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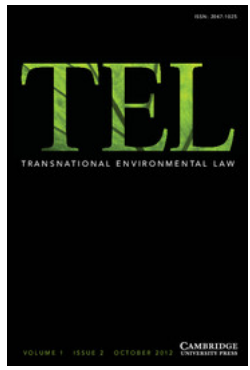

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ARTICLE

To Free or Not to Free? State Obligations and the Rescue and Release of Marine Mammals: A Case Study of 'Morgan the Orca'

Arie Trouwborst,* Richard Caddell** and Ed Couzens***

Abstract
Wild animals periodically encounter difficulties or suffer injuries that require human intervention and assistance. The natural assumption is that a surviving animal will, where viable, be released back to the wild. But is there a formal legal obligation for a rescuer to do so? This question arose recently in the context of 'Morgan', a female killer whale rescued in poor health in Dutch waters. Morgan was successfully restored to full health, but the Dutch authorities subsequently declined to repatriate her to the wild and, controversially, transferred her to a zoological facility in Spain. This article examines the largely unexplored legal obligations incumbent upon the Netherlands in respect of rehabilitated cetaceans, in the process exposing certain problems of clarity and consistency within the present regulatory framework. By necessary implication, this article identifies emerging issues of interpretation posed by the Morgan saga, illustrating the tensions between animal welfare and nature conservation – especially in the transboundary context – and concluding firmly that the Dutch authorities erred legally in making their final decision.

Keywords: Marine Mammal Capture-and-Release, Orca Morgan, ASCOBANS, CITES, Bern Convention, Habitats Directive

1. INTRODUCTION

The fate of marine mammals that are lost, stranded, sick or injured often receives significant public and media attention. Common examples include orphaned seal

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pups, beached whales, and dolphins or porpoises entangled in fishing gear. The enduring anthropomorphic appeal of such species frequently generates strong interest in the plight of individual animals: millions followed the attempted rescue of the northern bottlenose whale (*Hyperoodon ampullatus*) that inadvertently swam into the Thames in 2006.[1] Opinions on the most appropriate course of action in such cases nonetheless may vary strongly.

Where a stricken animal is encountered, the competent authorities or other actors involved may either refrain from interference, attempt to solve the apparent problem *in situ* (by guiding a beached dolphin to deeper water, for example), euthanize the unfortunate individual, or capture it (usually with a view towards its rehabilitation). If an animal is captured, several outcomes are again conceivable, including euthanasia, permanent captivity or release. The ultimate solution is, naturally, heavily case-dependent, but is also strongly influenced by the viewpoints guiding the agencies involved. Substantial differences may exist between a course of action that focuses primarily on the well-being of individual animals and one with the predominant aim of healthy wild populations. The wide range of viewpoints is amply illustrated with reference to 'Keiko', the killer whale (*Orcinus orca*) that 'starred' in the film *Free Willy* – albeit a specimen that had been intentionally captured for the entertainment industry, not 'rescued'. Indicative of anthropomorphically-driven responses is the well-attended memorial service held for the animal after it had succumbed, in freedom, to pneumonia in a Norwegian bay.[2] Whereas some viewed the returning to the wild as successful and worthwhile, others considered the expensive repatriation operation profligate and the media attention exaggerated, while further constituents expressed rather more industrial preferences for the whale.[3]

Many species of marine mammal – a group primarily consisting of cetaceans (dolphins, porpoises and whales) and pinnipeds (seals, sea lions and walruses) – are, to a greater or lesser degree, protected under an array of global and regional instruments. Hence, depending on the species and the state(s) involved, particular international obligations may apply to actions aimed at the rescue of stricken animals and to their fates after capture. The scope and application of these obligations may, however, become apparent only after careful scrutiny.

The situation of 'Morgan' presents an opportunity to scrutinize such potentially applicable international rules, the relationship between them, their application in a national context, and the respective roles of diverse actors – varying from national executives and the judiciary to scientists, private businesses and non-governmental organizations (NGOs). The Morgan case throws into sharp focus the need for clarity in regulatory regimes. Accordingly, this article seeks to identify, evaluate and interpret the international legal framework applicable to the rescue, rehabilitation and release of

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1 M.P. Simmonds, 'The British and the Whales', in P. Brakes & M.P. Simmonds (eds.), *Whales and Dolphins: Cognition, Culture, Conservation and Human Perceptions* (Earthscan, 2011), pp. 56–75, at 56–57.

2 'Oregonians Bid Farewell to Keiko', *Associated Press*, 21 Feb. 2004.

3 Norwegian MP Steinar Bastesen, cited in M. McCarthy, 'Turn Keiko into Meatballs', *The Independent*, 15 Sept. 1998.

marine mammals in the context of the 'Morgan' affair. The most contentious issue, and the central question guiding the analysis, is whether such an animal ought to be returned to the wild upon recovery. In this article, we conclude that, absent concerns over communicable diseases, meaningful efforts must be made to do so.

2. THE 'MORGAN' SAGA

On 23 June 2010 a severely emaciated juvenile killer whale was observed in distress within the Dutch segment of the Wadden Sea.[4] The nearest areas commonly frequented by killer whales are to the north and west of the British Isles and in the Bay of Biscay.[5] In the southern part of the North Sea, killer whales are vagrants. Observations in Dutch waters accordingly are rare.[6] An immediate rescue operation was organized by the Dolfinarium Harderwijk and its affiliate SOS Dolfijn, in consultation with the Netherlands Ministry of Agriculture, Nature, and Food Quality (LNV).[7] The animal, a young female subsequently christened 'Morgan', was found to be severely malnourished but with no major injury or disease. Morgan rapidly regained full health in the Dolfinarium. Attempts, which included genetic and vocal repertoire analyses, were made to establish the animal's origins. It was concluded that the whale most likely belonged to a herring-hunting killer whale population in the Norwegian Sea, which comprises an estimated 400 to 800 individuals. Initial efforts to identify and localize the animal's specific family pod proved fruitless. However, in September 2011 it was claimed that fresh acoustics data indicated that the whale's pod could be identified with 77 per cent certainty.[8]

Although its originally stated intention was to return the animal to the wild, the Dolfinarium formally abandoned this option in December 2010, based on specialist advice that indicated that Morgan's prospects for survival were essentially dependent upon her rejoining her pod.[9] The Norwegian killer whale population is largely composed of a series of consistent and interdependent social units of specific individuals, an arrangement that appears to be particularly important for females, which are not generally nomadic.[10]

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4 The following factual account draws upon N. van Elk et al., 'Expert Advice on the Releasibility of the Rescued Killer Whale (*Orcinus orca*) Morgan' (Dolfinarium Harderwijk and SOS Dolfijn, 14 Nov. 2010), available at: http://www.dolfinarium.nl/download/download_save.php?file=16.

5 Within the order *Cetacea*, the species killer whale (or orca) belongs to the suborder of the toothed whales (*Odontoceti*), and is the largest representative within the latter of the family *Delphinidae*. The species is currently listed as 'Data Deficient' on the International Union for the Conservation of Nature (IUCN) Red List, meaning that insufficient data is available accurately to assess its global conservation status: 'Orcinus orca', *IUCN Red List of Threatened Species,* available at: http://www.iucnredlist.org/apps/redlist/details/15421/0.

6 See K. Camphuysen & G. Peet, *Walvissen en Dolfijnen in de Noordzee* (Fontaine Uitgevers/North Sea Foundation, 2006), at pp. 134–7.

7 Netherlands Ministries were restructured in 2010; this body is now the Ministry of Economic Affairs, Agriculture and Innovation (EL&I).

8 Free Morgan Foundation, 'Morgan's Extended Family has been Identified Acoustically', 30 Sept. 2011, available at http://www.freemorgan.org.

9 Van Elk, n. 4 above.

10 See A. Bisther & D. Vongraven, 'Studies of the Social Ecology of Norwegian Killer Whales (*Orcinus orca*)' (1995) 4 *Developments in Marine Biology*, pp. 169–76.

With the identity and whereabouts of her family group unknown, alongside perceived practical difficulties with rehabilitation and release operations in the area of origin, it was concluded that 'Morgan therefore cannot be released and a proper location and setting for keeping her under human care has to be arranged'.[11] Subsequent efforts focused on finding a location for permanent captivity, since the Dolfinarium Harderwijk was not considered suitable, especially as no other killer whales were resident. In July 2011 the Dolfinarium announced that it had identified an appropriate destination, namely the 'Orca Ocean' at the Loro Parque, a modern zoological facility holding several killer whales on the island of Tenerife, Spain.

The appropriateness of the decision to retain the animal in captivity has been heavily disputed. In November 2010, the Free Morgan Expert Panel and Free Morgan Release Support Group – now called the Free Morgan Foundation – elaborated a programme targeting the whale's eventual return to 'the ocean environment, her home range and her orca community'.[12] Part of this initiative envisages her gradual rehabilitation in a holding area on the Dutch southwest coast, which features semi-natural conditions. This plan does not view the establishment of permanent social bonds with other killer whales as a precondition for success. Instead, a successful repatriation is deemed to be Morgan's survival at sea, 'ideally without further human intervention'.[13] A second report, in July 2011, also trenchantly rejected the Dolfinarium's assertions that continued captivity represented the best interests of the animal.[14]

The fate of the Dutch 'Willy' has received global media attention and prompted a series of legal actions and national and European parliamentary questions. Public opinion on Morgan's ultimate fate remains divided, ranging from organized agitation for her return to the wild, to criticism that the current furore over an individual animal obscures wider concerns over the degradation of the marine environment. Indeed some, including noted biologists, have publicly advocated the need to 'let vagrants die in peace'.[15]

Neither view ultimately prevailed. On 30 November 2011, amidst tight security, Morgan was airlifted to Tenerife where she remains at the Loro Parque facility. Despite these developments, the Orca Coalition has reaffirmed its commitment to repatriate the animal by launching a series of legal appeals. A judgment on the merits of the case is likely to be of significant interpretative value in future animal repatriation litigation, both in the Netherlands and abroad.

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11 Van Elk, n. 4 above, at p. 28.

12 Free Morgan Expert Panel and Free Morgan Release support group, 'Suggestions for Returning "Morgan" the Orca (Killer Whale) to a Natural Life in the Ocean', 3 Nov. 2010, at p. 3, available at: http://www.freemorgan.org/uploads/1/3/8/6/13862255/morgan_release_proposal_v1.4.pdf.

13 Ibid.

14 I.N. Visser & T.M. Hardie, '"Morgan" the Orca Can and Should Be Rehabilitated: With Additional Notes on Why a Transfer to Another "Captive Orca Facility" is Inappropriate and Release is Preferred', Orca Research Trust, July 2011, available at: http://www.freemorgan.nl/Visser%20&%20Hardie%20%282011%29%20MORGAN%20REHAB%20%28v1.1%29.pdf.

15 K. Camphuysen, 'Laat Zo'n Dwaalgast Rustig Sterven', *NRC Handelsblad*, 10 Sept. 2011 (translation from Dutch by present authors).

In contrast to the public debate thus far, this article is not overtly concerned with the moral or philosophical considerations over the captivity of marine mammals.[16] Instead, it concentrates on specific legal questions presented by the 'Morgan' affair and the precise scope of the multilateral commitments engaged thereby.

3. THE INTERNATIONAL LEGAL FRAMEWORK

It has been argued that the rehabilitation of stricken marine mammals 'currently lacks a coherent central set of core values, ethics, or goals'.[17] Although rescue techniques have advanced significantly since the 19th century – from when records memorably indicate the administration of 'a good glass of stiff brandy and water' to a stranded porpoise[18] – attempts to regulate capture-and-release operations are relatively recent. Rescued marine mammals traditionally constituted a convenient source of zoo exhibits, which accordingly discouraged the elaboration of release programmes. By the late 1970s, however, ethical and practical concerns had prompted a reconsideration of these policies.

From a species perspective, rehabilitation efforts are generally considered to offer modest conservation advantages, primarily because of their limited success.[19] United States (US) guidelines consider the overall health of wild stocks to be of paramount concern,[20] with the prospective introduction of diseases acquired in captivity a source of particular anxiety.[21] Few jurisdictions have adopted clear rules for the release of rehabilitated fauna. Insofar as national regulatory systems exist, core guidance principles seemingly include establishing clear criteria for assessing so-called 'releasability', combined with monitoring initiatives;[22] and such considerations should probably also inform the international legal framework on animal rehabilitation. These principles are also echoed in the work of the International Union for the Conservation of Nature (IUCN), which has designed broad guidelines for reintroducing wild animals.[23] Specific guidance for the release of marine mammals has not yet, however, been elaborated within this forum.

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16 On the case against the anthropogenic exploitation of cetaceans, see M.P. Simmonds, 'Into the Brains of Whales' (2006) 100(1) *Applied Animal Behaviour Science*, pp. 103–16.

17 M. Moore et al., 'Rehabilitation and Release of Marine Mammals in the United States: Risks and Benefits' (2007) 23(4) *Marine Mammal Science*, pp. 731–50, at 732–3.

18 Simmonds, n.1 above, at p. 63. The animal did not survive.

19 D. Wilkinson & G.A.J. Worthy, 'Marine Mammal Stranding Networks', in J.R. Twiss, Jr. & R.R. Reeves (eds.), *Conservation and Management of Marine Mammals* (Smithsonian Institution Press, 1999), pp. 396–411, at 401.

20 Moore et al., n. 17 above, at p. 734.

21 Ibid., at pp. 740–1; see also L. Quakenbush, K. Beckmen & C.D.N. Brower, 'Rehabilitation and Release of Marine Mammals in the United States: Concerns from Alaska' (2009) 25(4) *Marine Mammal Science*, pp. 994–9.

22 D.J. St. Aubin, J.R. Geraci & V.J. Lounsbury, 'Rescue, Rehabilitation, and Release of Marine Mammals: An Analysis of Current Views and Practices', NOAA Technical Memorandum NMFS-OPR-8, July 1996, at pp. 16–7, available at http://www.nmfs.noaa.gov/pr/pdfs/health/rescue.pdf.

23 IUCN, *Guidelines for Reintroductions* (IUCN, 1998). The Guidelines are prepared in the context of reintroducing species into areas of historical coverage, but provide lessons of broad applicability to the present context.

A number of international instruments which advance commitments that are, to a greater or lesser degree, of relevance to the rescue, rehabilitation and release of marine mammals, are considered below.[24] In the specific context of Morgan, the instruments considered are all in force in the Netherlands and are applicable to the Dutch sections of the North Sea and Wadden Sea.

3.1. *The United Nations Convention on the Law of the Sea*

The United Nations (UN) Convention on the Law of the Sea (UNCLOS),[25] popularly dubbed the 'Constitution of the Oceans', advances a general but unconditional duty under Article 192 that states 'have the obligation to protect and preserve the marine environment'. The Parts of the Convention that engage the exclusive economic zone (EEZ) and the high seas both establish duties to cooperate that specifically apply to marine mammals. Cetaceans are addressed, albeit obliquely, through Article 65 of the Convention, which requires states to 'work through' the 'appropriate international organizations for their conservation, management and study'.[26] It is often considered that this phrasing tacitly tips the balance of objectives in favour of the conservation of marine mammals.[27] Moreover, the plural formulation of this provision has generated sustained debate over whether multiple regulators may legitimately influence national obligations concerning cetaceans, which has clear implications for the regulation of capture-and-release programmes.[28] While ambiguity surrounds the precise scope of these obligations,[29] the wording must at a minimum be regarded as a reference to the International Whaling Commission (IWC). The plural formulation of 'organizations' has traditionally been viewed with some concern – especially the prospect of alternative fora usurping the role of the IWC in global quota-setting[30] – although it could

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24 On the legal protection of species in the North Sea generally, see A. Trouwborst & H.M. Dotinga, 'Comparing European Instruments for Marine Nature Conservation: The OSPAR Convention, the Bern Convention, the Birds and Habitats Directives, and the Added Value of the Marine Strategy Framework Directive' (2011) 20(4) *European Energy and Environmental Law Review*, pp. 129–49, at 132–43. For a more extensive analysis of the legal protection of marine species in the Netherlands, see H.M. Dotinga & A. Trouwborst, 'Juridische Bescherming van Biodiversiteit in de Noordzee', CELP/NILOS, 2008, pp. 112–54, available at: http://www.pbl.nl.

25 Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994 (28 July 1996 for the Netherlands), available at: http://www.un.org/depts/los.

26 This provision applies *mutatis mutandis* to the high seas by virtue of Art. 120. Since the animal was retrieved from Dutch jurisdictional waters, the pertinent provision to Morgan will be Art. 65 UNCLOS.

27 H.S. Schiffman, 'The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources', in W.C.G. Burns & A. Gillespie (eds.), *The Future of Cetaceans in a Changing World* (Transnational, 2003), pp. 159–85, at 168–72.

28 P.W. Birnie, 'Marine Mammals: Exploiting the Ambiguities of Article 65 of the Convention on the Law of the Sea and Related Provisions: Practice under the International Convention for the Regulation of Whaling', in D. Freestone, R. Barnes & D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006), pp. 261–80.

29 See T.L. MacDorman, 'Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention' (1998) 29(1) *Ocean Development and International Law*, pp. 179–94.

30 D.D. Caron, 'The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures' (1995) 89 *American Journal of International Law*, pp. 154–73. One potential alternative forum was created in 1992 – the North Atlantic Marine Mammal Commission (NAMMCO), available at: http://www.nammco.no.

also be interpreted as a reference to other relevant entities, such as the Convention on the Conservation of Migratory Species of Wild Animals (CMS)[31] and its subsidiaries, which have developed practices on rehabilitation issues.

As far as UNCLOS is concerned, while its provisions are of general rather than specific relevance to Morgan's case, the requirement for the Dutch government to work in conjunction with relevant treaty bodies indeed appears to be firm.

3.2. *The Convention on Biological Diversity*

The Convention on Biological Diversity (CBD)[32] strives for the conservation of 'biological diversity'[33] and the sustainable use of its components.[34] Parties to the Convention have committed themselves, amongst other things, to (i) promoting the conservation of viable populations of species in their natural surroundings; (ii) promoting the recovery of threatened species; and (iii) taking legal measures for the protection of threatened species and populations.[35] Indeed, the Convention's primary emphasis in the field of biodiversity conservation is on these and other so-called *in situ* measures, which aim for the 'conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings'.[36] Conversely, *ex situ* measures concern the 'conservation of components of biological diversity outside their natural habitats'.[37] For instance, CBD parties undertake, as far as possible and as appropriate, to adopt *ex situ* measures 'for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions'.[38] Naturally, *ex situ* conservation measures are not intended to replace *in situ* conservation action, but are rather to be taken 'for the purpose of complementing *in situ* measures'.[39]

3.3. *The International Convention for the Regulation of Whaling*

The International Convention for the Regulation of Whaling (ICRW)[40] was adopted in 1946 'to provide for the proper conservation of whale stocks and thus

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31 Bonn (Germany), 23 June 1979, in force 1 Nov. 1983 (also for the Netherlands), available at: http://www.cms.int.

32 Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993 (10 Oct. 1994 for the Netherlands), available at: http://www.cbd.int/convention/text.

33 Art. 2, ibid., defines this as 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'.

34 CBD, n. 32 above, Art. 1.

35 Ibid., Art. 8(d), (f) and (k).

36 Ibid., Art. 2.

37 Ibid.

38 Ibid., Art. 9(c).

39 Ibid., Art. 9. On this inter-relationship see S. Harrop, 'Climate Change, Conservation and the Place for Wild Animal Welfare in International Law' (2011) 23(3) *Journal of Environmental Law*, pp. 441–62, at 450–4.

40 Washington, DC (US), 2 Dec. 1946, in force 10 Nov. 1948 (14 June 1977 for the Netherlands), available at: http://iwcoffice.org/convention.

make possible the orderly development of the whaling industry'.[41] As its title indicates, the treaty was principally concerned with the regulation of 'whaling', and therefore with the directed catch of whales. It is now argued that the scope of the treaty has expanded over time, exemplified by the introduction in 2003 of a Conservation Committee.[42] Nevertheless, this remains controversial, with some parties refusing to recognize this Committee, while the wording in the Preamble remains unchanged.

Difficulties are also raised by the precise status of killer whale stocks themselves. Initially, the killer whale was not included in the species nomenclature accompanying the Convention. Since 1977, however, it has expressly belonged to the list of cetaceans over which the IWC exercises jurisdiction, and is within the scope of the current moratorium ('zero quota') on commercial whaling.[43] In 1980, the killer whale was added to the species listed in paragraph 10(d) of the Schedule, which states:

> [n]otwithstanding the other provisions of paragraph 10 there shall be a moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. This moratorium applies to sperm whales, *killer whales* and baleen whales, except minke whales.[44]

Notwithstanding the prohibition of the 'taking, killing or treating' of whales, including killer whales, the scope of this provision is evidently limited – also with respect to 'taking' – to *whaling* activities.[45] Moreover, none of the decisions adopted hitherto by the IWC address circumstances like those in the Morgan case.

To date, the Commission has not adopted a formal position regarding whales in captivity. This is probably because, inter alia, most species covered by the ICRW are simply too large to be kept viably in captivity. The demand for captive killer whales has waned dramatically in recent years as a result of animal rights protests and poor prospects for captive breeding.[46] Hence, anthropogenic removals have not reached levels for which the IWC would face political pressure to elaborate further policies on this issue. Accordingly, the Convention does not impose concrete obligations on the Netherlands concerning the capture and subsequent fate of Morgan, which may ultimately lie outside the ICRW and within the realms of more specific regulators.

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41 Ibid., Preamble.

42 See W.C.G. Burns, 'The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans' (2004) 13(1) *Review of European Community and International Environmental Law*, pp. 72–84.

43 In 1977, a definition of the species was included in the Schedule, which is an integral part of the Convention Schedule, para. 1(B): '"killer whale" (*Orcinus orca*) means any whale known as killer whale or orca'.

44 ICRW, n. 40 above, Schedule, para. 10(d) (emphasis added).

45 Besides the formulation of para. 10(d) itself, which concerns actions by whalers, para. 1(C) points in the same direction by establishing that '"take" means to flag, buoy or make fast to a whale catcher'.

46 R.R. Reeves, B.D. Smith, E.A. Crespo & G. Notarbartolo di Sciara, *Dolphins, Whales and Porpoises: 2002–2010 Conservation Action Plan for the World's Cetaceans* (IUCN, 2003), at p. 43.

3.4. *The Convention on International Trade in Endangered Species of Wild Fauna and Flora*

Unlike other regulatory regimes, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[47] does not address ecosystem considerations beyond the effects of unsustainable trade in endangered species. Nevertheless, CITES does have considerable experience in addressing the transportation of live animals[48] and the analogous issue of repatriating confiscated specimens. CITES lists a variety of marine mammal species in Appendices I (for which trade is authorized only 'in exceptional circumstances'[49]) and II (for which trade is subject to strict regulation[50]). CITES is buttressed in the EU by Regulation (EC) No. 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein (CITES Regulation).[51] The EU provision lists killer whales in its Appendix A as a species for which all commercial and translocation activities are prohibited without prior approval,[52] thereby prescribing a stricter regime than CITES itself.

Indicative guidance on returning species to the wild has been developed under CITES in respect of animals confiscated in illegal trade,[53] calling for individuals to be disposed of 'appropriately'. To this end, particular importance is accorded to the conservation status of wild stocks and finding a 'humane' solution to the problem. The CITES disposal regime has been subject to little sustained attention to date. The treatment of Morgan by the Dutch courts therefore provides illuminating insights into the application of these provisions.

All indigenous mammals occurring in the Netherlands are regarded as protected species under the 1998 Flora and Fauna Act.[54] Accordingly, the capture and/or killing of such species is in principle prohibited. The Dolfinarium Harderwijk holds an exemption under the Act permitting, inter alia, the keeping and transportation of cetaceans for the purposes of 'research and the protection of flora and fauna, that is, rescue,

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47 Washington, DC (US), 3 Mar. 1973, in force 1 July 1975 (18 July 1984 for the Netherlands), available at: http//:www.cites.org. Orcas are listed in Appendix II.

48 See S.J. Fisher & R.R. Reeves, 'Global Trade in Live Cetaceans: Implications for Conservation' (2005) 8(4) *Journal of International Wildlife Law and Policy*, pp. 315–40.

49 CITES, n. 47 above, Art. II(1). From the perspective of marine mammals, this Appendix lists mainly the great whales.

50 Ibid., Arts. II(2) and IV. All cetaceans not listed in Appendix I are so designated, alongside seals, dugongs and manatees.

51 [1997] OJ L61/1.

52 Ibid., Arts. 8 and 9.

53 Resolution Conf. 10.7: Disposal of confiscated live specimens of species included in the Appendices, available at: http://www.cites.org/eng/res/10/10-07R15.php.

54 *Wet houdende regels ter bescherming van in het wild levende planten- en diersoorten*, 25 May 1998, *Staatsblad* 1998, 402. For a full appraisal of the Dutch legal context, see A. Trouwborst, 'De Troebele Regels rond de Opvang van Zeezoogdieren: Een Analyse aan de Hand van de Casus van Orka "Morgan"' (2011) 38(10) *Milieu en Recht*, pp. 653–68.

rehabilitation, and release into the wild'.[55] The conditions attached to this exemption include the following:

> Captured specimens of cetaceans (*Cetacea*) may be retained temporarily to enable recovery, with the purpose of subsequent release. If release is not possible, such animals may be retained permanently for the purpose of conducting research which is relevant within the framework of obligations imposed by the EU Habitats Directive, the Bern Convention and ASCOBANS.[56]
> Stranded and captured animals must, as soon as possible after their rehabilitation (and, as the case may be, research), be released in a suitable habitat as close as possible to the place where they were found.[57]

Upon the capture of Morgan, the competent State Secretary confirmed that this exemption justified the whale's transfer to Harderwijk.[58] Moreover, the Dolfinarium's decision not to return the animal to the wild was officially sanctioned under this exemption,[59] albeit in the face of sustained dissent,[60] including a series of Parliamentary motions.[61]

Under CITES, the international transfer of an Appendix II species requires the grant of an export permit.[62] In the EU, the CITES Regulation states that permits may only be issued 'in accordance with the requirements of other Community legislation on the conservation of wild fauna and flora' – which is primarily a reference to Directive 92/43/EC on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive)[63] – and, inter alia, when the specimens in question are 'intended for research or education aimed at the preservation or conservation of the species'.[64] This is reinforced by the exemption granted to the Dolfinarium by the Dutch authorities.[65]

On 27 July 2011, an EU CITES certificate which authorized the transfer of Morgan to Tenerife was granted to the Harderwijk facility, 'under condition that the

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55 Exemption FF/75A/2008/064, 3 Feb. 2009 (translation by present authors; the original phrasing is: '*onderzoek en bescherming van flora en fauna, te weten opvang, revalidatie en het terugzetten in de vrije natuur*'). The exemption is valid for five years and is based on Art. 75 of the Flora and Fauna Act, providing derogations from Arts. 9, 10 and 13(1) of the Act.

56 On these instruments, see below (Sections 4.2., 4.1. and 3.5., respectively, in text).

57 Exemption FF/75A/2008/064, n. 55 above, paras 8 and 9 (translation by present authors).

58 Van Elk, n. 4 above, at p. 5.

59 See, e.g., letter by State Secretary Bleker to the Dutch Parliament, 25 Mar. 2011, *Kamerstukken II*, 2010–2011, 28 286, nr. 496.

60 Questions MP Ouwehand on the situation of the rescued *Orcinus orca*, 25 June 2010, and answers Minister Verburg, 13 July 2010, *Aanhangsel Handelingen II*, 2009–2010, nr. 2882; questions MP Ouwehand on the release of killer whale Morgan, 14 Mar. 2011, and answers State Secretary Bleker, 21 Apr. 2011, *Aanhangsel Handelingen II*, 2010–2011, nr. 2299; questions MP Ouwehand on disclosure of data on the rescued killer whale Morgan, 29 Apr. 2011, and answers State Secretary Bleker, 25 May 2011, *Aanhangsel Handelingen II*, 2010–2011, nr. 2635.

61 Motion MP Ouwehand, 22 June 2011, *Kamerstukken II*, 2010–2011, 28 973, nr. 53.

62 Art. III(2).

63 [1992] OJ L206/7.

64 CITES Regulation, n. 51 above, Art. 8(3), chapeau and under (g).

65 Exemption FF/75A/2008/064, n. 55 above, para. 13: '[t]he exemption for bringing the animals [to which the exemption applies] within or outside the territory of the Netherlands is valid only if prior approval for this has been granted by the competent authorities of the countries involved, and the necessary CITES documents have been provided' (translation by present authors).

animal will be kept for research'.[66] The Spanish CITES authorities also endorsed the transfer. It was initially postponed, however, because of litigation brought by the Orca Coalition, an alliance of NGOs committed to securing the animal's return to the wild. In early 2011, this group also initiated an action against the EL&I Ministry for alleged non-compliance with the Flora and Fauna Act and several international instruments. The merits of both cases have yet to be definitively reviewed, although overtures have been provided by the District Court of Amsterdam in two preliminary injunction decisions.

The first of these was delivered in August 2011.[67] As an interim measure, the court provisionally blocked the transfer of the killer whale to Tenerife by suspending the EU CITES certificate until six weeks after the State Secretary's decision on the Orca Coalition's objections. Having accepted the validity of all previous expert reports on the proposed treatment of Morgan, the court considered that the ultimate decision should turn on 'the questions of international law which have arisen'.[68] Moreover, the court ruled that the Dolfinarium should not be entrusted with the final decision, being 'a private party which may, moreover, have its own stakes in the affair'.[69] Having cast doubt both on the value of the proposed scientific research at Loro Parque, deemed 'an animal amusement park with commercial interests',[70] and the legitimacy of the State Secretary's decisions to endorse the killer whale's captivity and transfer,[71] the court called on all stakeholders to facilitate a satisfactory solution. Shortly afterwards, pro-release members of the European Parliament sought the opinion of the European Commission on the legality of the EU CITES permit, suggesting that infringement proceedings may ultimately be required against the Netherlands.[72]

The second decision of the court reversed the earlier position and authorized the whale's transfer to Spain.[73] The tone and approach of the judgment are strikingly different from the August judgment of the same court (but a different judge), affirming that the government 'rightly used the wellbeing of Morgan and her chances of survival as criteria when answering the question whether the release of Morgan after her rehabilitation represents a satisfactory solution'.[74] International instruments received scant attention, but were nonetheless not considered to impose the use of different criteria.[75] The court expressly referred to the aforementioned CITES guidance regarding confiscated animals, which:

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66 Decision to grant EU certificate 11NL114808/20, 27 July 2011, p. 4 (translation by present authors).

67 Rechtbank Amsterdam, joined cases AWB 11/3441 BESLU and AWB 11/3640 BESLU, 3 Aug. 2011.

68 Ibid. (translation by present authors).

69 Ibid.

70 Ibid.

71 Ibid.

72 Written question P-009807/2011 concerning the export of a wild orca from the Netherlands to a Spanish theme park, 25 Oct. 2011 (K. Arsenis).

73 Rechtbank Amsterdam, joined cases AWB 11/5033 BESLU and AWB 11/5035 BESLU, 21 Nov. 2011.

74 Ibid., para. 4.7 (translation by present authors).

75 Ibid.

> should not be interpreted in such a way as always prescribing return to the wild, but rather that the latter is only desirable under very specific circumstances. The wellbeing of the animal is an important aspect in this regard.[76]

Despite observing the apparent preference of many killer whale experts for a return to sea – including a notable reconsideration of opinions in favour of release by the majority of the experts on whose advice the Dutch government had formerly based its approval of permanent captivity – the court found that 'it is too uncertain whether Morgan has good chances of survival in the wild'.[77] Moreover, the EU CITES certificate was considered valid on the basis that the authorities 'could reasonably reach the conclusion that Morgan is transferred to Loro Parque for research *and education* aimed at the preservation or conservation of the species'.[78]

The November ruling thereby confirms that scientific research is subordinate to other interests at Loro Parque – inter alia, that of education – but no longer seems to consider this to be important. The judgment thus fails to acknowledge that the EU certificate for the killer whale was issued *exclusively* for research purposes. The latter circumstance, in turn, is undoubtedly a direct consequence of the conditions stipulated in the Dolfinarium's exemption, according to which permanent captivity of rescued cetaceans is permitted *exclusively* for the purpose of scientific research.[79] Interestingly, the animal could be affected if different conclusions are reached in a future Dutch judgment on the merits, even though it has left the jurisdiction, as there could be repercussions for the validity of the EU CITES certificate for the original transfer. The EU CITES Regulation specifies in this regard that a certificate 'shall be deemed void if a competent authority or the Commission, in consultation with the competent authority which issued the permit or certificate, establishes that it was issued on the false premise that the conditions for its issuance were met'.[80] The viability of this position is likely to be addressed in the eventual final judgment on the merits.

3.5. *The Convention on the Conservation of Migratory Species of Wild Animals and Subsidiary Instruments*

The Convention on the Conservation of Migratory Species of Wild Animals (CMS)[81] addresses the conservation of migratory animal species.[82] Parties to the Convention

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76 Ibid., para. 4.6 (translation by present authors).

77 Ibid., paras 4.8–4.11 (translation by present authors).

78 Ibid., para. 5.8 (emphasis added).

79 Exemption FF/75A/2008/064, n. 55 above, para. 8.

80 CITES Regulation, n. 51 above, Art. 11(2)(a).

81 N. 31 above.

82 See R. Caddell, 'International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention' (2005) 16 *Colorado Journal of International Environmental Law and Policy*, pp. 113–56.

agree to take action to avoid any migratory species[83] from becoming endangered[84] and to promote, cooperate in and support research relating to migratory species.[85] In addressing the conservation needs of migratory wildlife, the CMS adopts a two-tier approach, distinguishing between species identified as 'endangered' (listed in Appendix I to the CMS) and those considered to have an 'unfavorable conservation status' (assigned to Appendix II), with differing obligations and policies prescribed for each category. Parties 'endeavor to provide immediate protection' for Appendix I species,[86] and may conclude subsidiary instruments to address the long-term conservation and management needs of Appendix II animals.[87] The killer whale is listed in Appendix II.

ASCOBANS

One of the earliest subsidiary instruments under the CMS is the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS).[88] Uniquely, it applies solely to small cetaceans, encompassing the waters of the Baltic, Irish and North Seas, and parts of the adjacent Atlantic Ocean.[89] Under the Agreement, 'small cetaceans' encompass all species, subspecies, and populations belonging to the toothed whales (*Odontoceti*), except the sperm whale (*Physeter macrocephalus*).[90] Unlike the ICRW, ASCOBANS categorizes the killer whale as a *small* cetacean. The species is therefore regulated by both treaties, albeit under different bases.

The creation of ASCOBANS was motivated, inter alia, by the poor knowledge base and vulnerable conservation status of small cetaceans in the region.[91] Parties pledge to cooperate closely in order to achieve and maintain a favourable conservation status for the species, subspecies, and populations involved.[92] In particular, 'each Party shall apply [...] the conservation, research, and management measures prescribed in the Annex' to the Agreement.[93] Besides duties concerning, inter alia, habitat protection and the mitigation

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83 Defined as being 'the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries': CMS, n. 31 above, Art. I(1)(a). This remains a rather artificial definition: the fact that particular species may frequently cross human-established frontiers does not necessarily mean that it is inherently migratory in nature.

84 Ibid., Art. II(2).

85 Ibid., Art. II(3)(a).

86 Ibid., Art. II(3)(b). This entails a series of commitments to conserve and restore habitats, regulate activities or obstacles that seriously impede or prevent the migration of the species and prevent, reduce or control factors that are endangering or are likely to further endanger the species: ibid., Art. III(4).

87 Ibid., Art. II(3)(c).

88 New York, NY (US), 17 Mar. 1992, in force 29 Mar. 1994 (also for the Netherlands), available at: http://www.ascobans.org.

89 ASCOBANS, ibid., Art. 1.1. The Agreement area was expanded in 2003, a development that officially entered into effect in 2008, to incorporate Irish, Spanish and Portuguese waters. As yet none of these states have acceded.

90 Ibid., Art. 1.2(a).

91 Ibid., Preamble; see also Resolution 1.6: Agreements (Resolution adopted at the 1st COP of the CMS), available at: http://www.cms.int/bodies/COP/cop1/cop1_documents_overview.htm.

92 Ibid., Art. 2.1.

93 Ibid., Art. 2.2.

of fisheries by-catch and harmful underwater noise, the 'Conservation and Management Plan' contained in the Annex establishes the following obligation:

> [w]ithout prejudice to the provisions of paragraph 2 above, the Parties shall endeavour to establish (a) the prohibition under national law, of the intentional taking and killing of small cetaceans where such regulations are not already in force, and (b) the obligation to release immediately any animals caught alive and in good health. Measures to enforce these regulations shall be worked out at the national level.[94]

Whereas the formulation 'taking *and* killing' in the English treaty text could generate some ambiguity, the equally authoritative German and French versions clarify that either action is prohibited; they are not cumulative.[95] Furthermore, 'taking' is a concept that is generally interpreted broadly in the context of international nature conservation law. National laws have taken a similarly expansive view: for instance, the US Marine Mammal Protection Act further incorporates the non-fatal harassment of individual animals.[96]

Treaty-based definitions have tended to include all types of anthropogenic removal, whether through directed hunting activities, targeted captures for aquaria or accidental taking in the form of by-catches, providing a broad remit for regulatory action. An example is the generous definition in ASCOBANS' parent convention, which stipulates that 'taking' comprises 'capturing', without restricting the latter term in any way.[97] ASCOBANS lacks its own definition, and is therefore widely assumed to rely on the CMS articulation where it does not advance a contrary interpretation of key concepts. Moreover, the ASCOBANS text does not otherwise truncate the meaning of 'taking', except to qualify that paragraph 4 of the Conservation and Management Plan in the Annex applies to 'intentional' removals. Consequently, the prohibitions under paragraph 4(a) are limited to the deliberate capture and/or killing of cetaceans – as distinguished from the incidental removals, for instance in fishing gear targeting other species, which is addressed further in paragraph 1. The prescription under (b) appears to be motivated primarily towards cetacean by-catches in fishing gear. In any event, when rescued on 23 June 2010, Morgan was evidently not 'caught alive and in good health'.

A salient feature of paragraph 4 is that its stated prohibition of intentional taking and killing is subject to only one exception, in the form of a reference to paragraph 2 of the same Annex. It concerns the performance of research 'to (a) assess the status and seasonal movements of the populations and stocks concerned; (b) locate areas of special importance to their survival; and (c) identify present and potential threats to the different species'.[98] Such activities reflect the emphasis on habitat protection that underpins the agreement, alongside concerns to improve the paucity of data that,

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94 Ibid., Annex, para. 4.

95 The German version speaks of '*Vorschriften*' in plural, and the French of '*l'interdiction par la législation nationale de la capture et de la mise à mort intentionelles de petits cétacés*'.

96 'Taking' under the Act 'means to harass, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal' – section 3(13); codified at 16 U.S.C. § 1361 et seq.

97 CMS, n. 31 above, Art. I(1)(i).

98 ASCOBANS, n. 88 above, Annex, para. 2.

rightly or wrongly, permeate the text of ASCOBANS.[99] Paragraph 2 specifies that 'studies should exclude the killing of animals and include the release in good health of animals captured for research'.[100] According to the text of paragraph 4, capture for other purposes is not to be permitted. Consequently, ASCOBANS allows for significantly fewer exceptions than either the Bern Convention[101] or the EU Habitats Directive.[102] This is not problematic *per se*, since the advancement of stricter protection measures by states is expressly permitted under both the Convention and the Directive.[103] Nonetheless, under ASCOBANS the intentional capture of small cetaceans for the purpose of recuperation, education, and research that does not fit the description of paragraph 2 of the Annex, does not sit comfortably alongside wider obligations under the Agreement.

The position of stricken cetaceans under paragraph 4 of the Annex is curious. On the one hand, the provision calls for the prohibition of all intentional taking of small cetaceans, except for certain narrowly defined research ends; on the other, it prescribes the immediate release of *healthy* cetaceans. The *intentional* capture of sick or injured animals is covered by the required prohibition, except in cases of temporary captivity for research purposes as detailed in paragraph 2. Sick, injured or otherwise *unhealthy* animals that are taken *unintentionally* remain seemingly outside these considerations. Since paragraph 4 is silent on their treatment, national discretion appears intact in such cases. It is also peculiar that the Agreement apparently calls on states to prohibit rescue operations of ill or injured cetaceans carried out with a view to their recovery and subsequent release. After all, the recuperation of rescued animals would only seem to enhance the conservation status of the populations involved, if they can be viably returned to their ecosystems. ASCOBANS does not elaborate on the fate of animals once they have been captured for recovery purposes.

When applied to the Morgan case it follows that, strictly speaking, an intentional rescue operation to facilitate the animal's recovery and subsequent release is in conflict with the prohibition mandated by paragraph 4 of the ASCOBANS Annex. Furthermore, the treaty is silent on the post-capture fate of rescued cetaceans. The tenor of paragraph 4 of the Annex, however, considered in conjunction with paragraph 2 and the objectives of ASCOBANS, would appear to allow for only one conclusion: such an animal, particularly when restored to good health, ought to be returned to the wild – just like healthy animals caught accidentally[104] and animals captured temporarily for research.[105]

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99 For a critical discussion of the research-dominated tone of the ASCOBANS text, see H. Nijkamp and A. Nollkaemper, 'The Protection of Small Cetaceans in the Face of Uncertainty: An Analysis of the ASCOBANS Agreement' (1997) 9 *Georgetown International Environmental Law Review*, pp. 281–302, at 301.

100 ASCOBANS, n. 88 above, Annex, para. 2.

101 Convention on the Conservation of European Wildlife and Natural Habitats, Bern (Switzerland), 19 Sept. 1979, in force 1 June 1982 (also for the Netherlands), available at: http://conventions.coe.int/Treaty/en/Treaties/html/104.htm.

102 N. 63 above.

103 Bern Convention, n. 101 above, Art. 12, and Art. 193 Treaty on the Functioning of the European Union (TFEU), Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009 [2010] OJ C83/49.

104 ASCOBANS, n. 88 above, Annex, para. 4(b).

105 Ibid., Annex, para. 2.

The conduct of scientific research does not seem to provide an obvious justification for keeping an animal in permanent captivity either. The research exemption applies to activities undertaken for the ends outlined in paragraph 2 of the ASCOBANS Annex – predominantly concerning *field* research[106] – and is conditional upon the repatriation of any captured animals involved, when in good health.[107] The national exemption granted to the Dolfinarium Harderwijk – which states that when release is 'not possible', rescued cetaceans may be 'retained *permanently* for the purpose of conducting research which is relevant within the framework of obligations imposed by [...] *ASCOBANS*' – appears therefore to be misconstrued.[108] This case raises particular difficulties since research considerations have evidently become the official basis for the Dutch authorities to justify the permanent captivity of Morgan and her transfer to Loro Parque.

Capture-and-release issues have commanded modest attention under the Agreement, although the Morgan saga has prompted some reflection within the ASCOBANS Advisory Committee (AC). In 2011, two contrasting documents were tabled before the AC: the rehabilitation and release plan proposed by the Free Morgan Expert Panel, submitted by the Whale and Dolphin Conservation Society (WDCS),[109] alongside a letter from the Dutch authorities, contending that the animal 'had no chance of survival if she were to be released without knowing her family group' and that 'all legal procedures have been followed'.[110] The letter further stated that Morgan should be kept with other orcas and at a location with facilities suitable for large predatory animals that place an emphasis on public education.[111]

From a legal perspective, it is remarkable that the Dutch authorities made no mention of national commitments under ASCOBANS, in particular paragraph 4 of the Annex; the document only discusses *national* rules and decisions.[112] It is notable that *research* is *not* cited as a basis for permitting the capture and subsequent keeping of the killer whale – an omission that should perhaps be understood in light of the above conclusion that, under ASCOBANS, research cannot seemingly justify permanent captivity. The only indicated motivation is the animal's rescue, rehabilitation and release, and subsequently – given the stated impossibility of such release – a contribution to raising 'awareness of the beauty of wildlife'.[113]

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106 The explanation in the second half of para. 2 of the Annex clarifies that virtually all such research is of a kind which is to be carried out at sea.

107 ASCOBANS, n. 88 above, Annex, para. 2.

108 Exemption FF/75A/2008/064, n. 55 above, para. 8 (translation by present authors; emphasis added).

109 'Suggestions for Returning "Morgan" the Orca (Killer Whale) to a Natural Life in the Ocean', AC18/Doc.8-01, available at: http://www.ascobans.org/ac18.html. On the Society generally, see http://www.wdcs.org.

110 'Why Orca Morgan Cannot be Set Free', AC18/Doc.8-02, available at: http://www.ascobans.org/ac18.html.

111 Ibid.

112 Compliance with *national* law cannot be invoked to excuse non-compliance with *international* law, according to Art. 27 of the Vienna Convention on the Law of Treaties (VCLT), Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

113 'Why Orca Morgan Cannot be Set Free', n. 110 above.

A degree of ambivalence pervades the ASCOBANS response to this issue. Although some parties suggested that 'the sooner the animal could be released the better', others doubted whether the case 'was a priority for the Agreement'.[114] The WDCS was invited to resubmit the issue for consideration at subsequent meetings 'if it so desired'.[115] Tellingly, capture-and-release issues were not formally discussed at the 19th AC Meeting in March 2012, nor was there any reference to Morgan in the extensive Dutch report to that Meeting. Rescue policies remain marginalized within the Agreement, beyond a vague suggestion to consider preparing guidelines for the treatment of stranded cetaceans within the framework of ASCOBANS.[116] Such guidelines presumably would be based upon those developed by ACCOBAMS (see below), although these endeavours may perpetuate a 'chicken-and-egg' situation, given that the targeted rescue of small cetaceans does not currently sit comfortably within the strict letter of the Conservation and Management Plan. If parties do eventually wish to encourage such rescue operations, it appears that an amendment of ASCOBANS, in particular of paragraph 4 of the Annex, is a precondition.

ACCOBAMS

A measure of guidance regarding the future treatment of cetaceans such as Morgan under ASCOBANS may ultimately be forthcoming from the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS).[117] This 'sister' Agreement applies to cetaceans both 'large' and 'small' within the Black and Mediterranean Seas and the Atlantic waters contiguous to ASCOBANS. Killer whales, including accidental visitors to the ACCOBAMS Area, are designated on the 'indicative list' (Annex I) of applicable species appended to the Agreement.[118] While the Netherlands is not eligible to accede to the Agreement, the receiving state, Spain, is a party and is bound by relevant commitments in its treatment of Morgan.

Of particular relevance is a series of guidelines formulated under the auspices of ACCOBAMS for the release of captive cetaceans into the wild.[119] Like ASCOBANS, ACCOBAMS prohibits the 'taking' of cetaceans,[120] although anthropogenic removals in emergency situations are expressly permitted.[121] This is not surprising since the conclusion of the Agreement was motivated significantly by an epizootic morbillivirus

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114 Report of 18th Meeting of the ASCOBANS AC, Bonn (Germany), 4–6 May 2011, at p. 21, available at: http://www.ascobans.org/ac18.html.

115 Ibid.

116 Ibid.

117 Monaco, 24 Nov. 1996, in force 1 June 2001, available at: http://www.accobams.org.

118 Ibid., Annex I. Under Art. I(5), Annexes to the Agreement 'form an integral part thereof, and any reference to the Agreement includes a reference to its annexes'.

119 Guidelines for the Release of Captive Cetaceans in the Wild, adopted through Resolution 3.20 (2007) (the Guidelines), available at: http://www.accobams.org/index.php?option=com_content&view=article&id=1134&Itemid=165.

120 ACCOBAMS, n. 117 above, Art. II(1); again the notion of 'taking' is not defined within ACCOBAMS and is broadly assumed to correspond with that of the parent convention.

121 Ibid., Art. II(2).

that decimated stocks of cetaceans in these waters.[122] The impact might have been mitigated by coordinated quarantine and euthanasia procedures.[123] The Guidelines clearly envisage a presumption that cetaceans that have been taken into captivity for whatever reason should be released to the wild where a certain degree of health has been restored and environmental conditions at the release site are deemed fit for the release to be carried out.[124]

Paragraph 2.2 establishes extensive criteria to determine suitability for release. The tenor of this provision suggests that cetaceans should be released unless the individual is insufficiently healthy, is carrying communicable diseases, or has become so institutionalized and habituated to humans that enduring captivity is the only feasible course of action. Indicative guidance is also established in respect of release logistics, future monitoring and evaluative practices. Therefore, had Morgan been captured by the authorities of a party to ACCOBAMS, it is unlikely that her extended period of captivity would be legitimate. However, the scenario whereby a cetacean is transported into the ACCOBAMS Area from external waters appears not to have been considered. Instead, the Guidelines apply to the release of 'captive cetaceans that originate from, or are a result of breeding between cetaceans originating from, the Agreement area'.[125] This anomalous position engenders no commitment upon Spain to release Morgan to the wild, having received the animal from the Netherlands. Had the animal been captured in Spanish waters, however, the obligations to repatriate her upon recovery are clear and unambiguous.

This idiosyncratic arrangement probably stems from the fact that capture-and-release issues have largely involved cetaceans from the same region and between ACCOBAMS parties. Indeed, Morgan is not the first animal to be retained in captivity by the state that nursed it back to health. In 2007, the Ukrainian authorities granted 'several' permits to remove stranded bottlenose dolphins from the wild to rehabilitate them from sickness and trauma.[126] To date, at least three healthy individuals remain in captivity. As yet, no effective pressure has been brought to bear upon Ukraine to return these animals to the wild, although this seems to be formally required under the pertinent Guidelines.

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122 W.C.G. Burns, 'The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS): A Regional Response to the Threats Facing Cetaceans' (1998) 1(1) *Journal of International Wildlife Law and Policy*, pp. 113–33, at 114; and ACCOBAMS.org, 'Threats', updated 3 July 2012, available at: http://www.accobams.org/index.php?option=com_content&view=article&id=74&Itemid=64.

123 A. Aguilar & J.A. Raga, 'The Striped Dolphin Epizootic in the Mediterranean Sea' (1993) 22 *Ambio*, pp. 524–8.

124 Guidelines, n. 119 above, para. 3.

125 Guidelines, ibid., para. 1.1.

126 Report of the 4th Meeting of the Parties to ACCOBAMS, Monaco, 9–12 Nov. 2010, at p. 99, available at: http://www.accobams.org/index.php?option=com_content&view=article&id=1069:fourth-meeting-of-the-accobamscontracting-parties&catid=51:meetings-of-the-parties&Itemid=65.

The Wadden Sea Seals Agreement

Additional guidance is forthcoming from the Agreement on the Conservation of Seals in the Wadden Sea (WSSA),[127] another CMS subsidiary. This instrument, concluded two years prior to ASCOBANS, concerns the protection of harbour seals and, latterly, grey seals.[128] It commits its parties (Denmark, Germany and the Netherlands) to prohibiting 'the taking of seals from the Wadden Sea'.[129] The only exceptions to this prohibition are made for research purposes, under certain conditions, and also in respect of institutions designated for 'nursing seals in order to release them after recovery, insofar as these are diseased or weakened seals or evidently abandoned suckling seals'.[130]

It is striking that the drafters of ASCOBANS did *not* adopt a parallel clause. Given that all three parties to the WSSA assisted in drafting ASCOBANS, this appears to have been deliberate. It should, however, be noted that the WSSA negotiations were strongly influenced by the impact of disease (particularly phocine distemper virus (PDV)) on Wadden Sea seal populations, in a manner similar to ACCOBAMS. The potential need to cull or rehabilitate small cetaceans played no significant role during the ASCOBANS negotiations, hence capture-and-release issues were neglected.

For seals rescued under the WSSA, expert guidance elaborated in 1994 prescribes a precautionary approach to rehabilitation and release.[131] There is no absolute obligation to rescue, as only animals with some chance of survival are considered to be viable rehabilitation candidates. Moreover, live release should be sanctioned only if the animal has been treated with particular medicines, is free from pathogens alien to the wild population, and has not been held with mammals from outside the Wadden Sea. Seals are to be released no later than six months from the date of rescue and in the areas from which they were taken. This broad guidance represents a sensible model for any future ASCOBANS initiative to consider.

4. REGIONAL PROVISIONS

4.1. *The Convention on the Conservation of European Wildlife and Natural Habitats*

The Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)[132] is a regional nature conservation treaty operated under the auspices of the Council of Europe. It addresses the conservation of wild flora and fauna

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127 Bonn (Germany), 16 Oct. 1990, in force 1 Oct. 1991, available at: http://www.cms.int/species/wadden_seals/sea_bkrd.htm.

128 Although under Art. II(1), the WSSA applies exclusively to the harbour seal, the grey seal (*Halichoerus grypus*) is also addressed by the treaty's management plan adopted for 2007–2011.

129 WSSA, n. 127 above, Art. VI(1).

130 Ibid., Art. VI(2); the same provision adds that seals 'which are clearly suffering and cannot survive' may be killed by authorized persons.

131 'Conservation and Management Plan for the Wadden Sea Seal Population 2007–2010', reproduced at http://www.waddensea-secretariat.org/management/SMP/SMP%202007-2010.pdf.

132 N. 101 above.

and their natural habitats in Europe, with particular attention to threatened and vulnerable species.[133] The killer whale is one of the 30 species of cetacean classed as 'strictly protected fauna species' in Appendix II to the Convention. The Bern Convention elaborates a clear duty to guarantee the special protection of Appendix II species, requiring parties to take 'appropriate and necessary legislative and administrative measures' to this end.[134] Appendix III species are subject to a lighter regulatory touch, with a view towards ensuring that exploitation is managed in a manner that would 'keep populations out of danger'.[135] For cetaceans, 'all species not mentioned in Appendix II' are listed here, alongside harbour and grey seals.

For Appendix II species, Article 6(a) prohibits 'all forms of deliberate capture and keeping and deliberate killing'. This suggests that capture followed by the immediate release of such animals is not necessarily precluded. The retention of these animals is, however, clearly prohibited.[136] The words '*all forms* of deliberate capture', and the absence of any limitation related to the purpose of capture, indicate that the prohibition is intended to operate broadly. The possession and trade of Appendix II animals is also proscribed under the Bern Convention.[137]

Derogations may be permitted solely when three cumulative conditions are met. Firstly, the derogation must be motivated by one of the following interests:

- for the protection of flora and fauna;
- to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;
- in the interests of public health and safety, air safety or other overriding public interests;
- for the purposes of research and education, of repopulation, of reintroduction and for necessary breeding; or
- to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.[138]

Secondly, it must be clear that 'no other satisfactory solution' is available. Thirdly, parties must warrant that 'the exception will not be detrimental to the survival of the population concerned'.

The first criterion, 'the protection of flora and fauna', seems to be a potential candidate in the Morgan case. This clause is geared primarily towards avoiding disproportionately adverse effects from one protected species on *another*.[139] It could,

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133 Ibid., Art. 1.

134 Ibid., Art. 6.

135 Ibid., Art. 7.

136 See also M. Bowman, P. Davies & C. Redgwell, *Lyster's International Wildlife Law* (Cambridge University Press, 2010), at p. 314.

137 Bern Convention, n. 101 above, Art. 6(e).

138 Ibid., Art. 9(2).

139 See also C. Shine, 'Interpretation of Article 9 of the Bern Convention', Bern Convention Doc. T-PVS/Inf (2010)16 (Oct. 2010), at p. 6.

for example, justify the capturing or killing of protected carnivores in order to reduce predatory impacts on other vulnerable species. It should also support the removal of sick and infectious individuals from a threatened population to mitigate the effects of disease. If taken literally, this 'open-ended'[140] clause could justify the capture of a debilitated Appendix II specimen, with the aim of furthering the conservation of the species through that individual's recovery and return to the wild. Such a link is, in any event, expressly established in the national exemption held by the Dolfinarium Harderwijk under the Dutch Flora and Fauna Act. Here, derogations were granted for the purposes of (i) research, and (ii) 'the protection of flora and fauna, *that is*, rescue, rehabilitation, and release into the wild'.[141] The basis of 'research and education' is also pertinent here, although it is evident that the initial capture of Morgan was not motivated by these specific purposes. The same is true of the propagation defence, which is also mentioned under this heading.

Regarding the absence of other satisfactory solutions, the principal alternative to capturing the killer whale would obviously have been to leave it *in situ*, which would probably have resulted in its death. If the conservation of the species, under the heading of 'the protection of flora and fauna', is deemed the proper basis for capturing the animal, then it is debatable whether leaving the animal alone could have been justified as a 'satisfactory solution'. The second criterion thus initially appears to have been met. This ostensibly ceased to be the case, however, when it was decided to keep the whale in captivity indefinitely. From the perspective of conserving the wild population, a debilitated killer whale in the water seems a perfectly satisfactory alternative to an individual removed from its ecosystem never to return.

As far as the third criterion of Article 9 is concerned, aiding the recuperation of a severely weakened individual would clearly not impair the survival of the killer whale population involved.

Despite these considerations, there is some suggestion that the Article 9 test could be bypassed in capture-and-release situations. This stems from a remarkable passage in the Explanatory Report to the Bern Convention drawn up by the ad hoc Committee that prepared the Convention.[142] The explanation accompanying Article 9 elaborates, inter alia, that '[i]t was considered that the taking or killing of protected fauna for humane or humanitarian reasons was an accepted practice that did not require a specific provision in the convention'.[143] Evidently the Committee contemplated interventions which, at the time, were considered so widely accepted that specific exemption clauses for them were deemed redundant. The Explanatory Report applies the same logic to actions in self-defence – such actions lie outside of the scope of the prohibition of Article 6, even though this does not follow from the treaty text[144] – and to 'emergency cases where

140 Ibid.

141 Exemption FF/75A/2008/064, n. 55 above (translation by present authors; emphasis added).

142 Explanatory Report Concerning the Convention on the Conservation of European Wildlife and Natural Habitats (Council of Europe, 1979).

143 Ibid., para. 39.

144 Ibid., para. 31.

exceptions would have to be made without all conditions [of Article 9] having been fulfilled (e.g. the abatement of rabies)'.[145]

Assuming that the above explanation (still) represents a valid interpretation, particular actions performed for 'humane or humanitarian reasons', which in principle violate Article 6 of the Convention, would nevertheless be permissible without further regard to Article 9. It follows from the Explanatory Report that this construction is confined to generally accepted actions, similar to combating notorious diseases or wounding an unexpectedly aggressive animal in self-defence. It is not straightforward, however, to identify 'humane or humanitarian' actions that presently attract little controversy. One possibility is the mercy killing of a wild animal that clearly has no chance of survival, an exemption that is widely applied in national law. Whereas this may be *relatively* non-contentious, even the euthanasia of hopelessly suffering wild animals remains controversial in some quarters. In other contexts, states (including parties to the Bern Convention) have preferred to limit potential confusion by expressly regulating the issue. Examples include the WSSA,[146] ACCOBAMS[147] and the Agreement on the Conservation of Albatrosses and Petrels (ACAP),[148] another CMS subsidiary instrument addressing the conservation of seabirds.[149] At any rate, the capture and permanent captivity of charismatic megafauna is hardly 'non-controversial'. Hence, all things considered, it seems doubtful whether the reasoning of the Explanatory Report provides a valid justification for retaining rescued animals.

The Bern Convention does not offer advice on the release of rehabilitated animals, although some guiding principles may be distilled from its institutional framework. In 1985, the Committee of Ministers of the Council of Europe adopted a Recommendation on the reintroduction of wildlife species.[150] Although it predominantly addresses the release of species into historically occupied habitats, parallels can be drawn with rehabilitation efforts. In particular, the Recommendation advocates an appraisal of the species' prospects for success, 'analysing in particular the possible repercussions of reintroduction', while releases should be prohibited 'when adverse effects on the ecosystem are to be feared'. This has been endorsed by the Standing Committee to the Bern Convention in its policies on restocking populations.[151] Again, this is analogous to capture-and-release situations and mandates a preceding survey to establish that a reintroduction would be 'effective and acceptable' and undertaken pursuant to pertinent IUCN guidance. Reintroductions are also to be regulated to avoid 'substantial damage' to environmental interests and subject to an assessment of ecosystem implications.

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145 Ibid., para. 39.

146 WSSA, n.127 above, Art. VI(2).

147 ACCOBAMS, n. 117 above, Art. II(2).

148 Canberra (Australia), 19 June 2001, in force 1 Feb. 2004, available at: http://www.acap.aq.

149 ACAP, ibid., Art. 3(5): 'Humane killing, by duly authorized persons, to end the suffering of seriously injured or moribund albatrosses or petrels shall not constitute deliberate taking or harmful interference'.

150 Recommendation No. R(85) 15 of the Committee of Ministers to Member States on the Introduction of Wildlife Species.

151 Recommendation No. 58 (1997) on the Reintroduction of Organisms Belonging to Wild Species and on Restocking and Reinforcing Populations of Such Organisms in the Environment.

4.2. *The EU Habitats Directive*

The EU Habitats Directive[152] seeks to 'contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora' in the EU Member States.[153] The measures to be taken under the Directive 'shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest'.[154] The killer whale is such a species 'of Community interest' and is listed in Annex IV of the Directive, which addresses 'Animal and Plant Species of Community Interest in Need of Strict Protection'.

The Habitats Directive was adopted in part to implement the Bern Convention within the EU, hence there are considerable similarities between their provisions on species protection. Under Article 12 of the Directive, Member States shall take 'the requisite measures' to establish a 'system of strict protection' of Annex IV species in their natural range,[155] prohibiting, inter alia, 'all forms of deliberate capture or killing of specimens of these species in the wild'[156] and their 'keeping, transport and sale or exchange, and offering for sale or exchange'.[157] The parallel provision to Article 9 of the Bern Convention is Article 16 of the Directive, which 'defines in a precise manner the circumstances in which Member States may derogate'[158] from Article 12, 'provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range'.[159]

As under the Bern Convention, exceptions to the strict protection of such species may only be allowed when three cumulative conditions have been demonstrably fulfilled. Moreover, the scope for derogations under Article 16 is to be interpreted restrictively, as the European Court of Justice (ECJ) and the European Commission have stressed repeatedly.[160] The burden of proving that these three prerequisites are met rests on the Member State in question.[161]

Although there are differences in the formulation of the derogation conditions in the Convention and Directive respectively, for present purposes they are of minor

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152 N. 63 above.

153 Ibid., Art. 2(1). On the challenges of implementing the Directive within the marine environment, see R. Caddell, 'The Maritime Dimensions of the Habitats Directive: Past Challenges and Future Opportunities' in G. Jones QC (ed.), *The Habitats Directive: A Developer's Obstacle Course?* (Hart, 2012), pp. 183–208; and Trouwborst & Dotinga, n. 24 above.

154 Habitats Directive, n. 63 above, Art. 2(2).

155 Ibid., Art. 12(1).

156 Ibid., Art. 12(1)(a).

157 Ibid., Art. 12(2).

158 Case C-6/04, *Commission* v. *United Kingdom* [2005] ECR I-9017, para. 111.

159 Habitats Directive, n. 63 above, Art. 16(1).

160 See, inter alia, the ECJ judgment in Case C-6/04, n. 158 above, para. 111; and European Commission, Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive 92/43/EEC, Feb. 2007, at p. 53, available at: http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm.

161 Commission Guidance 2007, ibid., at p. 54; see also Case C-60/05, *WWF Italia and Others* v. *Regione Lombardia* [2006] ECR I-5083, para. 34; Case C-76/08, *Commission* v. *Malta* [2009] ECR I-8213, para. 48.

significance and are therefore not discussed. There is considerable congruence between the two instruments as far as capture-and-release situations are concerned. Accordingly, where Article 16(1)(a) of the Habitats Directive (which concerns the 'interest of protecting wild fauna') is engaged, it can in principle justify the capture and keeping of an animal only on the condition that every effort will be made to return it to its natural environment afterwards.

Article 16(1)(d) (which concerns 'research and education') is also of potential relevance. Guidance from the European Commission associates derogations for research purposes primarily with comparatively minor interventions, such as the brief immobilization of an animal in order to attach a transmitter.[162] Even so, it cannot be completely discounted that Article 16(1)(d) could be invoked to justify permanent captivity when major research objectives so require and those objectives cannot be attained in any other way. Again, however, the initial capture of Morgan in June 2010 was not driven by any such motives. It is notable that, in the conditions attached to the Dolfinarium's exemption under the Flora and Fauna Act, research considerations are categorically cited as justifying the permanent keeping of animals that were originally captured for *another* reason (namely the 'protection of flora and fauna') should their release ultimately prove 'not possible'.[163] The use of one derogative ground from Article 16 of the Habitats Directive[164] as a blanket stand-in measure, or 'Plan B', lest another basis[165] is no longer viable, raises doubts over whether Article 16 has been applied in the requisite careful and restrictive manner. Such a policy might, for instance, infer an artificial invocation of 'research' as justification.

Incidentally, there seems to be little reason to assume the existence of an implicit exception for actions for 'humane reasons' under the Habitats Directive. As with most other pertinent instruments, the Directive appears to assign little significance to animal welfare considerations. Indeed, Advocate-General Kokott has questioned whether, in connection with the condition of 'no satisfactory alternative', Article 16(1) of the Habitats Directive provides a clear justification for the killing of an Annex IV species in distress:

> [a]t least in some cases, it will indeed be a satisfactory alternative to let matters take their natural course, instead of stepping in and taking charge in order, in the final analysis, to give effect to human conceptions concerning dealing with animal suffering.[166]

4.3. *The Convention for the Protection of the Marine Environment of the North-East Atlantic*

A final instrument of potential relevance is the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention),[167] through

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162 Commission Guidance 2007, ibid., at p. 56.

163 Exemption FF/75A/2008/064, n. 55 above, para. 8.

164 Habitats Directive, n. 63 above, Art. 16(1)(d).

165 Ibid., Art. 16(1)(a).

166 Case C-6/04, n. 158 above, Opinion of A-G Kokott, 9 June 2005, para. 110. Incidentally, the issue had not been raised by the Commission, and the ECJ itself did not address it.

167 Paris (France), 22 Sept. 1992, in force 25 Mar. 1998, available at: http://www.ospar.org.

which parties undertake, inter alia, to 'take the necessary measures to protect and conserve the ecosystems and biological diversity of the maritime area' in the northeast Atlantic, including the North Sea.[168] This formulation assigns a broad margin of discretion to contracting parties in terms of the specific measures to be taken. Measures aimed at the protection of species are, however, clearly envisaged. Moreover, the discretionary margin has been gradually eroded with regard to particular species, by virtue of recommended actions agreed through the OSPAR Commission.

A central role is reserved for the 'OSPAR List of Threatened and/or Declining Species and Habitats' (OSPAR List).[169] Even though this List and other decisions by the OSPAR Commission are not formally binding, they arguably influence the interpretation of associated treaty commitments. Three marine mammal species are included in the OSPAR List, namely the blue whale (*Balaenoptera musculus*), northern right whale (*Eubalaena glacialis*), and harbour porpoise (*Phocoena phocoena*), for which recommendations concerning capture-and-release operations could potentially be developed. The killer whale does not occur on the OSPAR List; nor has it been the subject of species-specific recommendations.

5. ALTERNATIVE LEGAL APPROACHES: THE ANIMAL RIGHTS DIALECTIC

Recent litigation in the US has raised important questions over the applicability of constitutional rights to animals, which could potentially influence capture-and-release jurisprudence. Although the inherent rights of nature have been famously championed in the US,[170] European jurisdictions – and EU law[171] – have proved more circumspect to the *locus standi* of non-human claimants. Coincidentally, a case filed in California in October 2011 – with judgment delivered in February 2012 – concerned five individual orcas, held in captivity in two aquariums (SeaWorld San Diego and SeaWorld Orlando).[172] Intriguingly filed by the five orca claimants, suing in their own names[173] but represented by their six 'Next Friends' in the form of the organization People for the Ethical Treatment of Animals (PETA) and five individuals, the animals sought a declaration that they were being 'held by the Defendants in violation of Section 1 of the Thirteenth Amendment to the Constitution of the United States, which prohibits slavery and involuntary servitude'.[174]

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168 OSPAR Convention, ibid., Annex V, Art. 2(a) (in force for the Netherlands since 24 Aug. 2001).

169 For the latest version of the list, see OSPAR Agreement 2008-16 (2008), available at: http://www.ospar.org.

170 C. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review*, pp. 450–87.

171 See P. Newell & W. Grant, 'Environmental NGOs and EU Environmental Law', in T.F.M. Etty & H. Somsen (eds.), *The Yearbook of European Environmental Law, Vol. 1* (Oxford University Press, 2000), pp. 225–52.

172 In the US District Court for the Southern District of California. See the filed papers at http://www.peta.org/b/thepetafiles/archive/2011/10/25/peta-sues-seaworld-for-violating-orcas-constitutional-rights.aspx.

173 The orcas are named Tilikum, Katina, Corky, Kasatka and Ulises: ibid, para 1.

174 Ibid., para. 1.

The filed papers then canvassed the complexity of orca society,[175] describing their communication skills, emotional interactions and intelligence, alongside the debilitating effects of captivity on orcas.[176] They also recounted the life histories of the five plaintiffs, which had been in captivity for periods ranging from 29 to 43 years.

The orcas made two claims for relief from the court, in respect of slavery[177] and of involuntary servitude,[178] both based on Section 1[179] of the Thirteenth Amendment of the US Constitution. The orcas submitted that Section 1 prohibits slavery and involuntary servitude without regard to the identity of the victim;[180] that Section 1 is not confined to African slavery, and that it embodies a longstanding principle that is 'defined and expanded by common law to address morally unjust conditions of bondage and forced service anywhere in the United States'.[181]

Perhaps not surprisingly, the court on 8 February 2012 granted a motion brought by the defendant SeaWorld to dismiss the case.[182] The court noted that there are 'no authorities applying the Thirteenth Amendment to non-persons', and concluded that 'the Thirteenth Amendment only applies to "humans" and therefore affords no redress for Plaintiffs' grievances'.[183] Although the court accepted that 'constitutional principles have been extended over the years to apply to changing times and conditions' and embody 'fundamental constitutional concepts subject to changing conditions and evolving norms',[184] it was held that the Thirteenth Amendment is 'not reasonably subject to an expansive interpretation'; and that it 'targets a single issue: the abolition of slavery within the United States', with meaning being 'clear, concise, and not subject to the vagaries of conceptual interpretation'.[185]

The present article has examined duties accruing from various international commitments; the *SeaWorld* litigation is therefore of indirect relevance. It is, however, a timely reminder that many of the issues are likely to recur.[186] Many of the arguments

175 Ibid., paras 10–18.

176 Ibid., paras 19–27.

177 Ibid., paras 101–107.

178 Ibid., paras 108–111.

179 Which provides that '[n]either slavery nor involuntary servitude ... shall exist within the United States, or any place subject to their jurisdiction'.

180 Filed papers, n. 172 above, para. 104.

181 Ibid., para. 105.

182 US District Court, S.D. California, Westlaw citation: 2012 WL 399214 (S.D.Cal.).; Jeffrey T. Miller, District Judge.

183 Ibid., 'Applicability of the Thirteenth Amendment to Plaintiffs: para. 3'.

184 Ibid., para. 4.

185 Ibid., paras 4–5.

186 The *SeaWorld* case was not the first such case in the US. In 2004 the 9th Circuit Court (which includes California in its jurisdiction) decided that 'the world's cetaceans' did not have 'standing to bring suit in their own name under the Endangered Species Act, the Marine Mammals Protection Act, the National Environment Protection Act, and the Administrative Procedure Act': *The Cetacean Community* v. *George W. Bush, President of the United States of America; Donald H. Rumsfeld, United States of America Secretary of Defense*, US Court of Appeals for the 9th Circuit, No. 03-15866, D.C. No. CV-02-00599-DAE/BMK, filed 20 Oct. 2004; 386 F.3d 1169 (9th Cir. 2004). In this case, the cetacean community (meaning 'all of the world's whales, porpoises and dolphins') challenged the US Navy's use of certain sonar equipment which was allegedly injurious to them. This precedent may have prompted the *SeaWorld* plaintiffs to found their action on an alternative basis (violation of the Thirteenth Amendment).

made in the *SeaWorld* case could also be made in respect of Morgan,[187] whose prospects of a return to the wild will recede considerably with the passage of time. Moreover, the *SeaWorld* case serves as a reminder that, as our understanding of the emotional and other intelligence and the social relationships of marine mammals increases, concomitant public pressure will be applied to authorities to secure improvements in their care, if not their liberty.

6. CONCLUSIONS

A number of international legal instruments advance commitments of relevance to human interventions intended to aid stricken marine mammals. Reflecting trends in domestic legislation, these provisions do not prescribe an unequivocal course of action for the animal in question, while varying margins of discretion are conferred on the rescuing states. Situations like the one involving Morgan appear to have been unforeseen or neglected at the time of drafting, creating future interpretive difficulties as rescue techniques become more advanced and rehabilitation becomes an increasingly viable conservation tool for marine mammals from depleted stocks.

The overarching regulatory framework is slightly permissive and arguably ambiguous on this issue. Some instruments, however, clearly serve to restrict the options available to national authorities, such as CITES and the concomitant EU CITES Regulation 338/97, although in principle they do not specify whether a rescued animal ought to be returned to sea. More concrete objections to prolonged captivity arise under ASCOBANS, ACCOBAMS, the WSSA, the Bern Convention and the Habitats Directive, presupposing that the purported repatriation does not compromise the wider environment.

The Morgan controversy starkly exposes difficulties inherent in the present system. The ASCOBANS text, which appears not to contemplate situations of this nature, remains clearly problematic with cetacean rescue operations like Morgan's at odds with national commitments under the Agreement. The Bern Convention and Habitats Directive offer more immediate assistance in the present case, while ACCOBAMS and the WSSA present regulatory models to follow in the longer term, if sufficient political will can be mustered. Claiming research purposes as the basis for the killer whale's permanent captivity raises questions in the context of the Habitats Directive and the Bern Convention, and is evidently incompatible with the Annex to ASCOBANS. That the authorities have opted for permanent captivity therefore appears legally problematic, the more so given the stated reliance upon current international obligations to support this position.

This is compounded by the shifting justification provided by the Dutch authorities for continued human intervention. This has evolved from conservation considerations to research initiatives, with the latter basis omitted from the official explanation to ASCOBANS. That Morgan's permanent captivity is now justified on educational and welfare grounds ought to expose the decision-making process to searching review under domestic administrative law, which may further clarify international and EU obligations. Concerns must, however, be raised by the implications of the November judgment, which

187 Coincidentally, the orcas currently at Loro Parque originated from SeaWorld in the US.

revised the tenor of the previous decision, and was founded upon a CITES Resolution that is *not* (directly) applicable, while disregarding the interpretive value of instruments that the national legislation in question *was* intended to implement.[188] Neither does the judgment clarify whether subsequent research activities are 'relevant within the framework of obligations imposed by the EU Habitats Directive, the Bern Convention and ASCOBANS', as required by the conditions of the exemption.[189] It thus omits an essential consideration, since permanent captivity for research purposes cannot be justified under ASCOBANS.

In the final analysis, with human interventions now being relatively common, the international legal framework applicable to the capture of stricken marine mammals would benefit from clarification of the procedures involved – especially concerning cetaceans[190] – through the IUCN, specialist treaties and/or further judicial interpretation of the Habitats Directive. In the meantime, the Morgan situation remains highly unsatisfactory: the capture and captivity of the animal is not only patently problematic in the light of the Dutch commitments under ASCOBANS, but also troublesome from the perspective of the Bern Convention and Habitats Directive. Indeed, the preceding evaluation provokes the inescapable conclusion that the capture and keeping of the killer whale *may* have been compatible with national obligations under these instruments – *provided that* clear efforts were made to return the animal to sea, even if its prospects of long-term survival were not deemed especially promising. Ultimately, this appears to be the strongest legal obligation which can be identified in the matter of Morgan.

188 With regard to these instruments the judgment is limited to the general statement that the Flora and Fauna Act constitutes part of the Netherlands' implementation of its 'European and international obligations': Joined cases AWB 11/5033 BESLU and AWB 11/5035 BESLU, n. 73 above, para. 4.7 (translation by present authors).

189 Exemption FF/75A/2008/064, n. 55 above, para. 8.

190 A similar case to that of Morgan's could arise tomorrow in any state with a coastline.