



Photography by: Hal Whitehead, Scott Portell, Colin Wood

# Cetacean Rights

## Conference on Fostering Moral and Legal Change

Helsinki Collegium for Advanced Studies, University of Helsinki  
Finland, 21<sup>st</sup>-22<sup>nd</sup> May 2010

### Opening Address: Fostering Moral and Legal Change Towards Cetacean Rights

Chris Butler-Stroud  
Whale and Dolphin Conservation Society (International), United Kingdom

There has been a wide and distinguished circle of scholars who have explored the various viewpoints of the philosophical, legal and scientific basis to expand the moral community to include other animals. This conference will hear the first formal multidisciplinary case for cetacean rights.

A fundamental tenet of basic rights is for an individual not to be the property of another. Such fundamentals of human rights are well catered to within the State system because of our social structures, and our engagement with State governance process. Cetaceans have no such opportunity.

Theirs is a world devoid of borders. Rather than checkpoints, mesh fences, customs control or razor wire, theirs world is defined by temperature, salinity, season and current. Their homes spread across oceans, coasts and rivers; from the Arctic north through the equatorial tropics to the Antarctic south.

There can be little doubt that significant pressures are caused by the human activities, regulated by the State system. There is also evidence of legal and political will towards mitigating these impacts in a number of progressive States. In some cases these laws may provide the foundation stones of a future recognition of rights for cetaceans while they are within the boundaries of the State jurisdiction. However, as progressive as these laws are now, or may become, they can only confer a future right within their Exclusive Economic Zones and their Territorial waters, as they have no power to do more.

Therefore, we must conceive of better management of activities within our State system, while at the same time respecting the rights of entities that are not part of it. Understanding this is important, because to recognize and protect cetaceans rights will mean that States may have to relinquish control, to a limited and very focused extent, while accepting the a precedent that could shake the very foundations of their existence. *Fostering a Moral and Legal Change Towards Cetacean Rights* therefore needs to be the responsibly of those without a direct interest.



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### Whale Rights and Applied Ethics: The Ideas of Dignity, Solidarity, and Precaution

Matti Häyry  
University of Manchester, United Kingdom

Whale rights can be defended in (at least) two different ways. (i) One approach speaks directly of rights, and states, roughly: “We have a right not to be hurt, detained, or killed, and since whales are like us, they have similar rights.” This is the idea that primarily motivates the current work on behalf of whales, like it motivated similar work leading to the Declaration on Great Apes in 1993. (ii) The other main option is to start from the popular ideas of dignity, solidarity, and precaution, and to formulate a more indirect case for our duties to other species, including whales. The outline of the argument could then be: “We have duties to various beings, and since whales are among these beings, we have duties to them.” Since duties and rights can be seen as different sides of the same coin, this line of argument can also lead to the conclusion that whales have rights not to be hurt, detained, or killed. But how can these alternative defences for whale rights be explicated and supported?

(i) The first view says that rights – moral as well as basic legal rights – such as the rights not to be hurt, detained, killed, and so on can and should be assigned to beings, human and nonhuman alike, according to their mental characteristics, social abilities, and cultural features. Beings of any species who can feel pain or distress have a right not to be hurt or subjected to anxiety. Beings of any species who are aware of themselves as subjects of mental states over time have a right not to be killed. And structured family life and behaviour patterns that we can recognise as habits and customs strengthen the case for human non-interference in the matters of other highly developed species. This “rights” view calls for a robust analysis of what sorts of beings can matter morally and on what grounds. It also calls for an impartial assessment of the individuals and species belonging to the category of morally significant beings. And it calls for a bold commitment to the defence of the status and rights of (also nonhuman) beings that matter. Neutrality, clarity, and consistency are the cornerstones of this approach.

(ii) The second view says that even if intelligent non-human animals could not claim human-type rights, we can still owe them moral duties in the name of such ethical ideals as dignity, solidarity, and precaution. Even animals that are not rational or autonomous in the sense that most adult human beings are can have dignity by virtue of their beauty, complexity, and magnificence. Whales, in addition to their other morally significant characteristics, can easily be counted among such dignified living beings. People do not always pay heed to ideas like this, because anthropocentric attitudes and considerations of economic utility dominate their ethical thinking. When this is the case, they may be reminded of the requirements of fellow feeling and caution in our dealings with other intelligent creatures by unbiased information concerning their observed abilities and behaviour. This “duties” view calls for ethical sensitivity towards beings with whom we share our natural environment, especially, but not exclusively, in the case of animals with high intelligence and well-developed social lives.



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### Revisiting Whales' Right to Life

Sudhir Chopra  
Cambridge Central Asia Forum, United Kingdom

Almost twenty years back I published a co-authored paper on *Whales: Their Emerging Right to Life* in the American Journal of International Law. Almost two decades have passed since this publication. Perhaps, given the recent developments at the IWC, it is time to revisit the arguments presented in 1991 to advance a claim in support of Whales right to life.

First of all let me point out that my argument is legal and tries to address the legal issues through legal concepts applicable in the present scenario. The main legal issues are the scope and validity of various provisions of the treaty that established the International Whaling Commission in 1940's; and legal justification or arguments advanced by a select group of States to end moratorium on commercial whaling.

In my presentation I will deal with the two main legal issues by repeating our earlier assertion that customary international law demands that we cease Whaling altogether. The fact is that last twenty years have cemented a global resolve towards ending all kinds of Whaling activity. Indeed there are a few persistent objectors who demand that their cultural practices be allowed to go on for ever. It is like some states objecting to the abolition of human slavery or cannibalistic practices. They too were legal or acceptable at one point of time in one part of the world or other. But the gradual change brought by customary law through the process of changing perception of civilization did in the end out law such practices. The very fact that a legal instrument or treaty was negotiated to address the problem of whaling in the 1940's, is also a justification for finding new solutions to current problems through a legal framework.

The solution may rest in acknowledging and applying customary international law dealing with Whales. Alternatively finding ways to either amend the treaty establishing the IWC or negotiate a new global treaty that is in line with customary international law.



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### Personhood and Beyond: Cetaceans, Species-Appropriate Standards and Leveraging Research for Advocacy

Thomas White

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The scientific research on the intellectual and emotional abilities of dolphins suggests that dolphins are “nonhuman persons.” (Like humans, dolphins appear to be self-conscious, unique individuals [with distinctive personalities, memories and a sense of self] who are vulnerable to a wide range of physical and emotional pain and harm, and who have the power to reflect upon and choose their actions.) At the same time, fundamental differences between humans and dolphins have also surfaced. (Dolphin and human brains have features not found in the other. Dolphins possess a sense that humans lack [echolocation]. Humans and dolphins have profoundly different evolutionary histories.)

This juxtaposition of important similarities and differences has significant ethical implications.

The *similarities* suggest that dolphins qualify for moral standing as individuals—and, therefore, are entitled to treatment of a particular sort. Most fundamentally, dolphins have a right to life. They should also be regarded, as Kant would say, as “ends in themselves.” That is, the current human practice as regarding cetaceans primarily as economic commodities is ethically indefensible.

The *differences*, however, suggest that species-specific standards may apply when it comes to determining something as basic as “harm.” For example, dolphin social relationships are such a central part of the life of wild dolphins that this suggests that they play a central role in the growth, development and “flourishing” of any dolphin. It is even possible that their experience of the “self” is more social than is the case with humans. All of this makes it clear that the disruption and/or harassment of dolphin societies in the wild are seriously wrong. And this also argues that—because a captive situation can never approximate the social conditions dolphins need for “flourishing”—that all forms of captivity are wrong. The issue here, however, is not a “right to freedom” but, we might say, a “right to flourish.”

Scientific research on cetaceans, then, supports the claim that virtually every aspect of current human behavior towards cetaceans is ethically indefensible. Nonetheless, organizations that argue for better treatment of cetaceans fail to use the most important dimensions of this research effectively. The status of dolphins as “persons,” for example, and the evidence that each dolphin has a rich and unique individuality are at the heart of arguments that the killing and captivity of cetaceans are, from an ethical perspective, “murder” and “slavery.” Because advocacy groups fail even to mention the research that undergirds such claims, their current strategies for advancing the welfare of cetaceans have dramatic weaknesses.



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### Cetacean Cultures and Cetacean Rights

Hal Whitehead  
Dalhousie University, Canada

Culture is a vital constituent of the modern human, in some respects “the” vital constituent, and is often presented as the defining difference between humans and other animals. It can then be argued that species which also have advanced cultures should be included with humans in an extended moral community. A key element here is “advanced”. By many definitions of culture (such as “socially-learned group-specific information or behaviour shared by members of a group”), many species have it. But only in a very few non-human species has culture become a major determinant of many forms of behaviour. Evidence is growing that for at least some cetacean species, culture is both sophisticated and important. When this happens, processes which are important, but rare or absent in the standard genetically-evolved species, begin to operate: cultural group selection, conformism, cultural ethnicity with symbolic markers, and so on. These processes change the nature of society, individual roles within societies, as well as the ecology of the species. There is strong selection within such species to use this culture effectively. Perhaps this “cultural-drive” is a principal or contributing cause as to why cetaceans, humans and a few other species have evolved self-awareness, large brains, and astute intelligences. Thus there are good reasons to give highly cultural species special considerations. They are “more like us” not only because of the culture itself, but also because the advanced culture is at least a marker, and perhaps a cause, of other attributes that we think of as particularly human.



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### Cetacean Rights: A Test of our Ethical Consistency

Lori Marino  
Emory University, United States of America

There is abundant evidence for complex intelligence and sentience in dolphins based on years of scientific research. Dolphins possess large complex brains second in relative size only to those of modern humans. They have demonstrated prodigious cognitive abilities in such areas as language understanding, abstract thinking, and problem solving. Moreover, they are capable of recognizing themselves in mirrors and possess metacognitive abilities, showing that their sense of self is not unlike our own. These findings have important implications for the ethics of how we treat dolphins and for the issue of whether dolphins represent a test of our ethical consistency. Indeed, I argue, our knowledge of who dolphins are requires us to re-examine our treatment of dolphins in a variety of situations and to consider that they should be granted the same basic rights that humans bestow on each other. Despite all of the scientific evidence for cognitive sophistication and self-awareness we continue to treat dolphins as, essentially, non-sentient objects, commodities, or resources. Egregious examples of this are the many dolphin drive hunts that occur around the world. Moreover, the use of dolphins in marine parks for entertainment is another instantiation of an ethic towards dolphins that is at odds with the scientific evidence about their psychological needs and sensitivities. I argue that the scientific evidence on dolphin psychology (and vulnerabilities) provides an abundantly clear argument for shifting our thinking and treatment of these animals from current practices to a more ethical and consistent stance towards them as beings with a similar level of intelligence and sentience to our own.



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### Cetacean Rights: Confronting the Sustainability Paradigm and Deciding Who is 'Beyond Use'

Nicholas Entrup/Margi Prideaux  
Whale and Dolphin Conservation Society (International), Germany/Australia

After decades of denial it appears that human consciousness is shifting. We now accept that there are limits to what our environment can absorb and despite our long held preconceptions of human preeminence, scientists are helping us to understand that sophisticated intelligence exists beyond *Homo sapiens* – cetaceans (dolphins, whales and porpoises), among other species, have such qualities. This is a realization with profound implications.

This emerging science and philosophy does not fit comfortably into the 'sustainability paradigm', the foundation stone of contemporary domestic and international law and policy, which premises all of 'nature' as a resource for humans. Consequently, if we are to adjust our philosophy we also must adjust of legal and policy mechanisms as well.

At its core, the 'sustainability paradigm' places value on nature that is tied to the human economy. The success of management is measured by percentages of species or systems remaining intact. Perversely, instead of commerce being accountable to society, we have become accountable to the global economic system. Instead of human society being accountable to the biosphere, the biosphere has become accountable to us. A tree becomes timber; a mountain or a gorilla family become ecotourism destinations; a school of bluefin tuna becomes a fishery; a dolphin is an entertainment exhibit; a whale is meat and blubber.

In this way the 'sustainability paradigm' actually serves development rather than our moral compass and we might wisely question if putting a development value on components of Earth is the complete answer. We must ask and answer the question do we really intended for everything to be valued and 'sustainably used' or are some entities simply 'beyond use' as the current discussion about cetacean rights might suggest?



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### Cetaceans: From Bare Life to Nonhuman Others

Paola Cavalleri  
Etica & Animali, Italy

The history of our relationships with cetaceans can be divided in two phases. The longer one, extending from the beginning of cetacean hunting to the middle of the past century, is marked by unrestricted massacre, with all the attendant implications of disruption of families, deconstruction of codes of behavior and devastation of cultures. The second, more recent phase has seen the gradual development of some international restrictions and guidelines, with an incremental progression from mere regulation to preservation. Nonetheless, whales and dolphins still remain in a condition that is well-captured by the philosophical notion of bare life. For bare life is the life of those beings who, through a form of inclusive exclusion from the juridical order, remain “exposed to an unconditioned threat of death”.

If, however, in the case of normally protected beings such as humans, the condition of bare life is a form of degradation, in the case of routinely defenseless nonhumans this kind of inclusive exclusion can be seen as the premise of a radical change. This is the conclusion of legal reflections on the developments of the latter period, a conclusion suggesting that, currently, the trend in the component of customary international law which is called *opinio juris* points to the granting of an entitlement to life to cetaceans. In the same direction also points the consistent application of our contemporary moral paradigms – the personhood account and the human rights doctrine – to new scientific evidence about the cognitive and social characteristics of dolphins and whales. It can thus be argued that it is time to internationally acknowledge cetaceans’ right to life, finally clearing the way of the opposition from just a few national governments, whose alleged “cultural objections” are both locally misplaced and globally dangerous.