

Whales against humanity

An overview and analysis of the international and European legal protection of Cetacea against anthropogenic threats in their natural habitat

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Nederlandstalige samenvatting

Deze masterscriptie handelt over de juridische bescherming van walvissoorten. Er wordt onderzocht welke bedreigingen walvissoorten ervaren in hun natuurlijke habitat door toedoen van menselijke activiteiten. Voorbeelden hiervan zijn walvisvangst, het vangen van walvissen als bijvangst en de toeristische activiteit van het walvissen spotten. Bijkomend wordt er ook aangetoond wat het belang van deze bescherming is. Walvissoorten spelen immers een belangrijke rol in het ecosysteem, en zijn bovendien ook dieren die pijn en emoties kunnen voelen.

Diverse internationale en Europese juridische instrumenten, zoals verdragen, conventies en overeenkomsten, worden onderzocht inzake hun rol in het beschermen van walvissoorten. De criteria die worden onderzocht bij elk juridisch instrument zijn onder andere: welke maatregelen en regels ze opleggen aan lidstaten, hun materieel en territoriaal toepassingsgebied, hun bindende kracht en mogelijkheden tot afdwingbaarheid, welke mogelijkheden er zijn om de implementatie ervan door lidstaten te controleren en op te volgen, en de relevante organen opgericht in het kader van deze instrumenten. Dit onderzoek verloopt in de eerste plaats op basis van de tekst van de juridische instrumenten en wordt vervolgens aangevuld met analyses en conclusies op basis van rechtsleer.

Dit wordt gevolgd door een hoofdstuk waarin een algemene analyse wordt gemaakt van het huidige juridisch kader inzake bescherming van walvissoorten. De lacunes in en zwakke punten hiervan worden opgesomd en meteen aangevuld met voorstellen over hoe het juridisch kader kan worden uitgebreid en versterkt.

Ondergetekende verklaart dat de inhoud van deze masterscriptie mag worden geraadpleegd en gereproduceerd voor persoonlijk gebruik. Het gebruik van deze masterscriptie valt onder de bepalingen van het auteursrecht en bronvermelding is steeds noodzakelijk.

Foreword

I had the honour of writing a thesis on a subject that is extremely dear to me. Ever since I was young I have been convinced that all animals are equal to humans and deserve protection from harm and abuse. At the age of twelve I decided to become a vegetarian and today I try to incorporate vegan meals as well. During the pandemic I started watching a lot of documentaries and discovered *Blackfish*, which tells the story of Tilikum and other killer whales kept in captivity to entertain humans. Following this, I started researching more threats that cetaceans face and became even more convinced of the importance of their protection. Since my studies are in the field of law, the logic conclusion was to examine the possibilities for legal protection of cetaceans.

It was a joy to work on this thesis and the writing process happened smoothly, simply because I am convinced of the importance of this subject. It was also very easy to tell people what I was writing about, because it is a quite accessible topic. People immediately got an idea of what it was about and of the importance thereof, in comparison to what is the case with thesis topics that are more niche.

To conclude, I have some people to thank who helped me during the writing process. In the first place I want to thank my promotor, prof. dr. An Cliquet, for the helpful feedback she gave and for steering me in the right direction. I felt like she really cared about the topic as well, which was an enormous motivator to keep on writing. Her quick responses to my questions were always greatly appreciated.

Secondly, I would like to thank my parents for supporting me throughout my bachelor's and my master's degree and especially my mom for providing this thesis with a catchy title and for proofreading. Lastly, an enormous thank you and my sincere apologies to my dearest friends who never got tired of me talking about my thesis and who, during those last few months, had to hear numerous times 'I can't come, I'm writing my thesis'. I'll make it up to you.

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I. Introduction

“Let us speak for those who have no voice and trouble no more these giants of the deep”

- Laura Hoey¹

Because of human activities, some whale species are threatened with extinction and face inhumane treatment.² This thesis aims to contribute to the legal framework for the protection of whales. To outline the context and importance thereof, chapter two and three will first give an explanation of the different threats that cetaceans face and of the societal and scientific importance of their protection. Of course, whales face dangers from different sides because of the impact humans have caused.³ Nonetheless, the scope of the thesis will be limited to disturbances that whales face in their natural habitat, due to human activities. This disruption happens in the first place because of whaling, but also because of other human activities, such as whale watching and bycatch from the fishing industry.⁴ Of course, there is a number of challenges to be identified in the battle for better regulation, such as the impact that climate change may have on whales, pollution of their habitat and the practice of keeping whales in captivity.⁵ Since the scope of this thesis is limited, these threats will be kept in mind when examining the instruments themselves, but will not be explained in depth in chapter two.

¹ L. HOEY, “The battle over scientific whaling: a new proposal to stop Japan’s lethal research and reform the International Whaling Commission”, *William & Mary Environmental Law and Policy Review* 2017, (435) 470 (hereafter: L. HOEY: “The battle over scientific whaling”).

² H. SCHOUKENS and A. CLIQUET, “Schijnoverwinning in de strijd tegen de walvisjacht”, *Juristenkrant* 2014, 15-16; L. DEL CASTILLO, “The Whaling in the Antarctic Case, Applying the International Convention for the Regulation of Whaling as a Self-contained Regime”, *China Oceans Law Review* 2017, (75) 84 (hereafter: L. DEL CASTILLO, “The Whaling in the Antarctic case”).

³ C. WEED, “The world beyond Seaworld: a comparative analysis of international law protecting cetacea in captivity”, *Ocean and Coastal Law Journal* 2018, (281) 326 (hereafter: C. WEED, “The world beyond seaworld”).

See K. M. KOVACS and C. LYDERSEN, “Climate change impacts on seals and whales in the North Atlantic Arctic and adjacent shelf seas”, *Science Progress* 2008, 117-150; see M. SIGLER, “The Effects of Plastic Pollution on Aquatic Wildlife: Current Situations and Future Solutions”, *Water Air Soil Pollut* 2014; see R. DE STEPHANIS, J. GIMÉNEZ, E. CARPINELLI, C. GUTIERREZ-EXPOSITO and A. CANADAS, “As main meal for sperm whales: Plastics debris”, *Marine Pollution Bulletin* 2013, 206-214.

⁴ E. C. M. PARSONS, “The Negative Impacts of Whale-Watching”, *Journal of Marine Biology* 2012, 2-3 (hereafter: E. C. M. PARSONS, “The Negative Impacts of Whale-Watching”); M. DICENSO, “Trouble on the high seas: a need for change in the wake of Australia v. Japan”, *B. C. Int’l & Comp. L. Rev.* 2016, 13-27 (hereafter: M. DICENSO, “Trouble on the high seas”); S. DOLMAN, S. BAULCH, P. G. H. EVANS, F. READ and F. RITTER, “Towards an EU Action plan on Cetacean Bycatch”, *Marine Policy* 2016, 67-75.

⁵ C. WEED, “The world beyond Seaworld”, 281-327.

Chapter four then discusses the relevant legal instruments that currently regulate the status of whales. The instruments will be divided into different chapters, depending on whether these instruments have an international or European scope of application. National legislation will be excluded. The relevant instruments will be examined in light of different criteria, namely their binding nature and compliance pull, their material and territorial scope, their enforceability, how easily member states can choose to no longer be bound and their relevant organs. Compliance pull means to what level state parties feel compelled to abide by the rules of a legal instrument. Regarding binding nature and compliance pull, it is important to note that most legal instruments discussed here will be binding in se, but that they do not always contain binding language. Non-committal language leaves a lot open to interpretation by the states themselves and makes enforcement more difficult. Legal literature will help in interpreting these instruments and special attention will be spent to possible criticism these instruments may face. Not each and every legal instrument fits into the scope of this dissertation, so a selection of the most important and well known instruments was made. Only the most important and well known instruments are discussed. A lot of attention will specifically be spent on the International Convention on the Regulation of Whaling, since this is the oldest instrument that also works globally.

Thereafter, on the basis of the analysis in chapter four regarding the criteria as mentioned above, the general gaps in the existing legal framework can be identified. An example of such a gap may relate to the territorial scope of such an instrument. After all, a certain legal instrument may offer qualitative protection, but only apply to a limited geographic region. This is not desirable, since whales are migratory species. They follow their prey over long distances and frequently travel between breeding and feeding grounds.⁶ Because of this, cooperation between different states is of the utmost importance if we want to efficiently protect cetacean populations and individuals. All of this will give a better insight in the current legal protection for cetaceans. Where this current legal framework can be improved, the same chapter will examine possible scenarios to ensure better protection and a more humane treatment of these animals. ‘Better legal protection’ does not only mean protection from extinction, but also a drive towards a more humane treatment. These animals deserve protection for their own individual benefit, not just for the benefit of humans. What ‘better legal protection’ constitutes exactly depends on the criteria that will be examined for each instrument, as explained in the beginning of this chapter.

In this dissertation, the term ‘whales’ needs to be interpreted as including all cetaceans. Cetaceans are the taxonomic order of marine mammals including all kinds of whales, but also dolphins and porpoises.⁷ These

⁶ ASCOBANS, “Threats”, www.ascobans.org/en/species/threats.

⁷ INTERNATIONAL WHALING COMMISSION, “Whales – an introduction”, <https://iwc.int/about-whales/lives>; W. C. G. BURNS, “The Berlin Initiative on Strengthening the Conservation Agenda of the

cetaceans are divided into two suborders. The first suborder is called Mysticeti, or baleen whales, and includes four families. The other suborder is called Odontoceti, or toothed whales.⁸ According to scientists, approximately ninety species of cetaceans exist globally.⁹ The terms ‘cetaceans’ and ‘whales’ will be used interchangeably for the purpose of this dissertation, unless specified otherwise.

Terms to refer to groups of whales are species, populations and stocks. The International Whaling Commission (hereafter: IWC) for example rather refers to whale populations instead of whale species when assessing the status of a certain type of cetacean. This is done because within a given cetacean species, the population in a certain area may be thriving, while the population in another may be close to extinction. Within a certain population, there are subgroups that are referred to as stocks. Even within a certain population, there may be differences between the conservation status of different stocks.¹⁰

Lastly, in this thesis, different terms are used to refer to the regulation of cetacean populations, namely protection, conservation and management. Protection is the most extensive one of the three and is aimed at actively safeguarding individual cetaceans from harm. Conservation refers to the taking of measures to maintain the populations. Management does not have a positive or negative connotation. It is simply the regulation of whale populations according to what was agreed upon in a legal text. Note that these definitions are specific to this thesis and chosen by the author, and that the interpretation of these terms may vary in other texts.

The goal of this thesis is not to provide an all-encompassing solution to the problem. Rather, it aims to give a push in the right direction, by making scholars and policy makers attentive to the importance of the subject and by offering possible remedies. Of course, whale protection and conservation also requires cultural changes, dietary changes and changes in the way we view animals. The legal question alone is not enough to make a lasting and all-encompassing change, but it is nonetheless a very important one.

International Whaling Commission: toward a new era for cetaceans”, *Review of European Comparative & International Environmental Law* 2004, (72) 72.

⁸ ASCOBANS, “Species”, www.ascobans.org/en/species.

⁹ INTERNATIONAL WHALING COMMISSION, “Whales – an introduction”, <https://iwc.int/about-whales/lives>.

¹⁰ INTERNATIONAL WHALING COMMISSION, “Population status”, <https://iwc.int/about-whales/status>.

II. Main threats to cetaceans

1. Whaling

“If we can imagine a horse having two or three explosive spears stuck in its stomach and being made to pull a butcher’s truck through the streets of London while it pours blood into the gutter, we shall have an idea of the method of killing. The gunners themselves admit that if whales could scream, the industry would stop for nobody would be able to stand it.”

- Sir David Attenborough¹¹

In the 19th and 20th century, many whale species were hunted to dangerously low levels.¹² It is estimated that commercial whaling wiped out almost 3 million cetaceans in the last century.¹³ Regulations to protect them from extinction were only for the first time introduced in the 1960s by the IWC, which we will discuss below. Because of these protectionist measures by the IWC and other legal instruments, some populations have in fact recovered from near extinction. However, other populations still remain critically endangered.¹⁴

Whaling is not only a problem because of the possible threat of extinction that certain populations may face, but also because of the inhumane methods of killing that are used by whalers. During the traditional hunts of pilot whales on the Faroe Islands, the animals are pulled up to the beach by inserting metal hooks in their blowholes and are then killed with a blade inserted in their spinal canal. The animals do not die because of the cutting of the spinal cord, but because of gradual exsanguination¹⁵ More commercial methods of whaling make use of explosive harpoons fired from fast catcher boats.¹⁶

¹¹ P. BRAKES, A. BUTTERWORTH, M. SIMMONDS and P. LYMBERY (eds.), *Troubled waters*, s.l., Creasy Hood, 2004, 144 p.

¹² INTERNATIONAL WHALING COMMISSION, “Whales – an introduction”, <https://iwc.int/about-whales/lives>.

¹³ D. CRESSEY, “World’s whaling slaughter tallied”, *Nature* 2015, 140-141.

¹⁴ INTERNATIONAL WHALING COMMISSION, “Whales – an introduction”, <https://iwc.int/about-whales/lives>.

¹⁵ H. M. MAMZER, “Ritual slaughter: the tradition of pilot whale hunting on the Faroe Islands”, *Frontiers in Veterinary Science* 2021, 1-13.

¹⁶ M. J. MOORE, “How we all kill whales”, *ICES Journal of Marine Science* 2014, 760-763; P. J. CLAPHAM, “Whaling, modern” in B. WÜRSIG, J. G. M. THEWISSEN and K. M. KOVACS (eds.), *Encyclopedia of marine mammals*, s.l., Elsevier Inc., 2018, 1070-1074 (hereafter: P. J. CLAPHAM, “Whaling, modern”).

2. Whales as the victim of bycatch

Cetaceans are not only killed directly through whaling activities. They are also too often an indirect victim of the fishing industry as they are often captured as bycatch. This means that marine animals, such as cetaceans, accidentally get entangled in fishing gear that was not intended to capture these species. Several scenarios may happen when a cetacean gets entangled. They can drown in the fishing nets because they are unable to reach the surface to breathe. It is also possible that they are not killed immediately and that the animal tows the fishing gear with it for weeks, months or even years before dying because it cannot feed effectively.¹⁷ Bycatch has major conservation and welfare consequences, even for the whales that do survive. They become injured and stressed, and their quality of life is greatly affected.¹⁸ This threat affects cetaceans in particular, because they have a long lifespan and they breed slowly.¹⁹

Numbers of bycatch vary severely depending on the source. Some say that it is estimated that every year, several thousand cetaceans are caught as bycatch, while others say that this number climbs to at least 300.000 cetaceans every year. The high likelihood of cetaceans being caught as bycatch play a role in the endangered status of certain species, like the vaquita.²⁰

Regulation in this aspect is difficult, because of the migratory nature of whales and the different interest groups.²¹ Global cooperation with different actors, such as the fishing industry, governments and whale

¹⁷ ASCOBANS, “Threats”, www.ascobans.org/en/species/threats; INTERNATIONAL WHALING COMMISSION, “Bycatch”, <https://iwc.int/management-and-conservation/bycatch>; INTERNATIONAL WHALING COMMISSION, “Whale entanglement – building a global response”, <https://iwc.int/management-and-conservation/entanglement>.

¹⁸ R. R. REEVES, P. BERGGREN, E. A. CRESPO, N. GALES, S. P. NORTHRIDGE, G. NOTARBARTOLO DI SCIARA, W. F. PERRIN, A. J. READ, E. ROGAN, B. D. SMITH and K. V. WAEREBEEK, “Global Priorities for Reduction of Cetacean Bycatch”, <https://wwfint.awsassets.panda.org/downloads/topninerreportenglish.pdf>; S. DOLMAN, S. BAULCH, P. G. H. EVANS, F. READ and F. RITTER, “Towards an EU Action plan on Cetacean Bycatch”, *Marine Policy* 2016, 67-75; S. J. DOLMAN and M. J. MOORE, “Welfare Implications of Cetacean Bycatch and Entanglements”, 41-65 in A. BUTTERWORTH (ed.), *Marine Mammal Welfare*, s.l., Springer, 2017, xxvi + 297 p. (hereafter: S. J. DOLMAN and M. J. MOORE, “Welfare Implications of Cetacean Bycatch and Entanglements”).

¹⁹ INTERNATIONAL WHALING COMMISSION, “Bycatch”, <https://iwc.int/management-and-conservation/bycatch>.

²⁰ ASCOBANS, “Threats”, www.ascobans.org/en/species/threats; INTERNATIONAL WHALING COMMISSION, “Bycatch”, <https://iwc.int/management-and-conservation/bycatch>.

²¹ B. LASCELLES, G. NOTARBARTOLO DI SCIARA, T. AGARDY, A. CUTTELOD, S. ECKERT, L. GLOWKA, E. HOYT, F. LLEWELLYN, M. LOUAZO, V. RIDOUX and M. J. TETLEY, “Migratory marine species: their status, threats and conservation management needs”, *Aquatic Conservation: Marine and Freshwater Ecosystems* 2014, 111-127.

conservation organisations, is needed. The laws that do exist at the moment focus on the maintenance of populations rather than on humane treatment.²²

The global monitoring, data and reporting of bycatch is quite limited. This makes it difficult to effectively combat this problem.²³

3. Whale watching

Wildlife tourism is an increasingly popular activity. Whale watching is no different. For this thesis, whale watching is defined as all commercial activities which allow for the public to see cetaceans in their natural habitat, for example by boat. It will not include whales that are kept in captivity, such as in marine parks or aquaria.²⁴

Whale watching can negatively impact whales, as it is shown that cetacean behaviour can change in response to whale watching. This includes changes in surfacing, acoustic and swimming behaviour, and changes in direction, group size and coordination. These changes can also cause other negative impacts in the long-term. Additionally, the vessels that are used for whale tourism can harm or kill the animals in case of a collision.²⁵ In fact, these concerns not only apply to whale watching, but to all human activities whereby ships may come in close contact with whales, such as commercial shipping and industrial activities.²⁶

Legal and scientific literature has proposed different approaches on how we can mitigate the impact that whale watching has on cetaceans. A possible mitigation measure is the imposition of a speed restriction on vessels.²⁷

²² S. J. DOLMAN and M. J. MOORE, “Welfare Implications of Cetacean Bycatch and Entanglements”.

²³ INTERNATIONAL WHALING COMMISSION, “Bycatch”, <https://iwc.int/management-and-conservation/bycatch>.

²⁴ E. C. M. PARSONS, “The Negative Impacts of Whale-Watching”, 2.

²⁵ E. C. M. PARSONS, “The Negative Impacts of Whale-Watching”, 2-3; C. BRIDGEWATER, “The next step in North Atlantic Whale Protection: a closer look at whale-watch guidelines for the Northeast”, *Ocean and Coastal Law Journal* 2001, 347-370; M. B. ORAMS, “Tourists getting close to whales, is it what whale-watching is all about?”, *Tourism Management* 2000, (561) 561.

²⁶ ASCOBANS, “Threats”, www.ascobans.org/en/species/threats.

²⁷ T. N. NORRIS, “Lethal speed: an analysis of the proposed rule to implement vessel speed restrictions and the impact on the declining right whale population as well as the shipping and whale-watching industries”, *Ocean and Coastal Law Journal* 2008, 339-368.

4. Other threats to cetaceans

While whaling, bycatch and whale watching may be the most obvious threats to cetaceans, they suffer from a diverse range of other anthropogenic threats as well.²⁸ This chapter will explain why some human activities or circumstances caused by humans threaten cetaceans.

Ship strikes between cetaceans and vessels are a first threat. These accidents are increasing as marine transport increases. Accidents like this for instance prevent the recovery of the North Atlantic right whales and negatively impact a lot of other populations as well.²⁹

A second danger to cetaceans populations is habitat degradation, which includes nuisances like construction works in the marine environment, oceanic noise, plastics and chemical pollution and marine debris. Especially the cumulative impact of all these threats can render cetacean populations more vulnerable. For example, habitat degradation may decrease feeding opportunities, which in turn can render cetaceans more vulnerable to disease.³⁰

Another threat is climate change. One way in which climate change affects cetaceans is at the poles, where the melting sea ice changes the distribution of the fish and crustaceans that many cetaceans use as a food source. Another example is the melting of the ice caps in the Himalayas, which changes river flows and monsoon patterns. These disruptions force cetaceans to change their feeding and migration patterns when seeking food.³¹

²⁸ INTERNATIONAL WHALING COMMISSION, “Whales – an introduction” <https://iwc.int/about-whales/lives>.

²⁹ INTERNATIONAL WHALING COMMISSION, “Extinction and cetaceans”, <https://iwc.int/management-and-conservation/cetaceans-and-extinction>.

³⁰ INTERNATIONAL WHALING COMMISSION, “Extinction and cetaceans”, <https://iwc.int/management-and-conservation/cetaceans-and-extinction>.

³¹ INTERNATIONAL WHALING COMMISSION, “Extinction and cetaceans”, <https://iwc.int/management-and-conservation/cetaceans-and-extinction>.

III. Societal and scientific relevance of cetacean protection

Cetacean status has fluctuated throughout the years, but extinction remains a very real threat for some populations or even entire species. While extinction is a natural phenomenon, scientists today measure higher rates of extinction as opposed to historic background rates. These tendencies can inter alia be attributed to human activities which cause habitat disruption and climate change, which negatively affect cetaceans. As stated above, a species can also become locally extinct, with one population in a certain area thriving, but a population in another area ending up extinct. Conservation status of cetaceans is assessed by the International Union for Conservation of Nature (hereafter: IUCN) Red List of Threatened Species. According to this IUCN Red List, approximately 25% of cetacean species are classified as threatened.³² Five cetacean species and nineteen subspecies or subpopulations are classified as critically endangered, twelve species are endangered, seven species have a vulnerable status and ten are near threatened.³³

The early twentieth century and the industrialization process that came with it even accelerated the number of individuals caught and the number of species that could be targeted, due to technological advances. A chilling example of this is the Antarctic blue whale population which was estimated to have fallen from a pre-hunting level of 200.000-300.000 to less than 400 individuals.³⁴ However, mitigation and protection measures have been introduced since the 1960s and in 1998, the population was already estimated to number 2.300 individuals.

The introduction of the IWC played a large role in preventing extinction by regulating catch levels and regulating which species could be caught. The IWC also made efforts to estimate population sizes and increase scientific understanding of structures and trends. Over time, more and more anti-whaling states joined the IWC. Because of this, measures to protect different species and populations were taken more often. Examples include restricted whaling seasons and areas, bans on hunting mothers and calves, sanctuaries and moratoria for a whole species or a population. All this culminated in the global moratorium on commercial whaling since 1986. At the time, the underlying reasons for the moratorium were scientific

³² INTERNATIONAL WHALING COMMISSION, “Extinction and cetaceans”, <https://iwc.int/management-and-conservation/cetaceans-and-extinction>.

³³ IUCN, “Status of the world’s cetaceans”, <https://iucn-csg.org/status-of-the-worlds-cetaceans/> (consultation 30 July 2022).

³⁴ INTERNATIONAL WHALING COMMISSION, “Extinction and cetaceans”, <https://iwc.int/management-and-conservation/cetaceans-and-extinction>.

insights. Nowadays, the moratorium is kept in place because of moral and ethical reasons as well.³⁵ Later, the introduction of new legal instruments also played a large role in the protection of cetaceans and restoring their populations to a favourable conservation status, as is discussed in greater detail below.

While commercial whaling is abolished in a large part of the world, new 21st century threats have emerged. Some populations have thrived since the moratorium, but others are now facing the consequences of human activities and declining rapidly. A gloomy example are the North Atlantic right whales and western North Pacific gray whales that now each consist of only a few hundred animals.³⁶ These threats are for a large part addressed by the IWC and other legal instruments. Unfortunately addressing these threats still proves difficult, since removing one threat does not always suffice. Often it is the cumulation of different human activities that has a negative effect on cetaceans.³⁷

As the paragraph above makes abundantly clear, cetaceans suffer from several threats to their populations. Most of these threats are of a human nature.³⁸ Consequently, there is a pressing need for better regulation concerning whale protection, both for scientific reasons and for animal welfare reasons.

The animal welfare argument is the most obvious one. Human attitude towards whales has shifted in recent years, since it has become increasingly clear that whales are more than simply ‘big fish’. They are intelligent and social creatures who feel pain just like humans.³⁹ The capture and killing of whales is simply not possible in a humane way.⁴⁰ International biodiversity and wildlife law generally deals with the conservation of animals, but fails to address the welfare of these animals and to recognize their moral

³⁵ H. S. SCHIFFMAN, “The International Whaling Commission: challenges from within and without”, *ILSA Journal of International and Comparative Law* 2004, (367) 369 (hereafter: H. S. SCHIFFMANN, “The International Whaling Commission: challenges from within and without”); INTERNATIONAL WHALING COMMISSION, “Extinction and cetaceans”, <https://iwc.int/management-and-conservation/cetaceans-and-extinction>; S. FREELAND and J. DRYSDALE, “Co-operation or chaos – art; 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission”, *Macquarie Journal of International and Comparative Environmental Law* 2005, (1) 28 (hereafter: S. FREELAND and J. DRYSDALE, “Co-operation or chaos”).

³⁶ INTERNATIONAL WHALING COMMISSION, “Extinction and cetaceans”, <https://iwc.int/management-and-conservation/cetaceans-and-extinction>.

³⁷ INTERNATIONAL WHALING COMMISSION, “Extinction and cetaceans”, <https://iwc.int/management-and-conservation/cetaceans-and-extinction>.

³⁸ ACCOBAMS, “Threats”, https://accobams.org/species/_threats/.

³⁹ A. D’AMATO and S. K. CHOPRA, “Whales: their emerging right to life”, *American Journal of International Law* 2010, (21) 3 (hereafter: A. D’AMATO and S. K. CHOPRA, “Whales: their emerging right to life”); L. HOEY, “The Battle Over Scientific Whaling”, 435-470.

⁴⁰ H. SCHOUKENS and A. CLIQUET, “Schijnoverwinning in de strijd tegen de walvisjacht”, *Juristenkrant* 2014, 15-16; W. SCHOLTZ, “Killing them softly? Animal welfare and the inhumanity of whale killing”, *Journal of International Wildlife Law & Policy* 2017, 18-37 (hereafter: W. SCHOLTZ, “Killing them softly”).

worth.⁴¹ It is largely anthropocentric and focuses on conserving whales for humans' sake, instead of guaranteeing that they are treated with compassion and respect.⁴² Authors like D'Amato and Chopra even go as far as to state that whales should be granted a right to life. D'Amato and Chopra even expect that international law will in fact evolve to do just this.⁴³ Unfortunately, at the moment, animal welfare obligations at the international level remain scarce. Most of these issues are regulated at the national level, and thus depend largely on the goodwill of states. Biodiversity law and animal welfare are still tricky subjects and are being hindered by cultural differences. Because of this, there is a lack of consensus at the international level.⁴⁴ This is a possible explanation as to why there have not been sufficient efforts to draft a better framework for whale protection at the international level.

Apart from the animal wellbeing argument, scientific insights also play a role in the growing concern for better cetacean protection. If whales are captured, killed, entangled in nets, or hurt, not only the species itself is affected, but so is the entire marine ecosystem, since it loses an important element of its structure.⁴⁵ After all, cetaceans play a major role at the top of the food pyramid. Consequently, their conservation is of the utmost importance.⁴⁶

Lastly, a strong case is to be made for the role that whales play in our climate. They capture tonnes of carbon from the atmosphere. When they die, they sink to the bottom of the ocean, taking that carbon out of the atmosphere for centuries. Additionally, scientists have found an increase in phytoplankton in places where whales are present. These microscopic organisms capture an estimated 40% of all carbon produced. More whales means more phytoplankton, which in turn means more carbon capture. These are both strong arguments in favour of returning whales to their pre-exploitation levels.⁴⁷

At the moment of adoption of the International Convention for the Regulation of Whaling (hereafter: ICRW) and of a lot of other instruments aimed at the conservation or protection of cetaceans, there was not

⁴¹ W. SCHOLZ, "Injecting Compassion into International Wildlife Law: From Conservation to Protection?", *Transnational Environmental Law* 2017, (463) 464 (hereafter: W. SCHOLZ, "Injecting Compassion into International Wildlife Law").

⁴² W. SCHOLZ, "Injecting Compassion into International Wildlife Law", 470 and 483.

⁴³ A. D'AMATO and S. K. CHOPRA, "Whales: their emerging right to life", 21-62.

⁴⁴ W. SCHOLZ, "Injecting Compassion into International Wildlife Law", 467.

⁴⁵ CMS, "Bycatch", www.cms.int/en/page/bycatch.

⁴⁶ ACCOBAMS, "Bycatch", https://accobams.org/species/_threats/.

⁴⁷ A. J. PERSHING, L. B. CHRISTENSEN, N. R. RECORD, G. D. SHERWOOD and P. B. STETSON, "The impact of whaling on the ocean carbon cycle: why bigger was better", *Plos One* 2010, e12444; R. CHAMI, T. COSIMANO, C. FULLENKAMP and S. OZTOSUN, "Nature's solution to climate change", *Finance & Development* 2019, 34-38; R. PAGE, D. SANTILLO, K. THOMPSON, K. MILLER, L. CASSON, P. JOHNSON, T. PARK and W. MCCALLUM, "In hot water: the climate crisis and the urgent need for ocean protection", www.greenpeace.org/static/planet4-international-stateless/2019/11/018c3eae-30x30-ocean-climate-report-greenpeace-2019.pdf, 19.

much awareness of the impact that these animals have on their environment. Now that more and more states and environmental actors are becoming aware of this, it may be the right time to use this knowledge to our and the planet's advantage. Because of the role whales play in carbon storage and the ecosystem, bringing back cetaceans to pre-exploitation levels might even be a factor in attaining certain environmental goals, such as those enshrined in the Paris Climate Agreement.⁴⁸

In summary, increasing protection for cetaceans would benefit the animals themselves, the planet and all of humankind.

⁴⁸ Paris Agreement of 12 December 2015, *United Nations Treaty Series*, annex A, no 54113.

IV. Current legal framework for the protection of cetaceans

1. International legal instruments

1.1 International Whaling Commission and the International Convention on the Regulation of Whaling

A. Introduction

For years, whales have been treated as a *res nullius* resource. They were considered freely available for anyone to hunt and kill. This lack of regulation of whaling led to a significant decline in the number of several whale species. Eventually states realized that there was a need to regulate commercial whaling, and adopted the International Convention on the Regulation of Whaling in 1964, which established the International Whaling Commission.⁴⁹

The IWC is perhaps the most well-known organisation in the battle against whaling, but it did not start as a protectionist organisation. The IWC went from management, to conservation, to protection of whale stocks.⁵⁰ This will become clear in the analysis below.

B. Material and territorial scope

B.1 Material scope

The material scope *sensu stricto*, i.e. which cetaceans are protected by the Convention, in principle contains all whale species and populations.⁵¹ However, there is discussion on whether small cetaceans are also understood under ‘all whale species’.⁵² These small cetaceans include dolphins and porpoises.⁵³ The

⁴⁹ Art. III, §1 International Convention for the Regulation of Whaling of 2 December 1946, *United Nations Treaty Series*, vol. 161, 72 (hereafter: ICRW); S. FREELAND and J. DRYSDALE, “Co-operation or chaos”, 1-2.

⁵⁰ J. ZEMANTAUSKI, “Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission”, *University of Miami Inter-American Law Review* 2012, (325) 338 (hereafter: J. ZEMANTAUSKI, “Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission”).

⁵¹ INTERNATIONAL WHALING COMMISSION, “Commercial whaling”, <https://iwc.int/management-and-conservation/whaling/commercial>.

⁵² INTERNATIONAL WHALING COMMISSION, “Small cetaceans – dolphins and porpoises”, <https://iwc.int/management-and-conservation/smallcetacean>.

problem is that the 1946 Convention does not give a definition of ‘whale’. It only gives a list of twelve species in an Annex. Because of this, some member states believe that the IWC can only regulate Great Whale species. Other members, however, believe that the IWC also has jurisdiction over small cetaceans.⁵⁴ This point of view may also be supported by article 65 of the United Nations Convention on the Law of the Sea (hereafter: UNCLOS), which requires regulation of cetaceans in general. This could be interpreted as meaning that UNCLOS supports an expansion of the scope of the ICRW to all cetaceans.⁵⁵ The IWC itself states that small cetaceans are species not considered to be part of the Great Whales. While the IWC does not regulate small cetaceans in se, it does facilitate and fund research on and conservation programmes for small cetaceans. At the moment, there is no agreement on whether the IWC should regulate small cetaceans in the future.⁵⁶

The material scope *sensu lato*, i.e. the topics dealt with by the IWC, is a lot broader. The Commission deals with a range of different topics that are relevant to the well-being and survival of cetaceans. In the first place, it obviously deals with the regulation of whaling, but next to this, measures are also being taken regarding bycatch, entanglement, strandings, ship strikes and environmental concerns.⁵⁷ Below, the regulations and policy measures regarding the specific topics will be further explained.

The first IWC topic is whaling. Three types of whaling are distinguished.⁵⁸ The first one is aboriginal subsistence whaling. This type of whaling is necessary to support the nutritional and cultural needs of indigenous communities. It is done by four IWC member countries: Denmark, Russia, St. Vincent and the Grenadines and the United States. This type of whaling is seen separately from commercial whaling, since it is not aimed at maximizing catches or profit. Because of this, it is not subject to a moratorium.⁵⁹ It is still regulated in some way by the imposition of catch limits that are set by the IWC every six years. The second

⁵³ INTERNATIONAL WHALING COMMISSION, “Small cetacean catches for food, bait, trade and traditional use”, <https://iwc.int/management-and-conservation/smallcetacean/catches-food-bait-trade-and-traditional-use>.

⁵⁴ INTERNATIONAL WHALING COMMISSION, “Small cetaceans – dolphins and porpoises”, <https://iwc.int/management-and-conservation/smallcetacean>.

⁵⁵ J. MATANICH, “A treaty comes of age for the ancient ones: implications of the law of the sea for the regulation of whaling”, *International Legal Perspectives* 1996, (37) 67-68 (hereafter: J. MATANICH, “A treaty comes of age for the ancient ones”).

⁵⁶ INTERNATIONAL WHALING COMMISSION, “Small cetaceans – dolphins and porpoises”, <https://iwc.int/management-and-conservation/smallcetacean>.

⁵⁷ INTERNATIONAL WHALING COMMISSION, “The International Whaling Commission – IWC”, <https://iwc.int/en/> (consultation 30 June 2022).

⁵⁸ INTERNATIONAL WHALING COMMISSION, “Whaling”, <https://iwc.int/management-and-conservation/whaling>.

⁵⁹ INTERNATIONAL WHALING COMMISSION, “Aboriginal subsistence whaling”, <https://iwc.int/management-and-conservation/whaling/aboriginal>; INTERNATIONAL WHALING COMMISSION, “Whaling”, <https://iwc.int/management-and-conservation/whaling>.

type of whaling is commercial whaling. This is the type that has been subject to a moratorium since the 1985-1986 seasons onwards. Commercial whaling now only happens by non-IWC members and IWC members who exercise an objection or reservation to the moratorium. Currently, the only exceptions are made by Norway and Iceland. Norway lodged an objection when the moratorium was introduced. Iceland left the IWC in 1992 and made a reservation to the moratorium when it rejoined in 2002. Nonetheless, Norway and Iceland still have to provide the Commission with information and scientific data on their catches. Lastly, Russia also objected to the moratorium, but does not exercise this objection.⁶⁰ The third type of whaling is scientific whaling, which is allowed with a special permit issued by a member state.⁶¹ Chapter F containing the doctrinal analysis will further explain what the deficiencies are in the regulation of each type of whaling.

The IWC also deals with cetacean welfare issues through the Working Group on Whale Killing Methods and Welfare Issues. This Group produces reports on, inter alia, entanglements, ship strikes, whale watching and pollution. The Working Group also receives reports from member states on methods they use to kill whales and on the effectiveness thereof.⁶²

Another important topic is bycatch. The IWC has adopted a Bycatch Mitigation Initiative to develop and promote bycatch prevention and mitigation measures globally.⁶³

The entanglement of large whales is another topic that the IWC deals with. The Commission has developed principles and guidelines to prevent and deal with cetacean entanglement in fishing gear and other marine debris.⁶⁴ This is necessary because entanglement plays the main role in the decline of the critically endangered vaquita and North Atlantic right whale. It also played a major role in the extinction of the baiji.

⁶⁰ INTERNATIONAL WHALING COMMISSION, “Commercial whaling”, <https://iwc.int/management-and-conservation/whaling/commercial>; INTERNATIONAL WHALING COMMISSION, “Whaling”, <https://iwc.int/management-and-conservation/whaling>.

⁶¹ INTERNATIONAL WHALING COMMISSION, “Special permit whaling”, <https://iwc.int/management-and-conservation/whaling/permits>; INTERNATIONAL WHALING COMMISSION, “Whaling”, <https://iwc.int/management-and-conservation/whaling>.

⁶² INTERNATIONAL WHALING COMMISSION, “Welfare issues”, <https://iwc.int/management-and-conservation/welfare>.

⁶³ INTERNATIONAL WHALING COMMISSION, “Bycatch”, <https://iwc.int/management-and-conservation/bycatch>.

⁶⁴ INTERNATIONAL WHALING COMMISSION, “Principles and guidelines for large whale entanglement response efforts”, <https://iwc.int/management-and-conservation/entanglement/best-practice-guidelines-for-entanglement-respond>; INTERNATIONAL WHALING COMMISSION, “Whale entanglement – building a global response”, <https://iwc.int/management-and-conservation/entanglement>.

Next, the IWC deals with the issue of strandings. An international Strandings Initiative was established in 2017 under the auspices of the IWC. It is tasked with sharing best practices and training people on how to deal with strandings.⁶⁵

Ship strikes are mitigated as well. The Conservation Committee and Scientific Committee are working to reduce collisions between cetaceans and vessels. To this end, a Strategic Plan to Mitigate the Impacts of ship Strikes was developed.⁶⁶

Environmental concerns are also regulated. These environmental concerns include climate change, ocean noise, marine debris, chemical pollution, cetacean diseases, marine renewable energy and habitat degradation in general. The Scientific Committee tries to come up with mitigation measures. These are then implemented at international, regional and local level with the help of the Conservation Committee. A global oversight of environmental concerns is kept through biennial reports from member states and through the annual State of the Cetacean Environment Report (SOCER) of the Scientific Committee.⁶⁷

Another topic that the IWC deals with is whale watching. The IWC, in partnership with the Convention for Migratory Species, has also published a Whale Watching Handbook, aimed at regulators, industry and the general public. It contains guidelines for responsible management, ways to ensure that a whale watching trip happens correctly and a factsheet for different species.⁶⁸ The IWC also developed a Strategic Plan on whale watching, which sets out to support responsible and sustainable whale watching.

Lastly, the IWC has taken measures to specifically protect small cetaceans. While the ICRW does not explicitly regulate the capture of small cetaceans, the IWC does support several research and conservation programmes that focus on small cetaceans. Some examples are the Small Cetacean Voluntary Fund and the Small Cetacean Task Team. These bodies deal respectively with scientific research regarding small cetaceans and take urgent action where a significant and rapid decline in population happens.⁶⁹ One of the IWC programmes related to small cetaceans deals with catches for food, bait, trade or use in traditional customs. These catches happen on a small scale and are usually poorly documented. The IWC programme

⁶⁵ INTERNATIONAL WHALING COMMISSION, “Strandings Initiative”, <https://iwc.int/management-and-conservation/strandings/strandings-initiative>.

⁶⁶ INTERNATIONAL WHALING COMMISSION, “Ship strikes: collisions between whales and vessels”, <https://iwc.int/management-and-conservation/ship-strikes>.

⁶⁷ INTERNATIONAL WHALING COMMISSION, “Environmental concerns”, <https://iwc.int/management-and-conservation/environment>; INTERNATIONAL WHALING COMMISSION, “State of the cetacean environment: IWC report series”, <https://iwc.int/management-and-conservation/environment/socer-report>.

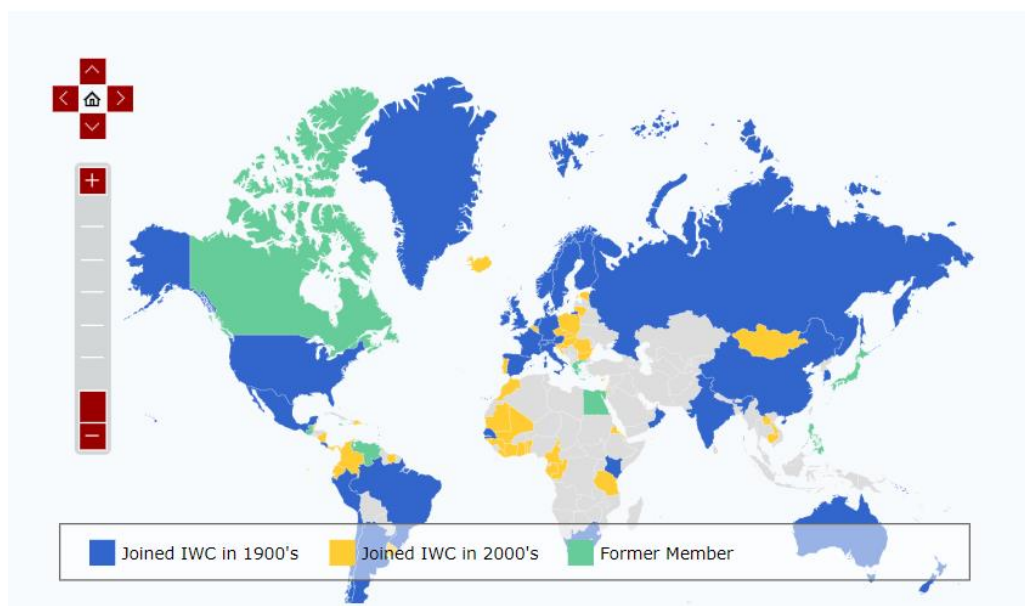
⁶⁸ INTERNATIONAL WHALING COMMISSION, “Whale watching”, <https://iwc.int/management-and-conservation/whalewatching>; INTERNATIONAL WHALING COMMISSION, “Whale Watching Handbook”, <https://wwhandbook.iwc.int/en/> (consultation 9 May 2021).

⁶⁹ INTERNATIONAL WHALING COMMISSION, “Small cetaceans – dolphins and porpoises”, <https://iwc.int/management-and-conservation/smallcetacean>; INTERNATIONAL WHALING COMMISSION, “Task teams”, <https://iwc.int/task-teams>.

is aimed at better understanding these catches.⁷⁰ Another example of small cetacean protection, is the fact that a Conservation Management Plan was developed for a small cetacean species, as mentioned in the introduction of this chapter.

B.2 Territorial scope

The territorial scope sensu lato refers to all states that are a member to the ICRW, which are 88 states. These members are indicated on the map below.⁷¹



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Only states can join the IWC. However, international organisations, non-governmental organisations and non-member states can apply for observer status. Observers are allowed to attend certain IWC meetings, join working groups, submit information and research documents. Scientists may participate in meetings of the Scientific Committee, upon approval of the Chair of the Scientific Committee.⁷³ The presence of observers from other organizations and non-member states at meetings is an important factor in effective

⁷⁰ INTERNATIONAL WHALING COMMISSION, “Small cetacean catches for food, bait, trade and traditional uses”, <https://iwc.int/management-and-conservation/smallcetacean/catches-food-bait-trade-and-traditional-use>.

⁷¹ UNTS, “International Convention for the Regulation of Whaling”, <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280150135> (consultation 30 July 2022).

⁷² INTERNATIONAL WHALING COMMISSION, “Membership and contracting governments”, <https://iwc.int/commission/members>.

⁷³ INTERNATIONAL WHALING COMMISSION, “How to join the IWC”, <https://iwc.int/commission/joining-the-iwc>.

regulation and enforcement. They can provide another point of view, subject the meetings to public scrutiny and push the parties in the direction of stricter conservation and management measures.⁷⁴

Concerning the territorial scope *sensu stricto*, the ICRW applies to all factory ships, land stations and whale catchers that fall under the jurisdiction of a member state and to all waters in which whaling is prosecuted by these factory ships, land stations and whale catchers.⁷⁵ This would mean that the IWC has a very wide margin of jurisdiction, since the Convention also applies to waters under jurisdiction of a state. This interpretation is rejected by some pro-whaling states, especially in light of the sovereign rights that states receive over these waters under UNCLOS. They argue that they have the sovereign right to harvest natural resources, including whales, in their exclusive economic zone (hereafter: EEZ) and that nothing in article 65 UNCLOS specifically gives an international organization the right to infringe upon a state's sovereign rights in its EEZ. However, others argue that UNCLOS does give the IWC legal authority to restrict the sovereign rights of states in these waters. This can be deduced from the first sentence of article 65 UNCLOS which allows the appropriate international organization to prohibit, limit or regulate catches in the EEZ. This supersedes a state's sovereign rights in its EEZ. This article thus recognizes the IWC's power to set regulations, including the moratorium, in a member state's EEZ. Article 120 UNCLOS gives the same power to the IWC regarding the high seas.⁷⁶

C. Obligations for states

The ICRW contains a Schedule, which is legally binding and puts forward specific measures that, according to a collective decision of the IWC, are necessary to regulate whaling and conserve whale stocks. These measures include catch limits for specific whale species and specific areas, areas that are designated as whale sanctuaries, protection of calves and females with calves, and restrictions on certain hunting methods.⁷⁷ The Schedule requires the presence of at least two whaling inspectors on each factory ship and at each land station. These inspectors are appointed by the member state that exercises jurisdiction over the vessel or the land station.⁷⁸ This is not the strongest possible measure, since inspectors appointed by

⁷⁴ J. SIMMONDS, "UNESCO World Heritage Convention", (251) 255.

⁷⁵ Art. I, §2 ICRW.

⁷⁶ J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", 337-338; S. FREELAND and J. DRYSDALE, "Co-operation or chaos", 20.

⁷⁷ INTERNATIONAL WHALING COMMISSION, "History and purpose", <https://iwc.int/commission/history-and-purpose>; INTERNATIONAL WHALING COMMISSION, "Schedule as amended by the Commission at the 67th Meeting", <https://archive.iwc.int/pages/view.php?ref=3606&k=> (hereafter: ICRW Schedule).

⁷⁸ Art. V, point 21, (a) and (b) ICRW Schedule.

whaling states may not be sufficiently qualified or may have interests that are in line with those of the whaling state. The Schedule also requires whale catchers to report certain information on the whales they capture.⁷⁹ The Schedule can be amended with a three quarters majority agreement.⁸⁰

At the moment of adoption of the Convention, this Schedule was aimed at maintaining the population to allow for more catch. This is still clear in its text, which states that amendments to the Schedule have to provide for the conservation, development and optimum utilization of whale resources. It even goes on to say that interests of consumers of whale products and interests of the whaling industry have to be taken into account. The only positive point in these provisions, is that they state that these amendments have to be based on scientific findings, meaning that amendments are not totally up to the political will of states.⁸¹

Conservation Management Plans (hereafter: CMPs) are another conservation initiative of the IWC. They each deal with a specific whale species and they form a framework for range states of vulnerable cetacean populations. The aim of these CMPs is to protect and rebuild those vulnerable populations and to help range state address threats to cetaceans. At the moment there are four cetacean populations for which a CMP was developed by the IWC: the Western North Pacific gray whale, the Western South Atlantic southern right whale, the Eastern South Pacific southern right whale and the Franciscana dolphin. This last one is the first small cetacean species for which a CMP was developed.⁸²

To better protect cetaceans, the Commission has also established two whale sanctuaries, one in the Indian Ocean and one in the waters of the Southern Ocean around Antarctica. In these sanctuaries, specific management plans are set up. Regrettably, the appointment of a sanctuary requires an amendment of the Schedule. Since a three quarters majority is needed for such an amendment, this doesn't happen very easily.⁸³

The most important obligations for member states are the following. Firstly, they are not allowed to remunerate whale catchers for whales captured contrary to what the Convention allows.⁸⁴ Secondly, states

⁷⁹ Art. VI, point 24-31 ICRW Schedule.

⁸⁰ INTERNATIONAL WHALING COMMISSION, “History and purpose”, <https://iwc.int/commission/history-and-purpose>.

⁸¹ Art. V, §2 ICRW.

⁸² INTERNATIONAL WHALING COMMISSION, “Conservation Management Plans”, <https://iwc.int/management-and-conservation/conservation-management-plans>.

⁸³ INTERNATIONAL WHALING COMMISSION, “Whale sanctuaries”, <https://iwc.int/management-and-conservation/sanctuaries>.

⁸⁴ Art. IX, §2 ICRW; art. V, point 22 ICRW Schedule.

have to inform the IWC of each violation that occurs within their jurisdiction.⁸⁵ This way the Commission does retain some overview of where possible problems may be situated, as long as states report and prosecute correctly of course. Lastly, member states are invited to submit reports on national implementation, conservation reports and catch information.⁸⁶ Such reports could be beneficial for the Commission to follow up on national implementation and allow it to redirect where necessary. Unfortunately, the use of ‘are invited to’ implies that such reports are not obligatory and thus depend on the goodwill of the members.

D. Binding nature and compliance pull

The Convention states that each member state ‘shall’ take appropriate measures for the application of the ICRW and to ensure punishment of violations thereof by vessels or persons under its jurisdiction.⁸⁷ A positive side here is the use of the word ‘shall’, indicating a binding obligation. On the other hand, the negative side is the fact that ‘appropriate measures’ is not defined and thus leaves room for interpretation by the states themselves. Additionally, this leaves the sanctioning of violations up to the goodwill of the member states. Especially pro-whaling states might not be inclined to effectively sanction the illegal capture of whales.

Another criterion to determine the compliance pull of a legal instrument is how easily a member state can choose to no longer be bound. The Convention states that a member state can withdraw from the Convention on 30th June of any year by giving notification at least 6 months prior.⁸⁸

E. Relevant organs

The first, and most obvious, body is the International Whaling Commission.⁸⁹ The main initial tasks of the Commission were to initiate studies and investigations relating to whales and whaling, process information on whale stocks and the effects of whaling activities, and spread information regarding measures to maintain and increase the populations of whale stocks.⁹⁰ Today the Commission’s tasks have become more

⁸⁵ Art. IX, §4 ICRW; INTERNATIONAL WHALING COMMISSION, “Infractions”, <https://iwc.int/management-and-conservation/infractions>.

⁸⁶ INTERNATIONAL WHALING COMMISSION, “How to participate at the IWC”, <https://iwc.int/commission/Participation>.

⁸⁷ Art. IX, §1 ICRW.

⁸⁸ Art. XI ICRW.

⁸⁹ Art. III, §1 ICRW.

⁹⁰ Art. IV ICRW.

aimed at taking protectionist measures for whales.⁹¹ The IWC is also in charge of amending the Schedule and may for example change protected and unprotected species, open and closed seasons, sanctuary areas and so on.⁹² The Commission further co-ordinates and funds conservationist projects. This includes research, building an international entanglement response capacity, taking measures to prevent ship strikes and making Conservation Management Plans for certain species and populations.⁹³

Tools at the IWC's disposal are resolutions and recommendations. Resolutions are adopted at plenary sessions of the IWC.⁹⁴ They are adopted either by consensus or by a simple majority. These resolutions are formal statements of the Commission. However they are non-binding, which takes away from the power that the Commission otherwise could have had in imposing obligations on states.⁹⁵ The IWC can also make recommendations to any party on any matter regarding whales or whaling and relating to the objectives of the ICRW.⁹⁶

The IWC has six different sub-groups. These groups can be joined by representatives of each member state.⁹⁷ Only the sub-groups that are relevant for the scope of this thesis will be discussed here. A first sub-group is the Scientific Committee, which is comprised of scientists specialized in cetaceans. Each year, the Scientific Committee establishes working groups that deal with specific issues.⁹⁸ Secondly, the Conservation Committee works on environmental and conservation issues. This entails measures to reduce ship strikes, measures regarding whale watching and the development of Conservation Management Plans. It also receives proposals for the establishment of new whale sanctuaries and national reports on cetacean conservation.⁹⁹ There is also an Aboriginal Subsistence Whaling Sub-committee, which advises the IWC

⁹¹ J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", *University of Miami Inter-American Law Review* 2012, (325) 338 (hereafter: J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission").

⁹² Art. V, §1 ICRW.

⁹³ INTERNATIONAL WHALING COMMISSION, "History and purpose", <https://iwc.int/commission/history-and-purpose>.

⁹⁴ INTERNATIONAL WHALING COMMISSION, "Resolutions", <https://iwc.int/commission/convention/resolutions>.

⁹⁵ INTERNATIONAL WHALING COMMISSION, "Future direction of IWC & special permit whaling in IWC agenda", <https://iwc.int/resources/media-resources/news/future-direction-of-iwc-and-special-permit-whaling>.

⁹⁶ Art. VI ICRW.

⁹⁷ INTERNATIONAL WHALING COMMISSION, "Commission sub-groups", <https://iwc.int/commission-sub-groups>.

⁹⁸ INTERNATIONAL WHALING COMMISSION, "Commission sub-groups", <https://iwc.int/commission-sub-groups>.

⁹⁹ INTERNATIONAL WHALING COMMISSION, "Commission sub-groups", <https://iwc.int/commission-sub-groups>.

on sustainability issues and the dependence of aboriginal communities on specific whale populations.¹⁰⁰ Furthermore, the Working Group on Whale Killing Methods and Welfare Issues advises the IWC on humane killing methods and other welfare issues.¹⁰¹ Finally, the Infractions Sub-committee discusses infractions data and the sanctioning measures taken by member states.¹⁰²

There are also specific IWC groups, not to be confused with the sub-groups. They focus on a range of different topics, including for example ship strikes, whale watching and bycatch.¹⁰³

The Conservation Committee addresses a wide array of different threats to whales and their habitats. It deals with similar issues as the Working Group on Whale Killing Methods and Welfare Issues.¹⁰⁴

Finally, the Secretariat implements the IWC's decisions, disseminates scientific information on cetacean conservation and management. It also conducts research itself.¹⁰⁵

F. Doctrinal analysis

In the last years, the IWC has played an important role in protecting whales and maintaining species and populations at a favourable conservation status. This was done especially by imposing a moratorium and by bringing the world's attention to the importance of protecting cetaceans. However, there are a few elements that weaken its position and its ability to efficiently enforce its own regulations.¹⁰⁶ Furthermore, the IWC today is also a very divided organization, with pro- and anti-whaling states severely disagreeing on several important discussion points. An example of such a clash of opinions within the IWC, is about the character and role of the organization. Most states today, and thus also most IWC members, have evolved to condemn whaling and want to influence the IWC's policy in the same way. Nonetheless, there are still a few states within the IWC that are traditional whaling states, like Norway and Iceland. These members are

¹⁰⁰ INTERNATIONAL WHALING COMMISSION, "Commission sub-groups", <https://iwc.int/commission-sub-groups>.

¹⁰¹ INTERNATIONAL WHALING COMMISSION, "Commission sub-groups", <https://iwc.int/commission-sub-groups>.

¹⁰² INTERNATIONAL WHALING COMMISSION, "Commission sub-groups", <https://iwc.int/commission-sub-groups>.

¹⁰³ INTERNATIONAL WHALING COMMISSION, "How to participate at the IWC", <https://iwc.int/commission/Participation>.

¹⁰⁴ INTERNATIONAL WHALING COMMISSION, "Conservation Committee", <https://iwc.int/commission/commission-sub-groups/conservation-committee>.

¹⁰⁵ INTERNATIONAL WHALING COMMISSION, "Secretariat", <https://iwc.int/commission/secretariat>.

¹⁰⁶ J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", 326.

in favour of a traditional interpretation of the ICRW in order to protect whaling activities.¹⁰⁷ This chapter will explain such discussion points within and weak points of the IWC.

F.1 Deficiencies regarding the moratorium

The IWC has banned all commercial whaling by imposing a moratorium that is applicable to commercial whaling of all whale species and populations since the 1985-1986 season.¹⁰⁸ While it plays a major role in the protection of whale species, the moratorium is lacking in some aspects. The ones that will be discussed here are scientific whaling, aboriginal subsistence whaling and the possibility to get rid of the moratorium.

The moratorium only applies to commercial whaling.¹⁰⁹ Article VIII, §1 ICRW contains a scientific permit provision, which gives the possibility to a member state to diverge from the moratorium for reasons of scientific research. This exception even allows for lethal research on endangered cetacean populations.¹¹⁰ It allows for the member states to unilaterally decide upon the appropriate conditions to grant such a scientific permit. Such a permit can be granted ‘notwithstanding anything contained in the ICRW’, so even cetaceans to which the moratorium applies can be caught.¹¹¹ On the one hand, this exception is beneficial to whales, since it aids the IWC in assessing the size and viability of whale stocks, which may be relevant information to make protection measures more effective. On the other hand, it is a tool for whaling states to circumvent the moratorium.¹¹² This exception is especially a problem because states themselves can issue these permits to their nationals. The only obligation for states is to report these permits to the IWC and to submit the results of their scientific research to the IWC, at least once a year.¹¹³ The role of the IWC is solely advisory. It can make comments on proposals for scientific whaling permits by issuing a resolution, but in the end,

¹⁰⁷ H. S. SCHIFFMAN, “The International Whaling Commission: challenges from within and without”, 370-371; J. MATANICH, “A treaty comes of age for the ancient ones”, 37-38.

¹⁰⁸ IWC, “Commercial Whaling”, <https://iwc.int/commercial> (consultation 12 March 2021).

¹⁰⁹ Art. VIII, §1 ICRW; L. DEL CASTILLO, “The Whaling in the Antarctic case”, 83.

¹¹⁰ Art. VIII, §1 ICRW; J. ZEMANTAUSKI, “Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission”, 326-329.

¹¹¹ H. S. SCHIFFMAN, “The International Whaling Commission: challenges from within and without”, 371; S. FREELAND and J. DRYSDALE, “Co-operation or chaos”, 9.

¹¹² S. FREELAND and J. DRYSDALE, “Co-operation or chaos”, 10; J. ZEMANTAUSKI, “Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission”, 326-329.

¹¹³ Art. VIII, §1 and §3 ICRW.

these resolutions are not legally binding.¹¹⁴ A case where the problems with the scientific whaling exception become painfully clear is the whaling in the Antarctic case, illustrated in chapter F.2.¹¹⁵

Next to scientific whaling, another exception is made for aboriginal subsistence whaling. This type of whaling remains an ideological battle within the IWC, especially now that there is a commercial moratorium. It is important to note that peoples who partake in aboriginal subsistence whaling depend on it for their livelihood and consider this part of their culture, and that the number of whales captured for aboriginal subsistence is rather modest.¹¹⁶ While the number of whales captured for this reason may be sufficiently low in order not to endanger the survival of the species, some of the methods of killing remain inhumane.¹¹⁷ This could be mitigated by imposing stricter methods of killing.

Finally, the moratorium is not an all-encompassing, perpetual ban on whaling. It can be overcome by a 3/4 majority vote of the members. Member states can also simply object to the moratorium and choose not to apply it, as is the case for Iceland and Norway.¹¹⁸

F.2 Conservation instead of protection and lack of enforcement

In recent years, the IWC has been given the mantle of a conservationist group, but it is important to note that the IWC did not at all start this way. When the structure and treaties of the IWC were drafted, the IWC was meant as a whalers club to protect whales *for* whaling, not *from* whaling.¹¹⁹ The ethics of whaling were not a concern at the initial stages of the development of the IWC.¹²⁰

This criticism is in a way still valid today. While the IWC is tasked with the conservation of whale stocks and the protection of all species of whales from overfishing, this objective is aimed at making possible the

¹¹⁴ INTERNATIONAL WHALING COMMISSION, “Special permit whaling”, <https://iwc.int/management-and-conservation/whaling/permits>; INTERNATIONAL WHALING COMMISSION, “Whaling”, <https://iwc.int/management-and-conservation/whaling>.

¹¹⁵ J. ZEMANTAUSKI, “Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Convention”, 330; ICJ 31 March 2014, ‘Whaling in the Antarctic’, *I.C.J. Reports* 2014, 226 (hereafter: ‘Whaling in the Antarctic’).

¹¹⁶ H. S. SCHIFFMAN, “The International Whaling Commission: challenges from within and without”, 373; L. VIKARI, “Rural local communities as holders of human rights: from aboriginal subsistence whaling to small-scale local community whaling?”, *Nordic Journal of Human Rights* 2022, 1-19.

¹¹⁷ H. M. MAMZER, “Ritual slaughter: the tradition of pilot whale hunting on the Faroe Islands”, *Frontiers in Veterinary Science* 2021, 1-13; M. J. MOORE, “How we all kill whales”, *ICES Journal of Marine Science* 2014, 760-763; P. J. CLAPHAM, “Whaling, modern”.

¹¹⁸ Art. III, §2 and art. V ICRW; IWC, “Commercial Whaling”, <https://iwc.int/commercial> (consultation 13 March 2021); L. DEL CASTILLO, “The Whaling in the Antarctic Case”, 83-84; L. HOEY, “The Battle Over Scientific Whaling”, 464.

¹¹⁹ L. HOEY, “The Battle Over Scientific Whaling”, 464.

¹²⁰ W. SCHOLTZ, “Killing them softly”, 18.

orderly development of the whaling industry.¹²¹ The preamble of the Convention even mentions that whale stocks should be managed, so they could grow in number, which will in turn permit the capturing of even more whales.¹²² Nowhere in the ICRW is it mentioned that whales should require protection because of their intrinsic value.

These critiques also come forward in other criticism that the IWC encounters nowadays, namely the fact that the only weapons at the IWC's disposal are recommendations, reviews and comments. There is little possibility for enforcement. This gives leeway for states like Japan to capture whales meant for commercial purposes under the false pretence of scientific whaling.¹²³ As stated by Matt Dicenso, "the IWC is all bark and no bite."¹²⁴

These weaknesses have become painfully visible in the Whaling in the Antarctic case between Australia and Japan. In this case, Australia brought proceedings against Japan before the International Court of Justice (hereafter: ICJ), because of Japan's scientific whaling programme, JARPA II. According to Australia, JARPA II was a cover for what were in reality commercial whaling efforts. The ICJ saw this the same way and ordered JARPA II to be halted.¹²⁵ This seems to be a victory in the fight against whaling, but it is barely a won battle. After all, the Court's decision only applied to Japan's whaling under that specific permit, but did not say that scientific whaling in general is unlawful. This opened the door for Japan to simply start over and issue a new permit, which they did with NEWREP-A and NEWREP-NP.¹²⁶ To make matters worse, Japan left the IWC in 2019 and resumed its commercial whaling activities in plain sight.¹²⁷ As expected, Japan was not the only country to use the scientific whaling exception to disguise commercial whaling activities. Iceland and South Korea also issued scientific permits to their commercial fleets. The IWC decided that these permits were in violation of the scientific permit clause and recommended that both countries revoked these permits. Contrary to Japan, both countries eventually phased out their scientific

¹²¹ Preamble ICRW; H. S. SCHIFFMAN, "The International Whaling Commission: challenges from within and without", p. 368.

¹²² Preamble ICRW.

¹²³ J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", 333-334; M. DICENSO, "Trouble on the high seas", 24.

¹²⁴ M. DICENSO, "Trouble on the high seas", 23.

¹²⁵ 'Whaling in the Antarctic', 226, §244.

¹²⁶ INTERNATIONAL WHALING COMMISSION, "Special permit whaling", <https://iwc.int/management-and-conservation/whaling/permits>; L. HOEY, "The Battle Over Scientific Whaling", 460; M. DICENSO, "Trouble on the high seas", 21.

¹²⁷ C. KOJIMA, "Japan's Decision to Withdraw from the International Convention for the Regulation of Whaling", *Asia-Pacific Journal of Ocean Law and Policy* 2019, (93) 93; IWC, "Membership", <https://iwc.int/members> (consultation 9 May 2021).

whaling programmes. This left Japan as the only country that kept circumventing the moratorium under the guise of scientific research, until the country eventually left the IWC.¹²⁸

All of the above makes it clear that the greatest weakness of the IWC is its lack of enforcement power. The IWC cannot effectively punish violations of the ICRW, since enforcement of ICRW provisions and prosecution of violations is up to the member states that have jurisdiction over the violator.¹²⁹ This lack of international punishment also applies to states' reporting obligations. In principle, states have to report to the IWC on the number of whales they caught, the species et cetera. However, since the IWC lacks enforcement power, some whaling states horrendously underreport the number of cetaceans captured. This in turn causes the IWC's calculations of global whale populations to be severely inaccurate.¹³⁰

F.3 Material scope and small cetaceans

Another discussion point is the material scope of the Convention. Because its text refers to 'whales', it was traditionally believed that not all cetaceans fall within this scope and some even say that the IWC is only competent for big whales.¹³¹ This discussion point was already extensively explained in chapter B.1 regarding the material scope, so it will not be reiterated here.

F.4 Revised Management Procedure

Another point of discussion within the IWC is the Revised Management Procedure (hereafter: RMP), adopted by the IWC in 1994. The RMP applies a catch limit algorithm to calculate how many individuals of a whale species can be taken without threatening its sustainability. It is not yet implemented, because there is discussion between whaling and non-whaling states. Whaling states want to see the RMP replace the moratorium. Non-whaling states on the other hand support the moratorium, not only for scientific reasons, but also on moral and ethical grounds. In 2006, the IWC recognized that discussions had reached an impasse and decided that the RMP should for the moment not replace the moratorium.¹³²

¹²⁸ J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", 330-331.

¹²⁹ Art. 9 ICRW; J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", 326-327 and 331-332; S. FREELAND and J. DRYSDALE, "Co-operation or chaos".

¹³⁰ J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", 326-327 and 331-332.

¹³¹ J. MATANICH, "A treaty comes of age for the ancient ones", 66-67.

¹³² INTERNATIONAL WHALING COMMISSION, "The Revised Management Procedure", <https://iwc.int/management-and-conservation/rmp>; S. FREELAND and J. DRYSDALE, "Co-operation or chaos", 28.

F.5 The objections clause

Article V, §3 ICRW permits a member state to opt-out of a certain amendment to the Schedule that it does not agree with by filing an objection. Consequently, that member will not be bound to the amendment.¹³³ Following an objection, the period for an amendment to come into force for the other member states is prolonged.¹³⁴ This means that one member can delay implementation for all other members, while not even abiding by the amendment itself, which severely weakens the power of the IWC. Furthermore, a member state may object to any amendment and then it will not apply to this state.¹³⁵

The objections clause has been used by pro-whaling states to avoid quotas, to reject new stock classifications that would reduce their whaling possibilities and even to avoid complying with standards on humane killing. This way, members to the IWC could keep whaling without violating the IWC rules.¹³⁶ This clause has been defended by former secretary of the IWC, Dr Ray Gambell, saying that without such a provision, the Convention would not have been likely to be accepted.¹³⁷

F.6 The withdrawal provision

When a state withdraws from the Convention, it is no longer bound by its obligations. The withdrawal provision has been invoked by Japan, Canada, Norway, Iceland and The Netherlands over the course of the Convention's lifespan. Norway and The Netherlands were eventually convinced to remain within the Convention, with the fact that membership granted them access to sharing of technology and whaling techniques. Canada and Japan each left at different points in time.¹³⁸ Iceland also left the Convention, but later rejoined with an exception to the moratorium.¹³⁹

G. Linkages between the IWC and UNCLOS

Article 65 UNCLOS plays a role in the relationship between UNCLOS and the IWC, but it may even have an impact on whaling states that are not party to UNCLOS, because this provision could be considered

¹³³ J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", 326; S. FREELAND and J. DRYSDALE, "Co-operation or chaos", 8.

¹³⁴ Art. V, §3 ICRW.

¹³⁵ Art. V, §3 ICRW.

¹³⁶ J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", 327-328.

¹³⁷ S. FREELAND and J. DRYSDALE, "Co-operation or chaos", 8.

¹³⁸ INTERNATIONAL WHALING COMMISSION, "Membership and contracting governments", <https://iwc.int/commission/members>; S. FREELAND and J. DRYSDALE, "Co-operation or chaos", 15-16; UNTS, "International Convention for the Regulation of Whaling", <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280150135> (consultation 30 July 2022).

¹³⁹ INTERNATIONAL WHALING COMMISSION, "Iceland", <https://iwc.int/iceland>.

international customary law.¹⁴⁰ The chapter on UNCLOS will go further into depth on the interplay between UNCLOS and the IWC.

H. Conclusion

The IWC and ICRW could be really useful to protect the interests of cetacean individuals and populations in a global manner, but the possibility for objections and lack of enforcement have created so many gaps that little is left of effective legal protection. All of these deficiencies in IWC practice and ICRW rules, have taken away from the power of the IWC to follow the majority wants and needs, namely protecting and conserving whales.¹⁴¹ Amendments to the Convention and the Schedule are necessary in order to give the IWC more teeth. These amendments require consent of all member states, including pro-whaling states, so this might not be a realistic goal.¹⁴²

The IWC is still regarded by the international community as the leading international organization for the global management of cetaceans, but as long as these gaps are not addressed, the IWC's credibility remains under threat.¹⁴³ The most positive scenario for whales would be if the IWC were to address these concerns and strengthen its enforcement mechanisms. If fragmentation and discussion within the Commission remain, other legal instruments will take its place and legal protection of whales will become differentiated and scattered, as is already happening.¹⁴⁴ An ideal scenario would be for the IWC to remain the leading organization in the global legal protection of whales, with other legal instruments providing for additional protection where necessary and strong linkages between these different instruments.

¹⁴⁰ J. MATANICH, "A treaty comes of age for the ancient ones", 68.

¹⁴¹ J. ZEMANTAUSKI, "Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission", 328.

¹⁴² S. FREELAND and J. DRYSDALE, "Co-operation or chaos", 16.

¹⁴³ S. FREELAND and J. DRYSDALE, "Co-operation or chaos", 35.

¹⁴⁴ S. FREELAND and J. DRYSDALE, "Co-operation or chaos", 36.

1.2 World Heritage Convention

A. Introduction

While the World Heritage Convention is primarily known by the general public for protecting cultural heritage, it also deals with natural heritage, and thus also plays a role as an important environmental convention dealing with wildlife and habitat conservation. Of course, this instrument does not directly protect whales. However, the criteria for the designation of world heritage sites explicitly mention marine ecosystems and communities of animals, so this is worth it to further look into.¹⁴⁵

This Convention was concluded in 1972 and is partly aimed at protecting natural heritage.¹⁴⁶ Natural heritage is defined as 1) natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; or 2) geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; or 3) natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.¹⁴⁷ Each state party has to identify these places of natural heritage on its own territory.¹⁴⁸

A site must, next to being of outstanding universal value, meet at least one out of ten selection criteria, to be designated as a world heritage site.¹⁴⁹ Three out of these ten selection criteria are relevant for marine environments that whales are a part of: criterion VII) ‘to contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance’; criterion IX) ‘to be outstanding examples

¹⁴⁵ A. CLIQUET, “Mariene beschermde gebieden: een druppel in de oceaan?”, (81) 94-95 in A. CLIQUET and F. MAES (eds.), *Recht door zee. Hedendaags internationaal zee- en maritiem recht*, Antwerpen-Apeldoorn, Maklu, 2015, 470 p.; E. J. GOODWIN, “The World Heritage Convention, the environment, and compliance”, *Colorado Journal of International Environmental Law and Policy* 2009, 157-198 (hereafter: E. J. GOODWIN, “The World Heritage Convention, the environment, and compliance”); §77 Operational Guidelines for the Implementation of the World Heritage Convention of the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (31 July 2021), <http://whc.unesco.org/en/guidelines/> WHC.21/01 (2021) (hereafter: Operational Guidelines for the implementation of the World Heritage Convention).

¹⁴⁶ Preamble World Heritage Convention of 16 November 1972, *United Nations Treaty Series*, vol. 1037, 151 (hereafter: World Heritage Convention); UNTS, “Convention for the Protection of the World Cultural and Natural Heritage”, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800fece0&clang=en> (consultation 7 August 2022).

¹⁴⁷ Art. 2 World Heritage Convention.

¹⁴⁸ Art. 3 World Heritage Convention.

¹⁴⁹ UNESCO, “The criteria for selection”, <https://whc.unesco.org/en/146> (consultation 23 December 2021).

representing significant ongoing ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animal’; and criterion X) ‘to contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation’.

The designation of world heritage Sites happens according to a procedure described in the Convention. Every state party has to ‘in so far as possible’ submit an inventory of property forming part of the cultural and natural heritage situated in its territory and suitable for inclusion in the list to the World Heritage Committee.¹⁵⁰ Inclusion of a property in World Heritage List thus requires consent of the state concerned. However, the final decision on whether a proposed site gets included on the World Heritage List lies with the World Heritage Committee.¹⁵¹

While it is a requirement for states under the convention to designate sites as world heritage, it is also a prerogative. The Convention does not give other states or the Committee the right to point out that a certain property of another state is not on the List. The obligations under the Convention can only apply when a state itself designates a site as natural or cultural heritage. Fortunately, lots of states do choose to identify certain areas, because of the funding they will receive, the increase in tourism and simply because of the prestige.¹⁵² Every state has to take individual and fitting measures to protect the areas in their territory. States then have to report to the General Conference of the UN Educational Scientific and Cultural Organization on the legislative and administrative provisions they have adopted and other actions they have taken for the application of this Convention.¹⁵³ Discussing all measures that states have taken to protect areas in their territory would lead us too far, so this chapter will only deal with the general protection granted by the World Heritage Convention.

If a site is deteriorating or other troubles arise, only a state party itself can request assistance with respect to a world heritage site in its territory. Organisations, individuals and other states cannot do so, and even an unsolicited offer for assistance by the Committee is frowned upon. However, the Committee can approach a state party in an informal way.¹⁵⁴

¹⁵⁰ Art.11 World Heritage Convention.

¹⁵¹ Art. 11 World Heritage Convention.

¹⁵² E. J. GOODWIN, “The World Heritage Convention, the environment, and compliance, (157) 168-170 and J. SIMMONDS, “UNESCO World Heritage Convention”, *Art Antiquity and Law* 1997, (251) 271 (hereafter: J. SIMMONDS, “UNESCO World Heritage Convention”).

¹⁵³ Art. 29 World Heritage Convention.

¹⁵⁴ J. SIMMONDS, “UNESCO World Heritage Convention”, (251) 276.

Citizens can send suggestions for new world heritage sites to the National Commission of the country concerned.¹⁵⁵ If a citizen has a concern about an existing site, they can contact the National Commission of the country in charge of the site or the World Heritage Centre.¹⁵⁶

B. Material and territorial scope

194 states are a party to the World Heritage Convention, which means that this Convention is almost universally ratified.¹⁵⁷ However, what is especially relevant here, are the protected sites themselves, which will be discussed further below in this chapter.

A number of marine and coastal areas are protected under the World Heritage Convention. In some of these areas, cetaceans are part of the outstanding universal value'. In 2005, the World Heritage Convention even went a step further and launched the World Heritage Marine Programme, consisting of fifty flagship marine protected areas across 37 countries. These areas are recognized specifically for inter alia their unique marine biodiversity or singular ecosystem. Among others, the World Heritage Marine Programme assesses climate change impact on marine world heritage and invests in building resilience at the site level.¹⁵⁸ Below, all marine protected areas under the World Heritage Convention where cetaceans are present will be discussed. This way, the material and territorial scope will be made clear simultaneously.

The map below indicates the fifty flagship marine protected areas under the World Heritage Marine Programme. Three of those areas are in danger and are indicated with a red dot. The areas in danger are the Islands and Protected Areas of the Gulf of California, East Rennell and Everglades National Park. The Islands and Protected Areas of the Gulf of California are home to a third of the world's cetacean species.¹⁵⁹ East Rennell is an island group in the Solomon Islands. This country is home to eight whale species and

¹⁵⁵ UNESCO, "Where can I send a recommendation", <https://whc.unesco.org/en/faq/4> (consultation 22 December 2021).

¹⁵⁶ UNESCO, "Where can I send a letter of concern about a threat to a World Heritage site, or a site on the List of World Heritage in Danger?", <https://whc.unesco.org/en/faq/1> (consultation 22 December 2021).

¹⁵⁷ UNESCO, "States parties", <https://whc.unesco.org/en/statesparties/> (consultation 22 December 2021); UNTS, "Convention for the protection of the world cultural and natural heritage", <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800fece0&clang=en> (consultation 22 December 2021).

¹⁵⁸ UNESCO, "Marine heritage: support to the Central Pacific project and support to the World Heritage marine programme", <https://whc.unesco.org/en/activities/806/> (consultation 23 December 2021); UNESCO, "World Heritage Marine Programme", <https://whc.unesco.org/en/marine-programme/> (consultation 23 December 2021).

¹⁵⁹ UNESCO, "Islands and protected areas of the Gulf of California", <https://whc.unesco.org/en/list/1182/>.

nine dolphin species, including endangered species.¹⁶⁰ Even the Everglades hosts cetacean species in its shallow waters, like the Atlantic bottlenose dolphin.¹⁶¹



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The second map shows world heritage sites in general, but is filtered to only show those that are marine or coastal and that are awarded this title because of one of the three criteria relevant for this thesis as explained above, namely criteria VII, IX and X. The sites on this map where cetaceans are present are further discussed under the map itself. These sites may be designated as world heritage sites because they fulfil a number of different criteria to be designated as such, but only the three criteria that are relevant for this thesis will be mentioned.

¹⁶⁰ UNEP, “East Rennell”, <http://world-heritage-datasheets.unep-wcmc.org/datasheet/output/site/east-rennell/>.

¹⁶¹ C. MITCH, “Dolphins of the Everglades: the swamp’s smartest animal”, www.captainmitchs.com/dolphins-of-the-everglades-the-swamps-smartest-animal/; M. COLLIER, “Exposed in The Everglades: the Bryde’s whale that wasn’t”, www.nps.gov/articles/000/riceswhaleatever.htm.

¹⁶² UNESCO, “World Heritage List”, <https://whc.unesco.org/en/list/?search=&themes=7&order=country> (consultation 10 July 2022); UNESCO, “World Heritage Marine Programme”, <https://whc.unesco.org/en/marine-programme/> (consultation 23 December 2021).



In the Americas, six marine World Heritage Sites can be found that are relevant for the scope of this thesis. The first of these areas is Kluane/Wrangell-St. Elias/Glacier Bay/Tatshenshini-Alsek.¹⁶⁴ These areas are all parks comprising glaciers and high peaks on both sides of the border between Canada and the United States. They have a high amount of biodiversity, including marine animals. The Tatshenshini and Alsek river valleys allow for animal migration. These parks include 242.700 ha of marine waters. It is home to killer whales and minke whales, among others.¹⁶⁵ All three of the relevant criteria are represented here. The text accompanying criterion IX mentions that the area includes a rich variety of marine environments with complex and intricate mosaics of life at various successional stages from 500 meters below sea level to 5000 meters above. Criterion X is fulfilled because the wildlife species common to Alaska and north-western Canada are well represented, some in numbers exceeded nowhere else. The marine component supports a great variety of fauna including marine mammals. Measures that are taken to protect this area

¹⁶³ UNESCO, “Interactive map”, <https://whc.unesco.org/en/interactive-map/?search=&themes=7&n7=on&n9=on&n10=on> (consultation 23 December 2021).

¹⁶⁴ UNESCO, “Kluane/Wrangell-St. Elias/Glacier Bay/Tatshenshini-Alsek”, <https://whc.unesco.org/en/list/72> (consultation 25 December 2021).

¹⁶⁵ MIAMI UNIVERSITY, “North America: Kluane/Wrangell-St. Elias/Glacier Bay/Tatshenshini-Alsek, Alaska & Canada”, <https://sites.google.com/a/miamioh.edu/geo121f13/home/f5-kluane-wrangell-st-elias-glacier-bay-tatshenshini-alsek-alaska-canada> (consultation 20 July 2022); UNESCO, “Kluane/Wrangell-St. Elias/Glacier Bay/Tatshenshini-Alsek”, <https://whc.unesco.org/en/list/72> (consultation 25 December 2021).

are environmental assessment processes, zoning, ecological integrity and visitor experience monitoring, and education programmes. Harvest of fish and wildlife are closely monitored and managed sustainably in areas where these activities are allowed.¹⁶⁶

The Islands and protected areas of the Gulf of California is a site comprising 244 islands and coastal areas. Criterion VII was awarded because of the diversity and abundance of marine life present in this area. Criterion IX is present because of the nutrient-rich upwelling oceanic currents supporting abundant phytoplankton and zooplankton, and criterion X is fulfilled because of the extraordinary diversity of marine life, which constitutes a global priority for biodiversity conservation. After all, the area provides a habitat for circa one third of the world's total number of marine cetaceans, sometimes in impressive numbers. Eleven species of whale visit the northern Gulf, such as the endangered blue whale, the fin whale and the vulnerable sperm whale.¹⁶⁷ Additionally, five species of dolphin, including the gulf porpoise or vaquita, can be found here. The vaquita is endemic to the Islands and Protected Areas of the Gulf of California, but is critically endangered. Less than ten individuals remain. Their survival is threatened by entanglement in illegal fishing nets. In light of the critical situation of this animal, which is an important attribute of the outstanding universal value of the site, the property was inscribed on the List of World Heritage in Danger. If no action is undertaken, this animal might go extinct. The UNESCO World Heritage Centre, the IUCN, the CITES Secretariat, the Mexican authorities and relevant institutions are all working together to ensure the survival of the vaquita.¹⁶⁸

The Archipiélago de Revillagigedo consists of four islands and their surrounding waters. Two relevant criteria are present here, namely criteria VII and IX. These are fulfilled because the area hosts a remarkable abundance of whales and dolphins gathering around the steep walls and seamounts. A large population of up to 2000 humpback whales visits the islands as well.¹⁶⁹

The Galápagos Islands area consists of nineteen islands and the surrounding marine reserve. Criteria VII and X are fulfilled here, because of the presence of marine mammals, including cetaceans.¹⁷⁰

The Brazilian Atlantic Islands, consisting of the Fernando de Noronha and Atol das Rocas Reserves have rich waters that are extremely important for the breeding and feeding of marine mammals. Baía de

¹⁶⁶ UNESCO, “Kluane/Wrangell-St. Elias/Glacier Bay/Tatshenshini-Atkasch Pass”, <https://whc.unesco.org/en/list/72> (consultation 25 December 2021).

¹⁶⁷ UNESCO, “Islands and Protected Areas of the Gulf of California” <https://whc.unesco.org/en/list/1182> (consultation 28 December 2021).

¹⁶⁸ UNESCO, “Concerns over the vaquita in the Islands and Protected Areas of the Gulf of California (Mexico)”, <https://whc.unesco.org/en/news/2310/> (consultation 28 December 2021) and UNESCO, “Saving the vaquita from extinction”, <https://whc.unesco.org/en/news/2304/> (consultation 28 December 2021).

¹⁶⁹ UNESCO, “Archipiélago de Revillagigedo”, <https://whc.unesco.org/en/list/1510> (consultation 28 December 2021).

¹⁷⁰ UNESCO, “Galápagos Islands”, <https://whc.unesco.org/en/list/1> (consultation 28 December 2021).

Golfinhos (Dolphin Bay), situated on one of these islands, has an exceptional population of resident dolphins. Criterion VII is present because Dolphin Bay is the only known place in the world with such a large population of resident dolphins. The waters around the islands are feeding ground for cetaceans as they migrate to the African coast, which is ground for criterion IX.¹⁷¹

St. Kilda is an important marine protected area in Europe. It is a volcanic archipelago, off the west coast of Scotland. It also comprises the marine area, where dolphins, minke whales and killer whales can often be spotted.¹⁷²

On the African continent, four relevant areas can be distinguished.

The Sanganeb Marine National Park and Dugonab Bay, and the Mukkawar Island Marine National Park include a diverse system of coral reefs, mangroves, seagrass beds, beaches and islets. The area provides a habitat for marine mammals. Resident populations of dolphins are hosted here. They use the atoll as a resting, breeding and feeding area. Criterion IX is fulfilled since the area is home to eleven species of marine mammals. Criterion X is also present because the whale seasonal aggregations in this area are unique to the entire Western Indian Ocean Region.¹⁷³

The Aldabra Atoll is comprised of four large coral islands which enclose a shallow lagoon. Aldabra is on the migration route of calving southern Ocean humpback whales, and several other cetacean species can be found here as well.¹⁷⁴

iSimangaliso Wetland Park is another marine area that is protected because of its abundance of dolphins and migration of whales off-shore. This cetacean presence fulfils criteria VII for this area.¹⁷⁵

The French Austral Lands and Seas fulfil the three relevant criteria. Criterion VII is present because the area supports one of the highest concentrations of marine mammals in the world. Criterion IX is fulfilled since the site is vast and includes one of the largest marine protected areas in the world, with over 672.000

¹⁷¹ UNESCO, “Brazilian Atlantic Islands: Fernando de Noronha and Atol das Rocas Reserves, <https://whc.unesco.org/en/list/1000> (consultation 28 December 2021).

¹⁷² X, “Wildlife”, <https://www.gotostkilda.co.uk/wildlife/>

¹⁷² UNESCO, “St Kilda”, <https://whc.unesco.org/en/list/387> (consultation 28 December 2021).

¹⁷³ UNESCO, “Sanganeb Marine National Park and Dugonam Bay – Mukawar Island Marine National Park”, <https://whc.unesco.org/en/list/262> (consultation 29 December 2021).

¹⁷⁴ J. APPOO, J. VAN DE CROMMENACKER, C. SANCHEZ and J. CURRIE, “The use of Aldabra and its protected waters by marine mammals”, www.researchgate.net/publication/349533675 *The Use of Aldabra and its Protected Waters by Marine Mammals*, 167; UNESCO, “Aldabra Atoll”, <https://whc.unesco.org/en/list/185> (consultation 29 December 2021).

¹⁷⁵ UNESCO, “iSimangaliso Wetland Park”, <https://whc.unesco.org/en/list/914> (consultation 29 December 2021).

km². Lastly, the site hosts large populations of cetaceans, such as commerson's dolphin, an endemic subspecies, which fulfils criterion X.¹⁷⁶

Four marine areas containing cetaceans are designated as a World Heritage Site in Oceania.

The Tubbataha Reefs Natural Park fulfils criteria VII and X since it is home to eleven species of whales and dolphins.¹⁷⁷

Shark Bay in Western Australia is home to five species of endangered mammals. The site fulfils criterion X for its increasing numbers of humpback whales and southern right whales that use Shark Bay as a migratory staging post. A famous population of bottlenose dolphins also lives in the Bay.¹⁷⁸

The Great Barrier Reef is perhaps one of the most famous sites on this list and is situated on the north-east coast of Australia. Migrating whales pass through the Great Barrier Reef, which fulfils criterion VII. Criterion X is also present, because at least thirty species of whales and dolphins occur here, and it is a significant area for humpback whale calving.¹⁷⁹

The Lagoons of New Caledonia, including the Reef Diversity and Associated Ecosystems, were designated as a World Heritage Site for criterion X, namely because they provide a habitat to emblematic or threatened marine species, such as whales.¹⁸⁰

C. Binding nature and compliance pull, enforcement and review mechanisms

The first subchapter will contain a textual analysis of the binding nature and compliance pull of the Convention. The second one will give a better insight into the enforcement mechanisms and into how easily a member state can choose to no longer be bound. Lastly, review mechanisms under the Convention will be explained.

C.1 Textual analysis regarding binding nature and compliance pull

In some provisions, the Convention text uses binding language, such as the use of 'shall' in article 5, obligating states to take certain measures to effectively protect world heritage.¹⁸¹ Other provisions use less

¹⁷⁶ UNESCO, "French Austral Lands and Seas", <https://whc.unesco.org/en/list/1603> (consultation 29 December 2021).

¹⁷⁷ UNESCO, "Tubbataha Reefs Natural Park", <https://whc.unesco.org/en/list/653> (consultation 29 December 2021).

¹⁷⁸ UNESCO, "Shark Bay, Western Australia", <https://whc.unesco.org/en/list/578> (consultation 29 December 2021).

¹⁷⁹ UNESCO, "Great Barrier Reef", <https://whc.unesco.org/en/list/154> (consultation 29 December 2021).

¹⁸⁰ UNESCO, "Lagoons of New Caledonia: Reef Diversity and Associated Ecosystems", <https://whc.unesco.org/en/list/1115> (consultation 29 December 2021).

¹⁸¹ Art. 5 World Heritage Convention.

binding language, such as article 4 which uses ‘will do all it can to this end’. With such wording, a lot depends on the member states themselves.¹⁸² This can also be concluded from article 3, which states that it is up to the member states to identify properties on its territory which are of outstanding universal value.¹⁸³

Article 6 on the one hand includes ‘whilst fully respecting the sovereignty of the states’, but on the other hand stresses that ‘such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate’.¹⁸⁴ An interplay can be seen here between a state’s sovereignty and the rights and obligations of third states. This is further explained in article 6.2, which tells us that state parties undertake to give their help in the identification, protection, conservation and reservation of the cultural and natural heritage ‘if’ the states on whose territory it is situated so request.¹⁸⁵ Article 6.3 further states that each state party ‘undertakes not to’ take any deliberate measures which might damage cultural and natural heritage.¹⁸⁶ Again, this is no binding language and seems to be more of an obligation of means.

C.2 Review mechanisms

The first tool for review and monitoring is the periodic reporting obligation. It is aimed at assessing whether the principal values for which a property was initially listed have remained intact.¹⁸⁷ State parties have to submit such a report to the World Heritage Committee every six years. In this report, they have to give information on legislative and administrative provisions and other actions they have taken for the application of the Convention. A first weakness here is that this is a self-reporting progress that is mainly led by the state parties in each region. Advisory Bodies and the Secretariat may commission further expert advice, but only with the agreement of the state parties concerned.¹⁸⁸ The Committee then examines these reports on the state of conservation of the inscribed properties. Consequently, it can ask state parties to take action when properties are not being properly managed and can formulate its recommendations. Following these recommendations, state parties have to make action plans at the national and regional level through a collaborative process, wherein they set strategies, priorities and goals for the implementation of the World Heritage Convention. States then have to implement these Action Plans and the recommendations of the

¹⁸² Art. 4 World Heritage Convention.

¹⁸³ Art. 3 World Heritage Convention.

¹⁸⁴ Art. 6 World Heritage Convention.

¹⁸⁵ Art. 6.2 World Heritage Convention.

¹⁸⁶ Art. 6.3 World Heritage Convention.

¹⁸⁷ J. SIMMONDS, “UNESCO World Heritage Convention”, (251) 272.

¹⁸⁸ Art. 29 World Heritage Convention; §199 Operational Guidelines for the implementation of the World Heritage Convention; UNESCO, “Periodic reporting”, <https://whc.unesco.org/en/periodicreporting/> (consultation 22 December 2021).

World Heritage Committee.¹⁸⁹ Further weaknesses can be found here. Firstly, an international conservation standard by which the effectiveness of conservation measures is measured is needed if the Committee wants to be able to hold state parties objectively accountable for their action or inaction.¹⁹⁰ Secondly, the Committee can issue guidelines and recommendations all it wants, but state parties can ignore them all since they are not legally binding.¹⁹¹

The second tool at the disposal of the World Heritage Committee is reactive monitoring.¹⁹² This is only used for certain properties under threat. For this reactive monitoring process, state parties have to give notice to the Committee when they intend to undertake or authorize major restorations or new constructions which may affect the outstanding universal value of the property in a protected area. Such a notice should be given as soon as possible and before making any decisions that would be too difficult to reverse.¹⁹³ Again, the same critique can be made here, namely that the Committee cannot take any deterrent measures when a property has deteriorated because of a state's action or inaction. It can either ask a state to take the necessary measures to restore the property within a reasonable period of time if it wants the property to be maintained on the World Heritage List, put the property on the List of World Heritage in Danger, or delete the property from the List.¹⁹⁴ Deleting the property from the List is probably the most powerful measure the Committee can take, since this will cause states to lose funding, tourism and international status. Even putting the property on the List of World Heritage in Danger may be a measure to ensure compliance, since states may find this humiliating and fear public scrutiny.¹⁹⁵ On the other hand, the importance of the List of World Heritage in Danger needs to be nuanced, since in practice it is not always easy to put sites on this list. A clear example of this was UNESCO agreeing to keep the Great Barrier Reef off the List after intensive lobbying from Australia.¹⁹⁶

¹⁸⁹ Art. 29 World Heritage Convention; §199 Operational Guidelines for the implementation of the World Heritage Convention; UNESCO, "Periodic reporting", <https://whc.unesco.org/en/periodicreporting/> (consultation 22 December 2021).

¹⁹⁰ J. SIMMONDS, "UNESCO World Heritage Convention", (251) 272.

¹⁹¹ J. SIMMONDS, "UNESCO World Heritage Convention", (251) 273.

¹⁹² §169 Operational Guidelines for the implementation of the World Heritage Convention (31 July 2021) (hereafter: Operational Guidelines for the implementation of the World Heritage Convention); <https://whc.unesco.org/en/guidelines/> WHC.21/01 (2021) and UNESCO, "Reactive Monitoring Process", <https://whc.unesco.org/en/reactive-monitoring/> (consultation 23 December 2021).

¹⁹³ §169 Operational Guidelines for the implementation of the World Heritage Convention.

¹⁹⁴ E. J. GOODWIN, "The World Heritage Convention, the environment, and compliance, (157) 174-175.

¹⁹⁵ E. J. GOODWIN, "The World Heritage Convention, the environment, and compliance, (157) 174 and J. SIMMONDS, "UNESCO World Heritage Convention", (251) 273.

¹⁹⁶ C. PACKHAM, "UNESCO keeps Great Barrier Reef off 'in danger' list after Australian lobbying", www.reuters.com/business/environment/unesco-keeps-great-barrier-reef-off-danger-list-after-australian-lobbying-2021-07-23/.

C.3 Enforceability

Strict enforcement of states' obligations under the Convention is impossible, which makes other tools, such as NGOs, more important.¹⁹⁷ Representatives of NGOs can attend Committee meetings to give advice. This NGO presence and involvement may encourage states to fulfil their obligations, since states know that if they don't, NGOs will draw attention to their non-compliance. This exposes state parties to international criticism.¹⁹⁸

According to some authors, all the measures the Committee can take and all the mechanisms described above, will cause states to be cautious about a possible delisting or a property being declared 'in danger' by the Committee and the consequences of these actions. While they are no real enforcement mechanisms, these measures still generate a strong compliance pull and may urge states to fulfil their obligations.¹⁹⁹

Another relevant criterion to determine enforceability is how easily a member state can choose to no longer be bound. Article 35 grants every party the possibility to denounce the Convention. This denunciation takes effect twelve months after the Director-General of UNESCO has received the instrument of denunciation. The financial obligations of the state keep living on until these twelve months have passed.²⁰⁰

D. Relevant organs

The General Assembly of State Parties always exists of twenty-one Committee members represented by twenty-one State Parties.²⁰¹ Seats are allocated by region in order to achieve equitable geographical and cultural representation.²⁰² The number of twenty-one Committee members has been criticized as not being enough, since it is not representative of the 'equitable spread' of the 194 state parties as required by article 8(2) of the Convention. Moreover, the Convention does not contain a provision to increase this number.²⁰³

¹⁹⁷ J. SIMMONDS, "UNESCO World Heritage Convention", (251) 255.

¹⁹⁸ J. SIMMONDS, "UNESCO World Heritage Convention", (251) 255.

¹⁹⁹ E. J. GOODWIN, "The World Heritage Convention, the environment, and compliance, 157-198; J. SIMMONDS, "UNESCO World Heritage Convention", 251-282.

²⁰⁰ Art. 35 World Heritage Convention.

²⁰¹ UNESCO, "The General Assembly of States Parties to the World Heritage Convention", <https://whc.unesco.org/en/ga/> (consultation 22 December 2021).

²⁰² UNESCO, "The General Assembly of States Parties to the World Heritage Convention", <https://whc.unesco.org/en/ga/> (consultation 22 December 2021).

²⁰³ Art. 8(2) World Heritage Convention; J. SIMMONDS, "UNESCO World Heritage Convention", (251) 255.

The Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (hereafter: World Heritage Committee) is responsible for implementation of the World Heritage Convention.²⁰⁴ This body has final say on whether a property is inscribed on the World Heritage List and the List of World Heritage in Danger.²⁰⁵ However, countries themselves can also submit nomination proposals for sites to the World Heritage Committee. If the committee decides that the nomination meets at least one of the necessary criteria, then the proposed property is inscribed on the World Heritage List.²⁰⁶

E. Conclusion

As seen above, a very large number of areas that host cetacean species is protected as a World Heritage Site. Some of these areas are even specifically protected simply because they contain cetaceans, which is an indicator that the international community is becoming aware of their outstanding scientific and intrinsic value. On the other hand, what this legal protection actually entails remains quite vague. The Convention text does impose some obligations on states to take measures, but the development of those is up to the states themselves.²⁰⁷ Enforcement and monitoring of these measures are severely lacking as indicated above. Most of the enforcement and monitoring mechanisms are non-binding, which makes compliance harder. To conclude, cetaceans are protected in principle, but the practice remains insufficient.²⁰⁸

²⁰⁴ Title III World Heritage Convention; UNESCO, “The World Heritage Committee”, <https://whc.unesco.org/en/committee/> (consultation 22 December 2021).

²⁰⁵ UNESCO, “The World Heritage Committee”, <https://whc.unesco.org/en/committee/> (consultation 22 December 2021).

²⁰⁶ UNESCO, “Who nominates sites?”, <https://whc.unesco.org/en/faq/25> (consultation 22 December 2021).

²⁰⁷ Art. 5 World Heritage Convention.

²⁰⁸ E. J. GOODWIN, “The World Heritage Convention, the environment, and compliance, 157-198; J. SIMMONDS, “UNESCO World Heritage Convention”, (251) 255.

1.3 CITES

A. Introduction

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereafter: CITES) was concluded in 1973 and is aimed at organising the international trade in endangered species in a sustainable way. If the trade of a specific species ends up to be too big a threat for the survival of the species, CITES can prohibit the trade in order to make way for the restoration of the population. The trade of species covered by the convention has to be authorized through a licensing system.²⁰⁹

CITES is more aimed at individuals than states. It imposes obligations on states, but it is the individuals who have to comply with the Convention. This contrasts with the World Heritage Convention, which is aimed at states. The preamble of CITES states that peoples and states are the best protectors of their own wild fauna and flora, but on the other hand also stresses that international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.²¹⁰

CITES has three appendices. Trade in a specimen of any of the species in these appendices is only allowed in accordance with the provisions of the Convention. Appendix I comprises all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species is not strictly forbidden, but it must be subject to particularly strict regulation. It can only be authorized in exceptional circumstances. Appendix II on the other hand, includes species that are not necessarily threatened with extinction, but for which trade must be limited in order to avoid threatening their survival. Finally, Appendix III includes species protected in at least one country and for which this country needs the cooperation of other state parties to control the trade in these species.²¹¹

Several cetaceans are protected in CITES Appendix I or Appendix II.²¹² For a significant number of species, reservations are made by the major whaling states (especially Japan, Norway and Iceland, but there are also some reservations made by Palau, and Saint Vincent and the Grenadines).²¹³

²⁰⁹ Preamble and art. III Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973, *United Nations Treaty Series*, vol. 993, 243 (hereafter: CITES); UNTS, “Convention on International Trade in Endangered Species of Wild Fauna and Flora”, <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280105383> (consultation: 7 August 2022).

²¹⁰ Preamble CITES.

²¹¹ Art. II CITES; CITES, “How CITES works”, <https://cites.org/eng/disc/how.php>.

²¹² Art. II-V CITES.

²¹³ CITES, “Reservations entered by parties”, <https://cites.org/eng/app/reserve.php> (consultation 2 January 2022); UNEP-WCMC and CITES Secretariat, “SPECIES+” (database), https://speciesplus.net/species#/taxon_concepts?taxonomy=cites_eu&taxon_concept_query=whale&geo_entities_ids=&geo_entity_scope=cites&page=1 (consultation 2 January 2022) (hereafter: SPECIES+).

The Convention also specifically regulates the transport of live specimens. Before granting a permit, the Management Authority of a state has to make sure that the shipping of live specimens will be done in such a way that the risk of injury, damage to health or cruel treatment is minimized.²¹⁴

B. Material and territorial scope

B.1 Material scope

Over twenty cetacean species are included in Appendix I.²¹⁵ This means more specifically that 23 out of 85 threatened cetacean species are protected in this Appendix.²¹⁶ Appendix II includes cetacea spp., except for the species included in Appendix II.²¹⁷ Since spp. is used to indicate subspecies, this means that all subspecies not protected under Appendix II, fall under Appendix I.²¹⁸ For the Black Sea population of the common bottlenose dolphin (*Tursiops truncatus*) removed from the wild and traded for primarily commercial purposes, a zero annual export quota was established.²¹⁹

More species have been included as opposed to when the Convention was just adopted in 1973. At that time Appendix I included only six species.²²⁰ In a way, this increase in number is good news, since it shows that the Convention does its job of identifying species in danger and restricting the trade for these species. On the other hand, the sad fact remains that more and more species are entering the danger zone and coming close to extinction.

²¹⁴ Art. III, IV, V and VII CITES and CITES, “Transport of live specimens”, https://cites.org/eng/prog/imp/Transport_of_live_specimens (consultation 2 January 2022).

²¹⁵ Appendix I CITES; CITES, “Appendices”, <https://cites.org/eng/app/appendices.php> (consultation 1 January 2022); CITES, “Checklist of CITES species”, <https://checklist.cites.org/#/en> (consultation 1 January 2022); SPECIES+ (consultation 1 January 2022).

²¹⁶ FEDERALE OVERHEIDSDIENST VOLKSGEZONDHEID, VEILIGHEID VAN DE VOEDSELKETEN EN LEEFMILIEU, “Conventions on biodiversity”, www.health.belgium.be/nl/node/8222 (consultation 1 January 2022).

²¹⁷ Appendix II CITES; CITES, “Appendices”, <https://cites.org/eng/app/appendices.php> (consultation 1 January 2022); CITES, “Checklist of CITES species”, <https://checklist.cites.org/#/en> (consultation 1 January 2022); SPECIES+.

²¹⁸ CITES, “Appendices”, <https://cites.org/eng/app/appendices.php> (consultation 25 March 2022); FEDERALE OVERHEIDSDIENST VOLKSGEZONDHEID, VEILIGHEID VAN DE VOEDSELKETEN EN LEEFMILIEU, “Conventions on biodiversity”, www.health.belgium.be/nl/node/8222 (consultation 1 January 2022).

²¹⁹ Appendix II CITES; CITES, “Appendices”, <https://cites.org/eng/app/appendices.php> (consultation 1 January 2022).

²²⁰ CITES; CITES, “Appendices”, <https://cites.org/eng/app/appendices.php> (consultation 25 March).

Parties may propose amendments to the species included in Appendices I and II at each meeting of the Conference of the Parties. These amendments are then voted on by the parties and adopted if a two-thirds majority is reached.²²¹

It is also important to mention that, upon ratification, states can make reservations for specific species.²²² The main whaling states have all made reservations for most species listed in Appendices I and II. This allows them to continue the trade in these species.²²³

B.2 Territorial scope

As many as 183 states are party to the Convention, so it is almost universally ratified.²²⁴ On the map below, the state parties are indicated in a green colour. This makes it seem like the Convention does not apply to the marine area, but introduction from the sea is specifically regulated in its provisions. It is defined as transportation into a state of specimens of any species listed in Appendix I or II which were taken in the marine environment not under the jurisdiction of any state. Introduction of the specimen of a species listed in Appendix I or II requires a permit granted by the state party of introduction. These specific provisions apply when a specimen is taken from the high seas, when the flag state of the vessel is the same as the state of introduction. These provisions applying to introduction from the sea can be found in articles III(5) and IV(6) CITES. It does not make any difference for CITES whether the animal is taken deliberately or as bycatch. Its provisions apply in both situations.²²⁵ Since almost all coastal states are party to the Convention, this provides in principle strong protection for cetaceans.

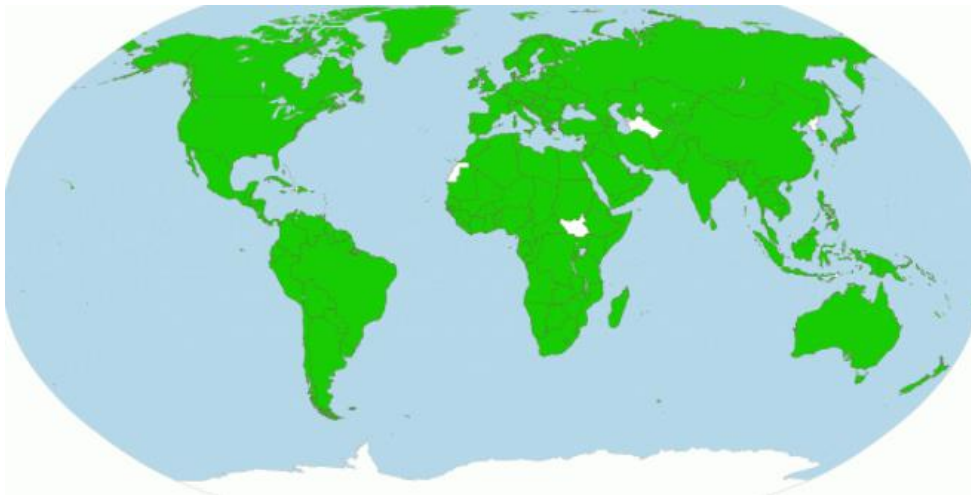
²²¹ Art. XV CITES; CITES, “How CITES works”, <https://cites.org/eng/disc/how.php> (consultation 1 January 2022).

²²² Art. XXIII CITES.

²²³ CITES, “Reservations entered by parties”, <https://cites.org/eng/app/reserve.php> (consultation 1 January 2022); FEDERALE OVERHEIDSDIENST VOLKSGEZONDHEID, VEILIGHEID VAN DE VOEDSELKETEN EN LEEFMILIEU, “Conventions on biodiversity”, www.health.belgium.be/nl/node/8222 (consultation 1 January 2022).

²²⁴ CITES, “List of contracting parties”, <https://cites.org/eng/disc/parties/chronolo.php> (consultation 1 January 2022); CITES, “List of parties to the Convention”, <https://cites.org/eng/disc/parties/index.php> (consultation 1 January 2022); UNTS, “CITES”, <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280105383> (consultation 1 January 2022).

²²⁵ Art. I(e), III(5) and IV(6) CITES; Conf. 11.4 ‘Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-11-04-R12.pdf>; CITES, “Introduction from the sea”, <https://cites.org/eng/prog/ifs.php> (consultation 2 January 2022).



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Article X of the Convention more or less expands its territorial scope. When exporting a specimen of a protected species to or from a non-state party, documentation comparable to the export and import permits for state parties, as required by the Convention, are needed.²²⁷ This broadens the scope to non-state parties, which reinforces the power of the Convention.

C. Compliance pull and enforcement

C.1 Textual analysis and relevant provisions

Articles III-V obligates states to regulate trade in specimens included in Appendices I, II and III in a certain way, by use of the word 'shall'. It states that import and export respectively require an import or export permit. Re-export requires a re-export certificate.²²⁸ Permits and certificates are granted by Management Authorities, established by each state party.²²⁹

Article VIII indicates that the parties 'shall take the appropriate measures' to enforce the Convention. This includes penalizing trade in, or possession of, such specimens or both, and providing for the confiscation or return to the state of export of such specimens. Each party 'shall' send periodic reports on the implementation of the Convention to the Secretariat.²³⁰

²²⁶ CITES, https://cites.org/sites/default/files/i/map/cites_map_1.gif.

²²⁷ Art. X CITES.

²²⁸ Art. III-V CITES.

²²⁹ Art. IX CITES.

²³⁰ Art. VIII CITES.

Another measure that may reinforce compliance is the fact that any body or agency, including NGOs, is allowed to be present at the meetings of the Conference, unless one third of the parties object.²³¹ As stated above, NGO presence may be an incentive for states to comply with the provisions of a Convention and to make efforts to effectively protect the species listed in the Appendices.

Secondly, the Convention regulates the effect of CITES on domestic legislation and international conventions. The provisions of the Convention do not affect the right of parties to adopt stricter measures.²³² It is of course positive that this is a possibility that is explicitly foreseen by the Convention.

A preliminary conclusion here could be that the Convention text contains lots of binding language. This is a first important layer of compliance. The presence of the second layer, namely enforceability, is examined in chapter C.2.

C.2 Enforcement and monitoring tools

Parties must ensure the objectives of the Convention by putting an administrative and regulatory system in place. If parties don't fulfil the Convention requirements, compliance measures may be imposed on them, including trade suspensions. An example of such a measure can be found in article XIII CITES, which regulates the international measures.²³³

The Conference of the Parties can adopt resolutions on specific topics relating to the trade in species. Some of these will be further discussed below. Resolutions adopted by the Conference of the Parties are not legally binding, unless incorporated in new legal texts.²³⁴ This is also made clear by the use of language such as 'recommends' and 'invites'.

The Convention requires the drafting of several reports, which help in monitoring the implementation of the Convention and the level of international trade in protected species.²³⁵ Two kinds of reports can be distinguished. In the first place, each party has to send periodic reports to the Secretariat. This includes an annual report on inter alia the number and type of certificates granted, with which states this trade occurred, the names of the species and the number of specimens. Parties who fail to send an annual report within the

²³¹ Art. XI, §7 CITES.

²³² Art. XIV CITES.

²³³ UNESCO, "CITES compliance procedures", <https://cites.org/eng/prog/compliance> (consultation 2 January 2022).

²³⁴ EUROPEAN COMMISSION, "Background to CITES", https://ec.europa.eu/environment/cites/background_en.htm.

²³⁵ CITES, "Annual report", https://cites.org/eng/imp/reporting_requirements/annual_report (consultation 2 January 2022).

deadline for three consecutive years may be subject to trade suspensions. The Conference of the Parties recommends parties not to authorize trade with such states. Trade restrictions may apply to all species or certain species in particular.²³⁶ The second periodic report is the biannual report, also known as the implementation report. This report deals with the measures taken to enforce the Convention. It is mandatory, but contrary to the general annual report not subject to compliance procedures.²³⁷ Thirdly, an annual illegal trade report on all seizures for violations involving protected species is expected. This report is mandatory, but not subject to compliance procedures either. The data from this report are used in global research on wildlife violations.²³⁸

Next to periodic reports, states have to send ad hoc reports as well. These reports are different from the periodic reports, the illegal trade report and the implementation report, which each party is required to submit periodically. Ad hoc reports on specific issues or species can be requested by the Conference of the Parties, the Standing Committee and the Animals and Plants Committees.²³⁹

Another monitoring tool is the periodic Review for species in Appendices I and II.²⁴⁰ Its aim is to ensure that the content of Appendices I and II is up to date. This review happens after every second meeting of the Conference of the Parties.

Lastly, a member state can choose to no longer be bound by denouncing the Convention. This will take effect twelve months after the notification is received. This has only happened once, with the withdrawal of the United Arab Emirates in 1988. However, the country became a party again two years later. The large number of parties and the limited number of denunciations show that there is a lot of willingness in the international community to work against illegal trade in endangered species.

²³⁶ Art. VIII(6-8) CITES, CITES, “Annual report”, https://cites.org/eng/imp/reporting_requirements/annual_report (consultation 2 January 2022); CITES, “Countries currently subject to a recommendation to suspend trade” <https://cites.org/eng/resources/ref/suspend.php> (consultation 2 January 2022); Conf. 11.17 ‘National reports’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-11-17-R18.pdf>.

²³⁷ Art. VIII, §6-8 CITES and CITES, “Implementation report”, https://cites.org/eng/resources/reports/Implementation_report (consultation 2 January 2022).

²³⁸ CITES, “Annual illegal trade report”, https://cites.org/eng/resources/reports/Annual_Illegal_trade_report (consultation 2 January 2022); Conf. 11.17 ‘National reports’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-11-17-R18.pdf>.

²³⁹ CITES, “Ad hoc reports”, https://cites.org/eng/resources/reports/Ad_hoc_reports (consultation 2 January 2022).

²⁴⁰ CITES, “Periodic review for species included in Appendices I and II”, <https://cites.org/eng/prog/periodicreview> (consultation 2 January 2022); Resolution Conf. 14.8 ‘Periodic Review of species included in Appendices I and II of the Conference of the Parties’ (s.d.), https://cites.org/sites/default/files/document/E-Res-14-08-R17_0.pdf.

D. Organs

The Secretariat has to undertake scientific studies that will contribute to the implementation of the Convention, including studies concerning standards for appropriate preparations and shipment of living specimens.²⁴¹ It also studies the reports of the parties and may request further information deemed necessary to ensure implementation of the Convention.²⁴² Furthermore, the Secretariat publishes and distributes the current version of the three Appendices, monitors the implementation of the Convention and adopts recommendations and reports regarding its implementation.²⁴³

When, according to the Secretariat, an Appendix I or II species is affected adversely by trade or when the provisions of the Convention are not complied with, it informs the Management Authority of the party concerned of this fact. The party in question then has to ‘as soon as possible’ inform the Secretariat of the relevant facts and propose remedial action. Based on the information provided by the state party, the Conference of the Parties will then make recommendations.²⁴⁴

The Conference of the Parties consists of all the parties to CITES. They meet every two to three years to review the implementation of the Convention. Among others, they review the progress of the conservation efforts for the species in the Appendices, amend the species lists in the Appendices and ‘recommend’ measures to improve the effectiveness of the Convention.²⁴⁵ Meetings of the Conference of the Parties can also be attended by observers, such as non-state parties, NGOs and members of the public.²⁴⁶

The Conference of the Parties can adopt resolutions on any topic relating to the trade in species.²⁴⁷ A resolution that is relevant for the scope of this thesis is Conf. 13.11 on wild meat. This document was drafted bearing in mind that illegal trade in wild meat may threaten the survival of wild CITES-species and threaten the food security of communities who depend on wildlife. The Conference of the Parties asks the parties to strengthen enforcement concerning the harvest and trade of wild meat and to monitor the status of wildlife populations known to be harvested for wild meat.²⁴⁸ Commercial whaling is not explicitly

²⁴¹ Art. XII CITES.

²⁴² Art. XII CITES.

²⁴³ Art. XII CITES; CITES, “The CITES Secretariat”, <https://cites.org/eng/disc/sec/index.php> (consultation 2 January 2021).

²⁴⁴ Art. XIII CITES.

²⁴⁵ CITES, “Conference of the Parties”, <https://cites.org/eng/disc/cop.php> (consultation 1 January 2022).

²⁴⁶ CITES, “Conference of the Parties”, <https://cites.org/eng/disc/cop.php> (consultation 1 January 2022).

²⁴⁷ UNESCO, “Resolutions of the Conference of the Parties after the 18th meeting”, <https://cites.org/eng/res/index.php> (consultation 2 January 2022).

²⁴⁸ Conf. 13.11 ‘Wild meat’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-13-11-R18.pdf>.

mentioned in this resolution, but it is clear that this falls under its scope, because cetacean meat is also wild meat.

The Animals Committee gives scientific advice to the Conference of the Parties, other committees, working groups and the Secretariat. It may advise when certain species are being traded in an unsustainable way and can recommend remedial action. Lastly, it can also adopt resolutions on animal matters. These resolutions can then be considered by the Conference of the Parties.²⁴⁹

E. Linkages with other legal instruments

The interplay between CITES and the ICRW is regulated in a resolution of the Conference of the Parties. Conf. 11.4 on conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission stresses the importance of international cooperation and working together with other intergovernmental bodies specialized in protecting cetaceans. To attain this, the CITES Secretariat obtained observer and adviser status at IWC meetings. Vice versa, the IWC obtained observer status at meetings of the CITES Conference of the Parties. The resolution stresses the need for special attention to the conservation of cetaceans and expresses the desire to grant them the maximum protection possible under the Convention. It recognizes commercial exploitation as the main reason for the rapid decline of many cetacean species and urges the parties to cooperate to prevent illegal trade in whale meat, whale parts and derivatives. Moreover, the IWC asked for the support of the CITES parties in protecting certain stocks and species of whales, because commercial exploitation of whales still occurs outside of the IWC member states. Considering all of the above, the Conference of the Parties in its resolution urges parties that have not yet ratified the ICRW to do so and to pay particular attention to documentation requirements for cetaceans. It also recommends the parties not to issue a permit for the trade in cetacean species or stocks protected from commercial whaling by the ICRW and intended primarily for commercial purposes.²⁵⁰

Another Conference of the Parties resolution deals with the linkages between CITES and the World Heritage Convention. Conf. 18.5 on cooperation and synergy with the World Heritage Convention stresses the importance of cooperation, since natural World Heritage Sites host a high level of CITES-listed species.

²⁴⁹ CITES, “Animals and Plants Committees”, https://cites.org/eng/disc/ac_pc.php (consultation 2 January 2022).

²⁵⁰ Conf. 11.4 ‘Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-11-04-R12.pdf>.

The decline of these species in these areas is one of the reasons why some of these areas have been listed as World Heritage in Danger.²⁵¹

F. Conclusion

Within the CITES framework, there are lots of extensive mechanisms and tools, such as reporting, trade restrictions, regular amendments of the appendices et cetera, to ensure proper implementation, compliance and enforcement. The Convention also has a broad territorial scope and often contains binding language. On paper, CITES seems to be a strong Convention which plays an important role in the protection of endangered wildlife.

On the other hand, there are some weaknesses to be pointed out. The fact that states can make reservations takes away a lot of power from the Convention. Of course, without this possibility for reservations, whaling states would probably not even accede to the Convention, which would deteriorate cetacean protection even further. Secondly, CITES does not specifically state that an animal cannot be captured or killed, it simply prohibits the trade of certain species, dead or alive.²⁵² This means that additional legal instruments that work at an earlier stage, namely at the time of capture or killing, are necessary in order to effectively protect cetaceans.

²⁵¹ Conf. 18.5 ‘Cooperation and synergy with the World Heritage Convention’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-18-05.pdf>.

²⁵² Art. I(b)(1) CITES.

1.4 Bonn Convention

A. Introduction

The Convention on the Conservation of Migratory Species of Wild Animals (hereafter: Bonn Convention) was adopted in 1979 in response to a Recommendation of the 1972 United Nations Conference on the Human Environment.²⁵³ It aims to protect endangered migratory species and to avoid other migratory species becoming endangered.²⁵⁴ Migratory species are species that migrate across or outside national jurisdictional boundaries.²⁵⁵

Like many other legal instruments, the Bonn Convention makes use of Appendices to distinguish to which level a certain species is endangered. Species listed in Appendix I of the Convention are endangered, while species with an unfavourable conservation status, that would benefit from international cooperation, are listed in Appendix II.²⁵⁶ Among the species listed in Appendix I and II are different whale species that require protection.²⁵⁷ For Appendix II species, states are encouraged to make international Agreements for their conservation and management.²⁵⁸ Here, the Bonn Convention functions as a framework treaty.²⁵⁹ The legal status of these Agreements may vary. They can range from legally binding treaties (called ‘Agreements’) to more informal Memoranda of Understanding.²⁶⁰ The object of the Agreements must be to maintain or restore a population of migratory species to a favourable conservation status. They should cover the whole range of the migratory species concerned. Every range state should be able to accede to these Agreements, whether or not they are a party to the Bonn Convention.²⁶¹ It is much welcomed that the scope of these agreements is this broad and that non-members are also invited to join. Two Agreements that

²⁵³ H. NUKAMP and A. NOLLKAEMPER, “The protection of small cetaceans in the face of uncertainty: an analysis of the ASCOBANS Agreement”, *Georgetown International Environmental Law Review* 1997, (281) 286 (hereafter: H. NUKAMP and A. NOLLKAEMPER, “The protection of small cetaceans in the face of uncertainty”); UNTS, “Convention on the conservation of migratory species of wild animals”, <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800bc2fb> (consultation: 7 August 2022).

²⁵⁴ Art. II-III Convention on the conservation of migratory species of wild animals of 23 June 1979, *United Nations Treaty Series*, vol. 1651, 333 (hereafter: Bonn Convention).

²⁵⁵ W. C. G. BURNS, “The Agreement of the Conservation of cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS): a regional response to the threats facing cetaceans”, *Journal of International Wildlife Law and Policy* 1998, (113) 120 (hereafter: W. C. G. BURNS, “ACCOBAMS: a regional response to the threats facing cetaceans”).

²⁵⁶ Art. III-IV Bonn Convention; CMS, “Convention on the Conservation of Migratory Species of Wild Animals”, www.cms.int/en/legalinstrument/cms.

²⁵⁷ Appendix I and II Bonn Convention.

²⁵⁸ Art. IV.1 and art. V Bonn Convention.

²⁵⁹ W. C. G. BURNS, “ACCOBAMS: a regional response to the threats facing cetaceans”, 120.

²⁶⁰ Art. IV.(3) and (4) Bonn Convention; ASCOBANS, “How to become a party”, www.ascobans.org/en/about/how-to-become-a-party; CMS, “CMS”, www.cms.int/en/legalinstrument/cms.

²⁶¹ Art. V(1) Bonn Convention; ASCOBANS, “How to become a party”, www.ascobans.org/en/about/how-to-become-a-party.

are concluded under the Bonn Convention are the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (hereafter: ASCOBANS), and the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic area (hereafter: ACCOBAMS) that specifically deal with cetaceans. These two Agreements will be dealt with in the chapter on regional legal instruments.²⁶²

Appendices can be amended upon proposal of any party. They are adopted by a two-thirds majority of the Conference of the Parties. Parties can make reservations for these amendments, and for any species included in the Appendices in general.²⁶³ Denmark and Norway, both traditional whaling states, have made reservations for several cetacean species in both Appendix I and II.²⁶⁴ This shows that despite the CMS' best efforts, member states can still choose to simply not apply certain protective measures.

In principle, taking Appendix I species is prohibited. However, the Convention mentions four exceptions: scientific purposes, enhancing propagation or survival, needs of traditional substance users and extraordinary circumstances.²⁶⁵ The first and third exception are similar to the scientific and cultural exceptions of the ICRW. The Bonn Convention however says that these exceptions can never be to the disadvantage of the species.²⁶⁶ This is an extra safeguard that cannot be found in the text of the ICRW.

B. Material and territorial scope

B.1 Material scope

Appendix I protects sixteen species of cetacea. For some of those species, the protection status is limited to a certain area.²⁶⁷ This makes protection less efficient, since cetaceans are a migratory species. In Appendix II, forty-four cetacean species are included. Not all of these species are protected everywhere in the world, as is the case for the species in Appendix I.²⁶⁸

²⁶² ACCOBAMS, "Introduction", <https://accobams.org/about/introduction/>; Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas of 17 March 1992, *United Nations Treaty Series*, vol. 1772, 217 (hereafter: ASCOBANS).

²⁶³ Art. XI and art. XIV.2 Bonn Convention.

²⁶⁴ X, "Parties' species reservations and territories to which the convention does not apply", www.cms.int/sites/default/files/basic_page_documents/cms_list_reservations_and_territories_June2020.pdf.

²⁶⁵ Art. III.5 Bonn Convention.

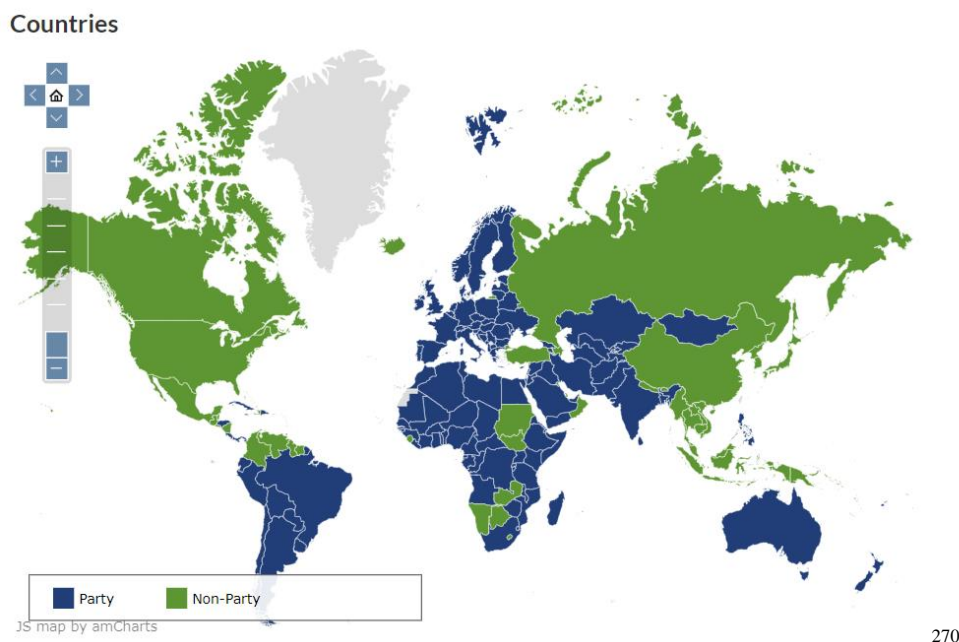
²⁶⁶ Art. III.5 Bonn Convention.

²⁶⁷ Appendix I and II Bonn Convention.

²⁶⁸ Appendix I and II Bonn Convention,

B.2 Territorial scope

The Bonn Convention currently has 133 parties. The map below indicates the Convention parties in a blue colour. Next to this, there are also several countries that have not ratified the Convention, but are nonetheless party to one or more of the Agreements or Memoranda of Understanding concluded under the Bonn Convention.²⁶⁹



C. Binding nature, compliance pull and enforcement

C.1 Textual analysis of the binding nature and compliance pull

Article II of the Convention imposes general obligations on parties regarding the conduct of research, imposing protection and the conclusion of Agreements. It uses noncommittal terms like 'should', 'shall endeavour' and 'are encouraged to take action'.²⁷¹ On the other hand, the provision that prohibits the taking of Appendix I species does rely on stronger wording, namely 'states shall prohibit'.²⁷²

In the following paragraphs some specific resolutions and recommendations are examined on their binding language. Firstly, the CMS recognizes the threat of bycatch and has issued resolutions and recommendations to improve fishing practices and to reduce the number of non-target species captured by fishing materials. In Resolution 12.22, for example, the Conference of the Parties reiterates the parties'

²⁶⁹ CMS "CMS", www.cms.int/en/legalinstrument/cms.

²⁷⁰ CMS, "CMS", www.cms.int/en/legalinstrument/cms.

²⁷¹ Art. II.3, a)-c), art. III.4 and art. IV.3-4 Bonn Convention.

²⁷² Art. III.5 Bonn Convention.

obligation to protect migratory species against bycatch and encourages them to change their fishing practices and methods in this regard. Unfortunately, as was the case with the CITES recommendations, this recommendation makes use of non-committal terms, like ‘encourages’, ‘urges’ and ‘calls upon’. While noteworthy that special attention is brought to bycatch, and more specifically that bycatch of marine mammals is mentioned, the non-binding nature of this recommendation leaves more to be desired.²⁷³ Within the structure of the Bonn Convention, there is also a Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region.²⁷⁴ Of course, such a Memorandum is a more informal instrument and doesn’t have the same compliance pull as for example an agreement. Fortunately, ASCOBANS and ACCOBAMS are both Agreements that also specifically deal with the effects of bycatch on cetaceans.²⁷⁵ Since they are Agreements, they have a more binding nature. They will be examined in depth below. Lastly, in Resolution 11.22 on Live Capture of Cetaceans from the Wild for Commercial purposes, the Conference of the Parties asks parties to prohibit this practice and to take stricter measures regarding the import of live cetaceans that have been captured in the wild for commercial purposes.²⁷⁶ The same reasoning as above applies here, namely that because this resolution uses terms like ‘invites’ and ‘encourages’, the resolution does not seem very binding, let alone enforceable. It is important to note that since this resolution deals with live capture, for example to use cetaceans in marine parks, it does not entirely fall within the scope of this thesis. However, it is still important to mention, since any kind of capture, dead or alive, has an impact on the survival of the species and on the entire ecosystem.

C.2 Enforceability

The Convention text states that the Conference of the Parties ‘may’ recommend parties to take further measures to benefit Appendix I species.²⁷⁷ While positive that additional measures are explicitly allowed, the use of ‘may’ does not give much incentive for states to do so.

²⁷³ Resolution 12.22 ‘Bycatch’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.12.22_bycatch_e.pdf.

²⁷⁴ CMS, “Pacific Islands cetaceans”, www.cms.int/pacific-cetaceans/.

²⁷⁵ CMS, “Bycatch”, www.cms.int/en/page/bycatch; see also the chapter on ASCOBANS and ACCOBAMS.

²⁷⁶ Resolution 11.22 ‘Life capture of cetaceans from the wild for commercial purposes’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.11.22%28rev.cop12%29_live-capture-cetaceans_e_0.pdf.

²⁷⁷ Art. III.6 Bonn Convention.

The Convention has established two techniques for monitoring and review, namely the Review Mechanism and the National Legislation Programme. Both are non-adversarial programmes designed to support member states that experience difficulties with implementation. The review processes are based on review of National Reports by the Secretariat or information submitted to the Secretariat. This information can be reported by a party itself, by another party, by the Secretariat, the Standing Committee or other relevant bodies and agencies.²⁷⁸

Lastly, a member state ceases to be bound by denouncing the Convention. This denunciation goes into effect twelve months after notification thereof.²⁷⁹

D. Relevant organs

The Conference of the Parties is the decision-making organ of the Convention. It reviews and assesses the conservation status of migratory species. In doing this, it can make recommendations to the parties for improving the conservation status of migratory species and review the process made under the agreements. Agencies or bodies that concern themselves with protection, conservation and management of migratory species are allowed to be present at the meetings of the Conference of the Parties, unless one-third of the parties present object. These observers have the right to participate, but not to vote.²⁸⁰

The Conference of the Parties has adopted several resolutions regarding cetaceans, for example on the adverse impacts of anthropogenic noise on cetaceans, on aquatic wild meat, on the protection and conservation of south Atlantic whales, on the impact of climate change and on bycatch.²⁸¹

²⁷⁸ CMS, “Review Mechanism and National Legislation Programme”, www.cms.int/en/activities/review-mechanism-and-national-legislation-programme; Resolution 12.9 ‘Establishment of Review Mechanism and a National Legislation Programme’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.12.9_review-mechanism_e_0.pdf.

²⁷⁹ Art. XIX Bonn Convention.

²⁸⁰ Art. VII Bonn Convention.

²⁸¹ Annex to Resolution 12.17 ‘Action plan for the protection and conservation of South Atlantic whales’ of the Conference of the Parties (s.d.), www.cms.int/sites/default/files/document/cms_cop12_res.12.17_annex_whales_south_atlantic_e.pdf; Resolution 12.14 ‘Adverse impacts of anthropogenic noise on cetaceans and other migratory species’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.12.14_marine-noise_e.pdf; Resolution 12.15 ‘Aquatic wild meat’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.12.15_aquatic_wild_meat_e.pdf; Resolution 12.21 ‘Climate change and migratory species’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.12.21_climate-change_e.pdf; Resolution 12.22 ‘Bycatch’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.12.22_bycatch_e.pdf.

The Scientific Council is tasked with giving scientific advice. It also makes recommendations to the Conference of the Parties as to the migratory species to be included in Appendices I or II and regarding specific conservation and management measures to be included in Agreements.²⁸²

E. Doctrinal analysis

There is a paradox to conventions and treaties that make use of appendixes to list species in different categories of endangerment, like CITES and the Bonn Convention. The problem is that sometimes species are delisted or put in an appendix with a lower protection status, because they are doing quite well. However, when this happens, the danger of extinction emerges again, since they now enjoy less favourable protection conditions. The Bonn Convention solves this problem by stating that species can only go from Appendix I to Appendix II if this will not cause them to become endangered again.²⁸³

²⁸² Art. VII Bonn Convention.

²⁸³ Art. III.3, b) Bonn Convention.

1.5 UNCLOS

A. Introduction

The United Nations Convention on the Law of the Sea was concluded in 1982. The biggest whaling nations, Norway, Iceland and Japan, are all a party to this Convention.²⁸⁴ This is relevant because UNCLOS does have some importance for cetaceans. For example, the preamble of UNCLOS explicitly refers to the importance of the conservation of living resources in the sea.²⁸⁵

The criteria that were examined under the other conventions will not all be examined for UNCLOS as well, since not all of them are relevant and since UNCLOS does not extensively deal with cetaceans. The ones that are relevant will be explained in short in the following paragraph.

As many as 158 states are a party to UNCLOS. This gives the Convention a very broad territorial scope.²⁸⁶ Some remarks also have to be made regarding the binding nature and compliance pull of the Convention. In general, states cannot make reservations, unless this is explicitly permitted for a specific provision.²⁸⁷ Furthermore, any member state may denounce the Convention. This takes effect one year after the notification.²⁸⁸

B. Measures regarding cetaceans

Article 65 of the United Nations Convention on the Law of the Sea obliges states to cooperate with the appropriate international organisations for the conservation and management of cetaceans in their EEZ and on the high seas, as an exception to article 56 that gives coastal states the right to exploit natural resources within their exclusive economic zone.²⁸⁹ This is a clear reference to the duties and obligations following from the ICRW.²⁹⁰ The role of article 65 is further explained in chapter C. States are also allowed to adopt stricter rules on the exploitation of marine mammals in their EEZ and on the high seas than provided for in

²⁸⁴ UNTS, “United Nations Convention on the Law of the Sea”, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en (consultation 18 July 2022).

²⁸⁵ Preamble United Nations Convention on the Law of the Sea of 10 December 1982, *United Nations Treaty Series*, vol. 1833, 3 (hereafter: UNCLOS).

²⁸⁶ UNTS, “United Nations Convention on the Law of the Sea”, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en (consultation 18 July 2022).

²⁸⁷ Art. 309 UNCLOS.

²⁸⁸ Art. 317 UNCLOS.

²⁸⁹ Art. 56 and 65 and 120 UNCLOS; R. DIEKJOBST, “The international whaling regime – a law with no teeth?”, *Völkerrechtsblog* 2019, al. 6.

²⁹⁰ H. S. SCHIFFMAN, “U.S. membership in UNCLOS: what effects for the marine environment?”, *ILSA Journal of International and Comparative Law* 2004-2005, (477) 481-482.

UNCLOS.²⁹¹ This may be a way to keep states like Japan, that left the IWC, under some level of control of the IWC.²⁹²

Section 2 of the Convention deals with the conservation and management of living resources on the high seas.²⁹³ All states have the right to fish on the high seas, but this right is subject to their obligations under other treaties.²⁹⁴ This right is also mitigated by the obligation of states to adopt all measures necessary for the conservation of the living resources of the high seas.²⁹⁵ States have to cooperate in the conservation and management of these living resources.²⁹⁶ Those two obligations use binding language, such as ‘have the duty to’ and ‘shall’.²⁹⁷ The Convention goes even further in saying that states, when adopting regulations regarding fishing, have to take into account the survival of other species which are dependent on those fished species.²⁹⁸

There is also an obligation to protect the marine environment from adverse human activities in the Area. The Area includes the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction.²⁹⁹

Finally, Part XII deals with the duty of states to protect and preserve the marine environment in general.³⁰⁰ States have to take this duty into account when carrying out their right to exploit their natural resources.

Two provisions are especially relevant for cetaceans. Firstly, states have to cooperate to protect and preserve the marine environment. This is beneficial to migratory species, such as cetaceans.³⁰¹ Secondly, states who fish in regions where highly migratory species are present have to cooperate to ensure the conservation of these species and to ensure their optimum utilization throughout the region.³⁰² Annex I contains a list of these highly migratory species. Among them are two dolphin species and seven families of other cetaceans.³⁰³ Of course, this provision does not prohibit the capture and killing of cetaceans. It is

²⁹¹ Art. 65 and 120 UNCLOS.

²⁹² C. WOLD, “Japan’s resumption of commercial whaling and its duty to cooperate with the International Whaling Commission”, *Journal of Environmental Law and Litigation* 2020, (87) 140.

²⁹³ Section 2 UNCLOS.

²⁹⁴ Art. 116 UNCLOS.

²⁹⁵ Art. 117 UNCLOS.

²⁹⁶ Art. 118 UNCLOS.

²⁹⁷ Art. 117-118 UNCLOS.

²⁹⁸ Art. 119, §1, (b) UNCLOS.

²⁹⁹ Art. 1, §1, (3) and 145 UNCLOS.

³⁰⁰ Art. 192 UNCLOS; Part. XII UNCLOS.

³⁰¹ Art. 197 UNCLOS.

³⁰² Art. 64, §1 UNCLOS.

³⁰³ Annex I UNCLOS.

simply aimed at maintaining the population in order to keep harvesting the animals. This mindset was also present in the early days of the IWC, as explained in the chapter on this topic.³⁰⁴

Another deficiency of UNCLOS can be found in article 64, §1 that imposes an obligation on states who fish in regions where highly migratory Annex 1 species are present to cooperate to ensure their conservation and optimum utilization.³⁰⁵ Firstly, ‘optimum utilization’ is not strong enough to effectively conserve, let alone protect cetaceans.³⁰⁶ Secondly, this provision contains vague language, being ‘with a view to ensuring conservation and promoting the objective of optimum utilization’, which gives leeway to pro-whaling states to circumvent the application of this provision.³⁰⁷

All in all, the above seems to indicate a difficult balance between the rights of states and their duty to protect the marine environment. It is also not clear what ‘marine environment’ entails exactly. This term is formulated quite broadly, so it could be argued that it also includes marine living resources found there.

C. Linkages between UNCLOS and the IWC and doctrinal analysis

As mentioned above, article 65 obliges its member states, including whaling nations, to cooperate with the appropriate international organisation for the conservation and management of cetaceans. While the IWC is not explicitly mentioned here, it is still a clear reference to the IWC.³⁰⁸

The introduction of article 65 UNCLOS has some clear advantages. In the first place, because it strengthens the current conservationist nature of the IWC and provides support for the IWC’s movement towards more protectionist measures.³⁰⁹ Additionally, article 65 takes away from the power of the threats of those states saying that they will leave the IWC. Even if a whaling state were to leave the IWC, UNCLOS still imposes an obligation on them to abide by the IWC measures intended to manage, conserve or study cetaceans. One could say that UNCLOS imposes a duty on its members that are whaling states to stay in the IWC.³¹⁰ Even

³⁰⁴ Verwijzen naar hoofdstuk.

³⁰⁵ Art. 64, §1 UNCLOS.

³⁰⁶ J. A. R. NAFZIGER, “Global conservation and management of marine mammals”, *San Diego Law Review* 1980, (591) 609-610 (hereafter: J. A. R. NAFZIGER, “Global conservation and management of marine mammals”).

³⁰⁷ J. A. R. NAFZIGER, “Global conservation and management of marine mammals”, 609-610.

³⁰⁸ H. S. SCHIFFMAN, “The International Whaling Commission: challenges from within and without”, 370; J. MATANICH, “A treaty comes of age for the ancient ones”, 39, 64 and 66.

³⁰⁹ J. MATANICH, “A treaty comes of age for the ancient ones”, 38-39.

³¹⁰ H. S. SCHIFFMAN, “The International Whaling Commission: challenges from within and without”, 370; J. MATANICH, “A treaty comes of age for the ancient ones”, 39, 64 and 66.

Iceland, a whaling state, has stated that article 65 made it feel obligated to comply with IWC regulations, as long as there is no other appropriate international organization. Other organizations that deal with cetacean management are either relatively new or only operate regionally, and thus do not hold the same authority as the IWC does.³¹¹ At the moment, the IWC is the only global organization specifically intended to exercise authority over whale stocks.³¹² However, there is some debate on whether for example the North Atlantic Marine Mammal Commission (hereafter: NAMMCO) may also be considered an appropriate international organization, which would take away from the power of the IWC.³¹³ However, NAMMCO is a more consumption-minded organisation. Its existence instils a fear that pro-whaling states might leave the IWC in favour of other organisations that are not as protective.³¹⁴ Furthermore, article 65 supports the moratorium by mentioning the duty to conserve, manage and study cetaceans. This can be seen as a way of supporting the current protectionist policy of the IWC.³¹⁵ These findings all seem very positive. Finally, as noted in the chapter relating to the IWC and the ICRW, there is discussion on whether small cetaceans fall within the scope of the ICRW. Article 65 UNCLOS may shed some light here, because it refers to the regulation of cetaceans in general. This could be interpreted as meaning that UNCLOS supports an expansion of the scope of the ICRW to all cetaceans.³¹⁶ Some anti-whaling states have even interpreted article 65 as endorsing an end to whaling.³¹⁷

In spite of all the positive remarks made above, article 65 leaves more to be desired. To start, it is important to note that article 65 UNCLOS uses the term ‘conservation’ instead of ‘protection’. ‘Protection’ would imply that no cetaceans can be captured anymore, while ‘conservation’ refers to measures to maintain the population while still capturing animals.³¹⁸ Either way, article 65 is formulated in a vague manner, which leaves room for states to interpret themselves which obligations they have exactly in the name of ‘conservation’.³¹⁹ What is more, this provision talks about ‘the appropriate international organization’, but does not provide criteria on what ‘appropriate’ entails. The vague nature of this provision could lead to differing interpretations among states, while a uniform approach might be more beneficial for migratory

³¹¹ J. ZEMANTAUSKI, “Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission”, 336.

³¹² J. ZEMANTAUSKI, “Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission”, 335.

³¹³ S. FREELAND and J. DRYSDALE, “Co-operation or chaos”, 19-20.

³¹⁴ H. S. SCHIFFMAN, “The International Whaling Commission: challenges from within and without”, 373-374.

³¹⁵ Art. 65 UNCLOS; J. MATANICH, “A treaty comes of age for the ancient ones”, 64-65.

³¹⁶ J. MATANICH, “A treaty comes of age for the ancient ones”, 67-68.

³¹⁷ J. MATANICH, “A treaty comes of age for the ancient ones”, 71.

³¹⁸ J. MATANICH, “A treaty comes of age for the ancient ones”, 59.

³¹⁹ J. MATANICH, “A treaty comes of age for the ancient ones”, 60.

cetaceans. The combination of these two facts might lead to whaling states joining weak, pro-whaling organizations.³²⁰ Lastly, as discussed in the chapter on the IWC, the IWC lacks power to enforce its own regulations. Even though article 65 can be used to legally bind a nation to the decisions of the IWC, this power still does not lie with the IWC itself.³²¹ This is still a strong deficiency in the IWC's enforcement power.

³²⁰ J. A. R. NAFZIGER, "Global conservation and management of marine mammals", 608.

³²¹ J. ZEMANTAUSKI, "Has the Law of the Sea Convention Strengthened the conservation ability of the International Whaling Commission, 339.

2. European legal instruments

In the chapter before this one, various international legal instruments were discussed and researched. The current chapter will go more into detail on regional legal instruments that explicitly or implicitly deal with the protection of cetaceans. Since 'regional' is a quite broad term, the choice was made to solely focus on European legal instruments. Chapter 2.1 will go more into depth on the Bern Convention, while chapter 2.2 will focus on various EU legislative and policy acts regarding cetaceans. Lastly, chapter 2.3 and 2.4 examine ASCOBANS and ACCOBAMS.

2.1 Bern Convention

A. Introduction

The Convention on the Conservation of European Wildlife and Natural Habitats (hereafter: Bern Convention) is aimed at ensuring the conservation of wild flora and fauna and their habitats. It was signed in 1979 and entered into force in 1982.³²² Only the provisions relevant to the protection of cetaceans will be discussed, so logically (parts of) provisions relating to the protection of wild flora will be left out.

The Convention gives special attention to endangered and vulnerable species and even explicitly mentions the need for cooperation between states to protect migratory species.³²³ The convention uses appendices that specify the protected species.³²⁴ Appendices II and III respectively contain strictly protected fauna species and protected fauna species. For fauna species listed in Appendix II, it is prohibited to deliberately capture, keep and kill them, to deliberately damage or destruct breeding or resting sites, to deliberately disturb them, and to possess or trade in these species.³²⁵ These are very far-reaching protection measures.³²⁶ Appendix IV then lists a number of prohibited means and methods of killing, capture and exploitation of mammals. This includes inter alia explosives, nets and traps. Unfortunately, an exception is made for

³²² Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979, *Treaty Series of the Council of Europe*, no. 104 (hereafter: Bern Convention).

³²³ Art. 1 and 10, §1 Bern Convention; A. TROUWBORST, "Conserving European biodiversity in a changing climate: the Bern Convention, the European Union Birds and Habitats Directives and the adaptation of nature to climate change", *Review of European comparative & international environmental law* 2011, (62) 65 (hereafter: A. TROUWBORST, "Conserving European biodiversity in a changing climate").

³²⁴ Bern Convention.

³²⁵ Art. 6 Bern Convention.

³²⁶ Appendix II and III Bern Convention.

explosives, which are allowed in case of whale hunting.³²⁷ This non-prohibition is certainly relevant in regards to whaling, as whales are commonly killed using explosive harpoons.³²⁸

B. Material and territorial scope

B.1 Material scope

As much as thirty species of cetacean are listed in Appendix II. Appendix III contains all cetacean species not mentioned in Appendix II.³²⁹ States may make reservations regarding the species listed in Appendix II or III and regarding means and methods of killing, capture and exploitation listed in Appendix IV. Reservations of a general nature and reservations regarding other provisions are not possible.³³⁰

B.2 Territorial scope

Fifty countries and the EU are members to the Convention.³³¹ Whaling states Iceland and Norway have also ratified the Convention, albeit with some objections.³³² The Bern Convention covers most of the European continent and some states in Africa.³³³ Since it is mainly aimed at the European territory, which is also reflected in its full name, it was chosen to deal with this Convention under the European chapter.

States may specify the territory to which the Convention applies.³³⁴ This implies that the Convention does not have to apply to the entire territory or to each person over which a state has jurisdiction. This takes away a lot of the power of this Convention. The map below indicates the marine areas to which the Convention applies.

³²⁷ Appendix IV Bern Convention.

³²⁸ N. GALES, R. LEAPER and V. PAPASTAVROU, “Is Japan’s whaling humane?”, *Marine Policy* 2008, 408-412.

³²⁹ Appendices II and III Bern Convention.

³³⁰ Art. 22, §1 and §3 Bern Convention.

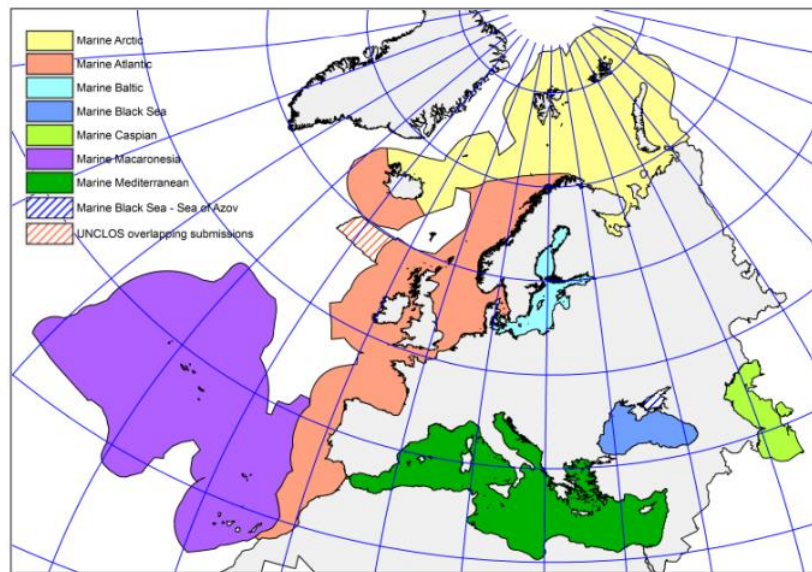
³³¹ COE, “Presentation of the Bern Convention”, www.coe.int/en/web/bern-convention/presentation.

³³² COE, “Chart of signatures and ratifications of Treaty 104”, www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104/signatures?p_auth=bNAL8QIY (consultation 10 March 2021); COE, “Reservations and Declarations for Treaty No. 104 – Convention on the Conservation of European Wildlife and Natural Habitats”, www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104/declarations?p_auth=bNAL8QIY (consultation 10 March 2021).

³³³ COE, “Presentation of the Bern Convention”, www.coe.int/en/web/bern-convention/presentation.

³³⁴ Art. 21, §1 Bern Convention.

Marine regions in the framework of the Bern Convention



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The Convention has established the Emerald Network of Areas of Special Conservation Interest through Recommendation No. 16 of 1989.³³⁶ This recommendation urges state parties to designate areas of special conservation interest where these areas contribute to the survival of a species, support a high diversity of species, contain an important or endangered habitat type, are an important area for migratory species or otherwise contribute to the objectives of the Convention.³³⁷ State parties have to take appropriate measures and management plans in order to protect these areas.³³⁸ Designation and management measures are implemented at national level, so the Standing Committee does not impose measures itself, but the implementation of national measures is monitored.³³⁹

³³⁵ COE, “Delineation of marine regions in the framework of the Bern Convention”, <https://rm.coe.int/delineation-of-marine-regions-in-the-framework-of-the-bern-convention-/16808fe2cf>.

³³⁶ COE, “Emerald Network of Areas of Special Conservation Interest”, www.coe.int/en/web/bern-convention/emerald-network.

³³⁷ Art. 1 Recommendation No. 16 of the standing committee on areas of special conservation interest (9 June 1989), https://search.coe.int/bern-convention/Pages/result_details.aspx?ObjectId=0900001680746c25.

³³⁸ Conf. 11.4 ‘Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-11-04-R12.pdf>; art. 3-4 Recommendation of the standing committee on areas of special conservation interest (9 June 1989), https://search.coe.int/bern-convention/Pages/result_details.aspx?ObjectId=0900001680746c25

³³⁹ COE, “Emerald Network of Areas of Special Conservation Interest”, www.coe.int/en/web/bern-convention/emerald-network.

The Emerald Network should be set up in each member state and each observer state to the Convention.³⁴⁰ It is notable that even observer states are included in this Network. As of December 2020, eight countries have set up Emerald sites within their territory, namely Andorra, Belarus, Georgia, the Republic of Moldova, Norway, Switzerland, Ukraine and the United Kingdom. Additionally, the Standing Committee may also nominate sites as ‘Candidate Emerald Sites’.³⁴¹

Its main objective is the long term survival of species and habitats of the Bern Convention requiring specific protection measures. These species and habitats are listed in Resolution No. 4 and Resolution No. 6 of the Standing Committee. Resolution No. 4 listing endangered natural habitat types requiring specific conservation measures comprises a number of marine habitats. Prima facie these do not seem to include habitats relevant for cetaceans.³⁴² Resolution No. 6 listing species requiring specific habitat conservation measures however includes two cetacean species, namely the *Tursiops truncatus* and the *Phocoena phocoena*. Both are marked with a #, which means that these species do not require specific habitat conservation measures everywhere since they are abundant in some parts of Europe.³⁴³

There is a need to efficiently and effectively manage this network. Requirements for this management have been set out in Resolution No. 8.³⁴⁴ Emerald sites should be protected from external threats and should try to achieve a satisfactory conservation status for the species and habitats listed in Resolutions No. 4 and 6 that are present at the site.³⁴⁵ Parties have to set up a monitoring framework to surveille the implementation of the conservation regime and to check the conservation status of the protected species and habitats.³⁴⁶

³⁴⁰ COE, “Emerald Network of Areas of Special Conservation Interest”, www.coe.int/en/web/bern-convention/emerald-network.

³⁴¹ COE, “Emerald Network of Areas of Special Conservation Interest”, www.coe.int/en/web/bern-convention/emerald-network.

³⁴² Resolution No. 4 ‘listing endangered natural habitats requiring specific conservation measures’ of the Standing Committee (6 December 1996), https://search.coe.int/bern-convention/Pages/result_details.aspx?ObjectId=09000016807469e7.

³⁴³ Resolution No. 6 ‘listing the species requiring specific habitat conservation measures’ of the Standing Committee (4 December 1998), https://search.coe.int/bern-convention/Pages/result_details.aspx?ObjectId=0900001680746afc.

³⁴⁴ COE, “Management and ecological character”, www.coe.int/en/web/bern-convention/management-and-ecological-character; Resolution No. 8 ‘on the national designation of adopted Emerald sites and the implementation of management, monitoring and reporting measures’ of the Standing Committee (2012), <https://rm.coe.int/1680746515>.

³⁴⁵ Art. 2.1 Resolution No. 8 ‘on the national designation of adopted Emerald sites and the implementation of management, monitoring and reporting measures’ of the Standing Committee (30 November 2012), <https://rm.coe.int/1680746515>.

³⁴⁶ Art. 3 Resolution No. 8 ‘on the national designation of adopted Emerald sites and the implementation of management, monitoring and reporting measures’ of the Standing Committee (30 November 2012), <https://rm.coe.int/1680746515>.

Lastly, every six years, parties have to send reports to the Secretariat regarding the conservation status of the species and habitats listed in Resolutions No. 4 and No. 6.³⁴⁷

C. Binding nature and compliance pull

The Convention text imposes a number of different obligations on member states through the use of the word ‘shall’. In the first place, parties are obliged to take measures to maintain the population of wild fauna or adapt it to an appropriate level, and to adopt national policies especially aimed at protecting vulnerable and endangered species.³⁴⁸ Furthermore, they have to protect the habitats of wild fauna species, especially those listed in Appendix II.³⁴⁹ For species listed in Appendix III, parties have to take the following measures: closed seasons, measures regarding exploitation and the regulation of sale of live and dead wild animals.³⁵⁰ Parties have to outlaw all indiscriminate means of capture and killing and the use of all means that may cause local disappearance of, or serious disturbance to, populations of a species. Especially the means listed in Appendix IV have to be prohibited.³⁵¹ To further improve the status of wild fauna, parties should reintroduce native species when this contributes to the conservation of an endangered species and control the introduction of non-native species. These provisions are less strict than the ones discussed above, because of the use of the terms ‘undertakes’ and ‘to encourage’.³⁵²

In the end, these all seem very protective measures. However, a weakness can be identified in the Convention. Parties are allowed to make exceptions to the obligations described above when they are able to show that the exception is not detrimental to the survival of the population concerned and when one of five grounds listed in the Convention is fulfilled. Exceptions can be made for inter alia the prevention of damage to fisheries and water, reasons of public health, and research and education.³⁵³ These grounds can be interpreted very broadly, so a state could easily apply such exceptions. The only review mechanism for these exceptions is the fact that Parties have to report to the Standing Committee every two years on the exceptions they have made.³⁵⁴ It is unclear whether the Standing Committee has any sanctioning power when they don’t agree with an exception. A positive point is that the Convention explicitly foresees in the

³⁴⁷ Art. 4 Resolution 8 ‘on the national designation of adopted Emerald sites and the implementation of management, monitoring and reporting measures’ of the Standing Committee (30 November 2012), <https://rm.coe.int/1680746515>.

³⁴⁸ Art. 2-3 Bern Convention.

³⁴⁹ Art., 4, §1 Bern Convention.

³⁵⁰ Art. 7 Bern Convention

³⁵¹ Art. 8 Bern Convention.

³⁵² Art. 11, §2 Bern Convention.

³⁵³ Art. 9, §1 Bern Convention

³⁵⁴ Art. 9, §2 Bern Convention.

possibility for parties to adopt stricter measures than those envisaged in the Convention.³⁵⁵ Moreover, when states are not yet ready for a binding legislative approach on certain topics, the Convention still makes an effort to positively influence species and habitats through more informal measures, such as guidances.³⁵⁶

As with most other legal instruments examined in this thesis, member states can cease to be a party to the Convention by denouncing it. Such a denunciation goes into effect six months after the notification thereof.³⁵⁷

D. Tools for monitoring and review

Monitoring of the implementation of the Convention is done by the Standing Committee. The tools it has at its disposal are reviewing reports, processing case-files and following up on the implementation of previous recommendations. A very positive point to note here is that all these implementation tools, including reports, are publicly accessible for national authorities, observer states and civil society.³⁵⁸ Monitoring of the implementation of the Convention and the recommendations of the Standing Committee also happens through the Groups of Experts set up under the Convention.³⁵⁹

There are also several types of reporting established under the Convention. Only one of these is obligatory, namely the biennial reports. These are expected from states who made exceptions to the Convention provisions, and should be submitted every two years to the Secretariat. They should contain a scientific assessment of the impact of these exceptions on the obligation to protect species and habitats. These reports are examined by the Standing Committee. Next to these, parties may voluntarily submit two other kinds of reports. The first kind are general reports on the implementation of the Convention and the recommendations of the Standing Committee, which can be submitted every four years. Secondly, states may send legal and policy reports prepared by independent experts.³⁶⁰

Another tool that can be used in the monitoring process is the case-file system. NGOs or private citizens can make complaints on possible breaches of the Convention. These complaints are processed by the Secretariat, the Bureau and, when particularly relevant, also by the Standing Committee. The Standing Committee and the Bureau can arrange on-the-spot visits by independent experts, when more information is

³⁵⁵ Art. 12 Bern Convention

³⁵⁶ COE, “Standard-setting”, www.coe.int/en/web/bern-convention/standard-settings.

³⁵⁷ Art. 23 Bern Convention.

³⁵⁸ COE, “Monitoring”, www.coe.int/en/web/bern-convention/monitoring1.

³⁵⁹ COE, “Reporting”, www.coe.int/en/web/bern-convention/reporting.

³⁶⁰ COE, “Reporting”, www.coe.int/en/web/bern-convention/reporting.

required. These independent experts then report to the Standing Committee.³⁶¹ The basis of the case-file system does not lie in any Convention provision. This monitoring tool stems from a decision of the Standing Committee.³⁶²

E. Relevant organs

The Standing Committee bears responsibility for the application of the Convention. This responsibility means that the Committee can make recommendations to the parties regarding measures to be taken and make proposals to conclude agreements with non-member states in order to more effectively conserve species.³⁶³ This body usually asks parties to take action at the national level on the basis of instruments it has adopted, such as Recommendations, Species Action Plans, Codes of Conduct and Guidelines.³⁶⁴ Recommendations can relate to the conservation status of a certain species or habitat, or specific conservation challenges.³⁶⁵ Their goal is to set standards and procedure guidance.³⁶⁶ These recommendations are not legally binding, but they are adopted at the annual meeting of the parties, where NGOs can participate and witness developments. Because of this, they do carry some weight after all. Furthermore, the recommendations are often reviewed and followed up by the Bureau and the Standing Committee itself. During these reviews, observers, other convention bodies and NGOs are involved. All of this makes that the recommendations may still exercise some compliance pull, in spite of their non-binding nature.

Non-member states who are a member state of the Council of Europe may be present at the Committee's meetings as an observer. Non-member states who are not a member of the Council of Europe either, may only be present at meetings upon invitation of the Standing Committee. Bodies or agencies dealing with the protection, conservation or management of wild fauna and its habitats may under certain conditions also be present at Committee meetings.³⁶⁷

Thematic Groups of Experts that each deal with a specific topic, such as mammals or habitat conservation issues, are also set up under the Convention.³⁶⁸ They play a role in the development of other types of legislation or policy work, such as Species Action Plans, Codes of Conduct and Guidelines. They can also

³⁶¹ COE, "Case-files", www.coe.int/en/web/bern-convention/case-files.

³⁶² COE, "Case-files", www.coe.int/en/web/bern-convention/case-files.

³⁶³ Art. 14, §1 Bern Convention.

³⁶⁴ COE, "Standard-setting", www.coe.int/en/web/bern-convention/standard-settings.

³⁶⁵ COE, "Reporting", www.coe.int/en/web/bern-convention/reporting.

³⁶⁶ COE, "Standard-setting", www.coe.int/en/web/bern-convention/standard-settings.

³⁶⁷ Art. 13, §3 Bern Convention.

³⁶⁸ COE, "Standard-setting", www.coe.int/en/web/bern-convention/standard-settings.

adopt recommendations on the implementation of the Convention, which may in turn be adopted by the Standing Committee. NGOs with relevant expertise and observer status are also allowed to participate in the operations of Groups of Experts.³⁶⁹ When a Convention, Agreement or other legal instrument has an expert group set up under its auspices, this is always a good sign. Experts are way more qualified to decide and advise on proper conservation and management measures than political bodies and organs.

The different Convention bodies do also deal with cetacean conservation specifically. Just two examples out of a range of different measures are the establishment of a working group on small cetaceans in the Mediterranean and the adoption of a technical report on the situation of small cetaceans in the Mediterranean and Black Seas and Contiguous Waters and on the impact of fisheries.³⁷⁰

³⁶⁹ COE, “Groups of Experts set under the Bern Convention”, www.coe.int/en/web/bern-convention/thematic-group-of-experts.

³⁷⁰ Secretariat memorandum ‘Working group on small cetaceans in the Mediterranean’ of the Directorate of Environment and Local Authorities (4 March 1991), <https://rm.coe.int/09000016809dace3>; Technical Report ‘on the situation of small cetaceans in the Mediterranean and Black Seas and Contiguous Waters, and the impact of fishing gear and fishery practices on these animals’ of Greenpeace International (10 June 1991), <https://rm.coe.int/09000016809dac25>.

2.2 European Union legislation: the Habitats Directive and Natura 2000 Network

A. Introduction

There is some legislation regarding cetaceans on the level of the European Union as well. The EU legislation in general protects all whale species from deliberate disturbance, capture and killing within EU waters. However this legislation cannot be effective if it is not backed by international regulation, since whale populations can migrate and swim great distances.³⁷¹ In a scientific study, the European Commission found that in most parts of Europe, protected areas are too small to accommodate changes.³⁷²

As explained above, an Emerald Network of Areas of Special Conservation Interest was set up under the Bern Convention. Since the European Union is party to this Convention as well, it also had to set up these areas, which was done through the Habitats Directive of 1992 and subsequently the Natura 2000 Network.³⁷³

The Habitats Directive was adopted in 1992 and aims to reach a favourable conservation status for the species and habitats it covers and to ensure biodiversity through the conservation of natural habitats and wild fauna and flora in the European Union.³⁷⁴ The protected species are especially rare, threatened or endemic animal and plant species. Only the provisions relevant for animals, and specifically cetaceans will be covered here. Next to over one thousand species, around two hundred habitat types are conserved in their own right as well. Protection happens through annexes attached to the Directive. Annex I to the Directive lists habitat types of community interest whose conservation requires the designation of special areas of conservation. Under the title ‘open sea and tidal areas’ habitats like bays and reefs are mentioned.³⁷⁵ These are marine areas where cetaceans may be present.³⁷⁶ Annex II includes animal species for which core areas of their habitat are designated as sites of Community importance (SCIs) and are included in the Natura 2000 network. Two cetacean species are mentioned in this Annex, namely *Tursiops*

³⁷¹ EUROPEAN COMMISSION, “International Whaling”, https://ec.europa.eu/environment/biodiversity/animal_welfare/whaling.htm (consultation 12 March 2021).

³⁷² A. TROUWBORST, “Conserving European biodiversity in a changing climate”, 64.

³⁷³ COE, “Emerald Network of Areas of Special Conservation Interest”, www.coe.int/en/web/bern-convention/emerald-network; Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora of 21 May 1992, *Official Journal L*, 206 22 June 1992, 7-50 (hereafter: Habitats Directive).

³⁷⁴ A. TROUWBORST, “Conserving European biodiversity in a changing climate”, 70; art. 2 Habitats Directive.

³⁷⁵ Annex I Habitats Directive; EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

³⁷⁶ See maps shown for the different legal instruments discussed in this thesis.

truncatus and *Phocoena phocoena*.³⁷⁷ Annex III indicates the criteria for selecting sites eligible to be marked as a site of community importance and designation as a special area of conservation.³⁷⁸ For Annex IV animal species, a strict protection regime must be applied across their entire natural range within the EU, both within and outside of Natura 2000 sites. All cetacean species are included in this Annex.³⁷⁹ For Annex V species, member states can only engage in exploitation and taking in the wild of these species insofar as this is compatible with maintaining them at a favourable conservation status. No cetaceans are included in this list.³⁸⁰ Lastly, Annex VI lists all prohibited means and methods of capture and killing and prohibited modes of transport. Relevant prohibitions for cetaceans are inter alia the prohibition of electrical devices capable of killing and stunning, explosives, nets and traps which are non-selective, crossbows and certain semi-automatic or automatic weapons. Prohibited modes of transport are aircraft and moving motor vehicles.³⁸¹ The Bern Convention made an exception for the use of explosives in case of whaling. No similar exception is to be found in the Habitats Directive.

The Habitats Directive has established the Natura 2000 ecological network of protected areas.³⁸² It stretches across the land and marine territory of all EU member states and it is the largest coordinated network of protected areas in the world.³⁸³ It comprises sites hosting the habitat types listed in Annex I and habitats of the species listed in Annex II of the Habitats Directive.³⁸⁴ This network has designated almost 10% of the EU marine area as a Natura 2000 site, which means that human activities in these places are more strictly regulated.³⁸⁵ To establish the Natura 2000 network, states have to propose Sites of Community Importance. Once these sites are adopted, they have to be designated by the member states as Special Areas of Conservation as soon as possible and at most within six years. Member states then have to adopt

³⁷⁷ Annex II Habitats Directive; EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

³⁷⁸ Annex III Habitats Directive; EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

³⁷⁹ Annex IV Habitats Directive; EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

³⁸⁰ Annex II Habitats Directive; EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

³⁸¹ Annex VI Habitats Directive.

³⁸² Art. 3 Habitats Directive; EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

³⁸³ EUROPEAN COMMISSION, “Natura 2000”, https://ec.europa.eu/environment/nature/natura2000/index_en.htm.

³⁸⁴ Art. 3 Habitats Directive.

³⁸⁵ EUROPEAN COMMISSION, “Natura 2000”, https://ec.europa.eu/environment/nature/natura2000/index_en.htm (consultation 11 May 2021); EUROPEAN COMMISSION, “Natura 2000 in the Marine Environment”, https://ec.europa.eu/environment/nature/natura2000/marine/index_en.htm (consultation 12 March 2021).

conservation measures, including management plans.³⁸⁶ Areas can be declassified when this is warranted by natural developments.³⁸⁷

B. Material and territorial scope

The material scope, namely which cetaceans fall under the protective measures, is already made clear in the introduction. For the territorial scope, reference is made to the website of the European Environment Agency, which provides a map indicating all Natura 2000 protected areas.³⁸⁸ It is important to point out that Natura 2000 only protects certain habitats, but that species falling within the scope of the Habitats Directive are in principle protected everywhere in EU waters.³⁸⁹

C. Conservation measures

Measures developed at EU level to specifically reach the objectives of the Habitats Directive are EU Species Action Plans, developed to restore the population of a certain species across the EU.³⁹⁰ These plans contain information about the status, ecology, threats and current conservation measures for each species and are intended to assist member states in the conservation of these species.³⁹¹ While an interesting source of information to better protect certain species, the Species Action Plans are not legally binding.³⁹²

The EU also takes into account the European Red Lists of threatened species, developed by the IUCN, in order to take appropriate action to protect those species threatened with extinction.³⁹³

For the special areas of conservation that they have designated, member states have to adopt conservation measures, including management plans if necessary. In these areas, deterioration of the natural habitats and disturbance of the species for which the areas were designated must be avoided.³⁹⁴ Furthermore, member

³⁸⁶ EUROPEAN COMMISSION, “Management of Natura 2000 sites”, https://ec.europa.eu/environment/nature/natura2000/management/index_en.htm;
EUROPEAN COMMISSION, “Natura 2000 sites designation”, https://ec.europa.eu/environment/nature/natura2000/sites/index_en.htm.

³⁸⁷ Art. 9 Habitats Directive.

³⁸⁸ X, “Natura 2000 Network Viewer”, <https://natura2000.eea.europa.eu/#>.

³⁸⁹ Art. 2, §1 Habitats Directive.

³⁹⁰ EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

³⁹¹ EUROPEAN COMMISSION, “EU Species Action plans for selected species”, https://ec.europa.eu/environment/nature/conservation/species/action_plans/index_en.htm

³⁹² EUROPEAN COMMISSION, “EU Species Action plans for selected species”, https://ec.europa.eu/environment/nature/conservation/species/action_plans/index_en.htm.

³⁹³ EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

³⁹⁴ Art. 6 Habitats Directive.

states are obliged to monitor the conservation status of the natural habitats and species inhabiting these sites.³⁹⁵ This obligation applies to all habitats and species of community interest, and thus should happen within and outside of the Natura 2000 network.³⁹⁶

Plans or projects that are likely to have a significant effect on a protected site should be assessed by the member state before implementing them. They can only be implemented when the government is certain that they will not adversely affect the site concerned. Unfortunately, a plan or project can be carried out in spite of a negative impact assessment when there are overriding reasons of public interest.³⁹⁷ This exception is understandable from the viewpoint of the general duty of the government, but it is regrettable when looking solely at the biodiversity implications. Luckily, an exception to the exception is made for sites that host a priority habitat type or a priority species. In these cases, a government can only give the green light for a plan or project for reasons of human health or public safety, or when this has beneficial consequences to the environment, or for other reasons of overriding public interest following an opinion from the Commission.³⁹⁸

The Directive also establishes rules specifically for the protection of species. Member states have to prohibit the deliberate capture or killing of individuals in the wild, deliberate disturbance, deliberate destruction or taking of eggs from the wild and deterioration or destruction of breeding sites or resting places. Also forbidden are the keeping, transport and sale of specimens taken from the wild.³⁹⁹

Derogations in regards to inter alia the taking, capture and killing of species are possible. This is only the case if there is no appropriate alternative and if such a derogation is not detrimental to maintaining the species concerned at a favourable conservation status. Additionally, one of five grounds mentioned in the Directive has to be fulfilled for such a derogation to be possible. These grounds are for example protecting wild fauna and flora, conserving natural habitats, public health and public safety, and research and education.⁴⁰⁰ In case of a derogation, member states still have to prohibit the use of all indiscriminate means that might cause local disappearance of or serious disturbance to the population of a species. In particular the means of capture and killing listed in Annex VI(a) and (b) have to be prohibited.⁴⁰¹

³⁹⁵ Art. 11 Habitats Directive.

³⁹⁶ EUROPEAN COMMISSION, “Habitats Directive reporting”, https://ec.europa.eu/environment/nature/knowledge/rep_habitats/index_en.htm.

³⁹⁷ Art. 6 Habitats Directive.

³⁹⁸ Art. 4, §2 Habitats Directive.

³⁹⁹ Art. 12 Habitats Directive.

⁴⁰⁰ Art. 16, §1 Habitats Directive.

⁴⁰¹ Art. 15 Habitats Directive.

D. Binding nature and compliance pull

D.1 Binding nature and compliance pull: textual analysis and obligations for member states

Directives are binding on EU member states as regards to their objectives.⁴⁰² The member states have to adopt provisions of national law to reach the objectives of the Directive.⁴⁰³ This is also clear from the Directive text, which states that member states ‘shall’ designate sites as special areas of conservation.⁴⁰⁴ This means that in principle, it is up to the member states to choose which areas they deem of special conservation interest. However, there is an exception for sites not designated as a Natura 2000 site, but where scientific information points to the fact that they should be. In such cases, the European Commission can start a procedure to declare this site of Community importance anyway.⁴⁰⁵

Another criterion in deciding the binding nature of a legal instrument is how easily a member state can choose to no longer be bound. Directives are binding upon EU member states with regards to their objectives. Not being bound at all by EU legislation would mean leaving the EU, which is not an easy process.⁴⁰⁶

D.2 Monitoring and review

The Habitats Directive requires EU member states to periodically submit two types of reports. Every six years, member states have to send a report to the European Commission on the implementation of the measures taken under the Habitats Directive. They should also include information on the conservation status of habitats and species, and on compensation measures taken for projects that have a negative impact on Natura 2000 sites. These reports are accessible to the public. The reports are evaluated by the Commission.⁴⁰⁷ Every two years, the European Commission also expects a report on the derogations to the strict protection measures that member states have applied. These reports have to appoint a body that has the authority to check that the conditions to apply a derogation in practice are fulfilled.⁴⁰⁸

⁴⁰² EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

⁴⁰³ Art. 23, §3 Habitats Directive.

⁴⁰⁴ Art. 3, §2 Habitats Directive.

⁴⁰⁵ Art. 5 Habitats Directive.

⁴⁰⁶ EU, “Types of legislation”, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en; X, “Directive”, www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7bhovywnh7.

⁴⁰⁷ Art. 6, 12, 16 and 17 Habitats Directive; EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

⁴⁰⁸ Art. 6, 12, 16-17 Habitats Directive; EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

D.3 Relevant organs

The Habitats Committee assists the European Commission with the implementation of the Habitats Directive and gives its opinion on the draft list of LIFE-Nature projects that should be financed each year.⁴⁰⁹ The EU Life programme is a funding instrument for nature conservation.⁴¹⁰

D.4 Doctrinal assessment

A weak point that is also applicable to other legal instruments, such as ASCOBANS, is the fact that for most cetaceans in Europe there is a lack of knowledge regarding their range, size of populations and suitable habitat area. A report by the European Environment Agency even stated that cetaceans are among the species with the highest proportion of unknown assessments.⁴¹¹ Knowledge gaps like this need to be amended through scientific research in order to make legal protection more effective.

⁴⁰⁹ Art. 20 Habitats Directive; EUROPEAN COMMISSION, “The Habitats Directive”, https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

⁴¹⁰ EUROPEAN COMMISSION, “Bringing nature back through LIFE. The EU LIFE programme’s impact on nature and society”, https://emis.vito.be/sites/emis/files/articles/91/2020/bringing_nature_back_through_life.pdf.

⁴¹¹ Report No 10/2020 ‘State of nature in the EU. Results from reporting under the nature directives 2013-2018’ of the European Environment Agency’ (2020), www.eea.europa.eu/publications/state-of-nature-in-the-eu-2020/.

2.3 ASCOBANS

ASCOBANS and ACCOBAMS are just two agreements concluded under the Bonn Convention in what should eventually become a global network of interlocking agreements. Although both Agreements are in principle freestanding treaties, their objectives and implementation are strongly influenced by the Bonn Convention.⁴¹² These Agreements were necessary to especially protect small cetaceans, since other instruments existing at the time of their development were inadequate. The IWC for example did not and still barely does regulate small cetaceans.⁴¹³

A. Introduction

ASCOBANS was concluded in 1992.⁴¹⁴ It was first called ‘Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, but the geographical scope was later extended, which also changed the name to include North East Atlantic and Irish Seas.⁴¹⁵ This Agreement recognizes the importance of small cetaceans for the ecosystem and is aimed at protecting the numerous cetacean species that live in this area.⁴¹⁶ Its goal is to achieve and maintain a favourable conservation status for small cetaceans.⁴¹⁷ It is the first regional Agreement that aims to provide protection for small cetaceans from fisheries, pollution and other threats. A project on small cetacean abundance in the North Sea found three main threats to small cetaceans in this area, namely entanglement in fishing gear, environmental contaminants and environmental changes. Environmental changes include a decrease of food availability through fisheries and climate change, which changes plankton composition and other elements in the food chain.⁴¹⁸

The main idea of the Agreement lies in line with that of the Bonn Convention, namely the fact that migratory species, including cetaceans, can only be effectively protected by cooperating between states.⁴¹⁹ The Preamble of the agreement also stresses that small cetaceans are an integral part of marine ecosystems and that the conservation status of small cetaceans in the Agreement area is concerning. It also condemns bycatch, habitat deterioration and disturbances. However, there still is a lot of uncertainty regarding the

⁴¹² W. C. G. BURNS, “ACCOBAMS: a regional response to the threats facing cetaceans”, 113 and 119-120.

⁴¹³ H. NUKAMP and A. NOLLKAEMPER, “The protection of small cetaceans in the face of uncertainty”, 286.

⁴¹⁴ Art. 8.1 ASCOBANS; art. IV.4 Bonn Convention.

⁴¹⁵ ASCOBANS, “ASCOBANS”, www.ascobans.org/en/legalinstrument/ascobans.

⁴¹⁶ Preamble and art. 3 ASCOBANS.

⁴¹⁷ Art. 2.1 ASCOBANS.

⁴¹⁸ H. NUKAMP and A. NOLLKAEMPER, “The protection of small cetaceans in the face of uncertainty”, 281-282 and 284-285.

⁴¹⁹ ASCOBANS, “ASCOBANS”, www.ascobans.org/.

status of small cetaceans and the impact of external factors, especially because of their migratory nature.⁴²⁰ This is a conclusion that is applicable to most cetaceans.

B. Material and territorial scope

B.1 Material scope

ASCOBANS applies to all small cetaceans that can be found in the Agreement area.⁴²¹ What ‘small cetaceans’ are, is defined in the Agreement. This entails any species, subspecies or population of toothed whales (Odontoceti), except the sperm whale *Physeter macrocephalus*.⁴²²

There is some interplay between the Agreement and the Bern Convention regarding their material scope. All small cetaceans living in the Baltic and North Seas are also listed in Appendix II of the Bern Convention as strictly protected species.

Nowhere in the Agreement text is provided that a species needs to be endangered in order to enjoy protection. They get automatic protection as soon as they fall within the scope of the Agreement. This is a very good reference point, keeping in mind what was said in chapter III on societal and scientific relevance, namely that whales are intelligent animals, capable of feeling pain, that deserve protection in and of themselves.

The Agreement states that the Agreement itself and its Annex cannot be subject to reservations. However, there are some exceptions to this rule. A new party may make a reservation regarding a particular species, subspecies or population of small cetaceans.⁴²³ Furthermore, another provision reads that amendments shall enter into force ‘for those parties which have accepted them’.⁴²⁴ From this can be deduced that reservations are in fact possible for amendments.

B.2 Territorial scope

At the moment, ASCOBANS consists of ten parties. Any range state can accede to the Agreement. This means any state that exercises jurisdiction over an area where a species covered by ASCOBANS may be situated and any state whose flag vessels affect a species covered by ASCOBANS in the Agreement area.⁴²⁵ This brings up a first point of criticism, namely that the Agreement does not cover actions by flag vessels

⁴²⁰ Preamble ASCOBANS.

⁴²¹ Art. 1.1 ASCOBANS.

⁴²² Art. 1.2, (a) ASCOBANS.

⁴²³ Art. 8.6 ASCOBANS.

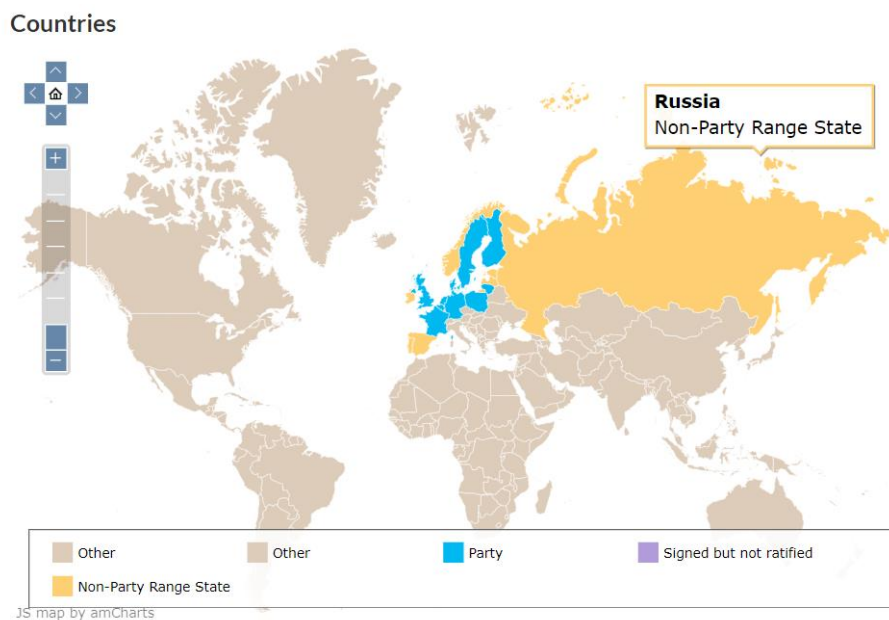
⁴²⁴ Art. 6.5.3 ASCOBANS.

⁴²⁵ ASCOBANS, “ASCOBANS”, www.ascobans.org/en/legalinstrument/ascobans.

of the members in areas outside of the Agreement area. Since vessels are still under the jurisdiction of the flag state, even at the high seas, it would have been beneficial if the Agreement also were to cover those situations.

There are also seven non-party range states. These are states that are bordering the Agreement area, but did not ratify the Agreement itself.⁴²⁶ As mentioned below, those non-party range states may also be present at meetings of the Meeting of the Parties.⁴²⁷

The parties and non-party range states are indicated on the map below. This map does not represent the geographical area covered by the agreement. For this area, one should look at the map under this one.



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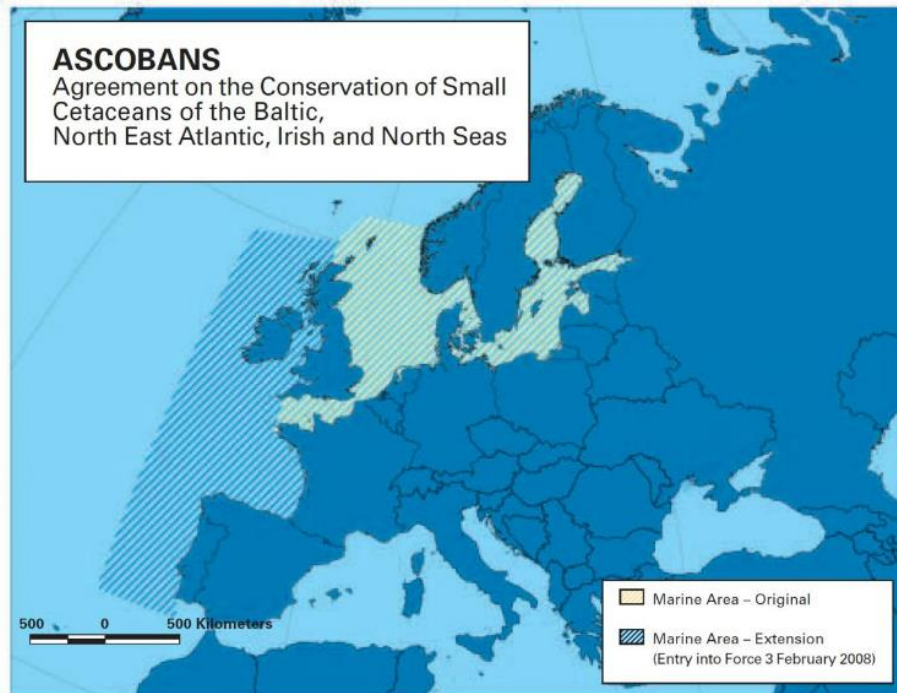
The map below this paragraph shows the entire territorial scope of the Agreement. The reason for the choice of this territory was a pragmatic one. Since states did not know the entire range and migration route of small cetaceans at the time, they decided to form an Agreement with like-minded states who showed interest in the issue. Because of this, the Agreement area may not fully overlap with the actual range of the protected small cetaceans.⁴²⁹

⁴²⁶ ASCOBANS, "ASCOBANS", www.ascobans.org/en/legalinstrument/ascobans.

⁴²⁷ ASCOBANS, "Organizational structure", www.ascobans.org/en/about/organizational-structure.

⁴²⁸ ASCOBANS, "ASCOBANS", www.ascobans.org/en/legalinstrument/ascobans.

⁴²⁹ H. NUKAMP and A. NOLLAEMPER, "The protection of small cetaceans in the face of uncertainty", 289-290.



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C. Conservation measures

The Annex to the Agreement holds a conservation and management plan that describes measures that have to be applied to populations of small cetaceans. These measures relate to habitat conservation and management, surveys and research, use of bycatch and strandings, legislation and information and education. In practice, this entails for example that certain types of fishing gear should not be used in order to reduce the number of bycatch and that parties should establish national legislation prohibiting the taking and killing of small cetaceans.⁴³¹

Within the structure of ASCOBANS, several action plans are made for the conservation or recovery of specific species in specific areas.⁴³² These focus more on a specific topic, contrary to the Agreement, which operates in a more general way.

Whale watching is another topic that receives the attention of the Agreement. ASCOBANS has developed some proposals in order for whale watching trips to cause as little disturbance as possible. The organization especially stresses that there should be regulations regarding the manner and proximity of approach by

⁴³⁰ ASCOBANS, “ASCOBANS”, www.ascobans.org/en/legalinstrument/ascobans

⁴³¹ Annex to ASCOBANS.

⁴³² ASCOBANS, “Action Plans”, www.ascobans.org/en/documents/action-plans.

vessels, as well as regarding the number of vessels and the duration of the trip. They are only proposals and thus non-binding.⁴³³

There are also several working groups set up. These deal among others with topics like bycatch -the ASCOBANS Working Group dealing with bycatch works jointly with ACCOBAMS-, pollution, resource depletion, underwater noise, specific species and specific geographic areas, and large cetaceans.⁴³⁴ This last topic is noteworthy, since ASCOBANS is in principle only meant for the conservation and management of small cetaceans.⁴³⁵

Furthermore, there are also projects set up within ASCOBANS. These may also deal with, for example, specific species or specific threats to small cetaceans.⁴³⁶ Other initiatives within ASCOBANS are workshops, awards, scientific publications and the issuing of guidelines.⁴³⁷ All these initiatives are intended to make conservation and management measures more effective.

Lastly, the Agreement explicitly foresees the right of parties to take stricter conservation measures.⁴³⁸

D. Binding nature and compliance pull

The Agreement foresees review measures. One of these is the fact that each party has to submit an annual report to the Secretariat on the national implementation of the Agreement.⁴³⁹ These annual reports should contain information on the effects of bycatch, resource depletion, marine debris and strandings. They should also give information on surveys and research done by the submitting state.⁴⁴⁰

A member state ceases to be bound by denouncing the Agreement. This takes effect one year after the notification thereof.⁴⁴¹

⁴³³ ASCOBANS, “What you can do to protect whales, dolphins and porpoises”, www.ascobans.org/en/species/take%20action%21.

⁴³⁴ ASCOBANS, “Working Groups”, www.ascobans.org/en/working-groups.

⁴³⁵ ASCOBANS, “Informal Working Group on Large Cetaceans”, www.ascobans.org/en/working_group/large_cetaceans.

⁴³⁶ ASCOBANS, “Projects”, www.ascobans.org/en/projects.

⁴³⁷ ASCOBANS, “Awards”, www.ascobans.org/en/awards; ASCOBANS, “Guidelines”, www.ascobans.org/en/publications/guidelines; ASCOBANS, “Scientific publications”, www.ascobans.org/en/publications/scientific; ASCOBANS, “Workshops”, www.ascobans.org/en/meetings/workshops.

⁴³⁸ Art. 2.6 ASCOBANS.

⁴³⁹ Art. 2.5 ASCOBANS.

⁴⁴⁰ ASCOBANS National Report ASCOBANS/AC27/NR.8 of the Advisory Committee (24 June 2022), www.ascobans.org/sites/default/files/document/ascobans_ac27_nr8_belgium.pdf; ASCOBANS, “National reports”, www.ascobans.org/en/documents/national-reports.

⁴⁴¹ Art. 8.7 ASCOBANS.

E. Relevant organs

The Meeting of the Parties is the most important organ of ASCOBANS. It takes decisions by simple majority voting.⁴⁴² The Meeting of the Parties has adopted an extensive number of resolutions on the conservation and management of small cetaceans, with topics ranging from the regulation of specific species to general human impact on cetaceans.⁴⁴³

Observers of several different biodiversity-related instruments have the right to attend these meetings. This is for example the case for observers of the Bonn Convention, CITES, the Bern Convention, the IWC and the IUCN. These observers don't require a voting of the Meeting of the Parties to attend.⁴⁴⁴ Other bodies dealing with cetacean conservation and management may also ask to be represented at the Meeting of the Parties. This however is not a right, but requires that one third of the parties does not oppose.⁴⁴⁵ Lastly, range states that are not a party may also be present at the Meeting of the Parties.⁴⁴⁶

Another relevant organ is the Advisory Committee. It assists the member states by giving expert advice and information on the conservation and management of small cetaceans.⁴⁴⁷

F. Doctrinal analysis and conclusion

It is positive to see that so much attention is brought to the danger of bycatch and that measures are being taken to limit and prevent it. The ASCOBANS organization specifically states that bycatch is the most serious threat to cetaceans in the Agreement area.⁴⁴⁸

However, a few points of criticism can be found in legal literature. A first remark is that the original Agreement much focused on research, because at the time little was known about small cetaceans. Data on their range and on threats they faced were scarce. Both the Agreement text and the text of the Bonn Convention are characterised by flexibility, long-term and non-committal objectives, faith in research and faith in future cooperation. Little obligations that did not already apply under other treaties are imposed. At the moment of adoption, the members were reluctant to accept strong commitments and the Agreement did not really focus on management.⁴⁴⁹ In spite of that, it seems that the Agreement has proven today to also attach certain importance to cetacean management, as becomes clear from the chapter on conservation

⁴⁴² Art. 6.3 ASCOBANS.

⁴⁴³ ASCOBANS, "MOP Resolutions in effect", www.ascobans.org/en/documents/mop-resolutions.

⁴⁴⁴ Art. 6.2.1 ASCOBANS.

⁴⁴⁵ Art. 6.2.1 ASCOBANS.

⁴⁴⁶ ASCOBANS, "Organizational structure", www.ascobans.org/en/about/organizational-structure.

⁴⁴⁷ Art. 5.1 ASCOBANS.

⁴⁴⁸ ASCOBANS, "Threats", www.ascobans.org/en/species/threats.

⁴⁴⁹ H. NUKAMP and A. NOLLKAEMPER, "The protection of small cetaceans in the face of uncertainty", 290 and 300.

measures. A second criticism is that the Agreement would focus too much on small cetaceans and not enough on the ecosystems that support them. Ideally, conservation policies should be part of broader ecosystem policies.⁴⁵⁰

⁴⁵⁰ H. NUKAMP and A. NOLLKAEMPER, “The protection of small cetaceans in the face of uncertainty”, 300.

2.4 ACCOBAMS

A. Introduction

The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area was concluded in 1996 under the Bonn Convention and entered into force in 2001.⁴⁵¹ Its goal is to reduce threats to cetaceans, by improving current knowledge on the animals. The main idea was to adopt more stringent measures in comparison to earlier instruments.⁴⁵²

Such an Agreement specifically for the Black Sea, Mediterranean Sea and Contiguous Atlantic was necessary because the western Mediterranean Sea hosts approximately 200.000 dolphins and 3.000-4.000 fin whales. Next to this, there are also several other cetacean species that inhabit this area. A significant number of these species is threatened. The Black Sea also has seen significant declines in its cetacean populations in the past fifty years. It is estimated that between 1950 and 2000 the dolphin population in this area has fallen with 99%.⁴⁵³

The Agreement requires the parties to take measures to achieve and maintain a favourable conservation status for cetaceans. They have to prohibit deliberate taking of cetaceans in this area and they should create a network of specially protected areas. This is similar to the obligations of ASCOBANS.⁴⁵⁴ It will become clear that this is not the only similarity between the two Agreements, but that there are on the other hand also some differences.

B. Material and territorial scope

B.1 Material scope

ACCOBAMS was established under article IV(4) of the Bonn Convention, which does not apply to all cetacean species found in the Mediterranean Sea, the Black Sea and the Contiguous Atlantic area, Nonetheless ACCOBAMS establishes conservation measures for all cetaceans found in the Agreement area.⁴⁵⁵ More specifically, the Agreement applies to all cetaceans whose range lies entirely or partly within the Agreement area or that may accidentally or occasionally be present in this area. Annex 1 to the

⁴⁵¹ Art. IV.4 Bonn Convention; ACCOBAMS, “Introduction”, <https://accobams.org/about/introduction/>.

⁴⁵² Art. IV.4 Bonn Convention; ACCOBAMS, “Introduction”, <https://accobams.org/about/introduction/>.

⁴⁵³ W. C. G. BURNS, “ACCOBAMS: a regional response to the threats facing cetaceans”, 113.

⁴⁵⁴ Art. II.1 ACCOBAMS.

⁴⁵⁵ W. C. G. BURNS, “ACCOBAMS: a regional response to the threats facing cetaceans”, 121.

Agreement contains an indicative, but non exhaustive, list of the species that may fall under this scope.⁴⁵⁶ In principle, parties cannot make reservations regarding the protected species.⁴⁵⁷

B.2 Territorial scope

The territorial scope is referred to in the full name of the Agreement and further specified in the text itself. It is referred to as the Agreement area and encompasses all maritime waters of the Black Sea and the Mediterranean Sea and the internal waters connected hereto, and all maritime waters of the Atlantic area contiguous to the Mediterranean Sea west of the Straits of Gibraltar.⁴⁵⁸ It also includes the Pelagos Sanctuary dedicated to marine mammals in the North-West Mediterranean and the EEZ of Spain and Portugal.⁴⁵⁹

ACCOBAMS consists of twenty-four parties.⁴⁶⁰ Any range state can become party to the Agreement, whether or not areas under its jurisdiction lie within the Agreement area.⁴⁶¹ ‘Range state’ refers to any state that has jurisdiction over any part of the range of a cetaceans population or a state of which its flag vessels engage in activities in the Agreement area.⁴⁶² The map below indicates which states are party to ACCOBAMS and which states are range-states.

⁴⁵⁶ Art. I.2 ACCOBAMS.

⁴⁵⁷ Art. XV ACCOBAMS.

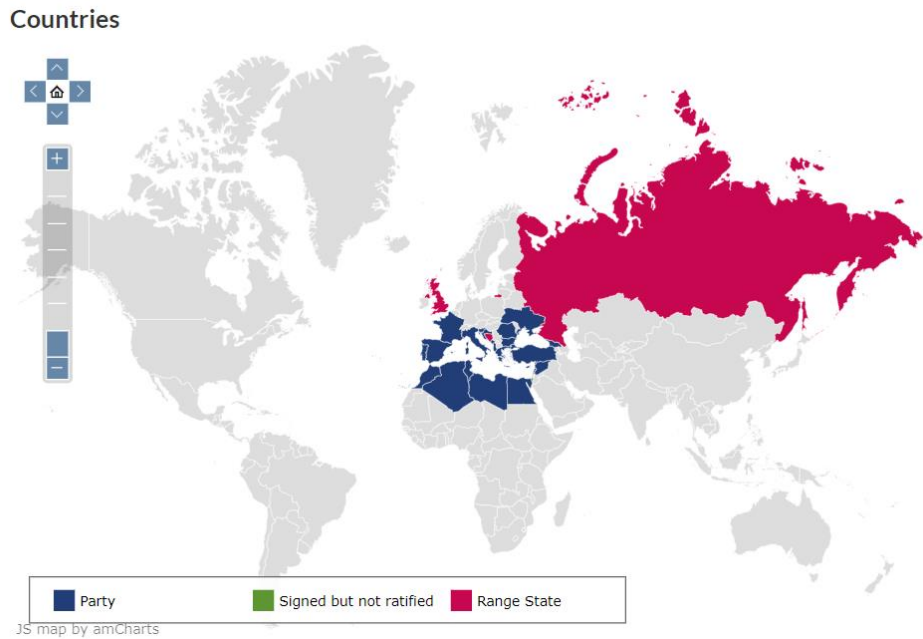
⁴⁵⁸ Art. I.1, a) ACCOBAMS.

⁴⁵⁹ ACCOBAMS, “Introduction”, <https://accobams.org/about/introduction/>.

⁴⁶⁰ ACCOBAMS, “ACCOBAMS”, www.cms.int/en/legalinstrument/accobams; ACCOBAMS, “Introduction”, <https://accobams.org/about/introduction/>; ACCOBAMS, “List of contracting parties and signatories to the agreement”, www.accobams.org/wp-content/uploads/2019/12/ACCOBAMS-Parties-and-signatories.pdf.

⁴⁶¹ Art. XIII.1 ACCOBAMS.

⁴⁶² Art. I.3, g) ACCOBAMS.



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The map below shows that being a range state does not automatically mean that this state falls within the Agreement Area, which is shown on the map. Russia, for example, is a range state, but does not fall within the Agreement Area.



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A positive remark is that the Agreement tries to include non-range states that exercise maritime activities which may jeopardize cetacean conservation.⁴⁶⁵ This is not the case for ASCOBANS. However, the

⁴⁶³ ACCOBAMS, “ACCOBAMS”, www.cms.int/en/legalinstrument/accobams.

⁴⁶⁴ ACCOBAMS, “Introduction”, <https://accobams.org/about/introduction/>.

⁴⁶⁵ ACCOBAMS, “Introduction”, <https://accobams.org/about/introduction/>.

territorial application of the Agreement is negatively impacted, since parties can make reservations regarding a specifically delimited part of their internal waters.⁴⁶⁶

C. Conservation measures

ACCOBAMS distinguishes nine conservation actions, ranging from anthropogenic noise, over bycatch, to whale watching. For each of these actions, the Agreement has adopted relevant resolutions, decisions and other initiatives.⁴⁶⁷ Regarding bycatch of small cetaceans, three projects have been established. Two of those, namely the Medbycatch Project and the Depredation Project, are still ongoing. They make use of inter alia monitoring and on-board observers.⁴⁶⁸ There is also a specific tool to regulate whale watching. Since whale watching is increasingly popular in the area covered by the Agreement, ACCOBAMS has created the 'High Quality Whale-Watching Certificate, which should ensure that these activities happen sustainably.⁴⁶⁹ This certificate can be obtained by any whale watching operator after following a three-day training programme. While a good initiative, two remarks have to be made. Firstly, only three ACCOBAMS parties currently make use of this certificate. Secondly, it is unclear whether a whale watching operator is obligated to obtain this certificate in order to carry out its activities.

Within the structure of ACCOBAMS, there are also workshops -for example on the effect of sonars on cetaceans-, Conferences on Cetacean Conservation in South Mediterranean Countries, Guidelines -for example on anthropogenic noise, whale watching and the establishment of Marine Protected Areas-, Species Conservation Management Plans and Status Reports.⁴⁷⁰

⁴⁶⁶ Art. XV ACCOBAMS.

⁴⁶⁷ ACCOBAMS, "Anthropogenic noise", <https://accobams.org/conservations-action/anthropogenic-noise/>; ACCOBAMS, "Bycatch & depredation", <https://accobams.org/conservations-action/bycatch-depredation/>; ACCOBAMS, "Cetacean watching", <https://accobams.org/conservations-action/cetacean-watching/>; ACCOBAMS, "Resolutions", <https://accobams.org/documents-resolutions/resolutions/>.

⁴⁶⁸ ACCOBAMS, "The Depredation Project", <https://accobams.org/the-depredation-project-ongoing/>; ACCOBAMS, "The MAVA 1 Project (2015-2018)", <https://accobams.org/main-activites/the-mava-1-project-2015-2018/>; ACCOBAMS, "The Medbycatch Project (ongoing)", <https://accobams.org/the-mava-2-project-ongoing/>.

⁴⁶⁹ ACCOBAMS, "High Quality Whale Watching Certificate", <https://accobams.org/main-activites/high-quality-whale-watching-certificate/>.

⁴⁷⁰ ACCOBAMS, "Conferences on cetacean conservation in South Mediterranean countries", https://accobams.org/meetings_page/biennial-conferences/; ACCOBAMS, "Conservation Status Reports", <https://accobams.org/news-publications/conservation-status-reports/>; ACCOBAMS, "Guidelines", <https://accobams.org/documents-resolutions/guidelines/>; ACCOBAMS, "Species Conservation Management Plans", https://accobams.org/species_/conservation-plans/; ACCOBAMS, "Workshops", https://accobams.org/meetings_page/workshops/.

To conclude, the Agreement stipulates that states can take more stringent measures and that if a state's obligations or rights under any other legal instrument would negatively impact the conservation of cetaceans, the Agreement should prevail.⁴⁷¹ It is to be applauded that the Agreement explicitly mentions this, instead of simply stating that its text does not affect the right and obligations that parties derive from other instruments.

D. Binding nature and compliance pull

A first general remark is that the Agreement text frequently uses the term 'shall' when talking about member states' obligations, which implies a more binding nature.⁴⁷² Furthermore, the Agreement requires the parties to take measures to achieve and maintain a favourable conservation status for cetaceans. They have to prohibit deliberate taking of cetaceans in the Agreement Area and they should create a network of specially protected areas.⁴⁷³ This is similar to the goal of ASCOBANS. More specifically, to reach the objectives of the Agreement, member states should take four types of conservation, research and management measures that are prescribed in Annex 2. The first one is the adoption of national legislation. This measure is obligatory through the use of the word 'shall' and requires states to impose cetacean-friendly fishing methods. The second measure is the assessment and management of interactions between humans and cetaceans, which deals inter alia with touristic activities. Another measure is habitat protection. This provision states that parties 'shall endeavour' to establish specially protected areas and thus uses less committal language. The last measure that states have to take concerns research and monitoring, capacity building, information obligations and responses to emergency situations.⁴⁷⁴ These are all far-reaching obligations.

The Agreement also established a tool for review and monitoring. Each party has to prepare an implementation report before each ordinary session of the Meeting of the Parties, i.e. at least every three years.⁴⁷⁵

A point of criticism can be made here, because the Agreement allows exceptions to the prohibition of deliberate taking of cetaceans in emergency situations or for the purpose of non-lethal in situ research with the aim of maintaining a cetacean species at a favourable conservation status. These exceptions may be

⁴⁷¹ Art. XI.1 ACCOBAMS.

⁴⁷² Art. II ACCOBAMS.

⁴⁷³ Art. II.1 ACCOBAMS.

⁴⁷⁴ Art. II.3 and Annex 2 ACCOBAMS; W. C. G. BURNS, "ACCOBAMS: a regional response to the threats facing cetaceans", 122.

⁴⁷⁵ Art. III.2 and art. VIII, b) ACCOBAMS.

granted by any party and are not subject to binding review by any organ of ACCOBAMS. The only requirements are that 1) for both exceptions, the Bureau and Scientific Committee have to be informed, and 2) for the exception with regards to non-lethal in situ research, advice of the Scientific Committee has to be obtained. The Agreement text does not state that this advice is binding.⁴⁷⁶

Keeping in mind the problems with exceptions that can be granted within the framework of the ICRW, and specifically the ‘Whaling in the Antarctic’ case, it is clear that one should be wary of such exceptions that can simply be granted at the will of a state.⁴⁷⁷ It is true that the exception of non-lethal in situ research can only be granted for the goal of maintaining a favourable conservation status, but what is to stop a state party from lying about the goal and doing something else in practice, as Japan did with JARPA II? On the other hand, it is positive that only non-lethal research is possible, but states have to be careful that this research is carried out with minimal disturbance of the individuals. Of course, an exception like this should not be abolished, since it has the best interest of cetaceans in mind, namely doing more research to better protect them. It is however necessary that such exceptions are treated with caution and are reviewed by the appropriate Agreement body.

Lastly, the Agreement allows a party to denounce the Agreement at any time. This goes into effect twelve months after the notification.⁴⁷⁸

E. Relevant organs

The Meeting of the Parties is the decision-making body of ACCOBAMS.⁴⁷⁹ At its meetings, the Meeting of the Parties shall review the conservation status of the protected cetaceans and of their habitats, review implementation reports of the parties and make recommendations to the parties.⁴⁸⁰ Non-state parties, agencies and bodies concerned with the conservation of cetaceans are entitled to be present at these meetings. Other agencies and bodies may also be present, unless one third of the parties object. They do not have the right to vote.⁴⁸¹

The Meeting of the Parties adopts decisions by consensus. Exceptionally, if consensus cannot be reached, a decision may be adopted with a two thirds majority. However, if a vote is taken, instead of a consensus reached, parties may choose not to apply the adopted decision.⁴⁸² The disadvantage of consensus is that

⁴⁷⁶ Art. II.2 and Annex II, §6 ACCOBAMS.

⁴⁷⁷ See also the chapter on the ICRW and the IWC.

⁴⁷⁸ Art. XVI ACCOBAMS.

⁴⁷⁹ Art. III.1 ACCOBAMS.

⁴⁸⁰ Art. III.8, a)-c) ACCOBAMS.

⁴⁸¹ Art. III.4-5 ACCOBAMS.

⁴⁸² Art. III.6 ACCOBAMS.

decisions may not be adopted as easily and consequently, that a body has less teeth. This is why it is favourable that voting is also possible within the Meeting of the Parties.

The parties are supported when implementing the Agreement by the Agreement Secretariat.⁴⁸³ It facilitates the preparation of guidelines, covering inter alia the reduction of human interactions that may adversely affect cetaceans, habitat protection and natural resource management methods, emergency measures and rescue methods.⁴⁸⁴

Co-ordination units established under the Agreement, facilitate implementation of the activities described in Annex 2, collect and disseminate information.⁴⁸⁵ They also facilitate publications, including reports on the status of populations, gaps in scientific knowledge, important areas for cetaceans and agencies and bodies concerned with cetaceans.⁴⁸⁶

Finally, the Scientific Committee provides advice to the Meeting of the Parties and to individual parties, conducts research regarding the conservation status of the protected cetaceans and may establish working groups that deal with specific matters.⁴⁸⁷ The Agreement text literally states that the Scientific Committee is comprised of persons who are experts in cetacean conservation.⁴⁸⁸ Not every instrument that has a Scientific Committee foresees this, while it is necessary that the people that have a seat in the Scientific Committee are experts, since wildlife conservation and management should not solely be left to political will.⁴⁸⁹

F. Conclusion

The intentions of the Agreement are very honourable. It imposes a lot of conservation and management measures on member states and sets up several other projects to improve the conservation status of small cetaceans. Another positive remark is that the territorial scope is opened up for range states outside the Agreement area to become a party as well.

⁴⁸³ Art. IV.2, c) ACCOBAMS.

⁴⁸⁴ Art. IV.3 ACCOBAMS.

⁴⁸⁵ Art. V.1 ACCOBAMS.

⁴⁸⁶ Art. V.2 ACCOBAMS.

⁴⁸⁷ Art. VII.3-4 ACCOBAMS.

⁴⁸⁸ Art. VII.1 ACCOBAMS.

⁴⁸⁹ See for example the Convention texts of the International Convention for the Regulation of Whaling and the World Heritage Convention.

However, as with all legal instruments, weaknesses can still be found. These were already mentioned throughout the text. Notably the possibility for reservations and exceptions allowing lethal research severely weakens the practical protection value of ACCOBAMS. This was also made clear when a Working Group was appointed to prepare a strategy proposal, based on an analysis of the effectiveness of ACCOBAMS between 2002 and 2010. The Working Group found that ACCOBAMS has not managed to bring cetacean populations to a good status, but it had succeeded in improving regional cooperation.⁴⁹⁰

⁴⁹⁰ ACCOBAMS, “ACCOBAMS Strategy”, <https://accobams.org/documents-resolutions/accobams-strategy/>.

3. Other legal instruments

Of course, there rests still a number of international legal instruments that do not fit into the scope of this thesis anymore. They will be discussed here very briefly, but will not be extensively examined.

The Convention on the Conservation of Antarctic Marine Living Resources (hereafter: CCAMLR) was concluded in 1980 and entered into force in 1982.⁴⁹¹ It is aimed specifically at conserving and managing Antarctic marine living resources and it uses an ecosystem-based and precautionary perspective.⁴⁹² CCAMLR for example sets up Marine Protected Areas providing protection for all or some natural resources therein.⁴⁹³ The Convention text refers to marine living resources in general, but this also comprises cetaceans living in the agreement area.⁴⁹⁴ This can be deduced from the fact that among its conservation measures there are trials testing the impact of specific fishing material on cetaceans⁴⁹⁵ and documents researching the impact of certain fisheries and climate change on cetaceans.⁴⁹⁶

The Convention on Biological Diversity was signed in 1992 and entered into force a year later.⁴⁹⁷ It is aimed at conserving biological diversity, sustainably using its components and the fair and equitable sharing of the benefits of genetic resources.⁴⁹⁸ Under the Convention on Biological Diversity, over 300

⁴⁹¹ UNTS, “Convention on the conservation of Antarctic marine living resources”, <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800dc364> (consultation 10 July 2022); CCAMLR, “About CCAMLR”, www.ccamlr.org/en/organisation.

⁴⁹² D. G. M. MILLER, E. N. SABOURENKOV and D. C. RAMM, “Managing Antarctic Marine Living Resources: the CCAMLR approach”, *International Journal of Marine and Coastal Law* 2004, 317-364.

⁴⁹³ CCAMLR, “Achievements and challenges”, www.ccamlr.org/en/organisation/key-challenges-and-achievements.

⁴⁹⁴ Convention on the Conservation of Antarctic Marine Living Resources of 20 May 1980, *United Nations Treaty Series*, vol. 1329, 47 (hereafter: CCAMLR).

⁴⁹⁵ R. E. MITCHELL, J. CLARK, P. REYES, L. JONES, J. PEARCE, C. E. EDWARDS and D. AGNEW, “Preliminary results of trials testing modified longline gear ‘trotlines’ in presence of cetaceans in subarea 48.3”, <https://meetings.ccamlr.org/en/wg-fsa-08/44>.

⁴⁹⁶ K.-H. KOCK, M. PURVES and G. DUHAMEL, “Interactions between cetaceans and fisheries in Southern Ocean”, <https://meetings.ccamlr.org/en/wg-fsa-05/11>; R. HUCKE-GAETE, C. A. MORENO and J. A. ARATA, “Operational interactions between cetaceans and the Patagonian toothfish (*Dissostichus eleginoides*) industrial fishery off Southern Chile”, <https://meetings.ccamlr.org/en/wg-fsa-03/95>; Resolution SC-CAMLR-XV/BG/13 ‘Resolution on environmental change and cetaceans’ of the IWC (s.d.), <https://meetings.ccamlr.org/en/sc-camlr-xv/bg/13>.

⁴⁹⁷ Convention on Biological Diversity of 5 June 1992, *United Nations Treaty Series*, vol. 1760, 79 (hereafter: Convention on Biological Diversity).

⁴⁹⁸ Art. 1 Convention on Biological Diversity.

Ecologically or Biologically Significant Marine Areas have been established in order to protect, preserve and sustainably use marine biodiversity.⁴⁹⁹ Several of these protected areas host cetacean species.⁵⁰⁰

The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) was concluded in 1992.⁵⁰¹ It has five annexes that deal with prevention and elimination of pollution of the marine environment, assessments of the quality of the marine environment and the protection and conservation of the ecosystems and biological diversity of the maritime environment.⁵⁰² The OSPAR Convention divides the North-East Atlantic area in five regions. In each of these regions cetaceans are found.⁵⁰³

The NAMMCO Agreement established the North Atlantic Marine Mammal Commission and entered into force in 1992.⁵⁰⁴ This Agreement is however not the biggest player in the fight against whaling, since it is mainly aimed at conserving whales in order to keep consuming them. This is clear in both the preamble and on NAMMCO's website. The preamble states that marine mammals should be conserved in light of their optimum utilization, and the Commission's website declares marine mammals a sustainable food source.⁵⁰⁵

⁴⁹⁹ CONVENTION ON BIOLOGICAL DIVERSITY, "Ecologically or Biologically Significant Marine Areas (EBSAs)", www.cbd.int/marine/EBSAs.shtml.

⁵⁰⁰ CHM, "Ecologically or Biologically Significant Areas (EBSAs) East Levantine Canyons (ELCA)", <https://chm.cbd.int/database/record?documentID=204120>; CHM, "Ecologically or Biologically Significant Areas (EBSAs) North Aegean", <https://chm.cbd.int/database/record?documentID=204115>; CHM, "Ecologically or Biologically Significant Areas (EBSAs) Sicilian Channel", <https://chm.cbd.int/database/record?documentID=204108>; CHM, "Ecologically or Biologically Significant Areas (EBSAs) Southern Gotland Harbour Porpoise Area", <https://chm.cbd.int/database/record?documentID=241821>; CHM, "The Clearing-House Mechanism of the Convention on Biological Diversity (CHM)", <https://chm.cbd.int/database/record?documentID=204128>; X, "Ecologically or Biologically Significant Marine Areas", www.cbd.int/ebsa/ebsas.

⁵⁰¹ Convention for the protection of the marine environment of the North-East Atlantic of 22 September 1992, *United Nations Treaty Series*, vol. 2354, 67 (hereafter: OSPAR Convention).

⁵⁰² Annex I-V OSPAR Convention.

⁵⁰³ OSPAR COMMISSION, "Region I: Arctic Waters", www.ospar.org/convention/the-north-east-atlantic/i; OSPAR COMMISSION, "Region II: Greater North sea", www.ospar.org/convention/the-north-east-atlantic/ii; OSPAR COMMISSION, "Region III: Celtic Seas", www.ospar.org/convention/the-north-east-atlantic/iii; OSPAR COMMISSION, "Region IV: Bay of Biscay and Iberian Coast", www.ospar.org/convention/the-north-east-atlantic/iv; OSPAR COMMISSION, "Region V: Wider Atlantic", www.ospar.org/convention/the-north-east-atlantic/v.

⁵⁰⁴ Art. 1 Agreement on cooperation in research, conservation and management of marine mammals in the North Atlantic of 9 April 1992, <http://nammco.wpengine.com/wp-content/uploads/2016/10/nammco-agreement-with-signatures-and-logo.pdf> (hereafter: NAMMCO Agreement); NAMMCO, "NAMMCO Agreement", <https://nammco.no/nammco-agreement/>.

⁵⁰⁵ Preamble NAMMCO Agreement.

It is clear that this Agreement, while also playing its part in the management and conservation of cetaceans, will not be majorly important for their protection and wellbeing.⁵⁰⁶

⁵⁰⁶ Preamble NAMMCO Agreement.

V. Lacunas in current legal protection and proposals for improvement

This chapter contains an overview of what is lacking in each of the legal instruments discussed in this thesis. It tries to bring all the criticisms, gaps and problems with current legislation together. When pointing out what is lacking, this chapter will immediately propose ways to improve the existing framework of cetacean legal protection. In the first place, some general remarks and proposals will be made to improve the existing legal framework. Thereafter, examples of good practices that are already in place will be given.

A first way to improve the effectiveness of legal instruments is to make it easier for international organizations and non-governmental organizations states dealing with the protection and welfare of cetaceans, and for non-member states to apply for observer status and to be present at meetings of treaty bodies. Some treaties already foresee this, like for example the IWC, CITES and the Bern Convention, but this process can still be made easier.⁵⁰⁷ This can be done by removing the prerequisite of needing a high majority of member state votes in order to obtain observer status or to be allowed at meetings. A good example here is the Bonn Convention, which states that third parties are in principle allowed to be present, unless a certain majority of members specifically opposes.⁵⁰⁸ Presence of non-member states and organizations involved in cetacean protection at meetings of treaty bodies improves legal protection, because it may steer meetings of the treaty bodies in a positive direction. They can provide another point of view and push members in the direction of stricter conservation and management measures. It also subjects the meetings to public scrutiny, since member states know that NGOs will draw international attention to non-compliance.⁵⁰⁹ Observer status could also improve protection, since it gives international organizations and non-member states the chance to join working groups and it gives them access to documents which may in turn allow them to improve their legislation.⁵¹⁰

⁵⁰⁷ Art. 11, §7 CITES; CITES, “Conference of the Parties”, <https://cites.org/eng/disc/cop.php> (consultation 1 January 2022); COE, “Groups of Experts set under the Bern Convention”, www.coe.int/en/web/bern-convention/thematic-group-of-experts; INTERNATIONAL WHALING COMMISSION, “How to join the IWC”, <https://iwc.int/commission/joining-the-iwc>.

⁵⁰⁸ Art. VII Bonn Convention.

⁵⁰⁹ J. SIMMONDS, “UNESCO World Heritage Convention”, (251) 255.

⁵¹⁰ INTERNATIONAL WHALING COMMISSION, “How to join the IWC”, <https://iwc.int/commission/joining-the-iwc>.

Secondly, treaty bodies should be equipped with stronger enforcement tools. A recurring theme in all legal instruments discussed is that they lack teeth. The IWC for example only has resolutions and recommendations at its disposal, and both are non-binding.⁵¹¹ The same goes for resolutions adopted by the Conference of the Parties within the CITES framework.⁵¹² A non-binding statement by a treaty body severely lacks the power to change minds in whaling countries. More possibilities to enforce compliance and to sanction violations are necessary. Another remark to be made is that, to make enforcement tools actually effective, a conservation standard by which the effectiveness of conservation measures is measured, is needed in order to hold parties objectively accountable.⁵¹³

Proposals regarding monitoring and review can be made as well. Monitoring tools, such as reports, should be publicly accessible for national authorities, observer states and civil society. This is already the case for the reports submitted in the framework of the Bern Convention.⁵¹⁴ Secondly, reporting by member states on national conservation and protection measures taken should be made obligatory. Right now this is not the case for every legal instrument.⁵¹⁵ The IWC for example ‘invites’ its members to submit such reports, but there is no obligation to do so.⁵¹⁶ Thirdly, the World Heritage Convention, like many other legal instruments, works with a self-reporting mechanism. This means that the state itself chooses who makes these reports, and experts do not necessarily have to be involved.⁵¹⁷ Involving experts on cetacean protection and management could make these reports more correct and make evaluation and measures adopted on the basis of these reports more effective.⁵¹⁸ Lastly, consequences and sanctioning should be attached to a report that is negatively evaluated or to a missing report. A good practice can be found within

⁵¹¹ INTERNATIONAL WHALING COMMISSION, “Future direction of IWC & special permit whaling in IWC agenda”, <https://iwc.int/resources/media-resources/news/future-direction-of-iwc-and-special-permit-whaling>; INTERNATIONAL WHALING COMMISSION, “Resolutions”, <https://iwc.int/commission/convention/resolutions>.

⁵¹² EUROPEAN COMMISSION, “Background to CITES”, https://ec.europa.eu/environment/cites/background_en.htm.

⁵¹³ J. SIMMONDS, “UNESCO World Heritage Convention”, (251) 272.

⁵¹⁴ COE, “Monitoring”, www.coe.int/en/web/bern-convention/monitoring1.

⁵¹⁵ See for example the chapter on the Bern Convention.

⁵¹⁶ INTERNATIONAL WHALING COMMISSION, “How to participate at the IWC”, <https://iwc.int/commission/Participation>.

⁵¹⁷ Art. 29 World Heritage Convention; §199 Operational Guidelines for the implementation of the World Heritage Convention; UNESCO, “Periodic reporting”, <https://whc.unesco.org/en/periodicreporting/> (consultation 22 December 2021).

⁵¹⁸ See for example the Convention texts of the International Convention for the Regulation of Whaling and the World Heritage Convention.

the CITER framework, where trade suspensions are attached to the failure to send a report.⁵¹⁹ Another tool for monitoring could be to allow members of the public to report infractions by member states.⁵²⁰

Furthermore, it is advised that scientific treaty bodies are made up of scientific experts specializing in cetacean conservation, management and protection. In general, the presence of a Scientific Body, like the Scientific Council within the framework of the Bonn Convention, is a good idea. This may improve the effectiveness of conservation and protection measures taken, since they will then be based on scientific grounds.⁵²¹ After all, for most cetaceans in Europe there is a lack of knowledge regarding their range, size of populations and suitable habitat area.⁵²² Knowledge gaps like this should be amended through scientific research in order to make legal protection more effective.

A proposal for improvement specific to legal instruments that make use of annexes or appendices is that a species should only be delisted or put in an annex or appendix with a lower protection status if this will not cause harm to the species. A way to circumvent this problem is given by the Bonn Convention stipulating that a species can only move to an appendix with a lower protection level if this will not cause this species to become endangered again.⁵²³ In this regard it is also important to note that the fact that an annex or appendix protects a large number of cetacean species does not automatically imply a positive finding. This can also point to the fact that there is simply a large number of cetacean species that is threatened with extinction or otherwise endangered, which is the opposite of what is desirable.

Whether the possibility to make reservations, derogations and objections is desirable or not is a more difficult question. On the one hand, the possibility for member states to exclude certain species or certain areas from the scope of a legal instrument allows for whaling states to simply carry on with their activities. On the other hand, without the possibility for reservations and objections, whaling states might not even

⁵¹⁹ Art. 8(6-8) CITES, CITES, “Annual report”, https://cites.org/eng/imp/reporting_requirements/annual_report (consultation 2 January 2022); CITES, “Countries currently subject to a recommendation to suspend trade” <https://cites.org/eng/resources/ref/suspend.php> (consultation 2 January 2022); Conf. 11.17 ‘National reports’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-11-17-R18.pdf>.

⁵²⁰ J. SIMMONDS, “UNESCO World Heritage Convention”, (251) 276.

⁵²¹ See for example the Convention texts of the International Convention for the Regulation of Whaling and the World Heritage Convention.

⁵²² Report No 10/2020 ‘State of nature in the EU. Results from reporting under the nature directives 2013-2018’ of the European Environment Agency (2020), www.eea.europa.eu/publications/state-of-nature-in-the-eu-2020/.

⁵²³ Art. III.3, b) Bonn Convention.

become party to treaties aimed at conserving and protecting whales. If the possibility for reservations, derogations or objections is foreseen, the parties could choose to include in the legal instrument a list of grounds where they are allowed.⁵²⁴

Another weakness in several legal instruments are exceptions to the prohibition of the capture of whales. Both the ICRW and the Bonn Convention prohibit the taking of all or certain species of whales, and both foresee exceptions to this prohibition. The ICRW imposes a moratorium on commercial whaling of all whale species, which would in an ideal world be extended to aboriginal subsistence whaling. This is however not as straightforward, since indigenous communities depend on whale catches for their livelihood. An area of tension is noticeable here between human rights and animal rights.⁵²⁵ The scientific whaling exception is understandable and might even benefit whale species in the long run, but more and IWC monitoring of the scientific whaling permits granted by states is welcome, in order to avoid abuses. The IWC should also be able to impose sanctions in case of violations.⁵²⁶ The Bonn Convention too allows exceptions on four different grounds. The same remark as in the case of reservations and objections can be made here: in theory the best thing to do would be to not allow for any exceptions at all, but in practice, this would mean that certain states would not even join such legal instruments. If exceptions are possible after all, they should be formulated as stringently as possible. If not, states might try to circumvent the rules by interpreting the scope of the exceptions more broadly. ACCOBAMS also has exceptions to the prohibition of deliberate taking of cetaceans. These exceptions can be granted by a party and are not subject to binding review by an ACCOBAMS body, which is another weakness that should be amended.⁵²⁷

Cetacean protection can always be expanded. Some legal instruments make use of annexes and appendices, whereby only the species included in these annexes or appendices receive protection. A better way forward is to protect all whales, regardless of their conservation status. This is for example the case for the ICRW moratorium, which applies to all whales, and ASCOBANS, whereby all cetaceans that fall within its scope

⁵²⁴ Art. 16, §1 Habitats Directive.

⁵²⁵ INTERNATIONAL WHALING COMMISSION, “Aboriginal subsistence whaling”, <https://iwc.int/management-and-conservation/whaling/aboriginal>; INTERNATIONAL WHALING COMMISSION, “Whaling”, <https://iwc.int/management-and-conservation/whaling>; L. VIKARI, “Rural local communities as holders of human rights: from aboriginal subsistence whaling to small-scale local community whaling?”, *Nordic Journal of Human Rights* 2022, 1-19.

⁵²⁶ INTERNATIONAL WHALING COMMISSION, “Special permit whaling”, <https://iwc.int/management-and-conservation/whaling/permits>; INTERNATIONAL WHALING COMMISSION, “Whaling”, <https://iwc.int/management-and-conservation/whaling>.

⁵²⁷ Art. II.2 and Annex II, §6 ACCOBAMS.

get automatic protection.⁵²⁸ A second improvement would be to not only focus on cetacean protection, but also on the ecosystems that support these animals. Ideally, conservation policies should be part of broader ecosystem policies.⁵²⁹ Next to protecting the species in general, attention should also be given to cetacean welfare issues. The IWC does this through the Working Group on Whale Killing Methods and Welfare Issues.⁵³⁰

The migratory nature of cetaceans should also be taken into account when developing legislation.⁵³¹ UNCLOS, for example, requires states to cooperate in this regard.⁵³² The same goes for the Bern Convention, which also stresses the need for cooperation between states to improve protection for migratory species.⁵³³

Several instruments use non-binding language in their texts, such as ‘may’.⁵³⁴ Such terms leave a lot of leeway to states to interpret certain obligations to their advantage or provide a ground to justify not taking any protective measures at all.

In general, legal instruments should move from a conservationist to a more protectionist stance. Several legislative instruments still focus on the maintenance of populations rather than humane treatment.⁵³⁵ This is the case for UNCLOS, whereby one of its provisions is aimed at ensuring the optimum utilization of cetacean species, but does not prohibit their killing and capture in se. It is only aimed at maintaining the population to keep harvesting cetaceans.⁵³⁶ However improvements have become noticeable. The IWC, for example, started as an organisation for management, then conservation, and finally protection of whale

⁵²⁸ ASCOBANS; IWC, “Commercial Whaling”, <https://iwc.int/commercial> (consultation 12 March 2021).

⁵²⁹ H. NUKAMP and A. NOLLKAEMPER, “The protection of small cetaceans in the face of uncertainty”, 300.

⁵³⁰ INTERNATIONAL WHALING COMMISSION, “Welfare issues”, <https://iwc.int/management-and-conservation/welfare>.

⁵³¹ EUROPEAN COMMISSION, “International Whaling”, https://ec.europa.eu/environment/biodiversity/animal_welfare/whaling.htm (consultation 12 March 2021).

⁵³² Art. 64, §1 and art. 197 UNCLOS.

⁵³³ Art. 1 and 10, §1 Bern Convention; A. TROUWBORST, “Conserving European biodiversity in a changing climate: the Bern Convention, the European Union Birds and Habitats Directives and the adaptation of nature to climate change”, *Review of European comparative & international environmental law* 2011, (62) 65 (hereafter: A. TROUWBORST, “Conserving European biodiversity in a changing climate”).

⁵³⁴ Art. III.6 Bonn Convention.

⁵³⁵ S. J. DOLMAN and M. J. MOORE, “Welfare Implications of Cetacean Bycatch and Entanglements”.

⁵³⁶ Art. 197 UNCLOS.

stocks.⁵³⁷ At the moment of adoption, ASCOBANS did not focus on management either, but this has also improved over time.⁵³⁸

To finalize this chapter, some good practices that are already in place should be mentioned. Examples of such good practices are abundant in the current legal and political climate, such as the adoption of conservation management plans and the establishment of whale sanctuaries.⁵³⁹ Furthermore, several legal instruments deal with a broad range of topics, such as entanglement, bycatch, ship strikes, environmental impacts and many more.⁵⁴⁰ Another positive evolution is that several legal instruments refer to each other

⁵³⁷ J. ZEMANTAUSKI, “Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission”, *University of Miami Inter-American Law Review* 2012, (325) 338 (hereafter: J. ZEMANTAUSKI, “Has the Law of the Sea Convention strengthened the conservation ability of the International Whaling Commission”).

⁵³⁸ H. NUKAMP and A. NOLLKAEMPER, “The protection of small cetaceans in the face of uncertainty”, 290 and 300.

⁵³⁹ ACCOBAMS, “Species Conservation Management Plans”, https://accobams.org/species_conservation_plans/; INTERNATIONAL WHALING COMMISSION, “Conservation Management Plans”, <https://iwc.int/management-and-conservation/conservation-management-plans>; INTERNATIONAL WHALING COMMISSION, “Whale sanctuaries”, <https://iwc.int/management-and-conservation/sanctuaries>.

⁵⁴⁰ ACCOBAMS, “Anthropogenic noise”, <https://accobams.org/conservations-action/anthropogenic-noise/>; ACCOBAMS, “Bycatch & depredation”, <https://accobams.org/conservations-action/bycatch-depredation/>; ACCOBAMS, “Cetacean watching”, <https://accobams.org/conservations-action/cetacean-watching/>; ACCOBAMS, “Resolutions”, <https://accobams.org/documents-resolutions/resolutions/>; Annex to Resolution 12.17 ‘Action plan for the protection and conservation of South Atlantic whales’ of the Conference of the Parties (s.d.), www.cms.int/sites/default/files/document/cms_cop12_res.12.17_annex_whales_south_atlantic_e.pdf; INTERNATIONAL WHALING COMMISSION, “Bycatch”, <https://iwc.int/management-and-conservation/bycatch>; INTERNATIONAL WHALING COMMISSION, “Commission sub-groups”, <https://iwc.int/commission-sub-groups>; INTERNATIONAL WHALING COMMISSION, “Environmental concerns”, <https://iwc.int/management-and-conservation/environment>; INTERNATIONAL WHALING COMMISSION, “History and purpose”, <https://iwc.int/commission/history-and-purpose>; INTERNATIONAL WHALING COMMISSION, “How to participate at the IWC”, <https://iwc.int/commission/Participation>; INTERNATIONAL WHALING COMMISSION, “Principles and guidelines for large whale entanglement response efforts”, <https://iwc.int/management-and-conservation/entanglement/best-practice-guidelines-for-entanglement-respond>; INTERNATIONAL WHALING COMMISSION, “Ship strikes: collisions between whales and vessels”, <https://iwc.int/management-and-conservation/ship-strikes>; INTERNATIONAL WHALING COMMISSION, “State of the cetacean environment: IWC report series”, <https://iwc.int/management-and-conservation/environment/socer-report>; INTERNATIONAL WHALING COMMISSION, “Strandings Initiative”, <https://iwc.int/management-and-conservation/strandings/strandings-initiative>; INTERNATIONAL WHALING COMMISSION, “The International Whaling Commission – IWC”, <https://iwc.int/en/>; INTERNATIONAL WHALING COMMISSION, “Whale entanglement – building a global response”, <https://iwc.int/management-and-conservation/entanglement>; INTERNATIONAL WHALING COMMISSION, “Whale watching”, <https://iwc.int/management-and-conservation/whalewatching>; INTERNATIONAL WHALING COMMISSION, “Whale Watching

and establish the relationship between them. Two good examples of this are article 65 UNCLOS which refers to the ICRW, and CITES, which refers to the ICRW and the World Heritage Convention through its resolutions.⁵⁴¹ Better cooperation between the various legal instruments and their discussion and decision-making fora is a good way to fill in the gaps explained above.⁵⁴² Legal instruments should also explicitly allow states to adopt stricter measures. This is already the case for inter alia UNCLOS and the Bern Convention.⁵⁴³ Lastly, the Bern Convention allows NGOs or private citizens to make complains regarding possible breaches of the Convention.⁵⁴⁴ This is an interesting mechanism that would benefit other legal instruments as well.

Handbook”, <https://wwhandbook.iwc.int/en/> (consultation 9 May 2021); Resolution 12.14 ‘Adverse impacts of anthropogenic noise on cetaceans and other migratory species’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.12.14_marine-noise_e.pdf; Resolution 12.21 ‘Climate change and migratory species’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.12.21_climate-change_e.pdf; Resolution 12.22 ‘Bycatch’ of the Conference of the Parties (October 2017), www.cms.int/sites/default/files/document/cms_cop12_res.12.22_bycatch_e.pdf.

⁵⁴¹ Art. 65 UNCLOS; H. S. SCHIFFMAN, “U.S. membership in UNCLOS: what effects for the marine environment?”, *ILSA Journal of International and Comparative Law* 2004-2005, (477) 481-482.; Conf. 11.4 ‘Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-11-04-R12.pdf>; Conf. 18.5 ‘Cooperation and synergy with the World Heritage Convention’ of the Conference of the Parties (s.d.), <https://cites.org/sites/default/files/document/E-Res-18-05.pdf>; R. DIEKJOBST, “The international whaling regime – a law with no teeth?”, *Völkerrechtsblog* 2019, al. 6.

⁵⁴² H. NUKAMP and A. NOLLKAEMPER, “The protection of small cetaceans in the face of uncertainty”, 301-302.

⁵⁴³ Art. 12 Bern Convention; art. 65 and 120 UNCLOS.

⁵⁴⁴ COE, “Case-files”, www.coe.int/en/web/bern-convention/case-files.

VI. Conclusion

A large number of states unequivocally sees the importance of legal protection of cetaceans and concludes treaties, conventions and agreements to attain this. There exists an abundance of legal instruments that in one way or another deals with either management, conservation or protection of cetaceans. A lot of good practices and positive evolutions are clearly visible. However, as the previous chapter made clear, even legal instruments that seem to work well on paper may not always be efficiently transformed in concrete actions.⁵⁴⁵ This is for a large part caused by the dichotomy that still exists between whaling and non-whaling states. Because of the diametrically opposing views of member states within one and the same organization, organizations cannot take decisions as easily and cannot always impose the strictest measures possible.⁵⁴⁶

International law remains dependent on the voluntary cooperation of states. Whaling states can simply choose not to accede to organizations regulating whales, or to make derogations and reservations to certain provisions and obligations. Jus cogens or international customary law is thus necessary in order to also obligate whaling nations to protect whales. Article 65 UNCLOS may be starting to go in that direction.⁵⁴⁷ As long as a clear international customary norm does not exist, legal protection of whales, which is in nature an international matter because of their migratory nature, will remain dependent on the goodwill of sovereign states. This means that in the first place, a cultural and societal shift in how states think about cetaceans is needed more than anything if we want to efficiently protect them. Only then will legal measures really be effective. Of course, an abundance of legal instruments protecting cetaceans may also contribute to this cultural and societal shift.

⁵⁴⁵ W. C. G. BURNS, “ACCOBAMS: a regional response to the threats facing cetaceans”, 133.

⁵⁴⁶ H. S. SCHIFFMAN, “The International Whaling Commission: challenges from within and without”, 370-371; J. MATANICH, “A treaty comes of age for the ancient ones”, 37-38.

⁵⁴⁷ J. MATANICH, “A treaty comes of age for the ancient ones”, 68.

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