scheme by the IWC could be based on the above precedents; the European Parliament has also proposed consideration of schemes for international enforcement or inspection of EEC fisheries within Member States' FZ's[47]. Any information gleaned from such joint surveillance which suggests that there is reasonable suspicion that a vessel is engaging in "pirate" whaling could then be transmitted to its flag state and warning could also be transmitted to any coastal state whose waters, ports or harbours it might enter. ICRW contracting states have already committed themselves to take the measures

necessary to prevent "pirate" whaling and would then be alerted by this information to do so. Such schemes might, as developed in the following section, be extended to areas of national fisheries jurisdiction.

Even in the absence of such a scheme for mutual surveillance it would not be illegal for vessels of one state to observe the activities of other vessels (but they would not be obliged to do so), although if the vessel is whaling on the high seas, since it is not committing an offence under international law, it could not be boarded. Considerations of reciprocity and good neighbourliness would also require that caution be exercised and false reports avoided; suspicion must be based on reasonable cause.

It should be noted that development of modern technology has considerably improved the potential for surveillance. It can take place for example not only from vessels but from hovercraft, aircraft, helicopters, offshore platforms, and by use of satellites and transponders[48]. All these sources can be instructed to watch for "pirate" whaling vessels.

(b) Powers of Stopping and Boarding

If surveillance reveals a suspected violation it becomes necessary to stop the vessel concerned *inter alia* to verify its papers and flag. Some international agreements provide for authorized officials of states parties also to board and search vessels which they have reasonable grounds to believe may be violating the Convention involved. Although such agreements relate to the high seas it follows that in FZ's and EEZ's coastal states can and will want to exercise similar rights. It must be stressed, however, that on the high seas states cannot board vessels which are not suspected of committing a violation of a convention to which they and the boarding state are both party, or of customary law. "Pirate" whaling vessels thus could not, as the international law stands at present, be subjected to this procedure simply because of their whaling activities although it is possible that the law concerning whaling could be changed in the ways and by the means indicated at the end of this Section to make so-called "pirate" whaling an offence. Unless this is done, however, the above techniques can be exercised only in zones of national jurisdiction within which the coastal states concerned have enacted the legislation necessary to ban all whaling or at least to apply the IWC regulations.

Although under some international agreements participating states have agreed to exercise the above powers on a mutual basis under joint enforcement schemes insofar as the high seas are concerned, present practice shows that coastal states are reluctant to pool their powers in a similar way within areas of national jurisdiction. As many of the international enforcement schemes have, with the advent of widespread adoption of 200 mile fisheries jurisdiction, either lapsed or apply to a very much reduced area of high seas or within a reduced membership, or both, and as the cost of surveillance increases, some states will thus increasingly find it economically impossible to maintain at sea the number of vessels etc. necessary effectively to board all suspected ships. It would seem to be worthwhile for states, either regionally or through existing fisheries agreements (including the ICRW) to consider not only international joint enforcement on the high seas but, at least for "pirate" whaling purposes, in areas of national jurisdiction also. All vessels could be co-opted into a "pirate" whaling watch. At the very least advantage could be taken of the fact that many states use warships, specially authorized for fishery pro-

tection duties, for enforcement purposes. Foreign warships have rights of innocent passage in the zones of other states and might usefully be employed, if their powers are carefully circumscribed by international or bilateral agreement and the vessels used are clearly identified when on this task, *e.g.* by flying an agreed or IWC pennant, jointly for these purposes. It would be particularly appropriate in regional seas or semi-enclosed seas and, as described in Part 2, the European Community is currently considering the establishment of a Community enforcement or inspection system in waters subject to the fisheries jurisdiction of its member states. Boarding under previous schemes has been permitted for such purposes as inspection, for search, for oberservation of the conduct of enforcement, but always subject to production, or availability for production, of duly authorized official credentials.

(c) Powers of Inspection and Observation

Having boarded, officials need to carry out certain tasks to implement the enforcement objectives. International agreements have authorized examination of catch; nets; gear (whether in situ or on or near the working deck readily available for use); examination of books, documents and other articles at the discretion of the inspector; and the questioning of those on board — all for purposes of verifying observance of the regulations in force under the agreements insofar as they apply to the vessel inspected.

Although, as already stated, "pirate" whalers *ipso facto* will hot be flying flags of states party to the ICRW and therefore cannot be inspected on the high seas and the IWC does not at present permit, in any event, joint inspection of vessels of its Contracting Governments, it is possible for all states, whether parties to the ICRW or not, to enact its regulations, or stricter regulations, for purposes of enforcing them within national jurisdiction. As in the case of stopping and boarding above, the inspection powers could also be the subject of joint enforcement schemes, as appropriate, even within national jurisdiction, thus reducing the area in which unsupervised and unregulated whaling can take place.

The ICRW does not provide for international inspection but provides instead in its Schedule for there to be received on board vessels of Contracting Governments such observers as the member countries may arrange (by agreement between themselves) to place on factory ships and land stations or groups thereof of other member countries, the observers being, however, appointed by the Commission, acting through its Secretary, though paid by their national governments[49]. They have no powers to board or inspect vessels other than those to which they are appointed and their powers of observation are limited by agreement. Their reports are, however, submitted to the IWC for comment. The limitations of this scheme need not, however, limit such observers, should the opportunity arise, from reporting on any activities of "pirate" whalers they may chance to view. Such official observers are necessarily especially expert in whaling and the measures required to regulate it under the ICRW. The great reduction in whaling by IWC members, however, now provides little opportunity for this kind of casual encounter.

Within national jurisdiction, of course, none of the above limitations on inspection powers apply and states can inspect or require carriage of national inspectors or observers on board fishing vessels entering their zone or both, if they so provide in

national law, and can do so for all whaling vessels whether or not the states whose flag they fly are parties to the ICRW.

(d) Reporting Activities

Inspectors' actions have usually, under international agreements, been limited to merely filing reports to the flag state of the offending vessel, to the discretion of which any further enforcement action such as arrest, seizure or detention of the vessel, and any subjection to judicial or administrative process is left. Some agreements, however, do permit exercise of these powers or some of them, by the inspecting states participating in the scheme. Agreements usually specify in detail the formalities to be followed by inspectors for the purpose of ensuring that the proceedings are seen to be fair and just. Requirements are likely to include making the report (and copies) available to the ship's master for comments; a time limit for filing the report; in the case of apparent violations, making a recording in the ship's log of the date, time and location of the offence; involvement, if practically possible, of inspectors of the flag state in order to facilitate enforcement action by it; preservation of the relevant evidence, including examination, photographing and measurement of the catch as necessary; removal of fishing (or whaling) gear which contravenes the flag state or international regulations. All the evidence is then attached to the report filed with the flag or coastal state, or both. The IWC's Observer Scheme, as already stated, limits observers to reporting only, although the report is sent to the Commission as well as the flag state.

(e) Powers of Arrest, Seizure or Detention

Several international agreements authorize, or have done so, arrest or seizure of vessels and persons offending, generally, however, *after* inspection or search by authorized officials which has revealed continued reasonable grounds for believing that the applicable regulations have been infringed. Some agreements, however, require that the vessel seized should actually be engaged in an activity contravening the convention concerned, *i.e.* seizure cannot be effected in such cases merely on reasonable cause for believing that an offence has occurred or is likely to do so; others permit seizure or arrest on evidence of violation. The state executing the arrest is usually required to notify the flag state and sometimes also to deliver the arrested vessel to authorized officials of the flag state, either at the port nearest to the place of seizure or a location agreed between the states concerned. Some agreements provide that if it is not possible or practicable for this to be done promptly the arresting state can retain the vessel within its own jurisdiction for purposes of surveillance until appropriate delivery can be effected.

Similar procedures are, of course, available to coastal states within their own jurisdiction without the necessity of securing international agreement. However, state practice, as will be seen in the following Section, evidences that all states accept certain limitations on the above powers in order to avoid arbitrary arrest and other abuses and for considerations of reciprocity and good neighbourliness. The UNCLOS Draft Convention (Informal Text) makes similar provisions but, pending its adoption and entry into force as a treaty, it is the state practice referred to in Part 3 of this Report that indicates the present extent of the exercise of coastal state jurisdiction over fisheries in the 200 mile zones in these respects.

(f) Imposition of Penalties and Sanctions

Under international agreements concerning regulation of high seas fisheries the power to prosecute and to impose penalties on offenders was, and continues to be, left to the flag state of the offending vessel. The UNCLOS Text, as will be seen in Section III, does not propose any change in this respect for fisheries offences on the high seas. The ICRW leaves enforcement, including determination of penalties, to member states although requiring that they report the details of their laws, infractions against them and penalties exacted under them, to the IWC, and that any financial penalties be reported in a common currency (the US dollar) to facilitate comparison. Under the ICRW penalties will be imposed either by the flag or coastal state if the offence occurs within its jurisdiction. Non-parties to the ICRW can also impose similar penalties; the Reports of the Whaling Commission are available for public inspection and the Secretariat also can provide guidance on appropriate penalties. International agreements as such, however, do not generally stipulate the amount of penalties. States concerned will, in any event, want to ensure that their scale is sufficiently flexible to allow for the effects of inflation. It is also important that they should be sufficient and appropriate for the purpose of deterring repetition of the offence concerned. The laws of ICRW parties provide some guide to the international standard necessary.

International agreements do provide at least one example of an exception to the rule that offenders are prosecuted only by their flag state. The South Pacific Commission, established by Chile, Ecuador and Peru, which also regulates whaling by these states and within their jurisdiction, has by Resolution established a system of penalties for breach of its regulations and allows prosecution of the offender by the state effecting his detention[50]. The Resolution does not specify the geographical area of its application but it seems likely that the intention was to confine it to offences committed in the 200 mile Maritime Zone of these states (two of which, Chile and Peru, are now members of the IWC).

Some agreements enable states other than the flag state at least to provide evidence, statements or witnesses to the flag state to facilitate prosecution and trial — for example the Reports of the inspectors or observers other than those of the flag state will be equated with the latter's for evidentiary purposes in the proceedings of the prosecuting state. The ICRW, however, does not at present make this provision: neither the reports of national inspectors nor of the international observers are given this status; there is, as we have seen, no provision for mutual inspection. Introduction of such a scheme, even in a limited form, *e.g.* use of the observers' reports as evidence in the courts of the flag state, would be a possible development but this would not facilitate prosecution of "pirates" since the observers are not placed on such vessels. It might be possible, if a scheme of port state jurisdiction were introduced, for observers incidentally to report on suspected "piratical" activities, in the event that they sighted them, and for their reports to be used to enable investigation by port states to elicit further evidence even if such observers' reports were insufficient *per se* to found prosecution or other action. The possibilities of port state jurisdiction are discussed at the end of this Section. As will be seen it can be implemented fully only if "pirate" whaling on the high seas can be made a legal offence, at least between the states participating in the scheme.

iii) Proposals in the UNCLOS III Draft Convention (Informal Text) for an EEZ and Concerning the High Seas

(a) The EEZ

Part V of the UNCLOS Text provides for an EEZ (Exclusive Economic Zone) to be established by the coastal state. It is defined in Article 55 as an area beyond and adjacent to the territorial sea, subject to the specific regime provided in that Part, under which the rights and jurisdictions of the coastal state and the rights and freedoms of other states are governed by the relevant provisions of the UNCLOS Draft Convention. The high seas area, in which freedom of fishing and navigation continue, is defined as beginning only beyond the EEZ, the breadth of which is set by Article 57 at 200 nautical miles from the territorial sea baselines. In the zone Article 56 recognizes that the coastal state has sovereign rights for *inter alia the* purpose of exploring and exploiting, *conserving and managing,* living natural resources, although it must in exercising these rights have due regard to the rights and duties of other states and act In a manner compatible with the provisions of the Convention generally.

Article 61 allows the coastal state to determine the total allowable catch in the EEZ. Taking account of the best scientific advice it must ensure through proper conservation and management measures that maintenance of the living resources in the zone is not endangered by over-exploitation. In taking measures the coastal state must take into consideration the effects on species associated with or dependent upon the harvested species with a view to maintaining or restoring their populations above levels at which their production is threatened. However, marine mammals are specifically exempted *inter alia* from: the requirement of Article 61(3) that the measures taken must be designed to restore populations of harvested species at levels which can produce a modified maximum sustainable yield; the requirement in Article 62 that the coastal state must promote the objective of optimum utilization of the living resources in the EEZ; and the requirement that other states must be given access to any part of the total allowable catch that is surplus to the coastal state's own harvesting capacity. The exceptions derive from the following important provision in Article 65, which relates exclusively to "Marine Mammals", viz:

> "Nothing in this Part restricts the right of the coastal state or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part."

Article 65 also requires "states" *(i.e.* all states, not coastal states only) to "cooperate with a view to the conservation of marine mammals and *In the case of cetaceans in particular* to work through the appropriate international organizations for their conservation, management and study."

States will, therefore, be fully justified in refusing any access whatsoever to cetaceans in their EEZ either because the IWC has determined that particular species and stocks are to be Protected Stocks or because the coastal state wishes to impose stricter regulations than those of the IWC. It certainly simplifies the coastal state's enforcement task if *all* whaling is banned in the EEZ but whether the coastal state does this or not the UNCLOS Text (Article 62(4)) not only requires nationals of other states fishing in the zone to comply with the conservation measures and with

the other terms and conditions established by the regulations of the coastal state, but insists that these regulations be consistent with the Convention and goes on to list the subjects, of which due notice must be given, to which regulations can *inter alia* relate. The list is not an exclusive one but nonetheless it is a comprehensive one, indicating the wide scope of measures regarded as appropriate and likely to prove acceptable (as this Part of the Text has remained unaltered for some time) namely (emphasis being added throughout):

(a) *Licensing of fishermen, fishing vessels and equipment,* including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;

(b) Determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(c) Regulating seasons and areas of fishing, the types, sizes and amount of gear, and the numbers, sizes and types of fishing vessels that may be used;

(d) Fixing the age and size of fish and other species that may be caught;

(e) Specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;

(f) Requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) *The placing of observers on board* such vessels by the coastal State; and similarly the placing of trainees on board;

(h) The landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) Terms and conditions relating to joint ventures or other co-operative arrangements;

(j) Requirements for training personnel and transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;

(k) *Enforcement procedures.* The provisions for a licensing system, appointment of observers and enforcement procedures are particularly pertinent to elimination of "pirate" whaling. It should be noted that, as illustrated in Part 3 of this Report, coastal states are already frequently requiring that in their unilateral FZ's or EEZ's foreign fishing vessels must carry on board observers from the coastal state, and for states which have a lot of foreign fishing vessels In their zone which do not often enter their ports this might be the most effective method of enforcement.

A State that exercises fully effective enforcement over *all* fisheries in its EEZ is not so likely to have its zone invaded by '"pirate" whalers. It is, therefore, worth noting in detail the methods of enforcement techniques laid down in Article 73. They are described in the following terms:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify, through appropriate channels, the flag State of the action taken and of any penalties subsequently imposed.

It should be noted that the Draft Convention specifically excludes, in Article 73(3) above, the use of *imprisonment* for offences against coastal state fisheries regulations and acceptance of an UNCLOS treaty will require states which at present exercise unilateral jurisdicton in extended FZ's, if they have provided this penalty, directly or indirectly, for violation of fisheries regulations, to amend these laws.

Although the above provisions give the coastal state wide powers of enforcement they are subject to two general limitations: (i) they must, under Article 56(3), be exercised in accordance with the text concerning the continental shelf *(i.e.* Part VI). This is not, however, likely to impose any restriction on deterrence of "pirate" whaling since Article 78 provides that the legal status of the super-jacent waters and airspace is not affected. On the contrary it means that at least all fishing and whaling vessels can be excluded from the 500 metres or more safety zones on the continental shelf as well as from the EEZ. (ii) In the EEZ, Article 58 preserves for all states (subject to other relevant provisions in the Convention) the freedoms of the high seas laid down in, *inter alia,* Article 87 *(i.e.* navigation, overflight, freedom to lay submarine cable and pipelines, to construct artificial islands and to conduct scientific research) all of which must correspondingly be exercised with due consideration for the interests of other states in their exercise of the freedoms, and for the rights exercised under the Convention relating to the deep seabed Area. However, Article 58 uses somewhat different language to Article 87 — more selective and at the same time more precise. It says that states enjoy, subject to the Convention, "the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, *and other internationally lawful uses of the sea related to these freedoms* such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the Convention" (emphasis added).

The effect of this *inter alia* is that the coastal states in their EEZ and on the high

seas are free to deploy both ships and aircraft for the purposes of enforcement (e.g. for surveillance, boarding, inspection, etc.) but must do so in a manner that does not disregard the rights of other states to go about their legitimate activities. States must, therefore, continue to exercise caution in inspecting foreign vessels in these areas and must not stop vessels without reasonable grounds for suspicion, and should not proceed further unless their suspicions prove justified. Other States will continue to be free to deploy vessels in the EEZ also for purposes of navigation and, as suggested earlier, use could be made of them in the institution of a global "pirate" whaling watch.

(b) The High Seas

Article 88 defines the high seas as "all parts of the sea that are not included in the exclusive economic zone, In the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic state." In this area, as outlined above, not only are the freedoms of the seas which were specifically identified in the Geneva Convention on the High Seas preserved but, as we have seen, they have been added to in an open-ended manner, in terms slightly different from the corresponding provisions in the Geneva Convention, since they are said to be *"inter alia."*

c) The Doctrine of Hot Pursuit: From Internal Waters, the Territorial Sea, the Contiguous Zone, the FZ or the EEZ to the High Seas[52]

i) Under the Geneva Convention on the High Seas: Pursuit from the Territorial Sea and Contiguous Zone

The High Seas Convention, which set out its intention of codifying the customary international law on the subject, provides in Article 23 a right of hot pursuit for purposes of enforcement, from areas of national to international jurisdiction, by vessels and aircraft of the coastal state, pursuing foreign vessels which the competent authorities of the coastal state have good reason to believe have violated its laws and regulations. This Convention limits the right in various ways, however. Pursuit must be commenced when the foreign ship, *or* one of its boats *(i.e.* the doctrine could be used against a "pirate" whaling factory ship if any of its catcher boats commit violations) is within internal or territorial waters or the contiguous zone of the coastal state and may only be continued outside these national zones if the pursuit has not been interrupted, *i.e.* if it continues to be "hot." Although this Convention does not fully define "interruption" customary law and practice indicates that in certain circumstances one vessel might take over the chase from another. Article 23 does, however, make clear that it is not necessary that, when the order is given to the foreign vessel in the zone concerned to stop, the ship giving the order also be within that zone. It must, however, make sure that the foreign vessel or team of vessels is within one or the other area and must give a visual or auditory signal to stop before commencing pursuit.

There are other limitations: ships can only be pursued from the contiguous zone if the specific rights for which that zone was established by the Territorial Sea Convention have been violated. As we have seen, these do not include a right to protect fisheries. However, contiguous zones will now mostly have been subsumed within the new FZ's and EEZ's, rights of pursuit from which are discussed below. The right of pursuit ceases as soon as the ship pursued enters the territorial sea of its own or

a third state.

The above provisions apply equally to aircraft, with the additional requirement that the aircraft giving the order must Itself carry out the pursuit until a ship or aircraft of the coastal state arrives to take over, unless the aircraft itself can arrest the ship. Just sighting the offending or suspect vessel from the air is not sufficient; it must either be ordered to stop by that aircraft or another aircraft or vessel which continues the uninterrupted pursuit. Compensation must be paid for stopping or arrest resulting from a pursuit which contravenes this provision.

It should be noted also (i) that the pursuing vessel must be a warship or military aircraft or other ship or aircraft on government service specially authorized for this purpose, *i.e.* civilian fisheries protection or coast guard vessels can be so commissioned; (ii) that an arrested vessel cannot claim release, on being escorted back to a port of the arresting state, solely because, in the course of the voyage, the offending ship was necessarily escorted across an area of high seas.

ii) Current Practice: Pursuit from Fisheries or Exclusive Economic Zones

Although neither the High Seas nor any other Convention makes specific provision for pursuit to commence from either of the above zones, in view of the extension of the customary right of hot pursuit in the High Seas Convention to include pursuit for violations of rights deriving from the functional purposes for which the Contiguous Zone was created in the Territorial Seas Convention, there seems no reason to doubt (although one or two writers disagree) that, following the declarations of 200 miles functional jurisdiction, hot pursuit can be commenced in such zones, though for violations of fisheries regulations only, *i.e.* for breach of the purposes for which these zones have been established. State practice now confirms this interpretation. There seems, moreover, to be no legal reason why the pursuit shoult not be continued into, and if necessary through, the FZ and EEZ of another state (though it could not be started there) since these areas remain high seas (unless there is general acceptance of an UNCLOS Convention under which it can be argued that the EEZ is *sui generis, i.e.* neither territorial nor high seas in status). The Geneva Convention, Article 23(2), provides that the right ceases "as soon as the ship pursued enters the *territorial sea* of its own country or of a third state" (emphasis added) *i.e.* it does not cease as soon as the ship enters the contiguous zone. The FZ and EEZ, however ambiguous their legal status, are clearly not part of the territorial sea.

iii) Provisions in the UNCLOS Text

Article 111 of the UNCLOS III Draft Convention makes provisions for hot pursuit similar to those of the High Seas Convention but adds (Aricle 111(2)) that "The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf Installations, of the laws and regulations of the coastal state applicable in accordance with the Convention to the exclusive economic zone or continental shelf, including such safety zones," and adds (Article 111(e)) that "the right of hot pursuit ceases as soon as the ship enters the *territorial sea* of its own country or of a third state" (emphasis added). The vessel pursued must have been in the EEZ or on continental shelf at the crucial time. Ships so arrested and taken back to a port of the arresting state cannot claim release solely on the ground that the ship, in the course of its voyage, was necessarily escorted across part of the EEZ or high seas.

Although the above provisions confirm the interpretation of customary law stated earlier, states will in practice no doubt want to exercise caution in pursuing foreign vessels into the FZ or EEZ of other states, especially into the zones of the flag state of the vessel pursued, where that state's jurisdiction over fisheries prevails. Current practice suggests that although some states authorize pursuit of offenders into the FZ some of them do so only following conclusion of bi- or multi-lateral agreements with the states concerned. It is important that pursuit does take place across such boundaries as, with the large areas now covered by FZ's, they provide the most convenient escape route for unregulated whalers. Although neither the UNCLOS Text nor any other treaty so provides, in view of the singling out in the UNCLOS Text, by means of special provisions for both Highly Migratory Species in Article 64 (the descriptive Annex of which includes most cetaceans) and for Marine Mammals in Article 65 (with special reference to cetaceans), states concerned to prevent "pirate" whaling, especially the parties to the ICRW, might consider initiating by agreement amongst themselves, the possibility of pursuit of vessels offending against International whaling regulations within their zones. Surveillance of foreign vessels remains an unrestricted freedom of the seas; concerned states could exercise this mutually, to aid each other in facilitating the exercise of hot pursuit when "pirate" whalers cross relevant high seas boundaries or are observed whaling In the FZ's of states with the appropriate national laws.

2. Alternative Methods that might be adopted to Improve Enforcement of Fisheries Jurisdiction against "Pirate" Whaling

a) Introduction

As surveillance, pursuit and other methods of enforcement at sea are expensive in vessels and personnel, especially for developing countries, in the light of such technological advances as use of helicopters, radar, transponders, and satellites, all of Which require trained personnel for operation, and as provision of inspectors or observers also requires that the necessary qualified personnel are available, alternative methods of enforcement such as detention of "pirate" whaling vessels if they enter the ports of states participating in such a scheme of enforcement, or if they attempt to land whales or whale products in the countries concerned, might provide alternative means of deterring "piratical" activities. A coastal state is not prohibited by international law, even If a catch has not been taken in contravention of international law *(i.e.* if the flag state is not party to the ICRW or other relevant Convention, or the catch Is of a species not regulated by the ICRW, and, in either case, is taken on the high seas) from preventing "pirate" whaling vessels entering or using Its ports or from landing or trading in the catch, or products derived from it, as long as the necessary national laws to prevent these actions have been enacted, in accordance with international law concerning personal and territorial jurisdiction. A fuller explanation of the use of trading laws, as well as other territorial techniques for deterrence of "pirate" whaling, will be given later in the relevant sections of Part 3, on national laws. It remains to consider in this section the possibility of adapting the technique of port state jurisdiction, developed by IMCO and the UNCLOS for purposes of preventing marine pollution emanating from oil discharges from tankers, to prevent "pirate" whaling. Its adaptation to whaling is not without difficulties and would require a major innovative change in the law and practice of states concerned to use it. Nonetheless, as it would provide a most ef-

fective weapon against the "pirates", it is worth considering what would be required.

b) Extension of Port State Jurisdiction to Prevent "Pirate" Whaling
The IMCO International Convention for the Prevention of Pollution from Ships 1973[52]

This Convention, which is generally known as, and hereafter referred to as, the MARPOL, was adopted by IMCO (Inter-Governmental Maritime Consultative Organization) on 2 November 1973. It has not yet entered into force. Its objectives include one similar to the prohibition of "pirate" whaling — that of achieving the complete elimination of intentional pollution of the marine environment by oil and other harmful substances. To this end it introduced, in Article 5, the provision that ships of states parties must hold a certificate establishing that the ship has been inspected and conforms to required standards. When it voluntarily enters ports or offshore terminals under the jurisdiction of a state party duly authorized officers of that state can inspect it but solely for the purpose of verifying that there is on board a valid certificate, unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate. In that case, or if there is no valid certificate, the inspecting state can take such steps as will ensure that the ship will not sail until it does not present a threat to the marine environment. If a party takes action against a ship because it does not comply with the Convention, or denies it access to its ports or terminals, it must inform the flag state authorities and before taking either action the flag state administration can be consulted.

The Convention also provides for limited action *against non-parties* to it: Parties must apply the "requirements" of the Convention with respect to ships of non-Parties "as may be necessary to ensure that no more favourable treatment is given to such ships." Although this is somewhat ambiguous and open-ended there is no doubt that some form of inspection of non-parties' ships can take place.

Parties are also, under Article 6, required to co-operate in the detection of violations and the enforcement of the Convention, "using all practicable means of detection." Ships to which the Convention applies (read in conjunction with the above it Is possible that this provision too applies to non-parties' ships) may, in any Party's port or off-shore terminal be inspected by authorized officers of that Party in order to verify whether the ship has made an unlawful discharge in violation of the Convention's regulations. If it is found that a violation is indicated a report of discharge in violation of the Convention is forwarded to the Flag State Administration. On receiving such evidence the Administration, if the evidence is sufficient, shall "cause proceedings to be taken in accordance with its law." Parties can also inspect ships to which the Convention applies, if they voluntarily enter their ports or offshore terminals, if another Party requests the investigation and provides sufficient evidence that the ship has discharged harmful substances *in any place.* A report is sent both to the requesting state and to the Flag State Administration so that appropriate action under the Convention can be taken.

Unless the discharge has occurred in an area subject to the jurisdiction of the coastal state concerned (which at present for oil pollution purposes is the territorial sea, although the MARPOL, by using the phrase "violation.. within the jurisdiction," left open the possibility of an extension of jurisdiction for this purpose to the 200 mile EEZ under any forthcoming UNCLOS Convention), although the port state has inspection and reporting powers, proceedings are still left to be instituted by the flag state.

The MARPOL has not yet received sufficient ratifications for entry into force and, as will be seen from the above account, the concept of port state jurisdiction is a limited one in the MARPOL but nevertheless it does provide some advance on former methods of enforcement and greatly facilitates the production of evidence of violations. Nonetheless, in considering whether either these powers or the more extensive powers proposed for prevention of oil polluting discharges in the UNCLOS Text can or should be extended to prevention of "pirate" whaling, it must be conceded that the major difficulty is that in both the MARPOL and the UNCLOS system it is essential that an offence against international law be committed or that there be grounds for suspecting that this is so. There must be a violation, in the case of MARPOL, of the Convention's regulations, and in the case of the UNCLOS Text, as we shall see, of internationally agreed standards. The challenge in extending port state jurisdiction to "pirate" whaling would be to find ways of rendering this activity on the high seas a legal offence, at least as between parties to the, scheme. The possible methods of doing this are considered later.

c) Proposals in the UNCLOS Draft Convention (Informal Text)

The UNCLOS Draft Convention (Informal Text) makes provisions in Article 218(3), in the case of vessel-source pollution only, which are stronger than the MARPOL ones. It provides that when a vessel is *voluntarily* within a port or offshore terminal of a state party, that party may undertake investigations and, where warranted by the evidence of the case, *institute proceedings* in respect of any violation of *applicable international standards* established through the competent international organizations or by general diplomatic conference, and occurring outside that state's internal waters, territorial sea or EEZ, *i.e.* on the high seas, if the flag state requests such action. The port state must also, as far as practicable, comply with requests from any other state for investigation of a discharge in violation of the international rules and standards referred to in Article 218(1), which is believed to have occurred in, caused or threatened to cause damage to the internal waters, territorial sea or EEZ of the state making the request: it should be noted that this provision does not apply to damage to the high seas. The port state likewise must, as far as practicable, as stated, comply with requests from the flag state for investigation of such violations irrespective of where the violation occurred, *i.e.* it can include the high seas since flag states have jurisdiction thereupon.

The UNCLOS Text provides various safeguards of the paramountcy of flag state interests and jurisdiction over its flag ships, for example in Articles 223-233. The records of the port state's investigation must be transferred to It (or to the requesting coastal state) on request. Proceedings initiated by the port state *may* be

suspended at the coastal state's request if the violation has occurred in areas subject to that state's jurisdiction, and the evidence will then be transferred to it (though it appears that transfer is not obligatory). The port state must then stop its own proceedings. Article 228 provides *inter alia* that if the offences occurred beyond the territorial sea of the prosecuting state "the proceedings must be suspended if the flag state itself institutes proceedings within six months of the institution of the port state's proceedings, *unless the proceedings relate to major damage to the coastal state or the flag state in question has repeatedly disregarded its obligations effectively to enforce on its vessels the applicable international standards and rules.* Only monetary penalties can In any event be imposed, under Article 230, for offences beyond the territorial sea and vessels can be released on bonding or other financial arrangements.

The UNCLOS Text does not, as we have seen, make any such provisions for port state jurisdiction over fisheries offences generally or for violation of international regulations relating to whaling, so any extension of such arrangements to whaling would have to be effected by international agreement outside UNCLOS, *i.e.* concluded subsequently through international organizations or through general diplomatic conference. The IWC is not such a broadly based international organization and may not provide such a good forum for negotiations of such schemes as the IMCO, which has 110 member states compared to the IWC's 35 and is also a UN specialized agency, or the ILO, which is also gradually providing for limited port state enforcement of some of its conventions' requirements *(e.g.* the 1976 Convention Concerning Minimum Standards in Merchant Ships), which has 137 members and is also a specialized agency of the UN.

Nonetheless, it is an encouraging development for the progress of effective enforcement, and one that points a way for the IWC, and other states interested in preventing "pirate" whaling, that even before these IMCO and ILO Conventions have entered into force some Western European States are inspecting vessels which enter their ports to see whether they conform to certain IMCO and ILO standards germane to prevention of oil pollution and elimination of sub-standard ships, under the terms of an informal Memorandum of Understanding agreed at The Hague in May 1978[53], following the *Amoco Cadiz* disaster. The EEC has subsequently given its support to this development. The procedure is still very limited; any deficiencies found from the international standards are merely reported to the flag state for action but nevertheless this does provide evidence that in the face of overwhelming and continuing incidents of oil pollution damage states have been prepared to regard as international standards which *should* be observed by *all* states, requirements laid down by international organizations of which the offending states may not be members, in conventions to which they may not be party, and in non-binding resolutions. These Port States have not, however, considered that they have a right to arrest or prosecute for such infringements, only to report to the flag state, since the deficient vessels have not violated either conventions to which both states are party or customary law.

Although the technique of port state enforcement proposed in the UNCLOS Text would be of inestimable value in deterring "pirate" whaling or similar operations on otherwise regulated marine mammals there are obviously a large number of difficulties in persuading a sufficient number of states to effect the necessary changes in the law and to participate in such a scheme to make it fully effective. Moreover, the UNCLOS Text provisions are very limited:

(i) they are confined to vessel-source pollution;

(ii) there must be clear objective evidence that a violation of international law has occurred (*i.e.* a discharge into the EEZ or Territorial Sea);

(iii) the violation must be of "applicable *international standards"* (though these need not necessarily be laid down in a Convention);

(iv) the violation must cause major damage or threat thereof to the coastline or related interests of the coastal state, or to resources in its territorial sea or EEZ;

(v) the vessel must enter port voluntarily.

d) Possible Changes in the International Law Required to Enable Exercise of Port State Jurisdiction Against "Pirate" and Other Whalers

(i) Offences in areas subject to national jurisdiction

To the extent that "pirate" whaling proper takes place on the high seas and does not directly threaten territorial interests, and that the protective standards of the ICRW or other conventions described in Section I of this Report are not universally accepted or even as widely accepted as those established by IMCO Conventions, or by Resolutions and Recommendations of the wider membership of IMCO (if they were "pirate" activities would not persist), the comparison between vessel-source pollution and "pirate" whaling is not a very close one. However, the special provisions now made for whales in numerous treaties indicate that they can and should be distinguished from fin fisheries and require a higher level of protection. Fully effective enforcement in zones of national jurisdiction is one part of the strategy to deter unregulated whaling and port state jurisdiction would undoubtedly improve enforcement for offences in these zones. It would, it is submitted, be acceptable to introduce for whales only some form of port state jurisdiction for violation of standards established by the appropriate international organizations and by conventions, for whales listed on the appropriate Annexes or Schedules as being endangered and requiring protective measures. States participating in the scheme would then have to enact into their national laws the relevant provisions identifying these species, and incorporating the necessary measures and standards, violation of which would then become an offence under national law for which proceedings could be instituted in national courts.

Introduction of port state jurisdiction for whaling would necessitate conclusion of a new international agreement, perhaps in the form of a Protocol to the ICRW, or — in order to include non-member states which might be interested to deter "pirates" though not to join the IWC — by an ad hoc diplomatic conference. The former would not require that the ICRW be revised; only that it be added to. The Protocol might be opened to non-member states wishing to support the scheme and which have national laws comparable to or stricter than IWC regulations. This would be desirable because the greater the numer of states participating in the scheme the less the "ports of covenience" open to unregulated whalers. Some states already, under national laws, prevent all whalers from using their ports at all, whether they have whaled outside IWC regulations or not. Examples of such laws are given in Part 3. The objective of the wider scheme would be to create a *network* of ports barred to unregulated whalers thus creating a tight regime against them which would inhibit activities also on the high seas. This could perhaps be done first on a regional or coastal basis, as was done for pirate broadcasting so that potential "pirates" at least could be eliminated from a whole region or area. As long as port states do not discriminate against the vessels of any one state but ban all vessels of a particular class which threaten to damage whale conservation there would seem to be no legal objection to such action; states are increasingly refusing entry to polluting vessels, especially nuclear powered ones or those carrying nuclear or other harzardous cargoes, which threaten adverse effects on the coastal state. Although "pirate" whaling does not so directly affect the coastal state's environmental conventions concerning protection of cetaceans have created an international interest on the part of all states party to them in preserving these species, and as we have seen, require that national laws provide the measures to ensure their protection. Maritime states will want to ensure adequate safeguards of the flag state interests: the MARPOL and the UNCLOS Text show ways in which this can be done. Customary rights of refuge for ships in distress would, of course, have to be preserved.

(ii) Offences on the High Seas

It is suggested that introduction of a scheme of fully effective port state jurisdiction for deterrence of "pirate" whaling proper, *i.e.* enabling arrest of vessels that have whaled *on the high seas* ouside IWC regulations, not just vessels so whaling in the EEZ's of other states, nor merely denying port entry, merits careful study and consideration but if it is to be more effective than that proposed in the UNCLOS Text, and not limited to mere reportage to flag states, as under the Hague Memorandum, it will be necessary to make whaling in violation of international standards of an offence under as many national laws as possible, and institute the scheme by treaty or Protocol, states party to which would create an offence which would make at least whaling outside IWC regulations illegal.

"Pirate" Whaling as a "Conversion" of the International "Property" in the Global Common Heritage

As port state jurisdiction on the MARPOL and UNCLOS model, if instituted, can be applied in EEZ's only, for breaches of international standards which have occurred in these zones of national jurisdiction (albeit that the zone claimed can be foreign to

that of the port state) and does not apply for offences occurring on the high seas unless the *flag state* of the violating vessel requests port state action, the system is not one directly applicable to prevent or deter "pirate" whaling proper, *i.e.* on the high seas. An alternative strategy is therefore required; it might be better, to avoid confusion, if it were adopted instead of, not additional to, the UNCLOS type of port state system. A technique is required which would enable port states to take action against "pirate" whaling vessels which have *on the high seas* taken whales otherwise protected under international conventions and standards. The legal problem is the lack of illegality in the action under present international law; a possible solution, not, of course, without political difficulties, would be for IWC members and "like-minded" states amongst themselves to regard such taking as a theft, or tort — a conversion of "international" property — a reverse adaptation of the method being used by the group of states which has enacted unilateral legislation to enable deep sea mining to facilitate their operations. How could this be done? Here perhaps the UNCLOS provisions concerning the resources of the Deep Seabed Area, beyond national jurisdiction, give some guidance on the means. Articles 136-138 of the UNCLOS Text declare as follows (emphasis added):

"Section 2. Principles Governing the Area

Article 136
Common Heritage of Mankind
The Area and its Resources are the Common Heritage of Mankind

Article 137
Legal Status of the Area and its Resources

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized.

2. *All rights in the resources of the Area are vested in mankind as a whole,* on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals derived from the Area, however, may only be alienated in accordance with this Part and the rules and regulations adopted thereunder.

3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals of the Area except in accordance with the provisions of this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

Article 138
General Conduct of States
in Relation to the Area

The general conduct of States in relation to the Area shall be in accordance with the

provisions of this Part, the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international co-operation and mutual understanding."

The Authority referred to is the International Seabed Authority which will be established by the same treaty if and when it enters into force. Although not all the 150 or more states which have participated in the UNCLOS will necessarily become party to the final Convention this provision will stand and have effect between the states party to the Convention. Article 137(2) goes on to provide also that "these resource are not subject to alienation. The minerals derived from the Area, however, may only be alienated in accordance with this Part and the rules and regulations adopted thereunder." Thus states party could take action against companies or agents of non-party states which violate these provisions, if they enter the jurisdiction of states party. Enforcement of the provision is left, under Article 138, to states parties.

It would be legally possible for the ICRW or some other appropriate organization such as the UN (although the IWC could become an appropriate body) to make similar provision for the great whales, at least, to be regarded as the common heritage or patrimony of mankind. The IWC could then revise the ICRW accordingly to enable "common heritage" rights in them to be vested in the Whaling Commission. Such a provision could be facilitated, or even established, by the adoption by the UN General Assembly, or some other appropriate international body, of a Resolution declaring whales, or at least, the great whales, or those currently regulated by the IWC, to be the "common heritage of mankind", and perhaps also vesting them in an appropriate body such as the IWC or UN body. A possible draft of such a Resolution is given below. If the IWC or the UN, following the UNCLOS model, vested the rights to the "common heritage" of whales in itself member states could then agree to treat any state whose flag vessel took whales on the high seas outside the regulations of the IWC (or the UN) whether the offence is regarded as a crime or a tort, as a conversion of an international common heritage, and thus a legal offence, which would enable port states to arrest the offenders and to take proceedings against them. A draft resolution is given below, adapted from one devised by the workshop on "Legal Aspects of Conservation of Marine Mammals" held at Quissac, France, 10-14 December 1979.

Possible UN General Assembly Declaration of Principles Governing the Conservation of Great Whales

The draft includes some alternatives in parenthesis

Draft Declaration of Principles Governing the Conservation of the Great Whales

The General Assembly:

Recognizing that the great whales are now increasingly being accorded special status in international and national law

Believing that this is a reflection of a widespread change in the perception by peoples of the nature of these animals

Noting that great whales have been the subject of wonder and a source of inspiration in the literature and art of ancient and contemporary societies and nations

Acknowledging that these species are among other marine mammals the group within which certain species and populations have been nearly exterminated by man

Affirming that threat of extinction has arisen from their vulnerability to human depredation because of:

(i) their low reproduction rates
(ii) their need to breathe air which necessitates frequent surfacing
(iii) their visibility when surfaced because of their large size
(iv) their great bulk which renders the catch of even one animal [exceptionally] valuable both for product yield and the intrinsic value of some products, some of which are unique

Feeling that new threats to their well-being have emerged or are in the process of emerging

Bearing in mind that great whales have other special characteristics which distinguish them from fin fish, *inter alia* that they are:

(i) widely distributed and highly migratory
(ii) live at high trophic levels, that is, feed on animals which themselves are predators in the food chain
(iii) have long life spans, mature slowly and depend, when young, for long periods on their parents.

Solemnly declares that:

1. The great whales are the common heritage [patrimony] of mankind.
   All rights in great whales are vested in mankind as a whole, on whose behalf [the General Assembly of the United Nations] [the International Whaling Commission] shall act.
2. States shall recognize the interest of all nations of the world in safeguarding the great whales for present and future generations.
3. States shall co-operate to protect and conserve all species of great whales and to this end shall ensure that national policies and activities affecting the great whales shall take account of their special characteristics and values.
4. States shall recognize that great whales have intrinsic scientific, ecological, aesthetic, biological, cultural, and recreational values, as well as other values, including subsistence value to native peoples.
5. States shall co-operate to establish an effective international regime for the protection and conservation of the great whales through the appropriate international organization to execute the principles herein.
6. Great whales shall be used by all states only for benign purposes which benefit mankind as a whole in accordance with applicable principles and rules of international law.

7. All States shall promote international co-operation in scientific research concerning the great whales, their habitats, marine ecosystems and ecological interrelationships and shall participate as appropriate in international programmes for these purposes.
8. States shall take all measures necessary to prevent the harassment of great whales, degradation of their habitats and harm to them by pollution from whatever source.
9. When and where appropriate, states shall unilaterally or in co-operation with other states by means of international agreements, establish sanctuaries for great whales in which they and their habitats shall be protected.

"Pirate" whaling equated to the offence of piracy

It has been stressed at various places in this Report that "pirate" whaling cannot, as the law presently stands, be equated to piracy on the high seas as defined in customary and treaty law, a thorough analysis of which has recently been made by Professor *Dubner*[54]. Articles 14-22 of the Geneva Convention on the High Seas 1958 (which, it will be recalled, states the desire of its parties to codify the relevant rules of international law) give the offence of "piracy" a specific and limited definition. Article 14 requires that "All States shall co-operate to the fullest extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State" but Article 15 defines the offence as follows:

> "Piracy consists of any of the following acts:
> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed:
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (b) Against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State;
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (3) Any act of inciting or of Intentionally facilitating an act described in subparagraph 1 or sub-paragraph 2 of this Article."

This definition clearly does not extend the offence to acts against living resources such as whales, not even the great whales, however strong the case that can now be made for saying that the latter, at least, are now distinguished in international law as requiring special measures of protection to conserve them.

Customary law, at present, as evidenced by state practice, clearly does not, as long as some states continue to register under their flags vessels whaling outside IWC regulations, equate "pirate" whaling with piracy as defined above. However, there is no reason why concerned states should not endeavour to change this. The IWC would not be an appropriate forum since so few states are members, but the United Nations General Assembly would provide a wider forum in which to negotiate the necessary agreement to treat unregulated whaling for the great whales as an illegal act of violence, detention or depredation akin to piracy. The introduction of a Resolution on the lines suggested above would be a good starting point. It could be

adapted to establish the norm that the taking of great whales without the permission of the appropriate international authority (either the UN General Assembly or the IWC) would be regarded as an illegal act constituting "pirate whaling". Alternatively a separate supplementary Resolution could be introduced. It might be considered that tactically it would be better to proceed in stages and to establish first the basic principles which should distinguish and govern the protection of the great whales, which are likely to be less controversial than constituting "pirate" whaling an international offence.

Another strategy, however, might be to confine the General Assembly Resolution to a Declaration of Principles and to initiate in the wake of the UNCLOS III a proposal to convene an ad hoc diplomatic conference to equate "pirate" whaling with piracy as an international offence. Interested IWC members could take the initiative in convening it, or it could, to attract the widest possible participation, be convened by the UN, perhaps following adoption by the General Assembly of the Resolution proposed earlier. It is now too late to attempt to re-open and re-negotiate the relevant articles of the UNCLOS Convention, including those concerning protection of marine mammals, *i.e.* Articles 65 and 120 (concerning marine mammals taken in the EEZ and on the high seas respectively) despite the fact that at the Ninth Session of UNCLOS III Canada filed an interpretative statement" to Article 65 which presently relates to these species. This statement takes advantage of some of the ambiguities in the present draft and proposes (amongst other interpretations) that the obligations imposed by Article 65 on particular states to "work through the appropriate international organizations" for purposes of conserving, managing and studying whales does not require any state to work through more than one organization, *i.e.* that a state can choose through which organization it prefers to work, which might not be the IWC. This, and Canada's other interpretations, are unacceptable to many other states. This potential controversy could have provided an opportunity for concerned delegations to seek at the UNCLOS to further revise or add to this article and the related Article 120. The opportunity has, however, now been missed although as so few states are currently engaged in "pirate" whaling the climate for revision is now more favourable than at the outset of the UNCLOS negotiation, when several states which are now members of the IWC were whaling outside its regulations and when more states than are now engaged in internationally regulated whaling were taking part in this unregulated activity. It may thus be possible in time to attract support for revision of Article 120 or for an additional article to be inserted by subsequent amendment of the Law of the Sea Treaty by the procedures allowed for in Article 312. Unfortunately these cannot be initiated until 10 years from the date of entry into force of the new convention. Article 120 or a new article would have to make it clear that "Any state taking any species of the great whales on the high seas, outside the regulations established by the IWC, would be held to have committed the offence of "pirate" whaling *(i.e.* a new offence established under the UNCLOS Convention).

An additional Article would then be required on the lines of Article 19, but adapting it as appropriate, of the Geneva High Seas Convention viz. providing that "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate whaling ship and arrest the persons and seize the property and

catch on board. The courts of any State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, and any whales taken, subject to the rights of third parties acting in good faith."

Although, as pointed out earlier, the UNCLOS Draft Convention prohibits imprisonment for fisheries offences committed in the EEZ, not only does Article 65 permit coastal states to regulate marine mammals more strictly than otherwise provided under the fisheries articles (*i.e.* Part VI of the Draft Convention) but there seems no reason why, if the offence is constituted under Part VII (High Seas), imprisonment should not be retained as a possibility.

It is impossible, especially bearing in mind the "package deal" nature of the UNCLOS Draft Convention, to endeavour to renegotiate this article at this late stage but it remains possible to proceed by way of an ad hoc diplomatic conference in the near future, or amendment to the UNCLOS treaty in the more distant future. It is appreciated, however, that at the present time, the opportunity to raise this question at UNCLOS III having been missed, any proposals to achieve this result by the other means canvassed might be regarded as untimely and too far reaching. As, however, it will be several years before amendments to the UNCLOS treaty can be made, the possibility should be borne in mind.

C. Responsibility for Exercise of Flag State Jurisdiction Over Whaling

1. Introduction

Coastal and port state jurisdiction becomes necessary to eliminate "pirate" whaling only if the flag states do not have, or do not effectively apply and enforce, the necessary laws and procedures to protect whales, requiring and enabling them to take proceedings against and to sufficiently punish their nationals for violations of these laws. Flag state duties respecting enforcement are laid down by international law as described below:

2. Under the Geneva Convention on the High Seas

Article 5 of the High Seas Convention (which it will be recalled aims to codify customary law) requires every state effectively to exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Except in exceptional cases provided for in international treaties or other Articles of the High Seas Convention, Article 6 provides that on the high seas ships are subject to the exclusive jurisdiction of the state with which they are registered and whose flag they consequently fly. This remains the legal position in both treaty and customary law. All extension of foreign state jurisdiction to flag state vessels on the high seas have been effected under treaty, *e.g.* in the Joint Enforcement Agreements referred to earlier, or by the extension of coastal state jurisdiction in the fisheries zones and EEZ's, which, though declared unilaterally, were based largely on the consensus arrived at on this issue at the UNCLOS III.

The Geneva Convention on Fishing and the Living Resources of the Sea, which has not been widely ratified and has now been largely superceded by the 200 mile zones,

though recognizing freedom of fishing on the high seas, required all states party to it to adopt, or to co-operate with other states in adopting, such measures for their nationals as may be necessary to conserve high seas resources and that states whose nationals fish high seas areas adjacent to a coastal state's territorial sea must not enforce conservation measures in that area which are opposed to the latter's; negotiated solutions should be arrived at with a view to prescribing by agreement the measures necessary for conservation of high seas resources in that area. Dispute settlement procedures are made available under this Convention, although they have never been used. States party to this Convention, however, or states which accept the provisions as part of customary law, should thus apply on their vessels measures to conserve *inter alia* whales, either on the model of IWC regulations (if coastal states concerned are members of that body) or measures compatible with those of the coastal state. Although this Convention is somewhat out of date it nevertheless provides further evidence of the duty of all states to take measures to conserve high seas resources and to co-operate internationally in doing so.

3. Provisions in the UNCLOS Text

Article 92 of the UNCLOS Text repeats Article 6 of the Geneva Convention placing vessels under the exclusive jurisdiction of their flag state on the high seas, save in exceptional circumstances, but it also goes further than that Convention, specifying in Article 94 not only that every flag state must effectively exercise its jurisdiction and control an administrative, technical and social matters but detailing a number of flag state duties including *inter alia* the requirement that officers and crew be generally competent and appropriately qualified. A state which has clear grounds for believing that proper jurisdiction and control have not been exercised may report the facts to the flag state, which must then investigate the matter and, if appropriate, take any action necessary to remedy the situation. As under the High Seas Convention warships and military aircraft or vessels authorized to be on government service meeting foreign vessels on the highs seas cannot, under Article 100, board the foreign vessel concerned unless there are reasonable grounds for suspecting that, amongst other things, the ship is without nationality, or though flying a foreign flag or refusing to show its flag, is in reality of the same nationality as the warships, in which case the warship can verify its flag and board it, as under the Geneva Convention.

Article 62 of the UNCLOS Text, concerning fishing in the EEZ, requires nationals of other states fishing there to comply with conservation measures and other terms and conditions of the coastal state, established in its regulations. It is likely that — and state practice supports this view — in view of the economic burden of enforcement coastal states will increasingly resort to a system of licensing or permits for fishing (including whaling) in the 200 mile zones and that a term of the licence will be that foreign vessels comply with the coastal state regulations. Flag states will then be responsible for ensuring that the appropriate instructions are given to officers and crews who are also appropriately qualified to carry them out. The licences will be revocable if the flag state does not ensure observance of these legal obligations; revocation provides an additional penalty to imprisonment or fines, etc. Flag states may also increasingly have to accept and provide accommodation for

observers of the coastal state pn board the flag vessel. All these new possibilities, if full advantage is taken of them, will greatly reduce the areas in which "pirate" whaling can take place and will also ensure that vessels whaling on the borders of zones are Inhibited from taking whales from adjacent high seas areas.

Part 2: The European Economic Community (EEC): Measures Taken to Prevent "Pirate" Whaling

I. Introduction

The European Economic Community (EEC) was instituted by the Treaty of Rome[56] for the purpose of establishing a common market and progressively approximating the economic policies of Member States to promote throughout the Community, *inter alia,* a harmonious development of economic standards and increased stability (Article I). To this end it constitutes a new legal order of international law for its ten member states viz. Belgium, Denmark, Eire, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, United Kingdom. For the benefits of its policies Member States have, to some extent, limited their sovereignty. Thus legal instruments of the Community bind Member States in certain clearly defined ways depending on the nature of the instrument used. Moreover, the legal regime established by the EEC applies not only to the member States as such but also to their nationals; independently of the legislation of the national state concerned Community law can impose obligations (and confer rights) on individuals also.

In the fields to which it can, under the terms of the Treaty, apply, Community Law takes precedence over national law. In some circumstances it has a direct effect, in others it does not but requires action by the Member State to give it effect. It depends upon the nature of the instrument used. The Community acting through its Council and Commission established under the Treaty can proceed to implement its purposes by the following means, laid down in Article 189:

(i) *Regulations:* these are measures of general application which bind Member States and, if they extend to them, individuals in those states as part of national law;

(ii) *Directives:* these measures can be individual or addressed to all. Though binding as far as their objectives are concerned, the choice of means of compliance is left to each member state. Member States are also often given a time limit within which to comply.

(iii) *Decisions:* these are individual measures of measures addressed to all the Member States which are binding both in relation to their objectives and the means prescribed in them.

(iv) *Recommendations or Opinions:* these are acts of the Community authorities which are purely advisory and non-binding.

These all require a unanimous vote of the Council of the Community for adoption. As these measures are legally binding in their various ways once adopted they may take a long time to secure approval. Nonetheless, the end result is a powerful enforcement weapon.

The Community decided recently to take action to protect whales, both the conservation (*i.e.* environmental) and economic aspects of fisheries matters being legitimately a concern of the Community for the reasons given later in connection with the Regulation on cetaceans. In this case it decided to ban the import of whales and whale products into the Member States territories and to do so by means of adopting a Regulation under Article 189 of the Treaty of Rome. The Community has four main organs for executing its purposes. The Council of Ministers; The Commission of the European Community; and the European Court of Justice.

i) The Council
The Council is the supreme and most powerful body. It is the decision-making organ in which Member States' voting is weighted according to a formula laid down in the Treaty of Rome (Article 148(2)). Its meetings are attended by whichever Minister of the Member State concerned is most appropriate for the subject matter in issue, *e.g.* for environmental affairs the Minister for the environment; for trade matters the Minister dealing with commerce; for fisheries issues the Minister for fisheries or agriculture. Meeting as the Council of the Community they decide whether to adopt the Decisions, Regulations and Directives proposed by the Commission. They also have the power, acting unanimously, to issue directives under Article 100 for approximation of the provisions laid down in Member States by law, regulation or administrative action, which directly affect the common market.

ii) The Commission
The Commission, a permanent executive organ, has, though it is not a decision-making body, nevertheless an important role to play. Specifically it must ensure that the provisions of the Treaty and the measures to be taken by Community institutions under it are carried out (Article 155). It is also important in the decision-making process since it can make legislative proposals to the Council of Ministers, which the Council then formally adopts or rejects. Though such proposals must concern policy conforming to the Treaty, the Commission can exercise its own initiative in this respect, unlike the Council, without being subject to direction from individual Member States although it works closely with them. If the Council wants a proposal to be amended it has to return it to the Commission with a request to that body to submit an amended version. The Commission works directly with Member States since proposals usually require ministerial approval in these states to become effective but nonetheless it has considerable scope for innovatory proposals, including in the environmental field. It has been making increasing use of this opportunity in this area, including to protect marine mammals.

iii) The European Court of Justice
This Court, which consists of one judge from every Member State, was established by Articles 164-168 of the Treaty, for the purposes of supervising the observance of the Treaty by Member States to ensure that in interpretation and application of the Treaty the law is observed. It interprets the Community treaties at the request of

Community institutions and can also, if Member States specially agree, decide disputes between individual Member States related to the Treaty's objects and even, when appropriate, cases brought by individuals in these states, concerning matters arising under the EEC treaties (Article 173).

Its decisions are binding and Member States must enforce them nationally, by appropriate means. Article 171 requires them "to take all necessary measures to comply with the jugdment of the Court of Justice".

iv) European Parliament

The European Parliament, now a democratically elected body, exercises advisory and supervisory powers conferred on it by the Treaty (Article 137). It can thus also play a role in improving measures to prevent "pirate" whaling and to protect marine mammals generally. It can debate the issues and commission in-depth studies and reports. Once approved by the Parliament these reports together with accompanying recommendations, can be forwarded to the Commission which must reply orally or in writing to questions put to it by the Parliament. It generally acts by an absolute majority of the votes cast.

It will readily be seen that in the light of all the above powers the European Community, as such, has greater opportunities than almost any other single international body referred to in this Report, for organizing international co-operation.' Although its primary concern is to do so amongst its Member States it can also, as an international entity, take the initiative in convening meetings with non-member states for purposes of negotiating further conventions, codes of conduct or other co-operative arrangements. Among its Member States it has wide powers to organize, adopt and take the enforcement measures, including trade embargoes, necessary to defeat "pirate" whaling and other undesirable internationally unregulated activities. It has thus not only recently adopted a Regulation to prevent the import of whales or other cetacean products into Member States but has also acceded to the CITES as a Community since it has international personality for this purpose — it can accede to Treaties of an economic nature, which includes environmental conventions with economic implications[57]. It must now, therefore, coordinate the laws of its Member States in order to implement the CITES as a Community and it has drafted a Regulation, which is currently under discussion within Member States and other concerned bodies, designed to carry out this purpose. The Commission, moreover, has formally sought the approval of Member States for the Community's accession to the new Convention for Conservation of the Living Resources of the Antarctic, described in Part I of this Report, and taken steps to adhere to the 1979 Bonn Convention on Conservation of Migratory Species of Wild Animals and the 1979 Berne Convention on Conservation of European Wildlife and Natural Habitats. The nature and significance of such accession depends on the subject matter and operation of the treaty concerned: the Community can and does (if a treaty so provides) become a full party in its own right, without the additional membership of its Member States, to conventions which regulate exclusively for economic purposes, as is the case in most fisheries commissions (it is thus a party to NAFO (Northwest Atlantic Fisheries Organization) and NEAFC (North East Atlantic Fisheries Convention)). In the case of organizations that are primarily or exclusively concerned with environmental matters, such as conservation of en-

dangered or threatened species, the Community will seek to become a member as well as, and alongside, its Member States, or such of them as become parties to that Convention. It does not replace them. Potentially, therefore, the Community can contribute ten concerned "parties" to give effect to environmental conventions within its area of competence, *i.e.* within the areas and activities subject to the jurisdiction of all Member States.

The Community has not sought to accede to the ICRW; though it has discussed the possibility internally it has decided not to do so. The ICRW does not provide for accession by non-state entities; a Protocol amending the convention to permit this would be required. If it does, however, decide to make the attempt at some future date to do so, it seems likely, given the IWC's present concerns, the comparatively small number of whales now exploited, the number totally protected and the scope and application of its New Management Procedures, that the IWC might now be regarded by most members of the Community as primarily an environmental organization concerned to preserve whales, their exploitation having been long since abandoned by the majority of its members, apart from the exceptions permitted by the IWC for subsistence whaling by aborigines. The Community might thus seek itself to accede and to encourage such of its ten Member States as are not aready members to accede likewise (viz: Belgium, Ireland, Greece, Italy, Luxembourg). The Federal Republic of Germany, not yet a party, is now enacting the necessary legislation to adhere to the ICRW.

When the Community joins an "economic" convention as the representative entity of its Member States it replaces the individual vote of these states to whatever extent is provided under the Convention concerned; if it joins an "environmental' convention alongside its Member States, all retain their individual voting power. If they are able to harmonize their policies for purposes of the Convention then the EEC can cast their vote for them, weighted in relation to the number of Member States which do support that particular policy; Member States which do not do so can vote separately. In either event the potential for better enforcement by co-ordinated action is enhanced. The Community, with Member States approval, can be using its legal powers and the Commission as a focal point for co-ordination of implementation, develop a cohesive policy and programme for enforcement — not only by vessels and aircraft etc. at sea and inspection and observance of maritime activities (it is currently considering proposals for such schemes in relation to fisheries subject to member states maritime jurisdiction) — but also for land-based aspects of such activities: catch and product landings in ports and elsewhere within the territory; through the markets and other commercial processes of Member States. By use of regulations, such as that described below concerning whales and cetacean products, the EEC can impose prohibitions on all trading in such species and products within Member States' jurisdictional areas, as long as it does so in the non-discriminatory manner required by the Treaty of Rome.

The achievement of the unanimous agreement between Member States necessary for adoption of Regulations and Directives concerning the subject matter of this Report is not, of course, without political difficulties deriving from the varying and sometimes unequal economic burdens which such measures impose in Individual states. Nonetheless as the Regulation below proves these can be overcome. There

was considerable discussion within the EEC concerning the legal basis in the Treaty of Rome for the adoption of a Regulation to prevent or control import of whale products, the form such a Regulation should take, and its relation to possible national rules which imposed stricter controls than those proposed for the Regulation. Although the European Commission proposed that the Regulation should be based on Article 113 of the Treaty, the Council finally based it on Article 235, which relates to powers which can be implied in the Treaty by interpretation of its articles and fundamental principles. It was accepted that Member States would be able to retain or introduce stricter national rules based on the provision in the Regulation (Article 3(3)) allowing Member States to continue to take, in accordance with the Treaty, measures for the protection of the cetacean species relating to any whale products which are not covered by the Regulation[58].

The Council and the Commission expressly stated that the agreement arrived at on the legal basis and form of the Regulation, and concerning the permissibility of possible future national rules more strict than those laid down in the Regulation was without prejudice to any future Community Rules for the protection of nature. They also stated that, in the case of the whale products listed in the Annex to the Regulation, Member States can, in conformity to the Rome Treaty, for reasons relating to the protection of cetacean species, enact or maintain, even after the adoption of the Regulation, national laws banning the holding or transport of whale products, except as regard the supervision of such bans insofar as the carriage of goods across state frontiers within the Community is concerned[60]. Article 5 requires that Member States must then take all measures, whether general or particular, appropriate to ensure the carrying out of their obligations resulting from the Regulation and must refrain from any measures which could jeopardize the attainment of the objectives of the Treaty. They must also facilitate the achievement of the Community's tasks.

II. Regulation on Common Rules for Imports of Whales and Other Cetacean Products: Council Regulation (EEC) No. 348/81 of 20 January 1981 (O.J. No. L 391, 12 February 1981)

The Council's powers to regulate in this field are stated in the Preamble to the Regulation to derive from the Treaty of Rome generally and from Article 235 in particular (which concerns powers implied by interpretation of the Treaty and its fundamental principles). It states that "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly state the appropriate measures." The Preamble also draws attention to previous regulations concerning the establishment of a common organization of the market in fats and oils and other products. The Commission's proposals on the subject and the opinion expressed by the European Parliament were also taken into account by the Council, which states that it

recognizes that conservation of cetacean species calls for measures which will restrict international trade and that such measures should be taken at Community level, whilst conforming also to the Community's international obligations *(inter alia* under the CITES).

Initially the list of banned products, which is contained in the Annex to the Regulation, is limited to the main whale or other cetacean products (pending the adoption at Community level of more general measures concerning the suspension of trade in species of wild flora and fauna, *i.e.* measures to implement the CITES) but the possibility of extending the list is reserved. Until that is done Member States will retain the power to take natiohai measures to protect species by regulating import of products other than those covered by the Regulation though import permits should not be issued unless Member States "competent authorities" have assured themselves that the products in question are not to be used for commercial purposes. The parts of whales and other cetacean products currently listed in the Annex are:

— Meat and edible meat offals of cetaceans, fresh, chilled or frozen

— Meat and edible meat offals of cetaceans, salted, in brine, dried or smoked

— Whalebone and the like, unworked or simply prepared but not cut to shape, and hair and waste of these products

— Meat and meat offals of cetaceans, unfit for human consumption

— Fats and oils of cetaceans, whether or not refined

— Oils of cetaceans, boiled, oxidized, dehydrated, sulphurized, blown, or polymerized by heat in vacuum or in inert gas, or otherwiese modified

— Oils and fats of cetaceans, wholly or partly hydrogenated or solidified or hardened by any other process, whether or not refined, but not further prepared

— Spermaceti, crude, pressed or refined, whether or not coloured

— Extracts and juices of the meat of cetaceans

— Flours and meals of the meat and offals of cetaceans, unfit for human consumption

— Leather treated with oil, whether or not modified, of whales or of other cetaceans.

All the products listed below which have been treated with oil, whether or not modified, of whales or of other cetaceans, or which have been made from leather treated with such oil:

— Articles of leather; saddlery and harness; travel goods, handbags and similar containers

— Fur skins and manufactures thereof

— Footwear, gaiters and the like; parts of such articles.

It is particularly noteworthy that a Committee of Cetacean Products is established by the Regulation, consisting of representatives of Member States to supervise the Regulation's application. As the substantial provisions of the Regulation are both short and succinct they are quoted in full below:

Article 1

1. From 1 January 1982 the introduction into the Community of the products listed in the Annex shall be subject to the production of a import licence. No such licence shall be issued in respect of products to be used for commercial purposes.

2. Member States shall notify the Commission before 1 July 1981 of the names and addresses of the authorities competent to issue the import licences referred to in paragraph 1. The Commission shall immediately inform the other Member States thereof.

Article 2

1. A Committee on Cetacean Products, hereinafter referred to as 'the Committee' is hereby set up, consisting of representatives of the Member States with a representative of the Commission as chairman.

   The Committee shall adopt its own rules of procedure.

   It may examine any question relating to the application of this Regulation, including the question of control, submitted to it by its chairman either on his own initiative or at the request of the representative of a Member State.

2. The following procedure shall be adopted for implementing this Regulation:

   (a) the Commission representative shall submit to the Committee a draft of the provisions to be adopted. The Committee shall deliver an opinion on the draft within a time limit set by the chairman having regard to the urgency of the matter. Decisions shall be taken by a majority of 45 votes, the votes of the Member States being weighted as provided for in Article 148 (2) of the Treaty. The chairman shall not vote.

   (b) The Commission shall adopt the provisions envisaged if they are in accordance with the opinion of the Committee.

   (c) If the provisions envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall without delay submit to the Council a proposal with regard to the provisions to be adopted. The Council shall act by a qualified majority. If, within three months of the proposal being submitted to it, the Council has not acted, the proposed provisions shall be adopted by the Commission.

Article 3

1. At the earliest opportunity, the Commission shall submit to the Council a report on whether the list of products in the Annex to this Regulation should be extend-

ed, and on the possibilities for supervising compliance with its provisions, together with proposals, as the case may be.

2. The Council acting by qualified majority on a proposal from the Commission may decide to extend the list referred to in paragraph 1.

3. Pending such decision, Member States may take, in compliance with the Treaty, measures concerning whales or other cetacean products not covered by this Regulation for the protection of the species.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Conclusion

Clearly the European Community with its continuing institutions, including the permanent Commission and dispute settlement procedures in the form of the European Court of Justice, as well as the powers derived from its Treaty which enable it In many circumstances to bind its Member States as well as to harmonize the measures taken by them, represents an important model for regional means of preventing "pirate" whaling. Everyone in its Member States should moreover now be made aware of the Regulation just adopted so that they can monitor its observance, since both private individuals in these states and concerned NGOs can fulfil a vital role in this respect to ensure that the Regulation is stringently applied and enforced.

Part 3: Selected National Laws Contributing to the Prevention of "Pirate" Whaling

I. Laws Concerning Marine Living Resources

It has been emphasized repeatedly in this Report that extension of national jurisdiction over fisheries and the application and strict enforcement of appropriate laws to give this effect is an essential element in preventing "pirate" whaling since it vastly reduces the area available for such operations and renders them increasingly uneconomic.

It must be stressed that national, as well as international law, contributing to the protection of marine mammals is also in a period of transition and development, as national laws gradually adjust to and take account of on the one hand the new perceptions and requirements introduced at the international level, and on the other, in many countries, of internal national demands for better protection of marine mammals generally and of cetaceans in particular.

States respond to these demands legislatively in very different ways, taking into consideration the peculiar requirements and characteristics of their constitutions

and national legal systems. States which have at some point in their history engaged in whaling are more likely already to have on their statute books laws to regulate whaling — and are also more likely to have laws which are out of date — than states which have never engaged in this industry although international concern for the preservation of whales is slowly changing this position.

A recent study by FAO entitled "Legislation and Coastal State Requirements for Foreign Fishing" (Legislative Study No. 21, FAO, Rome, 1981, by Gerald Moore) reveals that as at April 1980 out of some 136 coastal states almost three quarters (99 states) claimed fisheries jurisdiction beyond 12 miles and almost two thirds (84 states) claim limits of 200 miles, and that in a number of other states legislation to extend fisheries jurisdiction to 200 miles is either pending before the appropriate legislative bodies or awaiting entry into force. Whales are likely to be found in or migrate through virtually all these zones as is illustrated in the IWC's provisional list of states which were then (in 1979) non-members, through whose coastal waters' whales migrated ("Countries which are not members of the International Whaling Commission and which may have stocks of cetaceans off their coasts" (Geographical, IWC/29/14, Appendix A). Most of the now 35 member states of the IWC also have some cetaceans off the coasts. This evidence confirms the importance of all coastal states enacting legislation to regulate whaling within these zones, at least to the extent laid down by the International Whaling Commission, though some states prefer to prohibit all whaling within waters under their jurisdiction. The FAO study does not include examples of legislation specifically related to whaling but in analysing leading examples of current national legislation relating to the licensing and control of foreign fishing operations in coastal waters it provides compelling evidence of the wide extent to which such states now control such operations and devotes specific attention to enforcement methods. Examples are given of the national legislation establishing 200 miles jurisdiction over fisheries of 9 states (Brazil and Liberia (Territoral Sea Legislation), Canada, United Kingdom (Fisheries zones), Guyana, Mexico, Portugal, Seychelles (Economic Zones)) and of the national legislation providing for the control of foreign fishing operations in such extended zones of 13 states (Brazil, Canada, the Gambia, Japan, Mexico, New Zealand, Norway, Portugal, Senegal, Seychelles, Sri Lanka, United Kingdom, United States of America. This work is certain to be a vital tool and guide to fisheries enforcement methods. It is both pointless and practically impossible to duplicate its coverage in the present Report but some selective examples are included in the illustrations of national legislation pertaining to prevention of "pirate" whaling which as given below, as well as examples of national legislation directed specifically at regulation of whaling.

It should be noted that it is at present difficult, unless a direct and individually targeted approach to the fisheries departments of the 136 coastal states is made, to obtain examples of national legislation in force, as not all national laws are published and those that are seldom available in translation or fully up to date. The United Nations Legislative Series includes several volumes on "National Legislation and Treaties Relating to the Law of the Sea" but necessarily, as it covers all aspects of the subject, has only a limited section on laws relating to fisheries and conservation of living resources; very few examples of whaling regulations have been included in recent volumes, and in any event the most recent volume (ST/LEG/SER.B/19, UN,

New York, 1980) does not include laws enacted after 1978.

Contracting Governments of the ICRW are required to provide the IWC with copies of their national legislation relating to whaling. Although some states have fulfilled this obligation fully, of its 27 member states in June 1981, eight had provided no examples. Some of these were very new members, one of which (Switzerland), being land-locked, Is unlikely to have any relevant laws, but two (Argentina and Denmark) are long-standing members and the others certainly do have relevant laws *(e.g.* Chile and Peru). One of the newest members, Tonga, has already supplied copies of its 1979 laws. Some states, however, such as Australia, Brazil, Canada, Seychelles, Spain and the USA have also supplied materials relating to 1979 and 1980. But the information supplied by others is very out-of-date (Sweden (1916), France (1925), Iceland (1949), Japan (1951)). It is obviously important that all the members should supply the maximum up-to-date information on their legislation to the IWC Secretariat. This helps to publicice the deterrent laws, serves as a useful guide for potential members, and enables the concerned public, if they care to make use of the information thus provided, to take part in monitoring the observance of these laws.

States laws fall roughly into two groups, depending on whether they adopt what might be called a minimalist or maximalist approach to regulation. States falling into the first category are those which merely adjust to the changing perspectives by adapting existing laws, many of which relate to the early days of the whaling industry, by amendment. A good example of this approach is the United Kingdom. In the second group are the few states which have radically revised their whole approach to marine mammal protection and in the light of growing demands for more effective conservation have introduced innovatory legislation providing comprehensively for this purpose and dealing with all aspects of the regulatory problem. The leading example In this group is undoubtedly the United States. Unfortunately, neither example at the present time offers perfect guidelines for other states to emulate. The former is perhaps too simplistic and does not meet legislatively the changing views on cetacean protection, the latter in endeavouring to deal with the problem holistically is immensely complex and introduces a number of new concepts and provisions which make its interpretation and application difficult even for a state with the legal, administrative and scientific resources of the United States; it requires administrative and scientific authorities to be established to provide the necessary advice, as well as extensive monitoring of observance of its complex requirements. The Australian Bill for its proposed new whaling act avoids some of these difficulties, but in doing so, of course, avoids adopting a positive approach to management of cetaceans, though this does not dimish its effectiveness as a tool for deterrence of "pirates". Its provisions in this respect are exceptionally far reaching, as will be seen.

The following account of these and other relevant examples of national laws concentrates not on the general management problems, which are not so directly of concern to the subject matter of this Report, but on the ways in which national laws contribute to improved enforcement techniques for deterrence of "pirate" whaling. The approach of the United States of America, which is the most comprehensive of all national systems, will, however, be examined first. The list of the national laws

concerning whaling of member states of the IWC which are currently on file at the IWC Secretariat, will be observed to be neither complete nor up-to-date for all member states in the light of the discussion below. It is hoped that more states will contribute examples of relevant national laws for inclusion in the expanded version of this Report, namely the Handbook of Legal Measures for the Protection of Marine Mammals.

A. USA Legislation for Protection of Marine Mammals

1. Introduction

The background to the USA's present comprehensive approach to marine mammal protection reveals a route that could be followed by other states interested in adopting a similar, if not an identical, system. Recent USA laws such as the Marine Mammal Protection Act 1972 (hereafter referred to as the MMPA) and the Endangered Species Preservation Act 1973, represent a revolutionary change from the previous approach to the problem, which was based like the UK's existing system on a series of Whaling Acts and Regulations applying IWC requirements by means of a licensing system. A variety of interests, commercial, scientific and others, converged in agreement that the existing approach to legislative protection of these species, based on a diffused series of ad hoc enactments partially concerned with a variety of different species, was inadequate; many species were not protected at all. There were also problems, which may be representative of those experienced in similar federal systems, in that some species were protected only by the laws of certain individual states. However, as has been pointed out by *M. Bean* in his outstanding work on general US law in the wildlife field viz. "The Evolution of National Wildlife Law"[59], reconciliation of the legislative proposals of the various interest groups concerned to manage or conserve marine mammals led, in the case of the MMPA in particular, to complex compromises in the objectives, criteria and other terms of the legislation. As a result, although the general aim of unity in one act all the legal protection measures required for marine mammals is one that other states might take as a model, the complex terms used to effect this may require some revision by other states in the light of US experience. The US legislation can be used as a model for the bringing together in one instrument of *all* regulations for marine mammal protection and also of both trade sanctions and customary methods of fisheries enforcement. It is, therefore, important to methods of deterring "pirate" whaling but it must be treated with some caution insofar as its policy and other objectives are concerned, some of which are difficult to apply even in developed countries in view of the present lack of scientific knowledge of marine mammal populations and behaviour.

Nonetheless, other states might well follow the example of the USA in both consolidating and co-ordinating all regulations in one statute and federal states might also wish to follow the example of removing authority to a large extent from individual states, centralizing it in the federal government, then delegating appropriate parts of it back to the states to carry out federally approved measures. Australia, for example, as will be seen, is following a similar path, although Canada has not yet done so.

2. Marine Mammal Protection Act 1972 (16 USC Sec. 1361 et seq. (Supp. III, 1973))

In 1972, following the Resolution adopted at the United Nations Conference on the Human Environment, which called for a 10 year moratorium on all commercial whaling, the US enacted a Marine Mammal Protection Act, which heralded a new approach to regulation and protection of these species. Professor *Coggins* has commerited graphically:

> "Before the enactment of the MMPA, the little positive law protecting marine mammals was incomplete, fragmented among jurisdictions, and ineffectual in terms of protection. Some whales could be taken or imported, some treaties limited the harvest of some species, and a few states attempted to protect or limit the killing of others, but mostly the law amounted to catch as catch can.
>
> The MMPA is a radical departure from prior law and practice. Overnight, as it were, priorities were reversed 180 degrees: a moratorium on taking and importation was enacted; a new federal system was created; state law was pre-empted; and new policies for the international sphere were announced"[60].

The MMPA followed US Congressional findings that some species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of human activity and that they should henceforth be maintained on a ecosystem basis, at or above their optimum sustainable population. This approach goes much further than the IWC's New Management Procedures and as a result US national law now applies and enforces more stringent regulation than that of the IWC or the other Conventions referred to in Part I. The MMPA protects individual species as well as stocks in order to take account of inter-species relationships and dependencies. It also seeks to promote fresh international action to protect marine mammals and to this end requires US negotiators to pursue the Act's policies in international fora and even allows controls on imports of whale and other products from foreign states the fishing practices of which undermine the fulfillment of MMPA objectives. Formal procedures are provided for exceptions to be made on some parts of the Act.

Apart from the general improvements in management aimed at, the MMPA does offer a good model for improved methods of enforcement, as the specific provisions reviewed below indicate.

a) The Moratorium on Taking and Importing Marine Mammals and Marine Mammal Products

i) Definition

Section 1371 of the MMPA establishes two kinds of moratoria: first on any taking of marine mammals (which are very widely defined in S. 1362(5)) subject to some specific exceptions for which permits are required; secondly on importation of both marine mammals themselves and of their products. Moratorium is defined in S. 1361(7) as meaning "a complete cessation of the taking of marine mammals and a complete ban on the importation into the US of marine mammals and products thereof, except as otherwise provided." Marine mammal product, under S. 1361(6) means any item of merchandise which consists, or is composed in whole or in part, of any marine mammal.

ii) Illegal Acts

The above makes illegal both taking and importation of marine mammals, including whales, whether the taking is done by vessels whaling under the flags of members of the IWC or not, unless it is done exceptionally under a permit issued by the US, in the following terms:

(a) *Taking* includes taking by any vessel or person subject to the jurisdiction of the US and is broadly defined to include "to harass, hunt, capture, or kill any marine mammal" (S. 1362(13)); a definition which could be extended to broaden also the term "pirate whaling". Even unintentional taking is covered.

(b) *Importation* of any part of a marine mammal or any production therefrom into the USA (S. 1361(15) as amended). The catch of high seas "pirate" whalers cannot therefore be landed in the USA or otherwise imported. "Marine mammal product" is defined in S. 1362(6) as meaning "any item of merchandise which consists, or is composed in whole or in part, of any marine mammal." The term "importation" is not, however, defined, though the CITES does define it.

iii) Exceptions

A system of permits, which may be general or specific, is constituted by the MMPA. They are subject to prior review by new bodies constituted under the Act (the Marine Mammal Commission and its supporting Committee of Scientific Advisers on Marine Mammals), and allow, for exceptions to be made to the full rigour of the moratorium. Permits can be issued by the appropriate Secretary only if they are advised by these bodies as being consistent with the criteria laid down in S. 1361 of the MMPA, which requires an eco-system approach to management and determination therefore of "optimum sustainable population." The exceptions can be made for scientific research, for marine mammals taken incidentally to the course of commercial fishery operations; or takings by certain aborigines. But any taking authorized by waiver of the moratorium must not reduce the species of population concerned below the OSP. In promulgating regulations pursuant to waivers the Secretary, under S. 1373(b) must take into account the effects on conservation, development and utilization of fishery resources and the economic and technical feasibility of implementation.

b) Scope of Jurisdiction

i) *Geographical*

S. 1372(a)(2)(A) applies the MMPA to, and is thus there enforceable, in waters or on lands subject to US jurisdiction, although exceptions were created for taking expressly provided for by an international treaty, convention or agreement to which the US is party and by US laws implementing international law which had entered into force before the relevant provisions of the MMPA became effective. US territorial waters are at present limited to 3 nautical miles but the Act applies also to zones subject to US fisheries jurisdiction which was extended by the Fisheries Conservation and Management Act of 1976 described later in this section to 200 nautical miles from the baselines of the territorial sea.

ii) Personal: S. 1372(a) Makes Unlawful:

(a) "the taking of any marine mammal on the high seas by any person subject to the jurisdiction of the United States" S. 1372(a)(1)). This clearly prevents pelagic whaling by any US registered vessel, or person subject to US jurisdiction, *i.e.* US citizens, unless done under permit for the exceptional purposes laid down in the Act. In other words neither US citizens on US ships nor those serving on the flag ships of others can engage in "pirate" whaling on the high seas. Similar extension of personal jurisdiction by the majority of states would eliminate such activities if effectively enforced. The personal jurisdiction can, of course, only be executed when the offender returns within the jurisdiction of his national state.

Fortunately, however, for the maximum effectiveness of this provision, *i.e.* its use to prevent *all* whaling by US nationals, a US Court gave it this interpretation and found (In *US v. Mitchell*)[61], that US citizens taking marine mammals in the territorial waters of a foreign nation *could* be convicted under the Act, on the grounds that the Act could not be restricted in its application only to takings on the High Seas or within US jurisdiction (as contended by the defendants). The court concerned accepted that the objective of the general moratorium required that US citizens be prevented from taking marine mammals anywhere; It will be important therefore for states wishing to follow the model of the MMPA to ensure by appropriate legislative acts that the potential loophole represented by the MMPA provision that persons subject to national jurisdiction are stopped from taking only on the high seas be clearly closed.

(b) the taking by persons of *any* nationality of marine mammals in waters or on lands under the jurisdiction of the USA, which now of course also extends to the 200 mile Fisheries Zone (S. 1372(a)(2)(A)).

c) Prohibited Acts

In addition to the acts referred to above S. 1372 makes illegal the following:

(i) the use by any person, of any port, harbour or other place under US jurisdiction for any purpose in any way connected with the taking or importation of marine mammals or products thereof (S. 1372(a)(3)(A));

(ii) possession, by any person, of any such mammal (S. 1372(a)(3)(A));

(iii)transportation, sale offering for sale, of any such mammal or products thereof (S. 1372(a)(3)(B));

(iv)use by any person in a commercial fishery of any means or methods of fishing which contravene any regulations or limitation issued by the appropriate fisheries Secretary (S. 1372(a)(4));

(v) *Importation* of:

(a) marine mammals which are pregnant or nursing at the time of taking (if under 8 months old), or those taken from a species legally designated by the Secretary as a depleted species or stock or listed as an endangered or

threatened species under the 1973 US Endangered Species Act (which is described in the next Section of this Part of the Report), or taken in a manner determined by him to be inhumane (unless permitted for scientific research) (S. 1372(b) (1-4)). The wording of this section which appears to Imply that mammals taken for research can be taken in an inhumane fashion is not a model to be followed by other states;

(b) any marine mammal taken in violation of the MMPA (S. 1372(c)(1)(A)), or taken in another country in violation of its laws;

(c) any marine mammal product trade in which is illegal in the country from which it originated (S. 1372(C)(2)(A-B)).

There is a wide choice of sanctions under the MMPA: civil, criminal, and others. These include:

(i) *Civil Penalties:* a penalty of up to $ 10,000 can be exacted from any person who contravenes the terms of any permit issued to him, or any MMPA regulation, or any other provision under the Act (S. 1375(a)).

(ii) *Criminal Penalties:* any person who "knowingly" commits the above offences can be subjected to a fine of up to $ 20,000, or can be imprisoned for up to one year, or both (S. 1375(b));

(iii) *Other Penalties:*

(a) If a vessel or "other conveyance" is concerned In the prohibited acts its cargo ot the equivalent monetary value can be seized and forfeited (S. 1376(a));

(b) The vessel itself can be subjected to a civil penalty of up to $ 25,000.

(iv) *Supportive Measures:* Furnishing of information leading to convictions under the Act Is encouraged by the provision that half of any fine levied up to a maximum of $ 2,500, can be paid to the Informant.

d) International Programme

Because International treaties governing exploitation of marine mammals (Including the ICRW) bind only the states party to them and because some states exploiting the resource concerned are not party to the appropriate treaty or treaties, the treaties Involved (described in Part I of this Report) cannot effectively achieve their objective of preserving and protecting the resource. Treaties generally aim to include as many as possible of the states exploiting the resource, as well as others concerned to protect it. To encourage this compromises are made, as for example we have seen in the ICRW which provides objection procedures for states which are not prepared to accept the decisions of the majority, and which leaves enforcement to national means. All the agreements described in this Report's first Part leave enforcement to national means, *i.e.* they can be enforced by national states only on their own nationals, and on foreigners only if they commit an offence within the national Jurisdiction concerned.

The USA has therefore in the MMPA, and related Acts, endeavoured at least for marine mammals to remedy some of these restrictions by instituting an interna-

tional programme of activities. S. 1378 of the MMPA obliges the relevant Secretaries *Inter alia* to:

(i) initiate negotiations as soon as possible to develop bi- and multi-lateral agreements to protect and conserve all marine mammals covered by the Act (S. 1378(a)(1));

(ii) initiate negotiations as soons as possible with all foreign governments concerned; directly and indirectly, in fishery operations which are "unduly harmful" to any species of marine mammals, with the aim of concluding bi- and multi-lateral treaties to protect them (S. 1378(a)(2));

(iii) encourage other international agreements to protect specific ocean and land regions of special significance to the health and stability of marine mammals (S. 1378(a)(3));

(iv) initiate the amendment of existing international treaties for the protection and conservation of any species of marine mammal to which the US is a party in order to make such treaties consistent with the purposes and policies of the MMPA;

(v) try to convene an international ministerial meeting on marine mammals (by July 1973) to negotiate a binding international convention for the protection of *all* marine mammals and to implement (iii) above.

Following the above and the 1973 Endangered Species Act referred to below, the USA convened the 1973 Washington Conference which produced the CITES and it has subsequently pursued these objectives in the appropriate international fora, including the IWC, albeit only with limited success. It should be noted, however, that the IUCN had promoted drafts of the CITES Convention since 1963 and had held several governmental consultations to discuss them. More successful in the strategy to eliminate "pirate" whaling outside the IWC's regulations has been the provision of sanctions under the MMPA (especially those preventing importation) and under other Acts, particularly the existence of, and threat to use, if not the actual use of, both the Pelly amendment to the Fishermen's Protective Act 1967 and the Packwood-Magnuson Amendment to the Fishery Conservation and Management Act which are described later in this section.

3. Endangered Species Preservation Act of 1973 (16 USC S. 1531-43)

The precursors of this Act, namely the Endangered Species Preservation Act 1966 and the Endangered Species Conservation Act of 1969, are also of interest to states considering enacting similar legislation as they reveal the possible inadequacies for the purpose of more limited approaches. Briefly they provided as follows:

a) Endangered Species Preservation Act 1966 (Pub. L. No. 89-669, Ss. 1-3, 80 Stat. 926, Repealed 1973)

The US first introduced an act to execute a US programme "of conserving, protecting, restoring and propagating selected species of *native* fish and wildlife" (emphasis added) threatened with extinction. The above Act, (which was repealed in 1973) in very general terms, gave the Secretary of the Interior powers to determine, on the basis of specific criteria, which species were so threatened. This Act,

however, did not limit their taking or restrict trade in the products of such species. It was, therefore, soon augmented by the following instrument.

b) Endangered Species Conservation Act 1969 (Pub. L. No. 91-135, 83 Stat. 275)

This Act, *inter alia,* authorized the Secretary to issue a list of wildlife "threatened with *worldwide* extinction" (S. 3(a); emphasis added) and to prohibit their importation into the USA except for certain purposes (S. 2). Determination to list species In foreign countries required "consultation, in co-operation with the Secretary of State, with the foreign country or countries concerned, in which such fish or wildlife are normally found."

The Secretary was also directed to encourage foreign governments to protect endangered wildlife and to take measures to prevent fish or wildlife from becoming endangered, to give technical assistance to foreign governments to develop and implement protection programmes, and to promote bi- and multi-lateral treaties for protection of endangered wildlife (s. 5(a)). To further the last two aims the relevant Secretaries were required to seek the convening of an international ministerial meeting by June 30, 1971. Although the CITES, which is fully described in Part I of this Report, resulted from the initiatives and drafts of the IUCN, beginning with a Resolution of the IUCN General Assembly in 1963, the US in hosting the Washington Conference which adopted the CITES was fulfilling the purposes of this and earlier acts.

c) Endangered Species Preservation Act 1973

i) General Provisions

As neither the 1966 nor the 1969 Acts, amongst other defects, protected species until they were actually "endangered", did not protect individual populations, and did not prohibit taking of endangered species, the above Act, which provides much more comprehensively for the problems, was introduced.

It applies to "any member of the animal kingdom" (S. 1532(5)) and recognizes the "aesthetic, ecological, educational, historial, recreational and scientific value" of endangered species of wildlife and plants (S. 1531(a)(3)), provides for their ecosystem conservation, and urges all Federal Government departments and agencies to use their authority to achieve these ends, taking all the measures necessary to remove endangered species from that category (S. 1532(2)). Species are distinguished into (a) those endangered, *i.e.* "any species which is in danger of extinction throughout all or a significant part of its range" (S. 1532(4)); (b) those which are "threatened", *i.e.* "any species which is likely to become an endangered species within the forseeable future throughout all or a significant portion of its range" (S. 1532(15)). Species already categorized under the previous two Acts as endangered continued to be so listed until re-evaluated under the new Act. Others can be added following a strict review process but listings, removals from the list, and variations in status of species can be initiated not only by the appropriate Secretary but also by a petition from any concerned individual.

If a species is generally found in a foreign country, or is harvested on the high seas by foreign nationals the Secretary must consult the countries concerned before listing. It should be noted also that if a species is so similar to an endangered species (though not itself endangered) that the latter cannot be effectively pro-

tected unless the former is also listed, this can be done, and also is permitted under the CITES. The Secretary must give full consideration to species which are designated as "requiring protection from unrestricted commerce by any foreign country, or pursuant to any International agreement" (S. 1533(b)3)).

ii) Prohibited Acts

The following are prohibited under the 1973 Act if a species is listed as an endangered species:

(a) Taking by a person subject to US jurisdiction anywhere in the USA, in its territorial waters or oh the high seas. "Take" is broadly defined to include "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct" (S. 1532(14)).

(b) Importation, exportation, sale or shipment in interstate commerce In the course of a commercial activity. "Importation" is widely defined to cover "to land on, bring into or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the custom laws of the United States" (S. 1532(7)). Commercial activity, as amended, means "all activities or industry and trade, including but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling" but excluding "exhibition of commodities In museums or similar cultural or historical organizations" (S. 1532(1) and Act of July 12, 1976, Pub. L. No. 94-359 S. 5, respectively). "Industry and trade" have, by subsequent regulation, been Interpreted to cover any such activities which are carried out for the purpose of profit or gain.

iii) Exceptions

The Act exempts from the above restrictions, inter alia,

(i) Fish or wildlife held non-commercially in captivity or a controlled environment (an exception which has been interpreted broadly by the relevant authorities and extended to include sperm whale oil and finished scrimshaw products already held in the US before the Act came into force).

(ii) Certain activities by Alaskan natives and similar persons, taking species primarily for subsistence purposes or on some specific conditions.

(iii) Permits can be granted, for specified reasons, to engage in activities otherwise prohibited, in order to allow for, inter alia, "hardship cases" (S. 1539(b)).

Other Federal States considering adopting similar legislation will want to note that the 1973 Act provided for a transition period of up to 15 months during which Federal restrictions on taking threatened or endangered species were not to be applied. Individual states are, in any event, permitted to impose laws or regulations for taking which are more restrictive than the exceptions or permits under the Act. States can also enter Into "co-operative agreements" with the Federal Government to carry out management and conservation programmes in return for financial aid In a form different from that under the MMPA.

iv) Penalties
The following penalties were established by the Act:

(i) Willful violation of the above prohibitions, of permits issued under the Act, and of various regulations implementing it are subject to criminal sanctions of up to one year's imprisonment or fines up to $ 20,000 or both (S. 1540(b)).

(ii) Willful violation of regulations concerning threatened species is subject to sanctions of up to 6 months imprisonment or fines of up to $ 10,000 or both (S. 1540(b)).

(iii) Knowing violation of the above prohibitions, permits issued under the Act, and of various regulations implementing it is subject to civil penalties of up to $ 10,000 (S. 1540(1)(1)).

(iv) For violations that are not knowingly committed, and are not committed in the course of a commercial activity, a civil penalty of up to $ 1,000 can be imposed (S. 1540(a)(1)).

(v) Wildlife products obtained during commission of any of the above offences are subject to forfeiture (S. 1540(e)(4)).

(vi) Leases, licences, permits, or other agreements authorizing the use of Federal lands can be suspended or revoked if the holders are convicted of any of the criminal violations referred to above (S. 1540(b)(2)).

v) International Aspects
The 1973 Act not only implements the CITES and prevents importation of threatened and endangered species, but:

(i) orders the US President to start implementation of the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere of October 12,1940[62].

(ii) directs the Secretary to encourage foreign states to establish and excecute national endangered species programmes and authorizes financial aid and seconding of federal personnel for this purpose (S. 1537(a)).

(iii) authorizes the Secretary to carry out law enforcement investigations and other relevant research abroad (S. 1537(d)).

4. Pelly Amendment to the Fishermen's Protective Act 1967 (22 USC S. 1978)

a) Provisions
The above act is not specifically relevant to protection of marine mammals but the above amendment to it is since it allows the USA to use economic sanctions in the fisheries products field against foreign states whose nationals undermine fisheries conservation programmes (including those for conservation of cetaceans or other marine mammals) or international programmes for endangered or threatened species (which are listeed under the CITES).

The above amendment, under S. 1978 (1) and (2), authorizes the Secretary of Commerce to certify to the US President the following facts:

(i) If foreign nationals "are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation programm";

(ii) If foreign nationals, "directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international programme for threatened or endangered species".

For this purpose the amendment defines "international fishery conservation program" as "any ban, restriction, regulation or other measures in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea" (S. 1978 (h)(3)). It therefore includes many of the treaties referred to in Part \ of this Report. "International program for endangered or threatened species" is defined in similar terms relating to multilateral agreements the purpose of which is to protect these species of animals, and "taking" is defined to include "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect" or to attempt to do any of these things (S. 1978 (h)(5) and (7)(A)), whether or not the conduct is lawful under the laws of the offending country (S. 1978 (h)(7)(B)).

If the Secretary does so certify the US President *may* then order the Secretary "to prohibit... the importation .... of fish products of the offending country for such duration as he determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade." This Agreement, generally known as the GATT, permits some imposition of trade restrictions and provides also for some exceptions. It recognizes, in Article XX(g), the validity, in certain circumstances, of imposing trade restrictions concerning "exhaustible natural resources."

If the President does not impose such restrictions (which he is permitted but not required to do by the amendment) he must give his reasons to the US Congress; otherwise within 60 days of the Secretary's certification the President must notify the Congress of the Action taken by him pursuant to it. The Secretaries of Commerce and the Interior are now required periodically to monitor the activities of foreign nationals that may affect the international programme referred to above and promptly to investigate any activity by them that in the Secretaries' view may be a cause for certification, and to reach a prompt decision on this (S. 1978(a)(3)(A)-(C)). These Secretaries are also correspondingly required to periodically review the activities of nationals of a certified offending country to determine if the reasons for which the certification was made no longer prevail. If this is the case the Secretary must end the certification and notify this, and the facts, in the Federal Register (S. 1978(d)).

Prima facie this amendment could be used against states engaged in "pirate" whaling which are *not* parties to the ICRW but which are engaged in activities which diminish Its effectiveness or threaten or endanger species which it attempts to regulate. Under S. 1978 (b) it is unlawful for any person subject to US

jurisdiction to bring or import into, or cause to be brought or imported into, the US any fish products or wildlife products pursuant to this section. Various penalties are prescribed for violations of these provisions.

b) Penalties

Penalties imposable for violations include fines of up to $ 10,000 for the first violation, and up to $ 25,000 for each subsequent violation. In addition all fish and wildlife products brought or imported into the US in violation of the Section, or their equivalent monetary value, may be forfeited (S. 1978(e)(1) and (2)).

c) Enforcement

Those officially authorized by procedures established under the Section, to enforce, with or without warrant, its provisions, can:

(a) arrest any persons subject to US jurisdiction committing violations in the presence or view of those so authorized;

(b) search any vessel or other conveyance subject to US jurisdiction *(i.e.* both US flag ships anywhere and foreign vessels within US fisheries and other zones or on US territory) and if the search reveals reasonable cause to believe that either the vessel or the conveyance or persons on borad is or are engaged in operations which constitute violations, can arrest such persons;

(c) seize all fish products and wildlife brought into the US in violation of the section or its pursuant regulations (S. 1978(f)(1)-(5)).

Under S. 1978(g) the Secretaries of the Treasury, Commerce and the Interior are each authorized to prescribe the regulations determined by them to be necessary to execute the section's provisions.

The above actions and procedures are not necessarily appropriate, nor will they be effective, for use by all states, but, after full consideration of their constitutionality in individual states, their implications for that state's international relations, and the particular usefulness in relation to its fisheries policies and trade balances, some states might also be able effectively to adopt (and adapt as appropriate) the above techniques into their own national laws. The weight of possible adverse economic effects on states imposing such sanctions in relation to the impact on the state against which they are used, will obviously vary greatly in relation to the circumstances of each case. Problems concerning the use of this technique are political and economic, not legal. US practice subsequent to the amendment shows that there is no doubt that even the mere presence of such a provision on the statute book of states which offer a good market for fish products of other states and even the threat of its use, without further action being taken, can have considerable effect on modifying the conduct of some states previously engaged in whaling outside IWC regulations. Certification *without* further action by the President seems on several occasions to have had the desired effect in Inducing the states concerned to join the IWC and to accept its regulations[63].

5. Fishery Conservation and Management Act of 1976 (Pub. L 94-265,16 USC S. 181, as Amended)

Enforcement against persons and vessels taking marine mammals is covered by

the MMPA as already described in Section A above but this Act, which represents a major change of policy In the USA, is important in relation to marine mammals for four reasons: first it extended United States Fisheries jurisdiction to 200 nautical miles; secondly it provided for a system of permits for all foreign vessels fishing in the zone under Governing International Fishery Agreements (GIFAs) with the USA thus enabling more effective enforcement; thirdly it provided for a system of strict enforcement of the Act and regulations issued under it; fourthly its amendment in 1979, at the instance of Senators Packwood and Magnuson, enables it to be used as a specific sanction to prevent "pirate" whaling and other fishing activities regarded by the US as undesirable. This amendment is described below. The main purpose of the new legislation, however, was to provide a mechanism and a programme of management and conservation to preserve fishery resources adjacent to the coast of the United States. Although the Act was controversial in relation to the existing international law at the date of its enactment many states have now introduced similar, if not identical, legislation, as explained in Part I of this Report. It should be noted that the Act does not preclude regulation of fisheries by individual states of the USA, provided that the rules adopted are consistent with whatever regulations may be promulgated by the federal government. The tight system of permits and enforcement introduced by the Act contributes to effective surveillance and enforcement in the zone for purposes also of enforcement of the MMPA since the same surveillance and enforcement systems duplicate the functions necessary to fulfil the objectives imposed by both Acts.

In S. 1881 the Act takes note of the possible effect of conclusion of a Law of the Sea Treaty and provides that *"If the US ratifies* a comprehensive treaty, which includes provisions with respect to fishery conservation and management jurisdiction, resulting from any United Nations Conference on the Law of the Sea," amendments to regulations promulgated under the Act may be made by the Secretary if necessary and appropriate to conform such regulations to the new treaty provisions, "in anticipation of the date when such treaty shall come into force and effect for, or otherwise be applicable to, the United States" (emphasis added).

(i) *The Fishery Conservation Zone*
S. 1811 establishes: "a zone contiguous to the Territorial Sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured": This provision has been extended to apply the MMPA to this zone.

(ii) *Exclusive Fishery Management Authority*
S. 1812 provides that the United States shall exercise exclusive fishery management authority, as provided under the Act, *inter alia,* over all fish in the zone, other than highly migratory species of fish.

(iii) *Control of Foreign Fishing*
S. 1821(a) prohibits all foreign fishing in the zone that is not specifically authorized under the procedures established by the Act, *i.e.* under an inter-

national fishery agreement in effect (S. 1821(b)); (these are to be renegotiated by bringing them into conformity with the aims of the FCMA (S. 1322(a)-(c)); under a governing international fishery agreement (GIFA) other than a treaty in which the state concerned acknowledges the exclusive international fishery management authority of the United States, as set forth in the Act (S. 1821(c))1) and (2) (A)-(G)).

Each agreement will include a binding commitment by both the foreign state and its fishing vessels to comply with the terms and conditions set out in this Section. These include the following:

(1) the foreign national and the owner and operator of any fishing vessel fishing under an agreement will abide by all regulations under the Act.

(2) the above will also abide by the requirement that any officer duly authorized to enforce the Act's provisions will be permitted to board, to search or to inspect any vessel at any time; to make arrests and seizures as provided for in the Act whenever the officer has reasonable cause to believe, as a result of the search or inspection, that any such vessel or person has committed an act prohibited by the Act; to examine and make note on the vessel's permit. Not only must the permit be prominently displayed but transponders or other appropriate equipment aiding position fixing and identification must be installed as determined to be appropriate by the relevant Secretary. These must be maintained in working order.

(3) duly authorized United States observers be permitted on board and the US be reimbursed for the cost of such observers.

(4) agents be appointed and maintained within the United States who are authorized to receive and respond to any legal process issued in the United States with respect to the owner or operator;

(5) the persons referred to at (1) above will abide by any other monitoring, compliance, or enforcement requirement related to fishery conservation and management which is included in the Agreement. The foreign nation must agree to apply for a permit (which it must deliver promptly to the vessel owner or operator concerned) and to abide by and take appropriate steps under its own laws to assure that both the latter comply with relevant laws, applicable conditions and regulations.

(iv) *Import Prohibitions*

Certain prohibitions on imports into the US for fish and fish products of recalcitrant states which do not fully co-operate with the purposes of the FCMA are laid down.

The Secretary of State can determine certain facts and certify them to the Secretary of the Treasury for further action by him. These facts all relate to foreign nations' actions concerning US vessels and granting of reciprocal fishing opportunities to US vessels and are not relevant to objectives of eliminating "pirate" whaling. The existence of this example of the technique of utilization of import prohibitions to further national objectives abroad is

of interest, however, as it can be (as the Parkwood-Magnuson amendment evidences) adapted to other purposes, such as deterrence of "pirate" whaling and protection of other marine mammals. The FCMA provides (S. 1825(b)(1) and (2)) that, on receipt of any certification of these facts, the Treasury Secretary must at once take the necessary and appropriate action to prohibit importation into the United States of all fish and fish products from the fishery involved, if any; and on recommendation of the Secretary of State, such other fish or fish products from any fishery of the foreign nation concerned, which the Secretary of State finds to be appropriate to carry out the purposes of this section. "Fish" is defined to include any highly migratory species, and "fish products" to cover any article which is produced from or composed of (in whole or in part) any fish.

(v) *Prohibited Acts*

It is unlawful, under S. 1857 of the FCMA:

(a) *for any person, inter alia,* to violate any provision thereof or any regulation or permit issued under it; to violate any provision of, or regulation under, an applicable GIFA; to refuse to permit any authorized enforcement officer to board a fishing vessel subject to such a person's control for purposes of conducting any search or inspection in connection with the enforcement of the Act or regulations, permits or agreements relating to it; to resist lawful arrest for acts prohibited; to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control or possession of any fish taken or retained in violation of the Act, or any regulation, permit, or agreement relating to it.

(b) *For any vessel,* other than a US one, or for the owner or operator of such vessel to engage in fishing in any individual state boundary or in the 200 mile fishery conservation zone (unless the fishing is authorized by a permit).

(vi) *Sanctions*

The Act provides for a variety of sanctions both direct (civil penalties and criminal prosecutions) and indirect (by the flag state itself as required under the GIFAs), including reduction of quotas, suspension or revocation of permit; and US internal administrative action. A detailed analysis containing some criticism of certain ambiguities in the Act is given in a recent paper by Eugene *Fidell*[64].

Direct sanctions include:

Civil Penalties

Imposition of penalties is not limited to US registered vessels. Any person found by the Secretary (following opportunity for a hearing) to have committed one of the acts prohibited in S. 1857 is liable to a penalty of up to $ 25,000. The penalty assessed can be reviewed by the appropriate US court, though the Act sets criteria for assessing penalties.

Criminal Offences

A person is guilty of a offence if he commits acts prohibited under the FCMA's appropriate sections (S. 1857(1)(D), (E), (F), or (H)) *(i.e.* if he refuses to permit an authorized boarding; forcibly assaults or resists arrest by an authorized officer; resists arrest; or interferes with the arrest or apprehension of a third party, respectively). For these a penalty of up to 6 months imprisonment or a fine of up to $ 50,000, or both may be imposed. If a dangerous weapon is used, or if an enforcement officer suffers, or is placed in fear of, bodily injury, the penalty can be a fine of up to $ 100,000, or ten years imprisonment, or both. For foreigners the fine can be up to $ 100,000 or up to one year's imprisonment, or both. It must be remembered, however, that the UNCLOS Draft Convention does not provide for imprisonment for fishing offences (it specifically rejects this), and in practice the United States tend to resort to fines rather than criminal prosecution.

Conclusion

The US FCMA is one of the most comprehensive and also one of the most complex of the new acts which many states have introduced to establish jurisdiction over fisheries in the new 200 miles zones. It is not entirely without problems in operation because of various ambiguities in its provisions and also because it requires a considerable defence and administrative commitment to enforce. Agencies involved in enforcement include the National Oceanographic Atmospheric Administration; the United States Coast Guard; the Department of Defense (US Navy); US Customs Service; Department of Justice, Department of State; Regional Fishery Management Councils, and other state agencies. The enforcement burden is, however, considerably mitigated by the requirement that foreign vessels seeking permits to fish in the zone must enter into the GIFA which require that the foreign persons and vessels undertake to observe all requirements and that the flag states concerned themselves undertake to proceed against offending vessels. The use of technical aids, such as transponders, is also likely increasingly to mitigate the task of enforcement vessels and aircraft, and finally the carrying on board of observers from the coastal state should inhibit commission of violations. The degree of activity and surveillance required, however, should ensure maximum altertness and opportunity to deter any whaling as well as fishing activity in the Zone. It should be noted also that under the act the US asserts "jurisdiction beyond the conservation zone", under S. 1812(3), over continental shelf resources and lists the shelf species covered. This means that surveillance is also both enabled and required of extensive areas beyond 200 miles since in international law, as outlined in Part I the coastal states rights over its continental shelf extend throughout the natural prolongation of its land territory under the sea, which in some parts of the shelf extends jurisdiction for large distances beyond the 200 mile limit. States can take advantage of this fact, as the US has done, to extend surveillance to this area.

6. Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act of 1976

This amendment to S. 204(b)(6) of the FCMA was introduced to support the US Moratorium on whaling and to encourage member states of the IWC not to make use of the objections procedure provided under the ICRW to defeat this ultimate objective. The amendment provides that a permit to fish in the US 200 mile conservation zone, which as described above is necessary under the FCMA, will not be

issued to any foreign state which is certified by the Secretary of Commerce as being in violation of S. 8 of the Fishermen's Protective Act 1967, *i.e.* acts in such a way as to "diminish the effectiveness" of any international fisheries conservation programme, or of any programme to protect endangered species to which the US is party. It is thus similar to the Pelly amendment but adds to the sanction of banning import of fish and fish products allowed under it this new sanction. The effectiveness of this amendment, however, is likely to be reduced In ratio to the progress made in phasing down or even phasing out foreign fishing under the new Fisheries Promotion Act described below. Meanwhile it can be used against states which undermine IWC regulations.

7. American Fisheries Promotion Act of 1980 (Public L. 96-561)

This Act (which Incidentally, in S. 239, changed the name of the Fishery Conservation and Management Act of 1976 to the Magnuson Fishery Conservation and Management Act) was signed into law by the US President only on December 22, 1980. Its twofold purposes (enhancement of steelhead and salmon resources; promotion of American Fisheries generally) do not specifically concern protection of marine mammals but, as in the case of the FCMA itself, the new Act will indirectly add to improved enforcement for all living resources in the US fisheries zone.

The Act concentrates, however, on promotion of research and development of US fisheries and provision of various forms of financial aid to US fishing vessels and fisheries but it also provides for incremental phasing down (and even, possibly phase out) of foreign fishing in the US zone (S. 230). As US fishermen increase their catch (aided by the incentives provided by the Act) reserves will be set aside for them for one year (based on criteria for assessing an "annual fishing level") after which only any portion of the reserve unused by US fishermen will be made avaiable to foreign nations. There will, therefore, be incremental reductions, leading to there being far less foreign fishing vessels — perhaps at some future date none — in the US zone, over which the US will need to exercise surveillance and enforcement powers. This does not necessarily mean that the general level of surveillance will be less as US vessels are subject also to regulation under the FCMA, but it will make surveillance of foreign vessels less burdensome for US enforcement agencies. The new Act does not, therefore, undermine the points already made about the advantages to the strategy for deterring "pirate" whaling of strict enforcement of regulations in fisheries jurisdictional zones. Rigorous enforcement of a co-ordinated system, backed by administrative bodies, will prevent any attempt to circumvent whaling regulations within the zone and reduce the areas available to "pirates", as well as deterring "piratical" activities in bordering areas of the zones.

Under the new Act fresh criteria are laid down to be taken into consideration in calculating the Total Allowable Level of Foreign Fishing (TALFF). They include the foreign state's co-operation with the US in enforcement of US fishing regulations and the extent to which nations require the fish harvested from the US zone for their own domestic consumption (S. 231).

The Act establishes, in S. 236, a programme of full observer coverage, which is to enter Into force on October 1,1981 and to apply to all permits issued after December 1, 1981. The Secretary is directed, except under certain conditions, to place US

observers on all foreign fishing vessels within the 200 mile zone to ensure compliance with US regulations and he can make an additional surcharge (to the permit fee) to cover all costs of such observers. Exceptions to this requirement cover vessels engaged in fishing for such short periods that placing an observer on board would be impracticable; when facilities on board are wholly inadequate and unacceptable *(i.e.* they endanger the observer's health and safety); or if an observer is not available for reasons beyond the Secretary's control.

B. New Zealand

1. Marine Mammals Protection Act 1978, No. 80

This Act, which came into effect on January 1, 1979, repeals in S. 30 both previous Whaling Acts and Regulations and Seal Fishery Regulations and replaces them with a new system for the protection, conservation and management of marine mammals within New Zealand and within New Zealand fisheries waters. Subject to the Act no person can take *any* marine mammal, whether alive or dead, in or from its natural habitat or in or from any other place without an official permit (S. 4).

a) Application

S. 1 applies the Act to all matters and things "done, to be done or omitted to be done within New Zealand or New Zealand fisheries waters" (extended in 1978 to 200 miles) and includes acts and omissions on New Zealand ships and aircraft wherever they may be, and by any person who is a citizen of New Zealand wherever they may be.

b) Interpretation

Definitions in S. 2 which are exceptionally comprehensive, include the following:

(a) *"marine mammal"* covers "any mammal which is morphologically adapted to, or which primarily inhabits, any marine environment and all species of seals (pinnipedia), whale, dolphin and porpoise (cetacea), and dugong and manatee (sirenia), as well as the progeny of marine mammals and any part thereof.

(b) *"Take"* covers a wide variety of activities: to take, catch, kill, injure, attract, poison, tranquillize, herd, harass, disturb or possess; to brand, tag, mark or do any similar thing; to flense, render down, or separate any part from a carcass; or to attempt to do any of these things.

(c) *"Vessel"* means any ship, boat, steamer, lighter, launch, raft, barge, punt, or ferry boat, and includes every description of vessel, whether used in navigation or in any way kept or used as a hulk or storeship or for any other purpose.

Moreover under S1(2) a person is regarded as being in possession of a marine mammal if he has alone, or jointly with another, possession or control of it or over any vessel, vehicle, aircraft, hovercraft, container, package, receptacle, or place in or on which the marine mammal is kept.

c) Trade Restrictions

S. 4 (2) provides (Subject to S. 5(3) and other qualifications) that no person shall import into New Zealand or export from it any marine mammal or its products without a permit, though some limited exceptions are allowed (S. 4(5)(a)-(c)). The permit system is detailed in S. 5; applications are published in the New Zealand Gazette, before they are finally granted and anyone can then submit comments upon it, though again exceptions covering emergency situations and research are provided for. The granting of permits is at the discretion of the Minister concerned; though the conditions which he can attach to one by regulations are set out in S.7. A register of permits is established and must be maintained under S.8.

d) Offences and Penalties

It is an offence under S. 9 to take a marine mammal without permit. Persons committing it are liable on summary conviction to fines not exceeding $ 10,000 if they take, have in their possession, export or import, have on board any vessel, vehicle, aircraft or hovercraft, or have control of any marine mammal other than under or pursuant to the Act or a permit. Moreover, on conviction the offender forfeits to the Crown any marine mammal unlawfully taken as well as all vessels, vehicles, aircraft, hovercraft, gear, nets, tackle, equipment and apparatus used in connection with the offence.

It is also an offence to contravene S. 10 of the Act requiring all actions related to marine mammals and regulated by the Act and details of the actions to be notified to the Director-General.

e) Enforcement

A strict and detailed system of enforcement by official inspectors is established by S. 10.

i) *Appointment of Marine Mammal Officers:* Every Inspector of Sea Fishing and every constable becomes a Marine Mammal Officer for purposes of the Act. The Director-General can also appoint other persons to this office, the detailed terms and conditions of which are set out in this section.

Officers, who are entitled to be present at all operations concerning the taking of marine mammals, can board any vessel, aircraft, or hovercraft used for taking marine mammals and must be accommodated on board at the vessel's expense. Everyone refusing to accommodate an officer or to allow him to be present at such operations commits an offence.

ii) *Powers of Search:* S. 13 permits all officers subject to certain specified restrictions, on production of evidence of official appointment *(e.g.* a warrant) to enter, inspect and examine any vessel, vehicle, aircraft or hovercraft if he has reason to believe or suspect a breach of the Act or regulations pursuant to it. Officers can, when searching, open (by force if necessary) any container, package or receptacle, and seize or take away any marine mammal supposedly illegally taken as well as the objects referred to and anything else which the officer reasonably believes to constitute evidence of a breach of the Act or its regulations. The procedures for obtaining warrants and the exemption of officers from proceedings related to their actions under the Act are provided for in Ss. 14 and 15 respectively.

f) Advisory, Research and Technical Committee

The Act does not establish any permanent organ for its administration but provision is made in S. 21 for the Minister from time to time to appoint such of the above committees as he thinks fit and he can delegate to them such of his powers under the Act as he thinks fit, as well as requiring them to investigate and report on matters related to marine mammals.

g) Offences and Penalties

Offences: Under S. 23 every person commits an offence who:

i) acts in contravention of or fails to comply in any respect with any notice, direction, restriction, requirement, or condition given, made or imposed under the Act or any regulations made under it; or

ii) make false or misleading statements or material omissions concerning official applications, for the purpose of the Act or any regulations made under it; or

iii) refuses or fails to furnish officially required returns, information or particulars for the purposes of the Act or its regulations.

It is also a offence not only to take certain actions such as using chemicals etc. or using traps which may injure marine mammals but also to use any vehicle, vessel, aircraft, or hovercraft to herd or harass any marine mammal (S. 23(2)(a)(b)).

Penalties: If no penalty is provided elsewhere in the Act for a particular offence, the offenders are liable, on summary conviction before a Magistrate to a fine not exceeding, $ 5,000 for offences against S. 17 (banning purse-seining unless escape panels etc. through which dolphins and porpoises can escape are provided in the net, and other conditions are met) or against S. 23(2); and in the case of other offences $ 1,000. If the offence relates to the existence of a permit the onus of proof of that fact falls on the person charged.

h) Defences

Some defences are provided in S. 26 including one which weakens its effect as a holistic instrument for deterring "pirate" whales as compared to the Australian Whale Protection Bill detailed at the end of this section.

i) *Non-New Zealand Citizens:* if a person in this category is charged under the Act it is a defence to prove that the act or omission concerned took place beyond the outer limits of New Zealand fisheries waters or, not being an offence concerning the importing of any marine mammal or its products, relates only to marine mammals taken beyond these limits (S. 26(11)).

No provision is made, to offset this necessary conformity with current international law relating to the high seas, for any excercise of the powers of refusal or entry into New Zealand ports for such persons or for foreign flag vessels upon which they may serve, unlike the Autralian Bill referred to above.

ii) New *Zealand Citizens* can defend themselves against charges under the Act by proving that the act or omission concerned took place beyond the outer limit of New Zealand fisheries waters *and did not contravene any internatio-*

nal agreement to which effect had been given by regulations made under S. 28 of the Act (S. 26(2)), (emphasis added).

iii) *General defence:* any person charged can raise in defence that the act or omission concerned took place "in circumstances of stress or emergency and was necessary for the preservation, protection, or maintenance of human life" (S. 26(3)).

iv) *Accidental Killing or Injuring* of the marine mammal concerned is also, in circumstances set out in S. 26(4), a defence.

i) Regulations
Subject Matter: under S. 28(1) the Governor-General can, by Order in Council make regulations, *inter alia:*

(i) Prescribing the conditions on which permits may be issued, or which can be attached to existing permits;

(ii) *giving effect to the terms of any international agreement to which New Zealand is a party;* (emphasis added);

(iii) regulating, prohibiting or restricting the sale, distribution, custody, carriage, packaging, handling, or use of any marine mammal, marine mammal product, or any product containing anything derived from a marine mammal;

(iv) providing for such other matters as are contemplated by or necessary for giving full effect to the provisions of the Act and for its due administrations;

(v) as he thinks necessary or expedient for the protection, conservation, or management of any marine mammal (S. 28(2)).

Application: Regulations under this Section apply generally throughout New Zealand or New Zealand fisheries waters, but can be made to apply only within a specified area or areas (S. 28(3)).

Powers: Regulations may confer on the Minister of Director-General power to issue, as prescribed, instructions, orders, requirements, permits, authorities, or notices in order to ensure protection, or management or conservation of any marine mammal, and when so provided, such an instrument "shall have effect according to its tenor" and must be complied with by all persons affected by it (S. 28(4)).

This New Zealand Act, like the Australian Whale Protection Act but, unlike the US MMPA, does not lay down principles for or a scheme for management of marine mammals but it does offer a comprehensive model for any state desirous of enacting marine mammal legislation or revising and collecting existing laws (The New Zealand Act repealed 13 previous existing Acts, orders and sets of regulations) and, as it ensures by provision of inspection of enforcement that there will be no unregulated take of these species In New Zealand waters, it is an excellent example of effective exercise of national jurisdiction to prevent poaching by "pirates" in these areas. It also prevents New Zealand citizens from engaging in "piratical" activities *(i.e.* contravening IWC regulations) on the high seas since New Zealand is a party to the ICRW. It also provides a weapon against foreign pirates by use of trade

sanctions. It does not, however, provide for any legal measures to be taken against "pirate" vessels entering New Zealand waters or ports. Here the Australian Whale Protection Bill offers states another model, as will be seen at the end of this Section.

It should be noted that to improve enforcement New Zealand has included provisions in its fisheries agreements concluded, since the introduction of EEZ, with the Republic of Korea, Japan and the USSR making it a condition of access to the New Zealand fisheries in the zone that the state concerned "shall ensure that its nationals and vessels will refrain (in accordance with New Zeland law) from harassing, hunting, capturing or selling any marine mammal in the New Zealand Zone unless specifically authorized by the Government of New Zealand." (The term in paranthesis is included only in the USSR agreement).

C. United Kingdom

The United Kingdom, which ceased whaling in 1963, has not so far followed the example of the United States by adopting a single comprehensive statute for the protection of all marine mammals and Including both fisheries and trade sanctions. The term marine mammal Is indeed not used at all in the UK legislation. Instead the UK has adopted acts relating to specific species of marine mammls as it became necessary to regulate their taking both for the purposes of conservation and exploitation. UK statutes in force relating to marine mammals in some cases go back over 80 years since the approach adopted has been to retain the licensing systems introduced in them and gradually to amend the licences as appropriate until, on cessation of whaling by the UK, no further licences were required. The statutes remain but the licensing system is effectively inoperative.

UK fisheries legislation in general is based on the use of general acts which make provisions for subsequent orders by the appropriate Minister, thus retaining flexibility to adapt to changing perspectives in fisheries regulation and enforcement. Trade In endangered species Is regulated separately by an act introduced following the UK's signing of the CITES.

1. Acts Relating to Whales and Seals

Relevant UK Statutes in force for protection of marine mammals include:

Whaling Industry (Regulation) Act 1934 (24 and 25 Geo. 5 C.49) as revised.
Seal Fishery Act 1875 (38 and 39 Vict. C. 18)
Behring Sea Award Act 1894 (57 and 58 Vict. C. 2)
Seal Fisheries (North Pacific) Act 1895 (58 and 59 Vict. C 21, as revised)
Whale Fisheries (Scotland) Act 1907 (7 Edw. 7 c. 41)
Seal Fisheries (North Pacific) Act 1912
Fisheries Act 1981 (C. 29).
Conservation of Seals Act (C. 30; as amended 1981).

There appear to be no statutes relating to any other species of marine mammals but the three statutes relating to whaling are all of relevance to the purposes of this Report since they provide for a licensing system and for prohibition of whaling in UK waters even before the institution of the IWC. As already stated no licences are now issued under these statutes, though they are retained on the statute book. Briefly they provide as follows:

a) Whale Fisheries (Scotland) Act 1907 (C. 41); as Amended inter alia by Fishery Limits Act 1964 and 1976 and Sea Fish Industry Revised to 31st October 1978)

This Act applied only in Scotland, a component part of the United Kingdom which has, however, a separate legal system. The UK Parliament thus has to ensure that relevant acts are specifically made applicable and enforceable in Scotland and other parts of the United Kingdom. In 1981 this Act was rendered ineffective by S. 36 of the Fisheries Act 1981. It is retained here nontheless as an example of out- dated legislation.

i) Prohibition of Exercise of Whaling Industry Without Licence
S. 1 orders that no person shall in any part of Scotland land any whales, or engage In any way In the manufacture from whales of oil or other primary products, without **a** licence granted and issued subject to the conditions laid down in the Act.

ii) Licensing System S. 2
Licences, subject to a fee of £ 100, can be issued by the Secretary of State for Scotland subject to the conditions that: the person applying gives public notice with full details; an opportunity be provided for local authorities and interested persons to lodge objections which the Secretary of State must take into consideration before granting or refusing a licence; licences contain full descriptions of factory sites etc.; licence holders are generally restricted to one steamer though exceptions can be made; licence holders must be British subjects or companies registered in Great Britain; licences can be cancelled on application by the holder but licences cannot be assigned without the consent of the Secretary of State. If any of the licence conditions are infringed, or the holder or his employees are convicted under the Act, the licence can be cancelled or suspended for a period.

iii) Offences
It is an offence:

a) to land whales etc. contrary to S. 1 for which a penalty of £ 500 can be imposed.

b) S. 3, to use vessels other than the whaling steamer which captured the whale to tow it into the factory; for a whaling steamer to fail to carry a prescribed distinctive mark; to use harpoons other than those approved in the Act; to pursue, kill or shoot whales in British fishery limits (in 1907 only 3 miles but extended in 1976 by the Fishery Limits Act outlined below to 200 miles) or licence holders to do so within a mile of boats or vessels anchored or fishing; to kill or shoot herring — hog whales or whales with calf; or to pursue, kill or shoot whales outside the prescribed season, or within 40 miles from the low-water mark of the Scottish coast in a specified period.

iv) Inspection (S. 4)
The Secretary of State can employ officers to effect execution of the Act and can provide for inspection of factories, stations and vessels used by licence holders, who must make reasonable facilities available and make returns on any matter connected with their whaling business as required.

v) Small Cetaceans (S. 5(1))
The Act does not apply to the smaller whales known as bottlenose and caa-ing whales.

vi) Arctic and Antarctic Waters (S. 5 (2))
The Act does not apply to the whaling industries commonly followed (at the date of the Act) in Arctic or Antarctic waters, or engaging in the manufacture of oil or other products from whales taken in them.

vii) Penalties (S. 6)
Offenders, on summary conviction, can be fined up to £ 100, of failing payment, are subject to imprisonment.

b) Whale Fisheries (Scotland) (Amendment) Act 1922 (12 and 13 Geo. 5c. 34; Revised to 31st October 1978)
This Act merely enabled the Secretary of State to cancel or suspend whaling licences in order to protect herring fisheries.

c) Whaling Industry (Regulation) Act 1934 (24 and 25 Geo. 5 c. 49) as Revised to 31 st October 1978)
This Act was further amended by the Fisheries Act 1981 (c. 29) S. 35, as described under S. b(ii) below, which, *inter alia,* greatly raised penalties.

i) Purposes
This Act was passed to enable effect to be given to the first international Convention for the Regulation of Whaling signed at Geneva in 1931 and to prohibit taking **or** treating of whales in UK coastal waters, and related matters. It applied, under S.1, only to baleen whales, though others could be added by order in Council (which requires only approval by the Queen in Council and does not need to be put before Parliament) if this is necessary to effect subsequent Conventions signed by Her Majesty.

ii) Schedule
The whale species subject to the Act are specified and defined in the schedule and include Right, Blue, Fin and Grey Whales.

iii) Prohibitions
(i) No ship can be used in the UK coastal waters to take or treat whales (S. 2).

(ii) Persons belonging to British ships or subject to the Act must not kill or take right or grey whales, immature whales or female whales accompanied by a calf even while *outside* UK coastal waters (S. 3) (emphasis added).

iv) Penalties
Penalties for the above offences are respectively (i) imprisonment for up to three months, or a fine of up to £ 100, or both (ii) imprisonment for 2 to 3 months or a fine of up to £ 200 and an additional fine up to the value of the whale products, or both.

v) Licensing System: Ships and Factories
a) Licences are required under S. 4(1) for any British ships which are used to take or treat whales outside UK coastal waters, and for factories in Great Bri-

tain which treat whales.

b) The licences are granted for one year subject to various conditions Including payment of fee (up to £ 20 for ships or factories locating whales or £ 100 for ships taking whales (S. 5(2)).

c) They can be refused to persons convicted of offences under the Acts (S. 5(4)).

d) Failing to keep records leads to penalties of 3 months Imprisonment or a £ 50 fine.

e) remuneration of gunners and crew of whaling ships is excluded in respect of whales taken below the prescribed length (S. 6(1)).

f) for breach of licence conditions ships' masters, owners and charterers, or the manager or occupier of a factory can be imprisoned for up to 3 months or fined up to $ 200 or both and licences can be cancelled by the Court (S. 7).

vi) Penalties

a) It Is an offence to carry out the above activities without a licence, the penalty for which is: for each whale taken or treated imprisonment of up to 3 months or a fine of up to £ 200 and an additional fine of up to the value of the whale products, or both, imposable on the ship's owner and charterer, or the factory's manager and occupier (S. 4(1) and (2)).

b) *Conditions* can be attached to licences under S. 6(1)-(8) relating to method of remuneration of gunners and crew and persons treating whales; keeping of records of whales treated and taken; equipment used; full utilization of oil and residual products; prevention of "excessive destruction of whales" and wastage of whales or their products; taking whales in particular areas or by other than approved methods or of all whales of a particular description. Licences can be refused until the authorities are satisfied by inspection that conditions concerning structure or equipment are complied with.

vii) Exceptions: Scientific Permits

Permits can be Issued to take and treat whales otherwise forbidden by the Act for purposes of scientific research or "for other exceptional purposes" (which are not defined), subject to various restrictions.

viii) Inspectors' Powers

S. 8 Permits an officially authorized Inspector *(i.e.* appointed by the appropriate Department, or a commissioned officer) to board or enter any factory or ship *"which he has reason to believe"* is used for taking or treating whales and to inspect it and its plant and equipment. Appropriate licences, records etc. can be required to be produced (and can be copied) and necessary inquiries must be answered. He can board any British ship subject to the Act and used for treating whales and can remain on board, being present at all relevant operations. The ship must provide his subsistence and accommodation though the inspector must pay a prescribed sum for this. Any refusal to comply with the above requirements or impediment thereto can result in a fine of up to £ 100.

ix)Defences
It Is a good defence for owners and charterers of ships or occupiers of factories to prove that any act or omission with which they are charged took place without their knowledge or connivance and was not facilitated by their negligence (S. 10).

x) Application to British and Non-British Ships
Provisions which specifically apply to British ships can by Order in Council be made applicable to ships registered in British colonies and protectorates (S. (1)). The Act does not generally, however, apply to British protected states' coastal waters if a corresponding local law is in effect.

Various other provisions are either obsolete or insignificant for purposes of this Report.

2. Fisheries Acts

a) Fishery Limits Act 1976 (1976 c. 86)
This Act came into force on January 1st, 1977. It replaced the earlier Fishery Limits Act 1964 (which established the UK's 12 n.m. fishery zone following the First and Second UN Conferences on the Law of the Sea in 1958 and 1960 respectively) and defined and established new British fishery limits extending 200 nautical miles from the baselines of the territorial sea of the UK, Channel Islands and Isle of Man, or to whatever lines may subsequently be specified by order. It is provided also that they shall extend to a median line between these and other states' limits (drawn from their baselines), where that line is less than 200 miles from the baselines concerned, in the absence of some other line being specified.

The Act takes over earlier powers (formerly in the UK Act referred to above and the Sea Fisheries Act of 1968, S. 6) to control access to British fisheries. Areas within the above limits can be designated from time to time, as required, by subsequent orders, within which foreign boats may fish for specified species etc. Foreign boats can fish in such areas only if authorized under such orders. Fines, which were raised steeply from those imposed under former Acts, can be levied for breach of these provisions, although the Act did not raise penalties for whaling, presumably because the activity no longer takes place in UK waters, even as extended. This omission should, however, was remedied as a deterrence to any possibility of "pirates" ever starting-up operations, in the Fisheries Act 1981.

A fishing licensing system was already in existence under the Sea Fish (Conservation) Act 1967 but it applied only to British boats. The new Act (S. 3) extended the licensing power to foreign boats by merely substituting a new section (S. 4) for the former licensing section of that Act; it also permits conditions to be imposed for regulating sea fisheries generally and not just, as before, to prevent over-fishing. Fees are chargeable and boats can be required to give statistical information.

The actual conduct of sea fishing operations can be regulated also; S. 4 of the new Act extended powers already existing under the Sea Fisheries Act 1968 (S. 5) which previously restricted the powers to those necessary to give effect to international conventions. The new Act enables their exercise in respect of both foreign vessels fishing in British fishery limits and of British vessels fishing anywhere whenever Ministers consider it necessary or expedient.

Penalties under the earlier Act and those imposed under the Sea Fisheries Regulation Act 1966 and the Sea Fish (Conservation) Act 1967 were raised steeply: Maximum fines on summary conviction can be £ 1,000 in some cases, and as much as £ 50,000 in others. Added to the possibility of confiscation of catch or gear or both and detention of the vessel these penalties represent an effective deterrent to violations of all these Acts. Moreover, for some offences trial on indictment can be held with liability to unlimited fine, though the penalty of imprisonment and provision for higher penalties for repeated offences have been abolished. The former change brings British law into conformity with the proposals in the UNCLOS Draft Convention that Imprisonment should not be used for violations of fishery regulations.

The Act is divided into three main sections covering the extension of British fishery limits; regulation of sea fishing etc.; and general provisions, with attached Schedules, the first of which relates to the revised penalties.

i) British Fishery Limits (S. 1)
These extend to 200 miles from the baselines from which the breadth of the territorial sea adjacent to the UK, Channel Islands and Isle of Man is measured. The choice of baselines is an exercise of the Royal Prerogative not requiring Parliamentary approval; It is exercised through Order In Council. In general baselines are founded on the principles laid down in the Geneva Territorial Sea Convention 1958 (the UK still adheres to a 3 mile territorial sea, like the USA).

By Order in Council also the Queen can declare that the limits extend to some other line for purposes of Implementing any international agreement or arbitral award of an international body. Schedule 2 of the new Act extended the 1934 Whaling Industry (Regulation) Act to the 200 mile zone by substituting "the fishery limits of the British Isles" for the original phrase 'coastal waters', without raising the limits of monetary penalties, as noted above. Whaling is thus now prohibited in all UK waters, including those of Scotland and Northern Ireland. The same extension is made for a series of other Acts relevant to fisheries, directly and Indirectly.

ii) Access to British Fisheries
Ministers can by order "designate" any country outside Great Britain and the areas within the British limits and the types of sea fish for which fishing boats registered In that country may fish. Foreign boats not registered in a "designated" country are prohibited from entering British fishery limits other than for purposes recognized by International law *(e.g.* navigation) or by any convention in force between the UK and the flag state concerned. Various items and conditions are laid down — boats must leave the zone on completion of their purpose or must not fish in the zone. Registered boats of designated countries must only fish on the terms laid down, *i.e.* in approved areas for approved species.

Penalties: If fishing boats contravene the above:

(a) the master is liable on summary conviction to a fine of not more than £ 50,000; or if convicted on indictment to a fine.

(b) the convicting court can order forfeiture of fish or gear on board or taken or used by a person on board.

(c) In the case of Scottish offences, fish or gear confiscated can be destroyed or disposed of at the court's direction.

Special arrangements can be made for foreign flag fishing vessels as an exception by agreement to undertake fishing for purposes of scientific research in the zone.

iii) Regulation of Sea Fishing (S. 3)(1)-(12)): Penalties for breach of Regulations
The new Act does not introduce a licensing scheme *de novo,* since it already existed for British boats under S. 4 of the Sea Fish (Conservation) Act 1967. It merely extends this scheme to foreign vessels by substituting a new S. 4 for this old one in the earlier Act. The new section provides that fishing (whether by British or foreign boats) is prohibited in any specified area within British limits unless authorized by a Minister's licence and fishing by British boats is also prohibited in areas *outside* these limits unless authorized specifically.

Orders can specify, for the area concerned: the type of fish caught; methods of fishing; seasons etc.; boats of specified country only (exceptions can be made). If boats contravene the Act master, owner *and* charterer are guilty of an offence.

Fees can be charged for licences, which can limit the vessel to fishing in authorized areas; for periods, terms or particular voyages; to descriptions and amounts of fish; or can specify fishing methods. The licence can authorize fishing unconditionally or subject to terms (as necessary and expedient, including limitations on landing fish or parts thereof Including specifying the ports at which the catch is to be landed) or specify the use to which the fish may be put:

If a licence condition is broken by the master, owner and the charterer named in the licence (*i.e.* to whom it is issued) *each* is guilty of an offence. It is also an offence to fall to comply with continuous requests for statistical information made by the licensing Ministers.

Licences can limit the number of, or class of boats fishing in an area, or limit them to fishing for any type of fish therein, as appears to the Minister necessary or expedient for the regulation of sea fishing.

"British fishing boat" is defined as one registered in he UK or British owned; "foreign fishing boat" is one not so registered or owned.

iv) Regulation of Conduct of Fishing Operations, etc.
Conduct of fishing operations is regulated under S. 5 of the Sea Fisheries Act 1968. The new act varies this section by permitting regulation wherever it appears necessary or expedient to the UK government, instead of (as before) limiting regulation to the purpose of giving effect to any convention for the time being in force between the UK Government and the government of any other country.

v) The Schedules: 1, 2, 3 and 4

(a) *Schedule 1 revises penalties in earlier acts viz:*
Sea Fisheries Regulation Act 1966 (c 38): the penalty for obstructing an officer was raised from £ 50 to £ 1,000; for contravention of by-laws to £ 1,000 for all offences, whether first or not; nets and other gear can be ordered forfeit by the Court, as can

fish taken illegally; contravention of other by-laws is also subject to £ 1,000 penalty. These increases are effected by substituting new wording for the earlier phrases in this Act.

Sea Fish (Conservation) Act 1967 (c. 84): persons guilty of offences under this Act are henceforth, in the case of offences under S. 4(3) or 5(1) thereof, liable to a fine of up to £ 50,000 on summary conviction, or on conviction on indictment to a fine (not imprisonment as before); for offences against SS.1(1) or (3), 2, 3, 4(6); 5(6) or 6 on summary conviction to a fine of up to £ 1,000 or on conviction on indictment to a fine; for offences under S. 4(7) or 7(3) on summary conviction to a fine of up to £ 1,000. An owner or charterer of a fishing boat used to commit an offence under S. 4(3) or (6), or the boat named in the licence contravened, may be disqualified from holding a licence for a period for that boat.

Sea Fisheries Act 1968 (c. 77): Contravention of an order regulating the conduct of sea fishing operations under S. 5(4) of this Act now gives rise to a fine of up to £ 1,000 and the penalty for obstruction etc. of a fishery officer is also a fine of up to £ 1,000.

Sea Fish Industry Act 1970 (c. 11): penalties for offences in connection with white fish and herring subsidies were raised from £ 400 to £ 1,000; this is irrelevant to the purposes of this Report, except as an indication of the need for higher penalties in general.

(b) Schedule 2: Consequential Amendments
These mostly relate to substitution of the new limits in previous acts by replacing former Items with appropriate new ones to effect the extension in a large number (14) of earlier Acts.

It should be noted that a very large number of orders has been made (and varied) under the new Act, and under the earlier acts (as amended), designating foreign vessels, their areas of fishing, the types of fish to be caught; closing certain "boxes" of sea areas to certain kinds of fishing or for certain species. There have been many variations of all these, sometimes to effect EEC conservatory regulations, sometimes promulgated exclusively by the UK conservation purposes. The system is eminently flexible; the main weakness it the lack of provision for inflation in the penalty limits, which cannot be amended by orders.

(c) Schedule 3: Transitional Provisions: Powers of British Sea Fishery Officers
These made provision for earlier orders etc. to continue in existence until expired or replaced — in particular the powers of British sea fishery officers under S. 15(3) of the Sea Fish (Conservation) Act 1967, as extended to the new areas subject to British jurisdiction, *i.e.* any officer can exercise in respect of any boats in this area the powers conferred on him under the 1883 Sea Fisheries Act which are the powers considered necessary also for enforcement of the 1967 Act (see below).

(d) Schedule 4:
This merely summarizes the sections of previous Acts which are now repealed by the Fishery Limits Act.

b) Sea Fish (Conservation) Act 1967 (c. 84) as amended
This act dealt, following UK ratification of the 1964 European Fisheries Agreement, with *(inter alia)* regulation of sea fishery including licensing of British boats; of landing of sea fish; certain exemptions; penalties and offences; and enforcement of orders. The last named provisions typify UK enforcement methods, as extended under the new Act above to the 200 mile fisheries zone, and are summarized below; they are laid down in S. 15 of the Act.

Enforcement Powers of British Sea-Fishery Officers

i) every British sea-fishery officer can seize nets or gear involved in contraventions of the Act; any fish caught in contravention of the Act's prohibitions if the catch is on the fishery boat or the one concerned in the violation or is in the ownership or custody of, or under the control of the owner master or charterer of the boat; any fish landed in contravention of certain orders under the Act, and nets and gear used in the landing.

ii) Any such officer can use his powers on fishing boats within UK Fishing Limits or on British boats wherever they may be (the specific powers being conferred by orders in previous Acts). If British boats are not registered under the Merchant Shipping Act only some of the powers may be authorized by Ministerial order.

iii)Any such officer has the same powers as customs officers for seizing ships under the Merchant Shipping Acts. He can make any examination or enquiry *he* deems necessary to ascertain whether certain sections of the Act have been contravened.

iv)He is subject to the same protection in proceedings against him arising from this exercise as have customs officers.

v) Persons obstructing the officer are subject to the revised penalties laid down on the Fishery Limits Act above, as they are also if they refuse to comply with his lawful demands.

The Enforcement Officers
Under S. 16 for some offences the officers enforcing can be any of a variety of officials including the following: an officer authorized by the appropriate Minister; a police officer; an officer of a market authority (within the area of authority of the market); a fishery officer of a local fishery committee (acting within its district); an officer (acting within the City of London) authorized by the Fishmongers' Company. Which of the above officers is authorized to enforce varies with the nature of the offence, as specified in the Act.

In a interpretative section (S. 22) "British Sea-fishery Officer" is defined as any person who by virtue of sections of earlier Acts *Is* such an officer.

It should be noted that there are other Acts, dealing with specific aspects of fisheries, and that officers have powers to enforce their provisions, in the manner and to the extent that the Act concerned specifies for the offences etc. specified in them, including contraventions of the very detailed orders promulgated pursuant to' such acts. Sea fishery officers thus have to be highly trained and skilled in the details of fisheries and the relevant regulations. Since the passing of the Fishery

Limits Act such officers have included members of the Royal Air Force, used in fisheries reconnaissance, suveillance and enforcement of the vastly extended area of British fishery limits. The British Royal Navy reported observation of over 17,000 vessels in the zone in 1979, noting names, numbers, position, time and activities. Over 1,900 foreign vessels were boarded as result. Such extensive surveillance must inhibit all forms of unregulated activity.

c) Fisheries Act 1981 (1981 Ch. 29)

This recent act is Important as illustrating the need to revise old legislation in the light of new knowledge and perceptions of the problems of protecting cetaceans, particularly the need for realistically deterrent penalties, which take account both of inflation and new views of the seriousness of the offences of illegal taking etc. This act illustrates a method of revision without resort to a new comprehensive act. It dealt with a number of other fisheries issues and included only one or two sections relating to whaling which extended the 1934 Whaling Act to apply to all cetaceans (except for ships registered in colonies or associated states) as well as greatly raising penalties for offences as follows:

Part V

Miscellaneous and Supplementary

S. 35 amends the Whaling Industry (Regulation) Act 1934 in order to provide that:

i) references in S. 1 of that Act to whales are to be construed as references to *any cetaceans,* as accordingly are references to whale products;

ii) in the case of ships registered or licensed under the law of colonies or associated states some sections (Ss. 3-6 of the 1934 Act) are to refer only to whales known as whalebone or baleen whales, and as sperm spermaceti, cachelot or pot whales, though other species can be added at a later date by Order in Council (the order can be made subject to exceptions, limitations of application etc.). These provisions do not, however, extend to all cetaceans the provisions of S. 3 of the 1934 Act applying only to right, grey, blue or fin whales.

iii) (a) Penalties in secton 2, 3(i) and 4(2) of the 1934 Act for unlawful taking, treating, killing, or attempting to kill whales are raised on summary conviction to a fine of up to £ 50,000;

(b) Penalties in S. 6(7) of the 1934 Act for contravention of licence conditions are raised on summary conviction up to £ 5,000;

(c) Penalties in Ss. 6(8) and 9(1) of the 1934 Act for failing to keep or for falsifying records or forging documents are raised on summary conviction to up to £ 1,000;

(d) For wilfully obstructing inspectors the fine on summary conviction can be up to £ 5,000;

(e) Any person driving ashore in Scotland any of the smaller bottlenose and pilot whales is also guilty of an offence, fineable up to £ 50,000 on summary con-

viction (the 1907 Whale Fisheries (Scotland) Act was, as stated above, repealed by S. 36 of this new Act and the authority referred to in it with power to grant licences under the later 1934 Act has now been changed to the appropriate Secretary of State).

(f) Penalties for all offences referred to above are, if the offence results only in conviction on Indictment, an unspecified amount of fine.

3. Prohibition and Control of Import and Export of Endangered Species (Import and Export) Act 1976 (1976 c. 72)

This Act, which came into effect on 3rd February 1977, provides the powers necessary to implement the Convention on International Trade in Endangered Species (CITES), to which the UK is party. Briefly it prohibits, except under licence, the import and export of live or dead animals (and plants) and specified parts and derivations thereof to which the three Schedules to the Act apply (S. 1). An important innovation, further to CITES' requirements, is that it empowers the Secretary of State to appoint or designate scientific authorities to advise him (S. 2). He is also enabled to modify the Schedules (S. 3). S. 4 makes it an offence for any person to sell, offer or expose for sale, or even have in his possession for the purpose of sale, any of the restricted articles. The Secretary of State can, under articles 5-7 prohibit import of live animals of any kind by sea, air or land, and can restrict their importation to specified ports and other places, and also their subsequent movement. The Act can, by virtue of S. 9, be extended to any British possession.

The provisions of special relevance for the purposes of this Report include:

a) The Licensing System

i) Restriction of Importation and Exportation of Certain Animals and Plants (S. 1)

(a) *The Restrictions*

Importation and exportation of live or dead (a term given a wide interpretation in the Act) animals of the kinds listed on Schedule 1 is prohibited, as it is of any item listed on Schedule 3, (Ss. 1(1)a and c respectively) unless it is done under licence (for which a charge can be made) issued by the Secretary of State (S. 1(2)) who must submit the licence applications to whichever of the scientific authorities defined in the Act he considers best able to advise him on its issue and terms. Reasonable time for advice must be allowed (S. 1(3)). S. 1(4) provides that licences may be general or specific; modified or revoked by the Secretary of State at any time; or be valid for only up to a year.

(b) *Offences and Penalties*

(i) Fine or Imprisonment

Summary conviction for any of the following offences subjects the person (which includes corporations) offending to a fine of up to £ 400; conviction on indictment leads to imprisonment for up to two years or a fine, or both: making statements or representations or furnishing a document or information known to be false in a maternal particular or recklessly making a statement or representation, or furnishing a document or informaton similarly false (S. 1(6)).

(ii) *Loss of Licence*
If the above offences are committed for the purpose of obtaining a licence the licence is void.

(c) *Proof of licensed Importation:* Where the item imported or exported is one for which a licence is required *(i.e.* it is on Schedule 3) or a live animal is concerned persons authorized or commissioned by the Customs and Executive Commissioners can require that the person concerned *(i.e.* having possession or control of the animal or item) furnish proof of lawful import or export; otherwise the animal or item concerned is liable to forfeiture under the Customs and Excise Act 1952.

For further information on the meaning of specific terms in English law the annotation of the Act given in Halsbury's Statutes, vol. 46, can be consulted.

ii) Establishment of Scientific Authorities
S. 2 provides for the establishment of at least one such body to advise the Secretary of State on any questions which he might legitimately refer to It under the Act, generally in connection with import and export of animals of kinds which appear to him to be, or to be likely to become, endangered as a result of international trade, and in connection with items derived from such animals.

iii) Modification of Schedules (S. 3)
The Secretary of State can, after consulting the above scientific authority, modify the Schedules by means of an order, as necessary and desirable in his view to give effect to amendments of CITES or to the inclusion or withdrawal of anything from Schedule III (kinds of animals and plants trade in which a party identifies as needing international control): at the instance of a Convention party; to promote conservation of animals etc. which appear to the Secretary of State to be, or to be likely to become, endangered as a result of international trade; to remove restrictions which he later considers do not provide conservation; to facilitate more effective or convenient administration of the restrictions.

b) Offences (S. 4)
i) Offences
There is a large number of offences under the Act including: selling (including bartering and exchanging); offering or exposing for sale; having in possession for the purpose of sale; or displaying (whether or not for money) to the public generally or to sections of it anything imported without, or in contravention of, the licence and other terms of S. 1, or anything made wholly or in part from any animal or item so imported and which is listed on Schedule 3. Anything coming under these limitations is regarded as a "restricted article" (S. 4(i)).

ii) Defences
Defences include that when the restricted article came into a person's possession he made reasonable enquiries to check whether it was such an article; or that at the date of the offence he had no reason to believe that it was such. This enquiry requirement is fulfilled by production of a signed certificate from the supplier confirming that the supplier himself made the appropriate enquiries and had no reason to believe, on transferring possession, that the article was a restricted one.

iii) Further Offences
Derive from the above provisions. Persons furnishing certificates which they know to be false in a material particular, or recklessly supplying such a false certificate are also guilty of an offence.

iv)Penalties
A guilty person convicted summarily of one of the above offences is liable to a fine of up to £ 440 or, if convicted on indictment, to imprisonment for up to two years or a fine, or both. This provision does not, however, expressly apply the penalty for charges brought under the 1952 Customs and Excise Act, which relates to improper importation and evasions of restrictions on such importation.

c) Restriction of Ports of Importation
Enforcement of prohibitions or controls of importation by land, sea or air are greatly facilitated by the power given to the Secretary of State that if it appears desirable **to** him, in order to help detect evasions of the Act, he can make an order prohibiting the carrying out of one or more of the following: importing by sea any live animal of any kind expressly subject to the order; so importing it unless it is imported at a port or one of the ports specified in the order for that kind of animal; importing such-animals by air, unless unloaded at an airport or one of the airports specified in the order; importing any such animal by land unless brought across the boundary with Northern Ireland at a place, or one of the places, specified for such animals.

The Secretary can, however authorize importation without such restrictions on conditions laid down in such authorization.

d) Extension to British Possessions Elsewhere
By Order in Council (issued as stated earlier under the authority of Her Majesty without requirement of prior parliamentary approval) the Act's provisions can be extended, on whatever terms are specified therein, to any colony, other than one for whose external relations the UK is not responsible, and any country outside UK dominions over which the UK has jurisdiction.

e) Other Provisions
These relate to movement of live animals after importation and use of specified premises for keeping animals and are not of use in prevention of "pirate" whaling.

f) The Schedules: 1,2 and 3
Schedule 2 relates to plants and is irrelevant to this Report.

i) Schedule 1: Animals the importation and exportation of which is restricted
This Schedule includes all kinds of mammals save those specifically excepted. No marine mammals are so excepted, other than the Northern Fur Seal (Callorhinus ursinus).

ii) Schedule 3: Items the Importation and Exportation of which are Restricted
This Schedule is highly specific and includes *inter alia:*

1. Whale meat and whale offals.
2. Whalebone, if unworked or simply prepared, and hair and waste of whalebone.
3. Whale fat and whale oil *(other than sperm oil)* whether or not refined or modified

(emphasis added).

4. Whalemeat extracts and whale meat juices.
5. Any tusk (If unworked or simply prepared) of any of certain specified animals, which Include "any animal of the species Monodom monoceros (narhwal) and part of any such tusk and powder and waste of any tusk of any of the animals referred to.
6. Any tooth of any animal, if unworked or simply prepared, any part of any such tooth and powder and waste of any tooth of any animal.
7. Any furskIn of a defined animal if raw, tanned or dressed or made up in various specified ways, or parts thereof. Animals are defined to include the species Ursus maritimus (polar bear).

It should be noted that this Act, which has very detailed Schedules, clearly requires, as do the comparable comprehensive US acts, such as the Marine Mammal Protection Act and the Endangered Species Protection Act, an extensive infrastructure of well-trained customs officials and other inspectors and administrators, as appropriate, for their enforcement. The Secretariat of CITES which is kept informed of national legislation and the administrative and other bodies used to enforce the Convention in its states parties is now in an excellent position to give help and advice, to any state requesting it, on the most suitable and effective ways of instituting the necessary legislative and other mechanisms for this purpose. Handbooks are being produced by states, the IUCN and CITES for the guidance of states parties. The IUCN has published G. *Emonds* "Guidelines for National Implementation of the Convention on International Trade in Endangered Species of Wild Flora and Fauna" (IUCN, EPL No. 17, 1981, Gland, Switzerland).

D. Laws of Other States Deterring "Pirate" Whaling

It has not been possible in the time available for completion of this Report to examine in similar depth and detail the laws pertaining to whaling and trade in whales or whale products of other states. The USA and the UK do, however, provide good examples of the two different approaches. The selected examples of some other states representative of the major continents of the world confirm that one or other of these approaches is that used by most states although there are some differences in detail — periods of licences, penalties, whaling exceptions. Selected examples of other laws are given below and it is hoped that this Report being published in loose leaf form, states which would like examples of their own national legislation to be included, particularly if they consider that some aspect of it contributes to the diversity of techniques and sanctions which can be employed against "pirate" whalers, will send copies of their relevant laws to the author of the Report or its publisher or sponsors. Meanwhile the following laws illustrate some of the fisheries enforcement techniques used in Australia, South America, Asia, Africa, other parts of North America (Canada) and elsewhere in Europe. States which have never exploited whales rarely have legislation specifically applying to them but their general fisheries acts can be made applicable to whaling and used to prevent "pirates" entering their waters; examples of a recent fisheries acts in diverse parts of the world, which illustrate the wide scope for enforcement, are therefore included in the examples below.

1. Mexico

Mexico has never exploited whales. As a member of the IWC, it has, however, approved by decree the International Convention for Regulation of Whaling, but its main interest has been to create shelter for whales in specific areas (Decree, Whale Refuge (Scammon's) Lagoon, 6th December 1971 (as modified 28 March 1980; and regulations for its implementation)). It is, however, very concerned to protect its fisheries and recently enacted an extremely comprehensive instrument for this purpose, which includes many provisions for effective enforcement.

Federal Act on Fisheries Development (Ley Federal para el Fomento de la Pesca) 10 May 1972; Diano official No. 20, May 1972, p. 2, as amended by Decree of February 1976.

The Act implements Article 2 of the Mexican Constitution relating to the regulation, promotion and use of aquatic flora and fauna as natural entities that can be appropriated by man, but with a view to arriving at an equitable distribution of the national wealth and to conserve it. Concessions, permits or other formal authorizations are required for exploitation by private individuals or companies. This act is directed, *inter alia,* at regulation of fisheries and protection of aquatic flora and fauna.

a) Definition

For purposes of this Act, the term fisheries is understood (Ch. 1, 5.3) as covering the act of extracting or capturing by any authorized process, those species or biological entities whose environment is water, as well as prior or subsequent acts related thereto. Prior acts are those whose direct purpose is fishing; subsequent acts are those performed directly on species captured or extracted, including processing (Ch. 1, S. 6).

b) Scope

The Act (Ch. 1, 5.3) extends to regulation and promotion of fisheries in nationally owned inland waters; waters of the territorial sea; to vessels flying the Mexican flag in international waters; in exclusive or preferential zones declared as such by Mexico; to waters overlying the continental shelf; the continental shelf; waters of the high seas.

It should be noted that the purported extension to the superjacent waters of the continental shelf and to the high seas will be internationally acceptable only to the extent described in Part I of this Report. The existing international treaties, the customary international law, and the *lex ferenda* of the UNCLOS III provisions permit states to exercise Jurisdiction over the former only to the extent approved in the 1958 Continental Shelf Convention viz for the purposes strictly necessary to enable the coastal states to exercise its sovereign rights to explore and exploit the natural resources of the shelf and perhaps over ships entering the 500 metre safety zones. This section of the Mexican decree specifically accepts, however, that all the above matters shall be regulated by the respective laws and international treaties and agreements made or to be made, in accordance with the Mexican Constitution.

c) Concessions, Permits and Authorizations

Ch. V., S. 25 mandates concessions (from 5-20 years) for permits (two solar years) for commercial or sport fishing of species whose normal habitat is water. Issue of concessions and permits for whaling is totally prohibited under this.

Concessions relate to fisheries which require at least two year periods for economic stability. For other fisheries they can be issued (S. 27) only to:

i) Born or naturalized Mexicans, fisheries production and ejido fisheries productive co-operatives, decentralized authorities or firms in which the Mexican State is a shareholder.

ii) commercial companies which are constituted under Mexican law and have their registered office in Mexico, have registered share certificates; not less than 51 percent of share capital with rights subscribed by Mexicans or Mexican companies whose articles of association contain provisions that shares may not be held by non-Mexicans; articles of association providing that the majority of directives shall be nominated by Mexican shareholders and that only persons of Mexican nationality shall be eligible to be so nominated.

S. 37 prohibits all commercial fishery by foreign vessels in territorial waters and the waters of the Exclusive Economic Zone, though under S. 30 permits are granted to foreign nationals only for sport or scientific fishery (subject to the requirements of Mexican law) and in exceptional cases permits can be granted to foreign fishing vessels for each trip if there is a fisheries surplus to Mexican fishing capacity with the Total Allowable Catch preferences given to vessels of states which grant equal conditions of reciprocity.

No foreign government may be shareholder in, or establish in its favour, any right in respect of concessions or permits. Acts contravening this are regarded as null and void, and the foreign governmental assets and rights concerned are forfeit to the Mexican nation.

To obtain a concession or permit applicants must (S. 32 and 33) fulfil various conditions including: being registered in the National Fisheries Register (evidence of this is required to be produced); paying fees; satisfying all other requirements laid down in the Act and all other relevant laws and regulations.

In this event those seeking permits have to accept a number of specific conditions laid down in S. 37 including leaving the waters of the zone within a set time limit; not engaging in commercial fishing or hunting of marine mammals (or other forms of fishing other than that permitted); making a cash deposit as a guarantee of compliance with these obligations. Further specific requirements are laid down for fishing permits in territorial waters.

The Departments of Industry and Commerce is required "to make decisions in accordance with national interests", a provision that if widely interpreted would allow it to refuse access to the surplus of fin and other fisheries to states engaged in "pirate" whaling. The "reciprocity" approach might also influence such decision.

d) General Provisions

i) Obligations

S. 38 lays down twelve specific obligations on all persons fishing in the zone. These Include that they take only authorized species in authorized areas (of the kind and to the extent prescribed); admit inspectors on board; record details of commercial fishing; submit returns on the use of catches; notify the Fisheries Office of arrival and landing of catches; furnish any relevant required information; comply with other prescriptions of the Act and other relevant laws and regulations (including, of course, those relating to whaling).

ii) Conditions

Those imposed on concessionaires under S. 40 include that they undertake to comply with all the terms of the concession.

iii) Transport of fishermen

This is required within national territory (with limited exceptions) by S. 41 to be done only by Mexican vehicles covered by a fisheries logbook officially issued. Foreign vessels can be used for these purposes only if no Mexican vessels are available and are subject to the controls and inspections provided for under the Act and other relevant laws and regulations.

iv) Bonds

These can be required for grant of concessions, proportional to the capital outlay up to a limit of 10% thereof. For permits the bond must not exceed 5,000 pesos for Mexicans; for permits issued to foreign vessels the limit is 100,000 pesos.

(e) Lapse and Withdrawal of Concessions: Cancellation of Permits and Authorizations

These provisions (Ss. 44-48) relate more to promotion of fishing activity in the Mexican zone but some provisions are relevant to indirect enforcement of the objectives of this Report. For example the concession can be lost for assigning part or all of the production to purposes other than those legally specified; repeated falsification of catch returns; giving cause for removal from the National Fisheries Register; transferring the concession contrary to the Act. Permits are similarly forfeit except that the provisions on assigning production do not apply. In the event that concessions are to be withdrawn or permits cancelled the parties concerned must first be granted a hearing under S. 48 though the form of this is not specified in the Act.

f) Offences

No less than 22 offences are created under S. 78 the Act (Ch. X). Those relevant to the Report include engaging in commercial fishing without a relevant concession or permit; removing species out of the prescribed season or by prohibited methods or of size or weights below the limits specified; taking species from refuge areas or interfering with the ecology of such areas; trading in the products of domestic fishing, *inter alia;* importing or exporting fishery products without official permission; bringing about the death, degeneration or wounding of fishery species other than in cases of authorized extraction or capture or for scientific research; transshipping fishery products to any other vessel (except if there is an accident)

without official authorization, or landing commercial fishery products from foreign vessels; buying or possessing fishery products in order to trade in them, unless in conformity with the Act; failures to comply with acts provisions concerning penalties (Ch. XII).

g) Inspection and Supervision

The relevant Secretariat is required by Ss. 80-87 (Ch. XI) to establish control, inspection and supervision services in order to verify conformity with the Act. The three means specified are by demanding returns and other information; carrying out administrative inspections; carrying out on-the-spot checks. All required returns must be made in the 168 day period specified in the Act. Administrative inspections (at fisheries establishments) require production of books and documents as demanded. On-the-spot checks include inspection of gear, vessels, vehicles, storage premises, installations and sales premises connected with fisheries. The criteria for "connection" are not laid down so this provision enables wide inspection, though constitutional procedures must be followed and officials must first identify themselves. Reports of the inspection must be drawn up before two witnesses named by the interested party or his representative, or failing these, by the authorities and must be signed by all involved. Only procedures authorized under the Act can be used.

h) Penalties

Offences under the Act are punishable in the manner set out in Ss. 88-95 (Ch. XII) at the instance of the relevant Secretariat. Fines are payable, the amount varying with the offence concerned. For some offences under S. 78 (and some others) they can be as much as 100,000 - 200,000 pesos for each offence. For second and further offences the fine is doubled.

In addition to monetary penalties other sanctions can be used including for specified offences seizure of fisheries products, means of transport and gear; temporary closure of fishing (permanent closure for second and further offences); withdrawal of concessions or cancellations of permits. All these penalties can be used, in addition to fines, for some offences. Illegal fishing by foreign vessels gives rise to fines of from 75,000 • 300,000 pesos as well as seizure of vessel and catch. Moreover, the vessels can be detained in a Mexican port until the fine is paid.

S. 94 does state, however, that, for purposes of fining and detaining, the amount of fines, the economic condition of the offender and the seriousness of the offence shall be taken into account.

2. Canada

In addition to the laws of the United States which have already been referred to as a special case, those of Canada are also of great interest since it was one of the first states to introduce stringent control and protection of fisheries within its 200 mile zone and was also in the past a major whaling state, and leading member of the IWC from which, however, it withdrew in 1981. As in the case of the United Kingdom and as in the United States before the passing of the Marine Mammal Protection Act, Canada has long specifically regulated whaling by its vessels and in its waters. Evidence of its activity in this respect is provided by the fact that it has adopted no

less that 25 instruments, dating from a Fisheries Act of 1932 to its most recent instruments — the Fisheries Amendment (Whale Protection) Act 1980 and, the Beluga Protection Regulations of 22 May 1980 (P.C. 1980 — 1355). It is not possible to survey all their relevant provisions; reference will therefore be made only to provisions of special relevance to this Report. It should be noted that not only has Canada enacted the IWC Regulations through such instruments as the Whaling Act 1970, and its subsequent revisions and pursuant regulations, but it also controls trade in whales and whales products (with some exceptions) by means of regulations under the Customs Act of 1901, as amended to date, and the Export and Import Permits Act RSC 1970 which was specifically introduced to implement the prevention of importation of whale products into Canada from, and the transfer of whaling vessels etc. to, non-member countries.

a) Whaling Convention Act 1970 RSC 293, S. 1

i) *Definitions (S. 2)*

It should be noted that the Act itself (which is quite short) does not prohibit all whaling or any specific form of whaling or whaling for any particular species but that it provides for a licensing system under which whaling can incrementally be banned or controlled. Canada at present operates this system according to the requirements of IWC regulations; none of the large whales protected by the IWC is taken within Canadian jurisdiction. The system follows the simple British rather than the complex USA model, but with some variations.

This Act, by means of a Schedule, incorporates into Canadian law the whole of the 1946 International Convention for the Regulation of Whaling, and the Schedule to that Convention (since this is an integral part of it). Any necessary changes required by the annual adjustments to the ICRW Schedule by the meetings of the IWC are made by subsequent amendments to the Canadian Act, in respect of whaling Regulations. There have, of course, been a long series of these amendments, *inter alia:*

(a) a ship to which the Act applies is defined as a ship registered in Canada or a ship within the territorial waters of Canada. Following the extension of Canadian fisheries jurisdiction under the Territorial Sea and Fishing Zones Act 1964 (Statues of Canada 1964-65, Ch. 22 (as amended, RSC 1970, Ch. 45 (1st Supp) + RSC 1970 Ch. 14 (2nd Supp)) to 200 miles by the Fishing Zones of Canada (Zones 4 and 5) Order of 1 January 1977 (Canada Gazette, Pt. II, Extra., 1 January 1977) the Whaling Act now applies also to this extended zone.

(b) "factory ship" means a ship in or on which whales are treated whether wholly or in part;

(c) "whale catcher" means a ship used for the purpose of hunting, taking, towing, holding onto or scouting for whales;

(d) "whale products" means any part of a whale and blubber, meat, bones, whale oil, sperm oil, spermaceti, meal and baleen.

(e) "whale treaty" means the possession, treatment or processing of whales or of whale products;

(f) "whaling" means scouting for, hunting, killing, taking, towing or holding onto whales.

ii) *Offences (unlicensed activities) (S. 3)*

(a) Every person is guilty of an offence who either engages in whaling, as defined above, from or by means of a ship, the owner or charterer of which does not hold a licence Issued under the Act authorizing it to be used as a whale catcher, or engages in whale treating on, from or by means of a similarly unlicensed ship, unauthorized for use as a factory ship.

(b) Under S. 4 the owner and charterer of a ship used as a whale catcher or as a factory ship are each guilty of an offence unless they hold the appropriate licence.

(c) A person also commits an offence if he has any whale or whale products in his possession, knowing that the whale concerned has been taken in contravention of this Act or the regulations pursuant to it, *i.e.* it is not an offence merely to possess these items, proof of knowledge of their illegal origin is required (S. 5).

iii) *Regulations*

These can be issued under S. 6 (by the Governor of Canada) to execute both the provisions of the ICRW itself, regulations adopted by the IWC *and* its recommendations (even though these are not legally binding upon Canada under international law). Although this is a general power some specific objects of regulations are listed. These include: to provide for Issue, suspension and cancellation of licences; to prescribe their terms, conditions, forms and fees; respecting operation of whale centers, factory ships and land stations; for seizure, forfeiture and disposition of any whales or whale products in contravention of the Act; prescribing the powers and duties of those engaged in or employed in the administration or enforcement of the Act (a useful framework provision in relation to future and further action to deter "pirate" whalers); for conservation and protection of whale resources; prescribing penalties that might be imposed (at that date, on summary conviction or conviction on indictment, fines of up to $ 10,000 or up to 2 years imprisonment, or both, for violation of regulations by any person in Canada or on, from or by means of any ship.

iv) *Penalties (S. 7)*

Within the above limit every person guilty of offences under section 3 or 5 (*i.e.* illegal whaling, whale treating or unlawful possession of whales), is liable on summary conviction to a fine of $ 5,000, or to imprisonment for one year, or both. Offences under S. 4 (unlicensed activities) are punishable on summary conviction or conviction on indictment by a fine of $ 10,000 or by 2 years imprisonment or both.

b) The Export and Import Permits Act 1970 (RSC 1970)

This Act has enabled Canada to implement the IWC recommendations that import of whale products from non-member states be prohibited.

c) Fisheries Act

Canada has several acts and regulations relevant to application and enforcement of

fisheries jurisdiction viz.:

(i) Coastal Fisheries Protection Act, 31 March 1953 (as amended).

(ii) Coastal Fisheries Protection Regulations, 1976 (as amended 1978).

(iii) Foreign Vessel Fishing Regulations, 1976, as amended 1977.

(iv) Form of Foreign Fishing Vessel Licence.

As the bulk of these acts is now available in the FAO legislative study already referred it is not necessary to detail them in this Report. Strict enforcement and severe penalties are introduced in these acts. Only the first two are germane to this Report. Points to note are as follows.

i) *Canadian Coastal Fisheries Protection Act 1953*

(a) *Foreign Fishing Vessels (Ss. 3-4):* No foreign fishing vessel can enter Canadian "fisheries waters" for any purposes unless appropriately authorized (by the Act, by other Canadian laws, or by treaty).

Persons on board such vessels are prohibited from carrying out a number of activities unless properly authorized including unloading, loading or transshipping fish, outfitting or supplies; shipping or discharging crew members or other persons. Persons on board Canadian fishing vessel, cannot, without authority, bring into Canadian "fisheries waters" fish received outside Canadian fisheries waters from foreign fishing vessels.

(b) *Inspection, Seizure and Forfeiture:* (Ss. 5-6) Protection officers can board any fishing vessel within Canadian waters, bring the vessel into port, scan its cargo, examine the master or crew members under oath. If an officer suspects on reasonable grounds that an offence against the act has been committed he can seize the offending vessel and the goods on board. He can arrest *without warrant* any person whom he suspects, on reasonable grounds, of having committed an offence against the act.

(c) *Offences (S. 7).* Masters or those in command of fishing vessels commit an offence if they enter Canadian fisheries waters in contravention of the Act, or without proven legal excuse; other persons also do so if being on board a fishing vessel, they refuse to answer questions on oath put to them by protection officers, or, after an official signal to bring to, throw equipment overboard or destroy part of the vessel's cargo or equipment, or resist or willfully obstruct protection officers executing their duty.

(d) *Penalties (S. 8):* Violations of S. 3 lead, on conviction on indictment, to a fine of up to $ 5,000 and up to 3 months imprisonment, or both; those offending against S. 7 are liable, on conviction on indictment, to a fine of up to $ 10,000, or to imprisonment up to 2 years, or both, or on summary conviction, to a fine of up to $ 2,000 or imprisonment of up to one month, or both.

ii) *Coastal Fisheries Protection Regulations,* 10 December 1976 (SOR/76-80) as amended 12 May 1978 (SOR/78-447). These regulations which institute a licensing system for fishing within the Canadian Fishing Zones are largely concerned

with laying down the terms and conditions of such licences and other relevant details. Especially relevant to the objections of the Report is S. 11 the provisions of which are detailed below.

Terms and Conditions of a *Licence* (S. 11). This lengthy section requires *inter alia* that masters notify the authorities of the time and point of their vessels entry into the zone; the schedule of activities therein (to which the vessel and crew are limited as authorized); that written records be maintained and submitted; that entry into port (as authorized in the licence) be verified in advance; that reports of the vessel's position and activities be made as required in the licence. When feasible, on request, a technical observer must be permitted on board, as well as a protection officer, who may be on board from time to time and who must receive all necessary assistance. The master can be required at any time to proceed to port for assistance.

3. Nigeria

African states have not engaged in commercial whaling, apart from South Africa, which has now in any case ceased to do so, and therefore have generally not found it necessary to enact laws to control or regulate it. This is a gap which should be remedied to ensure that "piratical" activities are never started or resumed off the coast of African states. About 19 African coastal states have now provided for 50-200 miles fisheries jurisdiction by their legislative processes as the Table given by the FAO study on Legislation of Coastal States reveals (Table A: Limits of Territorial Seas, Fishing Zones and Economic Zones, pp. 328-334). The Introduction of extended fisheries jurisdiction provides both an opportunity and an incentive to ensure that it applies and can be enforced to provide that whaling outside IWC regulations and standards never takes place in these zones, and that "pirates" are deterred for any possible activities on the borders.

Nigeria does not yet have any specific legislation concerning whaling operations, but its fisheries laws, in the context of a recent decree extending Nigerian fisheries jurisdiction to 200 miles, are of interest as illustrative of enforcement techniques used and available in Africa. The legislation is much simpler and less detailed than that of the developed countries and of Mexico referred to above but nonetheless is a deterrent to illegal activities especially if specifically extended to whaling.

a) Sea Fisheries Decree 1976 (Decree No. 30)

i) *Licences:* These are required for operation of or navigation of any motor fishing boat within Nigeria territorial waters (S. 1(1)).

ii) *Offences:* Persons contravening the above section are guilty of an offence and on conviction are liable to fines of £ 500 for each day the offence continues or to up to one year's imprisonment, or both (S. 1(2)). Other offences (under S. 9) include contravening or failing to comply with any of the Decree's provisions, or requirements made under it, or conditions endorsed on licences.

iii) *Enforcement:* An authorized person can, in order to enforce the Decree, require the licensed or other boat owner or person in charge of it to exhibit his licence, fishing apparatus and catch; board it to search and examine the boat

and fishing apparatus; or if there is reasonable suspicion that an offence against the Decree has been committed, take the alleged officer and the boat, fishing apparatus and catch to the most convenient port or police station. The boat can be detained pending trial, the catch sold and the proceeds of sale kept pending trial. The owner of the licensed boat must render any required returns to a licensing officer and allow him, or any other formally authorized person, to inspect the boat's catch before or after the catch is landed (S. 3).

iv) *Penalties:* The court concerned can order the forfeiture of any fishing boat, apparatus or catch used in the commission of or derived from any act in respect of which the offender is convicted. Licences can be cancelled or suspended.

v) *Regulations:* These can be issued *inter alia* to give effect to the Decree, to regulate, prohibit or restrict the use of any boat, apparatus or methods considered harmful to the Nigerian sea fishing industry; provide for inspection of buildings and premises used for various aspects of the fishing industry; to regulate any other matters relating to the conservation and protection of the stocks of sea fish (a useful "catch-all" provision).

b) Exclusive Economic Zone Decree 1978

This Decree denominates as an Exclusive Economic Zone an area extending from the external limits of Nigeria's territorial waters to a distance of 200 nautical miles from their baselines. Sovereign and exclusive rights are vested, without prejudice *inter alia* to the above Sea Fisheries Decree 1976, in the Federal Republic of Nigeria In respect of the exploration and exploitation of the natural resources or the superjacent waters in the zone.

4. South Africa

South Africa, a member of the IWC, which has had to deal with the activities of the "pirate" vessel, *M.V. Sierra* (or *Run),* and did so most successfully, provides an excellent example ot the kind of legislation required and the ways in which it can be exercised. The incidents involving this vessel have been thoroughly documented by the People's Trust for Endangered Species in their study, referred to in Part I.

South Africa has given a detailed account to the IWC of the measures it took to prevent the vessels "pirate" operations (Report by the South African Commissioner on Measures Taken to Discourage Whaling operations IWC Operations; IWC Doc. 32/29).

South Africa, following its ratification of the International Convention for Regulation of Whaling used its existing sea Fisheries Act 1940 as the vehicle for applying the ICRW regulations by means of a series of Proclamations under that Act, as required to enact the ICRW's Schedule amendments.

In 1973 a new Sea Fisheries Act was passed and some important and innovative regulations giving effect to IWC recommendations pertaining to whaling were enacted pursuant to it, *inter alia* In 1979. These regulations (and other Acts relating to purposes other than whaling which will be discussed in Part 3(ll) of this Report) enabled South Africa to take effective action to deter this "pirate" whaler.

Sea Fisheries Act, 1973 (Act 58 of 1973): Regulations (15 June 1979, Government Gazette No. 6497)

A series of previous regulations from 1973-1979, promulgated under a 1912 Government notice, was amended by substituting a new regulation 89 under S. 10 and 13 of the Sea Fisheries Act, as follows:

Reg. 89: No *person shall:*

i) Use a whale or factory ship or use any other fishing boat or other vessel for the freezing or processing of whales or participate in any manner in the operation of or activities on such a ship, other fishing boat or other vessel; or

ii) have on board a whale factory ship, other fishing boat or other vessel referred to above any gear, apparatus or appliances which is required or which can be used in any manner for the freezing or processing of whales; or

iii) supply any ships' stores for use on or in any whale factory ship, other fishing boat or other vessel registered in any foreign state and used for the freezing or processing of whales or which has any connection whatever with such freezing or processing; or

iv) offer his services for or make available his experience on any of the activities referred to above at (a), (b) and (c) or render assistance in any manner calculated to facilitate or promote the performance of any such activities.

With suitable adaptations of style and language and other amendments to take account of national peculiarities such regulations would provide an effective weapon against "piratical" activities. The requirement that persons under South African jurisdiction should not supply stores or offer services or expertise to foreign whalers is an advance on the provisions of most national laws, which might be copied by others. It accords both with IWC recommendations and with the techniques adoptd by European states to eliminate "pirate" broadcasters, described in Part I. The further international law implications of controlling activities of nationals are considered in Part 3(ll) of this Report, as are those concerning Investigation of companies and capital which were used in conjunction with the above to stop the *M.V. Sierra's (Run's)* operations.

5. Japan

Japan, which has a long history of whaling and which has been a member of the IWC since 1951 has laws concerning whaling on file at the International Whaling Commission dating from its 1934 Regulations for Floating Factory Fisheries (M. & F. Ordinance No. 19, 29 July 1934) through a series of Ordinances and notifications ending with Regulations for Factory Ship Type Fisheries (M.A.F. Ordinance No. 3D of 1952; as amended by M.A.F. Ordinance No. 54 of 1952). Japan has presumably enacted subsequent IWC regulations but as these have been neither deposited with the IWC Secretariat nor included in the UN Legislative Series it has not been possible so far to trace them in the time available. Meanwhile, however, of considerable interest for purposes of this Report is Japan's recent Act extending its fisheries jurisdiction to 200 nautical miles since, unlike most similar extensions, it specifically refers to marine "animals".

Law No. 31 on Provisional Measures Relating to the Fishing Zone (2 May 1977V (FAO) Legislative Study No. 21, pp. 117-121)

i) *Purposes* (S. 1). These are specifically stated *inter alia* to be to ensure proper conservation and management of fisheries resources. The law prescribes provisional measures necessary for the exercise of fishery jurisdiction over fisheries "and similar activities within the fishing zone".

ii) *Jurisdiction* (S. 2). Japan has Jurisdiction over fisheries in the fishing zone (which S. 3(3) defines as the areas extending 200 nautical miles from Japan's baselines). "Fisheries" is defined (S. 2(1)) as "the undertaking Involving the catching and taking or culturing of marine animals and plants", though jurisdiction is extended also over marine animals and plants other than those coming within "fisheries" as defined (perhaps a somewhat confusing provision.)

Japan must (S. 2(3)), in exercising this jurisdiction *"respect" the recommendations* (emphasis added) relating to the conservation and management of fishery resources organizations of which Japan is a member.

iii) *Application* (S. 4): Japan's laws and regulations, as prescribed by Cabinet Order, apply to fisheries and the catching and taking of marine animals (and plants) in which foreigners engage in this zone. "Foreigners" is defined broadly (S. 3(4)(a) and (b)) to mean both persons who are not Japanese nationals (except persons lawfully resident in Japan) designated by the Ministry of Agriculture and Forestry (MAF) *and* foreign countries, public organizations of a foreign country or similar organizations, or juridical persons and other organizations established under foreign law.

Any technical modifications necessary to apply the above are prescribed by Cabinet Order, which allows for more speed and flexibility than enactment by formal statute.

iv) *Prohibitions* (S. 5). Foreigners must not engage in fisheries or in catching and taking marine animals and plants in specified areas within the zone unless the catching and taking is insignificant, as prescribed by MAF Ordinance.

v) *Permission to Fish* (S. 6). This must be obtained before foreigners can engage in fisheries or in the catching and taking of marine animals and plants in the zone; it is not given unless these activities will be conducted properly In accordance with an international agreement or other arrangements, will not exceed the relevant catch limit as laid down by the MAF, and will conform to other criteria laid down by Cabinet Orders (S. 7). Conditions and restrictions can be imposed in the permit.

vi) Fees (S. 8). Fishing fees must generally be paid by foreigners granted a permit to fish, though these can be waived.

vii) *Revocation of Permission (S.* 11). If a foreigner permitted to fish etc. contravenes the applicable laws and regulations and conditions or restrictions

thereunder, fishing or the catching and taking of marine animals by him may be suspended for a time or the permission may be revoked *(i.e.* in effect an additional penalty).

viii) *Effect of Treaties* (S. 16). Treaties are given precedence over the provisions of this Act viz where a treaty provides differently for subject matters provided for in it, the treaty provisions apply.

ix) *Penalties* (S. 17). Fines of up to ten million yen are imposed for contraventions of Article (fishing by foreigners of a kind and in areas not prescribed by MAF Ordinance); Article 6(1) (fishing without permission or contrary to the conditions fixed) or Article 11(1) (fishing when permission has been revoked etc.). Moreover, catch and products thereof, vessels and gear may also be forfeited, or an equivalent monetary value extracted in certain circumstances. Breach of Article 16 (predominance of treaty provisions; 17 (offences) or 18 (conditions etc. in the permits) by a representative of a juridical person or an agent, employee or other worker of such persons, results not only in the offender being liable but also the juridical or other person, to the limit set by the appropriate article.

As the above whaling acts and regulations are similar to those already discussed and will in any case be repealed as soon as the new 1980 bill becomes law, it is this proposed new Whale Protection Act that is of most interest to this Report, as pointing the way in which other states might want to develop their laws, either as a change or as an innovation. The Whale Protection Bill 1980 is worth describing here, in spite of the fact that it may not be enacted for some time.

E. Future Developments in National Legislation Relating to Marine Mammals

Australia

In 1979 Australia reversed its policy on whaling following the adoption by the Australian Government of the Frost Report. Until then it had followed the legislative pattern prevalent in whaling states (*e.g.* the Canadian/South African, UK and USA series of Acts and Regulations) of using framework enabling acts to control whaling subject to Australian jurisdiction by issue of permits or licences (*e.g.* the Whaling Act 1935, No. 62 of 1953; the Whaling Act 1960, No. 10 of 1960 (repealing the 1935 and a 1948 Act)), and then incorporating the annual changes in regulations introduced in IWC Schedules by means of subordinate legislation (*e.g.* Whaling Regulations; Statutory Rules 1961, No. 65 Regulations under the Whaling Act 1960; Regulation under the Whaling Act 1960-73: Statutory Rules 1975 No. 105, Amendment to the whaling Regulations (Statutory Rules 1961, No. 65)).

When Australia decided to cease all whaling in waters subject to Australian jurisdiction and by vessels registered under Australian flags it did so by means of a new Act, the Fisheries Amendment (Whale Protection) Act 1980, and at the same time began work on a new comprehensive Act which aims positively to protect, conserve and preserve whales, with objectives (though not by methods) similar to those of the then unique United States Marine Mammal Protection Act 1972.

In 1973, in support of IWC Resolutions recommending member states not to trade in whales or whale products with non-member states, and following the adoption of the 1973 CITES (Convention on Trade in Endangered Species) a Regulation was adopted under the Customs Act 1901-1971, viz. Statutory Rules 1973 No. 5, to impose the necessary controls.

As the above whaling acts and regulations are similar to those already discussed and will in any case be repealed as soon as the new 1980 bill becomes law, it is this proposed new Whale Protection Act that is of most interest to this Report, as pointing the way in which other states might want to develop their laws, either as a change or as an innovation. The Whale Protection Bill 1980 is worth describing here, in spite of the fact that it may not be enacted for some time.

a) Fisheries Amendment (Whale Protection) Act 1980

This Act will come into operation at the same time as the Whale Protection Act 1980, the Bill for which is discussed later.

i) *Objectives.* It amends the Fisheries Act 1952, referred to as "the Principal Act" (in UN Legislative Series ST/LEG/SER-B (6 December 1956, pp. 421-424)) which gives Parliament the power "to make laws for the peace, order and good government of the Commonwealth" with respect to Fisheries in Australian waters beyond territorial limits by adding at the end of Sec. 5B of the Principal Act the requirement that it shall be ensured, so far as practicable, that measures adopted in pursuit of its objectives "shall not be inconsistent with the preservation, conservation and protection of all species of whales."

ii) *Regulating Fisheries.* It also amends S. 8 of the Principal Act dealing with regulation of fisheries by enabling the prohibition "either at all times or during a period specified in the relevant notice, of the navigating by any person of a boat in respect of which a licence has been issued" (under specified sections of the Act) in an area of "proclaimed waters" specified in the notice.

iii) *Offences* (S. 13) of the Principal Act, relating to miscellaneous matters including prohibition of the use of boats in proclaimed waters, is amended by adding a new sub-section, which provides that a person does not contravene the relevant subsections of the Act merely by launching a boat in contravention of a notice in force, if it was necessary to do so, because of weather or sea conditions, in order to ensure the safety of either the boat or of human life.

b) Whale Protection Bill 1980

i) *Purposes & Title.* The bill is for a proposed "Act to provide for the preservation, conservation and protection of whales and other cetacea" which will repeal the Whaling Act 1960. It deals with the special federal and other peculiarities of the Australian Constitution by proposing to bind "the Crown in right of the Commonwealth, for each of the states of the Northern Territory", and it is the need for further approval and action by individual state governments and parliaments that has delayed the final approval and entry into force of the Act at the time of writing.

As there may be changes introduced on later readings of the Bill only a general account of its main proposals is given here. It should be specially noted that this

Bill *makes provision for measures against "pirate" whalers* and imposes severe penalties for breach of these measures. It thus deals directly as well as indirectly with the problems.

ii) *Administrative Responsibilities.* Whereas the Whaling Act 1960 had been the responsibility of the Department of Primary Industry executive responsibility for the new bill lies with the Minister for Science and Environment.

iii) *Repeal of the 1960 Whaling Act* by Clause 4 extinguishes all the previous machinery for licensing whaling operator, *i.e.* it goes further than the ICRW requirements; no operations will be able to be licensed whether or not they are in accordance with ICRW regulatory requirements.

iv) *Scope of Application.* Clause 6 applies the provisions to:

(a) *Foreign nationals, foreign vessels and foreign aircraft* within the Australian 200 mile Fishing Zone (FZ: established separately by the Fisheries Act (1952-78).

(b) *Domiciled Australian Citizens Everywhere.* Clause 6(1) extends the Act "to every external territory" and, unless an express intention to the contrary is indicated "to acts, omissions, matters and things outside Australia, *whether or not in a foreign country"* (emphasis added). It also applies to Australian aircraft and vessels and members of the crew (including persons in charge of such craft) though clause 3(1) defines "Australian boat" as meaning only boats "wholly" owned by a national resident in Australia or a company incorporated in Australia. However, whaling vessels only partly so owned, operating outside the Australian FZ would be likely to be contravening clause 31 below which requires whaling vessels not to enter Australian ports without written permission from the Minister and lays down stiff penalties for offences.

(c) *External Territories:* The Bill extends to *every external territory.*

(d) *Compliance with international law:* its effect is, however (Clause 6(3)) subject to Australia's obligations under international law including obligations under any agreement between Australia and another country or countries. Moreover, Clause 37(1) allows the Governor General to make any regulations consistent with the Act, which are necessary to and prescribable under the Act for carrying out or giving effect to the Act itself *or* an international agreement entered into by Australia. Australia has, however, no plans to permit whaling and now supports a global moratorium on this activity.

(e) *Prescribed Waters:* Application to Individual State's Waters.

The Bill does not, by virtue of Clause 7, apply to the Australian territorial sea adjacent to individual Australian states unless the Governor of that state or the Administrator of the Northern Territory declares that all or part of such waters are "prescribed waters" for purposes of the Act. This provisions, albeit necessary for constitutional reasons, nonetheless is proving an impediment to progress of the bill because of the ambiguities of Australian Constitutional Law, as it relates to the off-

shore jurisdiction of the separate states. The Minister concerned intends to extend application of Clause 7 by positively encouraging development of effective and consistent whale protection measures in all Australian waters. As a model it should be noted that the state of Western Australia has its own Wildlife Conservation Act 1950-77 which prohibits the killing or injuring of all protected wildlife including cetacea within the territorial sea. Licences can, however, be given for commercial exploitation. The new Act therefore sets stricter measures. States could fulfil the requirements of the new Act either by amending their own acts or agreeing to "prescribe" their waters.

v) *Prohibited Acts: Penalties:* The Bill is remarkable in the wide range of the activities it prohibits under Clause 9(2).

1. A person must not: (a) in water to which the Act applies, kill, injure, take or interfere with any whale. Clause 3 (the interpretative clause) defines (at 3(1)) "interfere" very broadly to include "harass, chase, herd, tag, mark or brand." (b) Treat any whale that has been killed or taken in contravention of the Act or has been unlawfully imported, which offence Clause 3(2) defines as importation contrary to customs regulations, viz the customs (Endangered Species) Regulations 1976 State Rules No. 219.

   The penalty for either offence is $ 5,000 (Aus.) on summary conviction or $ 100,000 on conviction on indictment. These regulations give effect to the CITES with the additional requirement that import permits are required for species listed on CITES Appendix II; since all cetaceans are now listed on one or other CITES Appendix in practice "unlawful importation" in the new Whaling Act will mean importation without a permit but the new Act itself does not clearly and specifically prohibit all importation of whale products.

2. A person who has in his possession a whale or part of a whale, or a product derived from a whale, where the whale has been illegally killed or taken or unlawfully imported, is guilty of an offence which on summary conviction is punishable by a fine of up to $ 5,000 or on conviction or indictment of up to $ 100,000.

3. A person who takes an unpermitted live whale otherwise than in contravention of the Act (presumably, for example, if taken accidentally) must release it, subject to penalties of either $ 5,000 (on summary conviction) or $ 10,000 (for conviction or indictment).

vi) *Defences:* Some are provided for; *e.g.* under Clause 9(5) in cases where the person concerned was not, for a variety of specific reasons, fully responsible for the offence.

vii) *Exceptions by Permit:* The permit system is covered by Clauses 11-19. Permits can be issued to take etc. whales for a variety of purposes and subject to various conditions, both sets of limitations being set out in Clause 11, but no permission whatsoever is made for the granting of permits for commercial exploitation purposes. Clause 18 requires publication of applications for permits and provisions of an opportunity for public comment.

viii) *Inspection*

(a) *Persons.* Clause 21 enables the Minister to appoint a person as an inspector (no specific qualifications are prescribed) though Clause 22 makes any member of the Australian police force or the police force of a territory *ipso facto* an inspector.

(b) *Powers*

1. *Of Arrest:* Clause 24 provides for powers to arrest any person *without warrant* (emphasis added) if the inspector has reasonable grounds to believe both that the person covered has committed an offence and that a summons would be ineffective.

2. *General Powers:* An inspector can, under Clause 25, search any vessel or aircraft and stop or detain it for the purpose, if he has reasonable grounds to believe that it contains an illegally taken whale or *anything* (emphasis added) else that will furnish evidence of the commission of an offence against the Act. The inspector can require persons he finds committing an offence or whom he has reasonable grounds for suspecting to have done so, to provide information and documentation specified in the Act.

   If an inspector on reasonable grounds believes that a vessel has beeen used or has participated in illegal activities he can bring, or require the person in charge of it to bring, the vessel to a place in Australia and can require various specific information to be given.

3. *Penalties:* A person who, without reasonable excuse fails to comply with an inspector's requirements commits an offence punishable on conviction by a fine of up to $ 1,000.

ix) *Seizure and Forfeiture:* Conviction of offences under the Act leads, under Clause 26, to possible forfeiture (under court order) of any vehicle, aircraft, vessel or article used or otherwise involved in the commission of the offence. An inspector can seize any of these items if he has reasonable grounds to believe that they have been used or involved in offences. It can be disposed of as the Minister thinks fit; as also can any whale which an inspector is empowered to seize in the same circumstances.

x) *Prevention of "pirate" whalers from entering Australian Ports:* Clause 31 makes important and innovatory provision for measures against "pirate" whalers. A person in charge of a foreign whaling vessel, who, without written permission from the Minister brings the vessel into a port of Australia or in an external territory is guilty of an offence which is punishable on summary conviction by a fine of up to $ 5,000 or, on conviction on indictment, of up to $ 50,000. Some exception are provided in secton 2 of this clause ((a)-(e)) but "foreign whaling vessel" is widely defined in S. 3 to indicate any foreign vessel "designed, equipped or used for either killing, taking, treating or carrying whales *or* for supporting trie operations of a vessel or vessels designed, equipped and used for these purposes (emphasis added).

xi) *Liability* S. 32) (a) The person in charge of a vessel or aircraft, or plant or equipment used or involved in an offence *(i.e.* the "primary offence") is also guilty of an offence against the Act, punishable on conviction as if it were the primary offence. This is so even if the person who committed the offence cannot be identified but the offender under this section cannot also be convicted for the primary offence.

xii) *Definitions:* It should be noted that, in addition to the interpretations already referred to, other broad interpretations are that "Australia" includes *all* the territories; "foreign" aircraft, country, person and vessel includes all those that are not Australian; "take" in relation to a whale means take, catch or capture; "vessel" includes boats of any description and covers hovercraft and floating structures; "waters to which this Act applies" means both any waters of the sea other than the coastal waters of a state or its internal territory, and as much of a state's or integral territory's coastal waters as are "prescribed" waters; and "whale" covers not only all the Mysticeti and Odontoceti of the order cetacea but also (with one exception) a part of a whale or any product derived from the whale.

Conclusion

This Act, if and when it comes into force, will clearly provide an excellent model both for states wanting to change their laws and policies relating to whaling, and those without any whaling legislation which nevertheless care sufficiently for conservation of the "global heritage" of species to want now to participate in protecting these important component species. The Australian Bill does not, unlike the US Marine Mammal Protection Act, aim generally at conservation; and certainly not at resource or ecosystem management, or attaining specific population levels. Some may thus regard it as deficient in some respects but its ommissions avoid the virtually unworkable complexity of these provisions of the MMPA and thus will make the Australian Bill a more attractive and appropriate model for many states than the US MMPA. These ommissions certainly do not undermine its great potential effectiveness for deterring "pirate" whaling. Its application *inter alia* to foreign vessels, persons and aircraft in Australian waters, as well as to Australians everywhere, its broad offences and severe penalties; the inspection powers and its specific provisions for deterring "pirate" whaling by refusing such vessels entry into port without permission and by prohibiting treatment of unlawfully imported whales, render the Act one of the best examples of use of fisheries related techniques combined with economical ones for deterrence of "pirate" whaling. Although it is not without some ambiguities which will require interpretation by state practice and the courts, it is less fraught with such weaknesses than the US MMPA, yet contrives to provide stronger measures than the simpler UK laws, or even the more stringent Canadian ones — for example by directly providing for refusal of unapproved port entry to the "pirates".

II. Possible Uses of National Laws Other than those Relating to Fisheries and Endangered Species to Protect Whales and Other Marine Mammals from Unregulated Taking

Many of the treaties referred to in Part 1 of this Report require States party to them to "take measures" to carry out their obligations under them without any specification in the treaty of the measures required or appropriate. Frequently the term "measures" is qualified only by such ambiguous phrases as "all appropriate" or "all practicable", or reference may be made to use of "all possible means' to apply and enforce the convention concerned. In this section of the Report further means and measures which states can use to execute their duties under these conventions and under customary international law, additional to the exercise of fisheries and customs jurisdiction illustrated in the previous section, will be considered and exemplified. Time and limitation of material currently available do not permit any detailed or extended examination of these further measures at this point — only an outline of possible approaches can be given below — but it is intended to expand and develop these possibilities in a later publication.

It has increasingly proved necessary for purposes of eliminating "pirate" whaling, as the International Whaling Commission has itself pointed out, to use more indirect measures than exercise of fisheries jurisdiction since such activities essentially take place in areas outside national jurisdiction. The IWC has in various resolutions recommended its members strictly to observe their obligations under Article I and IX of the International Convention for the Regulation of Whaling which require that each Contracting Government shall take appropriate measures to ensure the application of the provisions of that Convention and punishment of infractions against them by persons or vessels under its jurisdiction by fully exercising its fisheries jurisdiction. The Commission has, however, in recent resolutions gone much further than this and has recommended that Contracting Governments should (i) Prevent the transfer of whaling vessels and equipment, and, as far as possible, the dissemination of whaling information and expertise, or the provision of any other type of assistance specifically designed for and likely to be used for whaling, to any nation or entity under the jurisdiction of such a nation which is not a member of the IWC; (ii) Take all practicable steps within their jurisdiction to prohibit their nationals from offering services or expertise directly relevant to whaling to any vessel belonging to any nation, or entity under the jurisdiction of such a nation, which is not a member of the IWC; (iii) Consider taking the necessary appropriate steps to enforce the above measures, and punish their infractions.

For the present the IWC has made these measures merely recommendatory, acting by means of non-binding resolution, but it retains the option under the ICRW, if the necessary support and therefore votes can be attracted to the purpose, of incorporating the above measures into its regulatory Schedule, which, being an integral part of the Convention, would make the measures binding upon ICRW Contracting Parties.

Although it is apparent from the examples given in the Section on fisheries' and en-

dangered species' laws that some states have voluntarily enacted the above recommendations, or at least some of them (*e.g.* the USA, UK, South Africa), and that Australia intends to do so, others have not yet done so and some have raised questions about the constitutional legality of such measures in particular countries, as well as possible limitations imposed by existing international law. This section of the Report will, therefore, in its expanded version examine the existing international law relating to the kind of indirect measures for eliminating pirate whaling (which might also be used to protect other marine mammals) which have been recommended by the IWC and will also consider other measures which might be taken by means of using existing national laws. Thus a variety of new techniques will be scrutinized in relation to their acceptability in international law and their compatibility with current state practice as evidenced by the laws of selected states. Areas of law which will be considered will include the following, although the list should not be regarded as exclusive as other examples may emerge in the course of the study:

A. Prohibition of Transfer of Vessels and Equipment

Some of the national laws already decribed in Section 1 of Part III, both in the comprehensive statute category and the ad hoc acts, already provide for the banning of transfer of vessels and equipment. These and other examples will be assembled in later works under this heading and the developing international law concerning transfer of technology will be considered in relation to these developments. Obviously it is not intended to make any proposals which reflect on the more positive aspects for developing countries of emerging principles in this field and the work will concentrate on the identification of laws which selectively prohibit transfers of technology for particular purposes, for example laws concerning trading with enemy or with unfriendly states might be referred to.

B. Prevention of Dissemination of Information and Expertise on Whaling and Harvesting of Other Marine Mammals

This IWC recommendation is likely to be much more difficult to execute since such activities are difficult to control in practice and states with written constitutions or entrenched constitutional rights or conventions might find it unconstitutional to endeavour to restrict exchange of knowledge and expertise. Moreover, there is an International Convention on Intellectual Property (administered by an international organization, the World Intellectual Property Organization (WIPO) the provisions of which some attempts to control supply of information might infringe. Nonetheless, some states have on various occasions legislated to restrict supply of information and their practices will be examined as will their success in enforcing such restrictions. It is possible that developments of the international and regional law concerning human rights might also ben a limitation of the use of this technique. This aspect also will, therefore, be studied.

C. Prohibition of the Offering by Nationals of Services or Expertise Directly Relevant to Whaling to Vessels Registered under Flags of Non-Member States of the IWC

It Is possible that, for reasons similar to those expressed above, both constitutional and international law impose at least some restrictions on the taking of such measures in order to protect individual rights to move among countries and freely engage in activities, but the evidence suggests that some states in certain circumstances do consider that freedom of activity abroad, such as the freedom of travel or to supply foreign service, can be restricted. Clearly the views of states differ in relation to national needs, customs and policies but nonetheless some states have already legislated for this purpose in relation to service on whaling vessels. The USA and South African laws already described are cases in point but national and international laws relating to such subjects as passport control, mercenaries and human rights amongst many others should provide guidance on the perceived limits in this field and these also will be researched in later works.

These three indirect techniques for eliminating "pirate" whaling (which can readily be adapted to protect other species) are those proposed by the IWC but there are, it would appear, several other indirect methods of using existing national laws for these purposes. As many as possible of these will be studied and exemplified in later works. Preliminary research indicates that there are possibilities in the following areas of law.

D. Investigation of Companies and Entities Seeking to Register Vessels under National Flags

National laws concerning requirements for registration of vessels will be looked at and appropriate requirements for purposes of identifying potential "pirate" ships will be cited. The activities of past "pirate" whaling vessels (for details see "Pirate" Whaling: A Report by the People's Trust for Endangered Species on Whaling Under Flags of Convenience Outside the Jurisdiction of the International Whaling Commission", Pub., June (1979), PTES 19, Quarry Street, Guildford, Surrey GU1 3EH, UK; and "Pirate Whaling Further Developments: A Report by the People's Trust for Endangered Species to the Government of Portugal", December (1979)) suggests that states either do not include the necessary provisions in their vessel registration laws, or do not effectively investigate to ensure compliance with requirements or do not monitor the activities of vessels registered under their flags to ensure that false representations have not been made or that conditions have not been breached by subsequent alterations to or activities of vessels. The possibility of improving use of these techniques by development of the system of "port state jurisdiction" suggested in Part I will also be examined.

E. Requirements for Registration of Companies and Corporations: the Possibility of Looking Behind the "Veil" of State Company Objects

There would appear to be no legal difficulty in making certain that the objects of

companies do not include "pirate" whaling. It can be assumed that virtually all states' Acts relating to Company Law would be able to provide for such limitation of the objectives for which companies maybe formed. Examples will be included in later works, nevertheless, to underline this point. Problems are more likely to relate, in the use of this method, to those of enforcement. The problems are similar to those of investigating and following-up vessels registered under national flags. In both cases the possibility, if states apply and strictly enforce this technique, of the "pirate" concerned seeking a "flag of convenience" or registering his company in some less scrupulous state, will always remain. Nonetheless, concerned states will certainly want, it is suggested, to add this weapon to their armoury, if only as further evidence of their condemnation of the activity of "pirate" whaling. Another useful employment of Companies' Acts is illustrated by the information given by South Africa to the IWC (Report by the South African Commissioner on Measures Taken to Discourage Whaling Operations Outside IWC Regulations", IWC/32/29) revealing that as a company registered in some places, such as Bermuda is not under South African Company laws regarded as a legally registered company in the Republic of South Africa, its activities are illegal in that Republic (see Statutes of the Republic of South Africa-Companies, Companies Act, No 46 of 1926, S. 201A). As this provision, in the particular circumstances of the activities of the *M. V. Sierra* (also known as the *"Run"* — see the PTES Report on "Pirate" Whaling referred to above) enabled South Africa effectively to end that vessels activities, other states might emulate this use of Companies Acts.

F. Control of Investment Capital and Flows

It is possible that Exchange Control Laws and Investment Laws generally might provide useful devices for preventing "pirate" vessels setting up their operations, or maintaining them. National investors, whether private or public entities and whether individuals or corporations (such as banks) might be prevented by law from transferring monies to vessels known to be engaged in "piratical" operations which diminish the effectivenes of the ICRW. The technique might be extended to the international level with the World Bank being required to refuse funds to states known to be supporting such activities. There are similarities in the use of this technique with United States' efforts to employ such means to advance human rights and to protect the environment from further degradation and the constraints encountered In its use for these purposes thus must be taken into account, but again the possibilities of using this field of law should be researched as part of the global strategy to which this Report is and future works will be directed.

G. Tax Laws

The investigation of the accounts and returns of companies and private individuals by Income Tax Inspectors, which surely takes place in most states, could provide useful information for identifying financial gains from "pirate" vessels derived by individuals or companies, or by those trading in the products of such operations. Although in the past such information has generally been regarded as private and wholly confidential some states are beginning to permit disclosure in some precisely specified cases for distinct purposes to named officials. For example Tax Acts in

the UK now permit disclosure of information by the Inland Revenue to customs officers to aid them in their public duties of ensuring compliance with customs laws. Other states may already be following this route and its possible application to "pirate" whaling is apparent, through customs controls which give effect to the CITES and IWC resolutions recommending prohibition of trade in whale products.

H. Refusal of Insurance to Vessels Engaged in "Pirate" Whaling

Following the investigations of "pirate" whalers conducted on behalf of the Peoples' Trust for Endangered Species insurance companies covering the vessels involved were provided with the information made available with a view to the cancellation of insurance cover on these vessels. The vessels were insured in the UK, the relevant laws of which did not prevent insurance companies from covering such activities which are not illegal under either UK or international law. In spite of the absence of legal requirement to do so, the company approached did cancel the insurance cover of the vessels concerned. It cannot, however, be assumed that all insurance companies in all states will share such scruples and it might therefore be prudent for concerned states to ensure this result by positively preventing, by statutory provisions, the concluding of insurance cover for vessels engaged in "pirate" whaling by insurance companies registered within their territory. Similar existing provisions in national laws will be sought out which might be adapted for this purpose.

I. Conclusion

The means of using national laws to prevent "pirate" whaling or to protect marine mammals generally which have been sketched above are not, of course, the only ones which might provide fruitful lines of research into new strategies for these ends. Any further suggestions from readers of this Report concerning other possibilities would be welcomed by the sponsors and publishers of this Report and by the reporter, as particularly would any assistance which individuals or groups can provide in identifying national laws giving effect to any of these techniques. Without such assistance it may not be possible to provide the wide representation of laws, from both developed and developing countries, which it is hoped to be able to do.

It is hoped in a further publication to add to the examples of states' legislative practices in the fisheries field including relevant Acts directly relating to whales and whaling, seals and sealing, and to the taking and the protection of other species of marine mammals. It is also, as already stated, hoped to illustrate and examine in some detail legislation other than fisheries legislation which might provide techniques which indirectly can be used to protect these species from unregulated exploitation. The kinds of laws that might be, and in a few cases, have been used, have been briefly outlined above.

Meanwhile it is clear from the examples of national fisheries and related laws given in this part of the Report that, though some states are already moving in this direction by introducing within their new fisheries or whale protection Acts measures

gleaned from other branches of law, *e.g.* the use of import and export controls; the control of activities by nationals which are inimical to marine mammal protection generally and to whale conservation in particular, it appears to be only a few states which are responding to the new perceptions of the value of these species and the urgent need to protect them by more effective means than hitherto. Some states, as far as preliminary investigations have revealed, either have no directly relevant laws at all, or have omitted to include whales or other marine mammals in need of protection in either fisheries or species specific laws, and very few have seized the opportunity presented by the change of policy towards fisheries generally, which has occasioned the rapid move towards extending coastal states' jurisdiction to 200 miles fisheries zones, to thoroughly revise and adapt their whaling and marine mammal laws to the changed situation and values. This they should certainly now do and It Is hoped that this Report will help to provide the stimulation and opportunity for such a revision. Since whales and many other marine mammals are so highly migratory, and because of their size, need to surface to breathe, and in the light of other factors, are both especially vulnerable and attractive to capture, it is essential for the purpose of conserving them for the future benefit of mankind as a whole, that all states participate in the development of legislative means to prevent their unregulated taking. The parallel with "piracy" in the high seas has been drawn In Part I; it demands the same response from states, namely acceptance that taking of a whale or other marine mammal in need of protection for any reasons, without either national or international measures restricting the take, undermines the viability of these species and challenges the development of international law and order which is the only sure way to conserve and protect them. The challenge of preventing "pirate" whaling is international in its widest sense — it is a challenge to the interests of land-locked as well as coastal states since land-locked states can benefit from the knowledge, aesthetic and other values deriving from these species, and in some approved and appropriate instances, their use, and flags of land-locked states as well as these of coastal states can be used as "flags of convenience" by "pirate" whalers taking these species.

All states, therefore, even if they no longer engage in exploitation of these species *(e.g.* the USA, UK, Australia) or have never exploited them (*e.g.* Mexico, Nigeria), should ensure that they have appropriate laws on their statute books to prevent either unregulated or any taking, as appropriate to their national environmental and developmental policies, in conformity with the Stockholm Conference Declaration on the Human Environment and the general trends in the Law of the Sea emerging from the negotiations of the Third United Nations Conference on the Law of the Sea, which are evidenced in its series of Negotiating texts and its (Informal) Draft Convention.

These trends are also evidenced and reinforced by the growing number of conventions described in Part I which are relevant, directly or indirectly, to conservation of whales and other marine mammals. It is extremely important to the concerted global strategy that represents the only effective way of finally eliminating unregulated activities, that all concerned states, as many states as possible, ratify the relevant conventions (as identified in this Report) as soon as possible, that they apply them using effective administrative means, and that they effectively enforce them. The legal means for achieving all these goals have been preliminarily inve-

stigated in this first Report; others will be indicated in due course. The spate of laws asserting and giving effect to 200 miles fisheries jurisdiction, the rapid growth of protective international conventions, the revelation of new techniques using old laws to achieve the same ends, all these measures provide states with an unprecedented opportunity to eliminate "pirate" whaling for all time and also unregulated sealing and other relevant activities concerning marine mammals which take place outside any legal framework. The measures so far taken by only a few states have proved remarkably effective; the battle against the "pirates" may almost be won, apart from the need to "mop up" few remaining pockets of resistance, but it will probably never be over for all time: this will require the eternal vigilance enabled by comprehensive legislation, effectively applied and actively enforced.

Part 4: Summary and Recommendations

It should be noted that though this Report is limited to legal measures for prevention of "pirate" whaling most of the measures are equally applicable to prevention of unregulated taking of other marine mammals potected by international treaties.

A. Definition of "Pirate" Whaling

"Pirate" whaling for purposes of the Report is *not* regarded as equivalent to piracy proper in international law in the light of current definitions of the latter offence, as though proposals are made in this Report for changing this situation by treaty.

"Pirate" whaling throughout the Report is regarded as covering three kinds of activities by vessels flying a flag of a state which is *not* a party to the International Convention for Regulation of Whaling 1946 (ICRW), namely:

(i) whaling by such vessels on behalf of the flag state

(ii) whaling by such vessels on behalf of nationals of other states, *i.e.* using the flag as a "flag of convenience"

(iii) whaling by unrecognized states or territories which may fly no flag or an unrecognized flag.

"Pirate" whaling is also assumed generally to refer to activities on the high seas, essentially therefore, beyond the control of International Whaling Commission (IWC) member states because they take place outside their national jurisdiction since the vessels concerned are neither flying the flag nor operating within the territorial waters or zones of extended fisheries jurisdiction of IWC member states at the time the offence is committed. But the term can also cover all unregulated whaling beyond the national jurisdiction of the flag state.

The Report strongly stresses throughout that maintenance of a strict enforcement regime over all fisheries in all areas subject to national jurisdiction is a vital component of the strategy for eliminating "pirate" whaling, since with the advent of 200 miles fisheries zones in which coastal states can, if they wish, enforce IWC regulations or stricter regulations banning all whaling, the area available to "pirates" is

potentially vastly reduced, the chances of their detection of their operations in waters adjacent to these zones are enhanced, and the likelihood of "pirates" also turning "poachers" within the zone is reduced.

B. Evidence of "Pirate" Whaling

It is accepted that "pirate" whaling is for the moment on the decline following new measures taken by several IWC members, which are described in the Report, and other non-governmental actions. It is, however, assumed that all states nonetheless will continue to need to provide in their laws, to the maximum extent possible, for prevention of "pirate" whaling since:

(a) there are still one or two non-member states of the IWC and of other territories the registered vessels of which continue to engage in "pirate" operations;

(b) there may be vessels which from time to time pursue this activity undetected;

(c) there always remains the possibility, in the light of constantly changing political, economic and social perspectives concerning whaling, and the possible development and availability of new and improved technology for the purpose, that this undesirable activity, which undermines the effectiveness of the IWC's conservation of cetaceans, may someday be resumed in the long term since it is highly profitable, if markets for the products are available, whether domestic or foreign.

C. Legal Measures Available for Prevention of "Pirate" Whaling

Measures are available at three levels:

(a) international (b) regional (c) national.

The Report gives examples of all three and its recommendations and proposals are accordingly divided under these headings. The Report also considers ways in which new measures may be developed, if states so wish, to supplement the existing ones.

1. Measures Permitted under International Law

a) Development of Principles

New principles are already being developed by international law, in both custom and treaty, which enable and encourage states to take measure to conserve whales and other marine mammals (as well as many other species). They create a code of conduct of which all states should make themselves fully aware and on which they should endeavour to base their laws and practices.

Major new principles include those laid down in:

i) *The Declaration of Principles Concerning the Human Environment 1972*
These were adopted by the United Nations Conference on the Human Environment held at Stockholm, Sweden, in June 1972. They require *inter alia* the safeguarding of fauna, wise management of wildlife, prevention of damage to the environment of other states or international areas. They recommend also enact-

ment of international conventions to protect migratory species and species in International waters; the strengthening of the IWC; conclusion of a convention on the export and import of some species (including whales and some other marine mammals); development of principles of liability and responsibility.

It is recommended that states act on the Stockholm Principles and Recommendations and adhere to all conventions developing and applying them.

ii) *UNEP's Draft Principles for the Conduct of States in the Conservation and Harmonious Utilization of National Resources shared by Two or More States*
Some of the UNEP (United Nations Environment Programme) Principles may be regarded as already binding, others are not, depending on the views and practices of particular states. The principles advocate *inter alia* control or elimination of adverse environmental effects of utilization of shared natural resources; conclusion of bilateral and multilateral agreements to further international cooperation and make the principles legally binding; acceptance of state responsibility to prevent damage by activities under their control to the environment of other states and to international areas; sharing of informating; jointly seeking the aid of competent international organizations; provision of dispute settlement procedures and non-aggravation of disputes concerning shared natural resources pending settlement; acceptance and development of principles of responsibility and liability; assessment of external effects of domestic policies.

It is recommended that, as a matter of good faith and as appropriate, all states should now seriously consider these principles and develop methods for applying them in practice as a matter of law, including by adhering to the conventions and introducing the national measures outlined in this Report and by identifying and using the appropriate international organizations to further them, such as the IWC, UNEP. FAO (UN Food and Agriculture Organization), IUCN (International Union for Conservation of Nature and Natural Resources) EEC (European Economic Community); OAU (Organization for African Unity) and the Secretariats administering the conventions referred to in this Report.

b) International Conventions

It is recommended that all states should become parties to and take the measures (which are outlined in this Report) necessary to apply and enforce the following conventions, amongst others as appropriate:

i) *International Convention for the Regulation of Whaling 1946 (ICRW)*
This applies in all waters in which whaling takes place and requires its parties to establish a system of international regulation to protect and conserve species by applying the regulations laid down in the Schedule (which is an integral part of the Convention, revised annually at the Meeting of the Commission). Measures include providing for open and closed seasons; size limits for species taken; time, method and intensity of whaling; setting catch quotas and prohibitions of take of some species as determined under the IWC's New Management Procedures. It also requires members to take account of the IWC's recommendatory resolutions concerning prohibition of: trade in whales and whale products with non-member states; nationals of member states serving on whaling vessels of non-member; supply of gear, equipment, information; know-how or other services

to them.

It is recommended that the IWC members should consider making the subject matter of these resolutions binding upon members by incorporating them into their Schedule to the extent legally possible and appropriate.

It is further recommended that states party to the ICRW which are required by It to take appropriate measures to ensure Its application and to punish infractions should do so to the fullest extent possible in their extended zones of national fisheries jurisdiction by the means exemplified in this Report. They should moreover forthwith comply fully with the IWC's requests that they supply to the Commission details of their existing laws and penalties concerning whaling, and details of their whaling vessels for purposes of compiling International Register of whaling vessels.

It is recommended that IWC member states give serious consideration to the means of changing existing international legal limitations on measures to detain, arrest and prosecute "pirate" whalers which are suggested elsewhere in this Report.

ii) *Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES)*

This convention requires and enables states parties, on the international basis which is the only fully effective means of using such methods to deter "pirate" whaling, to prohibit or control, as appropriate, *inter alia* export and import of whales and whale products of species listed on its Appendices by instituting a national system for issue of permits prohibiting all trade in species listed on Appendix A as seriously endangered and controlling trade in species listed on Appendix B which might become endangered if trade in them is not controlled.

It is recommended that all states should become parties to this convention whether they are coastal or land-locked, since all states offer potential markets for whale products, and that in particular they should:

(a) familiarize themselves with the provisions of this convention which requires that its controls be applied to all specimens of species including any recognizable part or derivative thereof, even when in the form of "mixed" products;

(b) institute a permit system and ensure by provision of adequate administrative means, including establishment of the national Management Authorities and Scientific Authorities required by the CITES, that the convention is effectively applied and enforced by providing customs and other officials involved with all the necessary information and training in their power (such as by providing check-lists of "specimens", handbooks etc.) in order to facilitate strict enforcement of the system.

(c) co-operate fully with the secretariat established by the CITES by: providing full information on all suspected violations by their own nationals and those of other parties; by keeping records of trade in sepclmens and by submitting reports on legislation, regulations, and administrative measures since the

secretariat is an important new instrument in the strategy for prevention of "pirate" whaling. Examples of national means of implementing these requirements are given in this Report;

(d) co-operate to ensure that species determined by the IWC as requiring full protection (PS stocks) are listed on Appendix I of CITES should the situation ever again arise that IWC measures protect stocks not yet so listed by CITES, to facilitate detection and elimination of "piratical" activities;

(e) individual states make themselves aware of the possibility of applying stricter regulations nationally than there are required by the CITES;

(f) to the extent possible, CITES parties apply it to non-party states by requiring production from them of "comparable documentation", as laid down in the convention, for import from, or export or re-export to such states.

iii) *Bonn Convention on the Conservation of Migratory Species of Wild Animals 1979 (CCMSWA)*

This convention offers means of protecting all migratory species, including whales and other marine mammals, throughout the world on the premise that resources which cross boundaries are shared natural resources requiring international protection.

It Is recommended that states the marine boundaries of which are traversed by whales should ratify this convention as soon as possible thus bringing about speedy entry into force and that in particular such states should:

(a) even before entry into force conclude, or make preparations for concluding, the kinds of Agreements specified in the CCMSWA for purposes of conserving cetaceans throughout their migratory ranges and should apply and develop the guidelines for their conservation set out in the convention, taking special note of the requirement that cetaceans at a minimum should not be taken in a manner or to an extent prohibited under any multilateral agreement (such as the ICRW);

(b) even before the convention enters into force devote consideration and research to the future listing of cetacean species with "favourable or "unfavourable" conservation status, as defined in the convention, on the appropriate Appendices;

(c) begin to consider ways in which other terms and requirements of the convention can be given substance and meaning, including identification of "Range States" in order to prepare a list as required by the convention;

(d) prepare for the designation of National Authorities to implement the Agreements to be concluded under the convention and introduction or activation of other machinery for monitoring its effective implementation, and for submission of reports and information required by the convention to the Secretariat to be established by UNEP, as well as to other Range States;

(e) begin to plan now for fulfillment of the Convention's requirements concern-

ing stimulation of public interest in conservation of migratory species, of public awareness of the need to protect them for the threat of unregulated exploitation or other taking, and for public education and other-information on the measures necessary to achieve conservation objectives.

iv) *Convention on the Conservation of Antarctic Marine Living Resources 1980*
Though this convention is not aimed directly at conservation of cetaceans, being concerned primarily to establish a mechanism for regulating the catching of krill, as it introduces requirements of ecosystem management for purposes of conserving living resources in the Antarctic area as determined by the Antarctic convergence, it is indirectly concerned with protection of cetaceans, the unregulated taking of which could disturb the Antarctic ecosystem of which they are a vital component. The measures available under this convention, which has however limited potential parties, are thus applicable to conservation of cetaceans.

As pelagic whaling in the Antarctic area (as defined by it) has now been prohibited by the IWC, to ensure the widest possible observance of this ban *it is recommendedthat:*

(a) states permitted to become parties to this convention should ratify it at the earliest possible date thus expediting its entry into force;

(b) the above states ensure that all harvesting and associated activities in the area, whether by states parties or not are conducted in accordance with the convention, as is required by it;

(c) preparations be made for the institution as soon as possible of the Commission to be established under the convention, which will have powers *inter alia* to ensure co-operation between parties; to alert them to activities of non-parties in the area; to call upon non-party states to deal with any actions of their nationals which defeat the convention's objectives; to analyse the effectiveness of conservation measures (including enforcement measures); to implement a system of observation and inspection in the form laid down in the convention;

(d) intending parties should identify and implement nationally, even before the convention enters into force, in addition to the conservation measures specifically set out in it, all the measures recommended and required by the IWC prohibiting or regulating taking of cetaceans in the area, insofar as IWC regulations apply to the area within the Antarctic convergence, since the new Antarctic Treaty requires the Antarctic Commission to take full account of measures and regulations of existing fisheries commissions and provides that nothing in it shall derogate from the rights and obligations of contracting parties to the ICRW (or to the Convention on Conservation of Antarctic Seals). Intending parties should thus now take all other measures necessary to ensure conformity of activities of their nationals to this convention and to the extent possible, of non-nationals also, as required in this Antarctic Convention.

c) Regional Conventions

i) Berne Convention on the Conservation of European Wildlife and Natural Habitats 1979

As this convention, which Is aimed at protection of *Inter alia* cetaceans in waters under the jurisdiction of member states of the Council of Europe and some others and. their dependent territories, permits and requires measures to prevent "pirate" whaling *It Is recommended that:*

(a) states permitted to become parties viz. members of the Council of Europe and states participating in the negotiation of the convention, become parties as soon as possible in order speedily to bring It into force; that states subsequently invited to adhere to it accept the Invitation and that all parties take the opportunity provided by the convention to specify at the time of their ratification, acceptance, approval of accession, the territories to which it shall apply, and include dependent territories and others for whose international relations it is responsible or which it can commit;

(b) potential states parties should now consider and make provision for the means of fulfilling broadly the convention's requirements that they take "requisite measures" to maintain populations of cetaceans *inter alia* including regulation of trade in them or their products, as required in the Convention, and that they establish national conservation policies supporting and enabling these measures as also Is required in the convention;

(c) intending parties should consider now the appropriate categorization of cetacean species on the Appendices to this Convention, according to the degree of protection required to enable the speedy listing of all cetaceans on entry into force of the Convention and the subjection of these species to binding protective measures, including in particular special measures to protect areas most important to whales and other migratory species, and protection from capture of Appendix II species, as well as prohibition of trade in them as necessary;

(d) even if Council of Europe members do not initially become parties to this Convention they should avail themselves of the opportunity provided under it to become observers in order to acquaint themselves with Its purposes and progress concerning the measures necessary to ensure conservation of cetaceans and elimination of "pirate" whaling.

ii) African Convention on the Conservation of Nature and Natural Resources 1968 It is recommended that African states, to whom this convention, which aims to conserve and rationally use faunal resources *inter alia,* is addressed, *should:*

(a) become party to it forthwith;

(b) stimulate the Organization of African Unity (OAU) into actively promoting the convention's alms and measures and exercising its functions under it, Including compiling and collecting national laws and measures;

(c) extend its Annexes of species requiring protection forthwith to include ceta-

ceans, as well as other marine mammals currently listed, to accord with listings under other protective conventions such as the IWC categorizations and the CITES;

(d) introduce national laws for prevention, *inter alia* of unregulated taking of cetaceans by their nationals and by vessels registered under their flags and by foreign vessels within their national jurisdiction in order to give effect to the requirement in the Convention that contracting states shall "manage aquatic environments", prevent "mass destruction" of wild animals, and establish national parks and "special reserves", co-operating with other states to give effect to these purposes as necessary;

(e) establish national conservation agencies as required by the Convention;

(f) promote to the fullest extent possible the requirement that educational programmes at all levels include appreciation of the principles of nature conservation, the rules and measures necessary to achieve this, including regulation of whaling and trade, and that the convention's objective of "winning the public over" to the idea of conservation be encouraged by every means.

iii) European Agreement for the Prevention of Broadcasting Transmitted from Stations Outside National Territories 1965

Although this convention does not relate to living resources the techniques it prescribes for eliminating "pirate" broadcasts and which have proved highly effective for that purpose, are, almost without exception, equally applicable to deterrence of "pirate" whaling.

It is recommended that:

(a) states in regions where "pirate" whaling may take place should use this convention as a model for methods of deterring unregulated activities occurring outside national jurisdiction on the high seas, with a view to applying powers which they already legally have for other purposes to the purpose of preventing these activities in their region;

(b) such states should consider reaching agreement jointly that *all* states in the region will make punishable under their laws the establishment or operation of "pirate" whaling operations; all acts of collaboration knowingly performed as defined In the Agreement, including providing and servicing equipment; providing supplies; transport of persons, equipment and supplies; other relevant services;

(c) the above measures should be applied to nationals committing offences under the above laws on the territory, ships or aircraft of the states parties concerned, or outside national territory on ships or aircraft, and to non-nationals committing offences on any of the aforementioned which are within the jurisdiction of the state party.

iv) European Economic Community (EEC)

The EEC not only has several permanent institutions which can develop and help to apply measures for prevention of "pirate" whaling and protection of marine mammals generally but also can by use of Directives and Regulations bind its member states to take these measures thus harmonizing their laws and actions in this respect.

It is recommended that states in other regions note the recent concerted action of the EEC member states in adopting a regulation on Common Rules for Imports of Whales and Other Cetacean Products, which binds them to take harmonized measures for this purpose, with a view to using this method as a model for action by other regional groupings when and where appropriate.

2. Exercise of Existing National Jurisdiction to Prevent "Pirate" Whaling

States generally have power (subject to certain limitations of international and constitutional law which require further study) to exercise national jurisdiction at least over:

(i) their own nationals both within and outside areas of national territorial and fisheries jurisdiction;

(ii) vessels registered under their flags and aircraft registered with them;

(iii) foreign nationals, vessels, and aircraft entering their territorial or fisheries jurisdiction.

The scope of these powers has been greatly extended, for purposes of preventing unregulated whaling, by the adoption by most coastal states of jurisdiction over fisheries to a distance of 200 miles from the baselines of their territorial seas. A full and proper exercise of this jurisdiction contributes greatly to termination of "pirate" whaling by rendering this activity impossible in such zones which already cover vast areas of the oceans.

It is recommended, therefore, that:

(a) coastal states exercise to the full all the powers which they now have to regulate fisheries in respect of persons and vessels and aircraft under international treaties of a global and regional nature, including *inter alia* the 1958 Geneva Conventions on the Territorial Sea, High Seas, Continental Shelf, and on Conservation of Fisheries and the Living Resources of the High Seas, and under relevant conventions establishing regional fisheries regimes or joint enforcement schemes or both, details of which are given in the Report;

(b) to this end, states should provide specifically in national laws for, in particular, strict enforcement of their powers of surveillance at sea by ships and aircraft; stopping and boarding suspected vessels; inspection and observation of vessels; filing of reports of offences; arrest, seizure or detention of vessels and aircraft when evidence of offences is obtained;

(c) penalties and sanctions be imposed nationally which are adequate to deter offences such as unregulated whaling and that these either be related to a method

of inflation proofing or be continually reviewed and revised to take account of the effects of inflation;

(d) all coastal states study the ways in which and the extent to which other states have changed or augmented their existing national fisheries and whaling laws and regulations in order the better to effect the establishment and management of 200 mile zones, providing *inter alia* in precise detail for exercise of all the above powers of enforcement, for which purpose guidance is given by the examples cited in the Report and in a major new study by FAO — "Legislation on Coastal State Requirements for Foreign Fishing" (FAO Legislative Study No. 21, Rome (1981)) which is commended to all states concerned to improve the effectiveness of national enforcement;

(e) particular attention should be paid to use of *flexible* procedures (such as general acts followed by detailed rules and regulations) to accommodate changes, and to innovations introduced in some national laws including denial of access to fisheries In the 200 mile zone or territorial waters or to national markets for fisheries products, to foreign states the nationals of which undermine fisheries conservation programmes (Including those of the IWC and other conventions protecting marine mammals) or international programmes for threatened or endangered species; to proposals for denial of entry to ports of foreign vessels engaged in unlicensed whaling operations contrary to IWC or national regulations; requirements in some laws that foreign fishing vessels entering the 200 mile zones carry inspectors or observers from the coastal state on board as a condition precedent of entry and that the foreign state not only accommodates these inspectors but also pays them; provisions either in comprehensive Marine Mammal Protection Acts or in separate Whaling and Endangered Species Acts or Customs Acts for implementation of the CITES or similar requirements under other treaties by instituting a system of import and export permits for whales and whale products supported by establishment of national Management and Scientific Authorities; preventing nationals serving on foreign whaling vessels or transferring equipment or expertise to them; or taking whales In foreign jurisdictions.

The examples of national laws relating to these and other matters given in this Report can and should be augmented. It is hoped that materials will be made available to enable more detailed study of indirect methods of using national laws to prevent "pirate" whaling, other than fisheries or trade laws, will be more fully explored.

3. Proposals for Changes in or Development of Existing International Law In Order to Prevent "Pirate" Whaling

New jurisdictions and measures proposed in the Draft Convention (Informal Text) produced by the Third United Nations Conference on the Law of the Sea, as well as enforcement measures developed for other purposes by, for example, the IMCO conventions concerning prevention of marine pollution from ships, ILO maritime conventions and conventions and customary law concerning piracy proper, could be applied, adapted as necessary, the better to eliminate "pirate" whaling.

It is recommended that, in spite of the policital difficulties likely to be involved in changing the law to give effect to some of the above proposals, concerned states should give urgent consideration to means of introducing the following innovatory measures:

(a) Extension of the right of "Hot Pursuit" to offences against whaling and fishing regulations in the 200 mile zone including co-operating for the purpose of continuing the pursuit into the fishing zones of states other than that in which the pursuit originated, and to the possibilities of engaging in joint pursuit with such states.

(b) Extending, In recognition of the special protected status now accorded to cetaceans in so many International conventions, as evidenced in this Report, either the limited provisions for port state jurisdiction included in the 1973 MARPOL Convention (IMCO Convention for the Prevention of Pollution from Ships) or the wider power provided in the UNCLOS Draft Convention (allowing arrest and prosecution) to vessels which there are reasonable grounds to suspect have engaged in unregulated whaling in the extended fisheries zones, when the whaling is contrary to the international standards established by the IWC, when the whaling takes place either in the zone of the coastal state into whose port the offending vessels voluntarily enters or, on their request, in the zone of another state. Alternatively coastal states could jointly agree, on a regional or global basis, merely to refuse entry to their ports to any vessel so whaling, or whaling on the high seas contrary to IWC or national regulations.

(c) Introducing regional systems for reporting on the movements of vessels suspected of engaging in "pirate" whaling which voluntarily enter ports in the region so that the port states could co-operate in gathering evidence of the offence in order to report the offender's activities to its flag state whether or not the flag state is a party to the ICRW (on the lines of the European Hague Memorandum of Understanding Relating to Substandard Ships).

(d) Equating "Pirate" whaling to piracy *proprio sensu* either by convening a diplomatic conference for this purpose involving all coastal states or using the continuing UNCLOS, revising relevant articles of the Draft Convention to confer universal jurisdiction over the offence of "pirate whaling", which would enable any state which detected a pirate whaler to arrest it on the high seas and bring it back to port for prosecution under national laws enacting the new offence.

(e) Accepting by means of a General Assembly Resolution or IWC Resolution (though this would limit the scope of this proposal) or by resolution of some other appropriate body that at least the great whales are to be regarded as "the common heritage" or "patrimony" of mankind (as is proposed in the UNCLOS text for the deep seabed resources) and then vesting all rights to these species in the UN, IWC or other appropriate body; any taking of these species on the high seas without the approval of the body in which the "property" was vested would then become "conversion" of property *i.e.* it would be a legal offence akin to a tort in Common Law systems. States party to the UN Charter, the ICRW or other appropriate constituent instrument of the organization concerned could enact this offence into their national laws and arrest any vessel entering their

jurisdiction which they reasonably suspect has committed this offence; powers not available under the more limited system of "port state jurisdiction", which, on the UNCLOS model, applies only to offences committed in the EEZ or territorial sea, and which as currently proposed is limited to oil discharges from vessels.

Conclusion

As is apparent from this Report there exist many international conventions at the global and regional level as well as national laws that can already be used to terminate "pirate" whaling. As "piratical" activities can take place anywhere in the world and "pirates" are unlikely to seek a base in countries with strict laws for preventing their activities it is vital that *all* states take part in the strategy to end the undesirable operations which undermine the effectiveness of whale conservation by international organizations and concerned states, so that *no* state offers flags, zones, coasts or ports of "convenience" for "pirates". Even without such global participation and support, however, there is much that individual states can do by indirect as well as direct measures under existing national laws to deter "pirate" operations. Some uses of national laws other than fisheries and trade laws have been indicated in this Report. These and others will, it is hoped, be the subject of further study. It would be greatly appreciated by the author, the sponsors and the publishers of the present Report if any states or individuals having laws or other techniques to which they think attention should be drawn, either for purposes of preventing "pirate" whaling or for protecting marine mammals generally, would communicate these either to the Reporter, or to the IUCN Commission on Environmental Policy, Law and Administration.

Appendix I
Resolution Adopted by the International Whaling Commission at the 32nd Meeting, July, 1980

The International Whaling Commission

Recalling the resolution adopted by member nations at the 31st Annual Meeting to prohibit the importation of whale meat and products from non-member countries and operations, and

Taking note of the reports submitted to the present session by some Contracting Governments of the measures they have taken in accordance with that resolution.

Decides.

To urge Contracting Governments which have yet to take measures in accordance with the resolution of the 31st Annual Meeting to do so immediately.

That member states shall prevent the transfer of whaling vessels and equipment and, as far as possible, the dissemination of whaling information and expertise, or the provision of any other type of assistance specifically designed for and likely to be used for whaling to any nation or entity under the jurisdiction of such a nation which is not a member of the IWC.

That member states shall take all practicable steps *within their jurisdiction* to prohibit their nationals from offering services or expertise directly relevant to whaling to any vessel belonging to any nation, or entity under the jurisdiction of such a nation, which is not a member of the IWC.

That member states shall consider taking the necessary appropriate steps to enforce the above measures, and punish their infractions.

That nothing herein shall be construed as preventing the Scientific Committee from providing advice to nations not yet part to the IWC in respect of the conservation of whale stocks.

That the question of adopting amendments to the Schedule to give effect to the above measures be placed on the agenda of the 33rd Annual Meeting.

Notes

1 For the International law on this subject see B.H. *Dubner,* "The Law of International Piracy: Developments in International Law", Martinus *Nijhoff,* The Hague, Netherlands; Boston, USA; London, UK (1980)

2 Article 2, Convention on the High Seas, done at Geneva, 29 April 1958; in force 30 September 1962; 450 UNTS p. 11

3 Draft Convention on the Law of the Sea, A/CONF.62/L78, 28 August 1981, Articles 101-107

4 *Op. cit.,* n. 2, Article 2

5 International Convention for the Regulation of Whaling, December 2, 1946; printed by direction of the Commission, January, 1964; 161 UNTS No. 2124, p. 24

6 South Pacific Commission, established by Chile, Ecuador and Peru in 1954; UN Legislative Series ST/LEG/SER.B/6, 1956

7 For a brief description of Fisheries Commissions see Annotated Directory of Intergovernmental Organizations Concerned with Ocean Affairs, prepared by the Secretary General; UN Doc. A/CONF.62/L.14, 10 August 1976. Several of these commissions have recently renegotiated their constituent conventions to take account of extended national fisheries zones

8 *Op. cit.,* n. 2, Articles 4-6

9 "Pirate Whaling: A Report by the People's Trust for Endangered Species on Whaling Under Flags of Convenience Outside the Jurisdiction of the International Whaling Commission" June 1979; "Pirate Whaling: Further Developments", December (1979); Published by the People's Trust for Endangered Species, 19, Quarry Street, Guildford, Surrey, GU1 3EH, UK; J. *Frizell,* "The Pirate Whalers", Oceans No. 2, (1981) pp. 25-28; C. *Van Note* "Outlaw Whalers" 1979, 1980 and 1981 editions pub. Whale Protection Fund, USA. All examples of "Pirate Whaling" cited in the present report are based on the evidence related in these 4 works

10 Report by the South African Commissioner on Measures Taken To Discourage Whaling Operations Outside IWC Regulations, IWC/32/29; submitted to 32nd Meeting of the IWC, July 1980

11 *Frizell, o. cit.,* n. 9, p. 25

12 Norwegian Whaling Gazette No. 2, 1954, pp. 689-706. The legal status of the Peruvian 200 n.m. zone was disputed at that time and still regarded as a high seas area by many states: See also IWC 7th Report, 1956, p. 5 and IWC Docs. XXII and XIX, 1955, pp. 37-40 and p. 5 respectively

13 See for example the detailed account, supported by photographic evidence, given in the Observer Newspaper Magazine, 24 July 1979

14 J. *Frizell, op. cit.,* n. 9, p. 28

15 See D. *Johnston,* "The International Law of Fisheries", Yale University Press, New Haven and London (1965) passim, esp. pp. 42-77, and 433-460; see also *G. Knight (ed.)* "The Future of International Fisheries Management", West Publishing Co., St. Paul, Minn. (1975), Ch. I, pp. 1-49; C.J. *Colombos,* "The International Law of the Sea", 6th ed., Longmans, London (1967); A. *Koers,* "International Regulation of Marine Fisheries", Fishing News (Books) Ltd., London, UK (1973) passim

16 Convention on the Conservation of Fishing and the Living Resources of the High Seas, done at Geneva 29 April 1958; in force 20 March 1966; UNTS vol. 559, p. 285

17 *Op. cit.,* n. 3

18 Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, D.C., USA, March 3, 1973; in force 1975. ILM Xll(5) (1975), pp. 1085-1104

19 Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 3 June 1979; not in force; IUCN Bulletin, Special Supplement January/February (1980) pp. 19-21

20 Report of the United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm, Sweden, UN DOC. A/CONF.48/14/Rev. 1; Declaration of Principles on the Human Environment, at p. 3

21 Draft Principles of Conduct in the Field of the Environment for the Conduct of States on the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, UNEP/IG.12/2,8 February 1978, pp. 11-14; ILM XVII(5)(1978) pp. 1098-1099

22 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Annex to GAR 2625 (XXV) adopted without vote, 24 October, 1970; I. *Brownlie,* Basic Documents in International Law (2nd ed., 1972), pp. 32-40

23 Schedule, International Convention for the Regulation of Whaling. Latest available edition at the time of writing (as amended by the Commission at the 31st Annual Meeting, London, July 1979) published by the International Whaling Commission, February 1980

24 Vienna Convention on the Law of Treaties, concluded at Vienna, 23 May 1969; in force January 1980; UN Conference on the Law of Treaties, UN DOC.A/CONF.39/27; for a detailed analysis see I.M. *Sinclair,* "The Vienna Convention on the Law of Treaties", Manchester University Press (1973)

25 D. *Bowett,* "Legal Opinion on Schedule Provision for Prior Review of Scientific Permits and Prohibition of Whaling by Operations Falling to Supply all Data Stipulated, 28 April 1979, IWC/31/9

26 *Ibid.*

27 *See O. Schachter,* "The Evolving International Law of Development", 15 Columbia Journal of Transnational Law vol. 1(5) (1975) p. 1; R. *Falk,* "The Status of Law in International Society", Princeton University Press, Princeton, USA (1970) at p. 179

28 This practice dates from the first Meeting of the IWC, London, 1949, when the Secretary to the Commission was Instructed to prepare a Schedule of Penalties in force (IWC Paper No. 26, 1949, as revised). The Secretary first produced a summary of the laws and regulations of member states In 1950 (IWC DOC. 3, 1950). The IWC then resolved to send out a questionnaire on relevant legislation. The requirement has remained recommendatory.

29 See *supra* n. 28

30 Register of Whaling Vessels, IWC/32/14; see also IWC/33/17 International Register of Whaling Vessels, Second Draft", prepared by PTES, May 1981; unpublished

31 *Op. cit.,* n. 2

32 "An International Register of Whaling Vessels: Preliminary Draft", Published by the People's Trust for Endangered Species (1979), address given in n. 2

33 Declaration on the Maritime Zone and an Agreement on the Organization of the Permanent Commission of the Conference on the Use and Conservation of the Marine Resources of the South Pacific, August 18, 1952, UN Legislative Series, ST/LEG/SER.B/6,1956

34 Convention on the Conservation of Antarctic Marine Living Resources, done In Washington, USA, May 1980, not In force, ECO, vol. 4, May 1980, pp. 13-18

35 The Antarctic Treaty, signed 1 December 1959, UNTS vol. 402 No. 5778, p. 71

36 Convention on the Conservation of European Wildlife and Natural Habitats, done at Berne, 19 September 1979, not in force; Council of Europe European Treaty Series. No. 104 (Edition September 1979)

37 Convention published by the General Secretariat of the OAU

38 UN Legislative Series ST/LEG./SER.B/1, 1951, p.6; for a full account see M. *Savini,* Report on International and National Legislation for the Conservation of Marine Mammals Part I, FAO Fisheries Circular No. 326 FIRD/C.326,1974, pp. 23-35; UN DOC.A/CONF.62/L.14,10th August 1976, Annotated Directory of Intergovernmental Organizations Concerned with Ocean Affairs, prepared by the Secretary General, pp. 125-125

39 161 UNTS No. 485, p. 193; FAO Fisheries Circular, *op. cit. supra,* p. 25

40 European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories, done at Strasbourg, January 22, 1968, in force 19 October 1967 (Council of Europe); New Directions in the Law of the Sea, Documents vol. I (ed. Lay, Churchill, Nordquist) Oceana Publications Inc., NY, USA; British Inst. of Int. and Comp. Law, London, UK, at pp. 270-274

41 *Op. cit.,* n. 1

42 Convention on the Territorial Sea and Contiguous Zone, done at Geneva, 29 April 1959; In force 10 September 1964; UNTS vol. 516, p. 205

43 "Legislation on Coastal State Requirements for Foreign Fishing", FAO Legislative Study no. 21, FAO, Rome (1981)

44 A. *Koers,* "The International Regulation of High Seas Fisheries", Fishing News (Books) Ltd., England (1973)

45 W.T. *Burke et al.,* "National and International Law Enforcement In the Ocean", University of Washington Press, USA (1975)

46 M. *Savini,* "Report on International and National Legislation for the Conservation of Marine Mammals: Part I International Legislation", FAO, Rome (June 1974)

47 European Parliament Document R/23626/76, 12 October 1976, pp. 13-14. This body has called also for a European Coastguard Service, OJ. 1978, C 108/59

48 J.E. *Vorbach,* "The Law of the Sea Regime and Ocean Law Enforcement: New Challenges for Technology", publication forthcoming in Ocean Development and International Law Journal, 1981

49 For details of the Scheme and annual reports of observers see IWC Reports generally

50 *See* n. 25

51 For the major works on the doctrine of Hot Pursuit see N. *Papadakis,* "International Law of the Sea: A Bibliography", Sec. II.6.e. "Hot Pursuit", Nos. 1597-1609, pp. 137-138

52 International Convention for the Prevention of Pollution from Ships, done at London 2 November 1973, not in force, ILM XIV (1974) p. 1319

53 Convention Concerning Minimum Standards in Merchant Ships, ILO Convention No. 147, concluded at the 62nd (Maritime) Session of the ILO, 1976

54 *Op. cit.*, n. 1

55 Written Statement by the Delegation of Canada, 2 April 1980, A/CONF.62/WS/4

56 Treaty of Rome, UNTS, vol. 298, p. 11

57 See, for example, the EEC's adherence to the Paris Convention for the Prevention of Marine Pollution from Land-based Sources, concluded, Paris, 4 June 1974, in force 6 May 1978, ILM XIII (1974), p. 352

58 Letter from F.M.C. *Baron van Hovell to Westervlier,* Council of the European Communities to Dr. F. *Burhenne-Quilwin,* IUCN Environmental Law Centre, 31 March 1981

59 Michael *Bean,* "The Evolution of National Wildlife Law", Council of Environmental Quality, US Government Printing Office (1977)

60 G. *Coggins,* "Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation", 6 Environmental Law (1975), pp. 1-59, at p. 15

61 Environmental Law Reporter 6 (1976) p. 683 (S.D. Fla. April 26,1976)

62 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, done October 12, 1940; UNTS No. 485

63 As evidenced by the annual reports of the US Marine Mammal Commission from 1976-1979

64 Eugene *Fidell,* "Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot", Symposium on the Fishery Conservation and Management Act of 1976, Washington Law Review, vol. 52 (1977), pp. 513-598.