

OXFORD  
UNIVERSITY PRESS

# Marine Mammal Conservation and the Law of the Sea

CAMERON S. G. JEFFERIES

PREFACE BY JOHN NORTON MOORE

258

OXFORD  
UNIVERSITY PRESS

**OXFORD**  
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trademark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America.

© Oxford University Press 2016

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. Inquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form  
and you must impose this same condition on any acquirer.

---

Library of Congress Cataloging-in-Publication Data

Names: Jefferies, Cameron S. G., author.

Title: Marine mammal conservation and the law of the sea / Cameron S. G. Jefferies ;  
preface by John Norton Moore.

Description: New York : Oxford University Press, 2016. | Based on author's  
thesis (doctoral - University of Virginia, 2014). | Includes bibliographical  
references and index.

Identifiers: LCCN 2016013031 | ISBN 9780190493141 (hardback)

Subjects: LCSH: Marine mammals—Law and legislation. | Marine animals—  
Conservation—Law and legislation. | Wildlife conservation  
(International law) | Law of the sea. | BISAC: LAW / International.

Classification: LCC K3525 .J44 2016 | DDC 346.04/69595—dc23 LC record available at  
<http://lccn.loc.gov/2016013031>

---

9 8 7 6 5 4 3

Printed by Edwards Brothers Malloy, United States of America

**Note to Readers**

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

*(Based on the Declaration of Principles jointly adopted by a Committee of the  
American Bar Association and a Committee of Publishers and Associations.)*

**You may order this or any other Oxford University Press publication  
by visiting the Oxford University Press website at [www.oup.com](http://www.oup.com).**

## CONTENTS

Preface by John Norton Moore xi

Acknowledgments xiii

Abbreviations xv

I. Introduction 1

I. Unfinished Business 1

II. Conservation, Sustainability, and Other Key Terms 2

III. Foundational Works 7

IV. The Global Ocean 9

V. Marine Mammals 10

1. Scientific Classification, Description, and Distribution 10

2. A Brief History of Human-Marine Mammal Interaction 12

(i) Utilitarian Relationship 12

(a) Cetaceans 12

(b) Pinnipeds 15

(ii) Cultural Relationship 16

3. Current Conservation Status of Marine Mammals 17

VI. Conclusion 19

Notes 19

2. The Current Marine Mammal Regulatory Landscape 33

I. Resource Type and Economic Considerations 33

II. Legal Foundation of International Ocean Governance 35

1. The United Nations Convention on the Law of the Sea 36

2. Species and Area Based Approaches to Marine Mammal Management 38

(i) Fur Seals and Pinniped Regulation 39

(ii) The Great Whales and "Sustainable" Whaling 41

3. Other Relevant Treaties and Organizations 50

4. National Regulation 57

(i) The United States, New Zealand, and Australia 58

(ii) Nations That Take Marine Mammals 61

(a) Great Whale Take 61

(b) Small Cetacean Take 62

(c) Pinniped Take 62

III. Conclusion 63

Notes 63

3. Goals for the Rational Conservation of Marine Mammals and Emerging Ethical Considerations 89

I. Rational Decision-Making Model 89

1. Problem Identification and Goal Setting 90
2. Identification of Past Trends 90
3. Assessment and Analysis of Alternatives, Decision-Making, and Recommendations 90

II. Goals for This Work 91

1. Promote the Rule of Law in the Oceans 91
2. Expand Species Coverage 91
3. Expand Issue Coverage 91
4. Respect Competing Ocean Uses 91
5. Promote Cooperation and Enhance Global Participation 92
6. Incorporate Current Principles of International Law 92
7. Utilizing Science-Based Decision-Making and Conservation Tools That Enable Holistic Management 92
8. Promote Regional Implementation 92
9. Build on the Existing Foundation 93
10. Propose a Rational Arrangement 93

III. Ethical Considerations 93

1. Scientific Advances 95
  - (i) The Cetacean Brain 96
  - (ii) Behavior and Culture 97
2. Marine Mammal Killing Methods 99
3. Aboriginal Subsistence Whaling 104
4. Features of a New Response 107

IV. Conclusion 107

Notes 108

4. Modern Threats to Marine Mammals 119

I. Current Threats to Marine Mammals 120

1. Global Climate Change 120
  - (i) The Problem 120
  - (ii) The Current Response 123
2. By-Catch 125
  - (i) The Problem 125
  - (ii) The Current Response 126
3. Ship-Strikes 127
  - (i) The Problem 127
  - (ii) The Current Response 128
4. Environmental Pollution 130
  - (i) The Problem 130
    - (a) Traditional Pollution Problems 131
    - (b) Emerging Concerns 132
  - (ii) The Current Response 132
5. Ecotourism (Marine Mammal Tourism) 137
  - (i) The Problem 137
  - (ii) The Current Response 138

- II. Features of a New Response 140
- III. Conclusion 141
- Notes 141
- 5. The Case for an Implementing Agreement Pursuant to Articles 65 and 120 of UNCLOS and the Creation of an International Marine Mammal Commission 159
  - I. Legally Justified Options for International Marine Mammal Conservation 160
    - 1. Status Quo 160
    - 2. An Improved ICRW/IWC 160
    - 3. The "Soft" Law Approach 164
    - 4. Proliferation of Bilateral and/or Regional Agreements 165
    - 5. Reliance on National Regulation 167
    - 6. A New International Regime 167
  - II. UNCLOS Implementing Agreements 171
  - III. The History and Interpretation of Articles 65 and 120 of UNCLOS 176
    - 1. The Drafting History of Articles 65 and 120 177
    - 2. Competing Interpretations of Articles 65 and 120 181
    - 3. Pertinent Characteristics of Articles 65 and 120 181
    - 4. Contemporaneous and Emerging State/International Organization Interpretations 184
    - 5. Academic Interpretations 188
    - 6. Preferred Interpretation(s) 191
  - IV. Treaty Termination and International Organization Succession 193
    - 1. Treaty Termination 193
    - 2. Dissolution and Succession of International Organizations 195
  - V. Jurisdictional Limits 197
  - VI. Conclusion 199
  - Notes 199
- 6. The Proposal: Part I—The Framework for a New Approach 213
  - I. Introduction 213
  - II. Constructing the Framework for a UN Marine Mammals Agreement 215
    - 1. Introductory Matters 215
      - (i) Purpose and Objective 215
      - (ii) Key Terms 216
      - (iii) Scope of the New Regime 218
      - (iv) The Best Available Scientific Information, Evidence, and Knowledge Standard 221
      - (v) Encouraging Developing State Participation 223
      - (vi) Developing and Transferring Marine Mammal Related Technologies 223
      - (vii) Reservations, Declarations, and Relation to Existing Agreements 224
      - (viii) Amending Annex I of UNCLOS 225
    - 2. Institutional Structure of the Proposed Regime 226
      - (i) The International Marine Mammal Commission (IMMC) 226
      - (ii) The IMMC's Subsidiary Structures 229

(iii) Transparency in Decision-Making	234
(iv) Regional Marine Mammal Organizations	235
3. Compliance, Enforcement, and Dispute Resolution	236
(i) The Non-participant State Problem	236
(ii) Compliance and Enforcement	238
(iii) Dispute Resolution	241
4. Political Obstacles	245
III. Conclusion	251
Notes	251
7. The Proposal: Part II—The Secretariat, Regionalism, and Marine Protected Areas	269
I. Introduction	269
II. Institutional Structure and the Secretariat	270
1. The Commission and Regional Organizations/Arrangements	270
2. The Secretariat	270
III. Regionalism	275
1. What Is Regionalism?	275
2. Benefits and Drawbacks of Regionalism	277
3. Case Study	279
4. Regionalism as Contemplated in the Proposed Agreement	282
5. Conclusion	284
IV. Marine Protected Areas	284
1. MPAs Described	285
2. Relevance of Emerging Science	288
3. How MPAs Are Currently Utilized by the International Community	290
(i) The ICRW/IWC	290
(ii) Other International/Regional Arrangements	291
(iii) Innovative Work	292
(iv) Prospects Moving Forward	293
V. Conclusion	295
Notes	295
8. Concluding Thoughts	307
Notes	312
Appendices	
Appendix 1: Extant and Recently Extinct Marine Mammal Species	315
Appendix 2: Ocean Zones	323
Appendix 3: Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Sustainable Management of Marine Mammals (Short form: UN Marine Mammals Agreement)	325
Appendix 4: Structure of Proposed International Regime for the Conservation of Marine Mammals	373
Index	375