

■ Declaring Whales' Rights

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Abstract

In May 2010, at the University of Helsinki, a "Declaration of Rights for Cetaceans" was issued. Such an event can be seen as bringing to full cycle a process which, prepared by the creation in 1946 of the International Whaling Commission, and passing through the adoption of a moratorium on "commercial whaling" in 1986 and the IWC nonbinding resolution condemning "scientific whaling" in 2005, has reached its peak in the contemporary worldwide opposition to the killing of whales. Against the background of a relevant argument in International law, and in the light of recent scientific discoveries on cetacean intelligences and cultures, this essay explores the grounds for, and the implications of, the attribution of a right to life to whales.

Keywords: whales, right to life, customary international law, ethics, culture, genocide, self-consciousness

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Whales learn and live in ways that previously have only been identified as “human”
Hal Whitehead¹

Essentially, the brains of primates and cetaceans arrived at the same cognitive space
while evolving along quite different paths
Lori Marino²

A fundamental moral principle, which was first formulated by Aristotle, is that like
cases should be treated alike
James Rachels³

The Declaration

In May 2010, a Conference on Cetacean Rights was held at the University of Helsinki.⁴ At the end of the conference the following “Declaration of Rights for Cetaceans: Whales and Dolphins” was issued:

Based on the principle of the equal treatment of all persons;

Recognizing that scientific research gives us deeper insights into the complexities of cetacean minds, societies and cultures;

Noting that the progressive development of international law manifests an entitlement to life by cetaceans;

We affirm that all cetaceans as persons have the right to life, liberty and wellbeing.

We conclude that

- 1. Every individual cetacean has the right to life.*
- 2. No cetacean should be held in captivity or servitude; be subject to cruel treatment; or be removed from their natural environment.*
- 3. All cetaceans have the right to freedom of movement and residence within their natural environment.*
- 4. No cetacean is the property of any State, corporation, human group or individual.*

¹ Dieli Colburn (2003).

² Marino *et al.* 116.

³ Rachels 152-572.

⁴ “Cetacean Rights: Fostering Moral and Legal Change”, Helsinki Collegium for Advanced Studies, University of Helsinki, Finland 21st - 22nd May 2010.

5. *Cetaceans have the right to the protection of their natural environment.*
6. *Cetaceans have the right not to be subject to the disruption of their cultures.*
7. *The rights, freedoms and norms set forth in this Declaration should be protected under international and domestic law.*
8. *Cetaceans are entitled to an international order in which these rights, freedoms and norms can be fully realized.*
9. *No State, corporation, human group or individual should engage in any activity that undermines these rights, freedoms and norms.*
10. *Nothing in this Declaration shall prevent a State from enacting stricter provisions for the protection of cetacean rights.*

The History of IWC

In June 2010, the town of Agadir, in Morocco, hosted the 62nd Meeting of the International Whaling Commission (IWC). The history—and prehistory—of the IWC is rather known. Starting at least from the eleventh century, cetaceans, perceived as free resources, had been savagely massacred. Around World War I, large-scale hunting had developed into a commercial industry leading to the near extinction of many species; and the realization by the industries that their profits depended upon the availability of sizable numbers of whales prompted, in 1931, the conclusion of a Convention for the Regulation of Whaling. Since, however, due to the lack of enforcement of the agreements, the extermination of the entire whale population soon reemerged as a major concern, the year 1946 saw the creation of the IWC, with the explicit goal of coordinating the different national industries. And if for the first two decades the IWC's impact was hardly noticeable, soon afterwards the growing international interest in the plight of cetaceans made it the locus of a clash between the pro- and anti-whaling camps.⁵ In 1980 the IWC even sponsored in Washington, D.C., a conference on “Cetacean Intelligence and Behavior, and the Ethics of Killing Cetaceans.”⁶ Then, after the Convention on International Trade in Endangered Species outflanked the IWC on its left, listing as threatened many whale species, and in the face of the escalating

⁵ I'll stick here to the use of expressions like “whalers” and “whaling”, though they are in themselves disagreeable terms for what should be accurately called “whale hunters” and “whale hunting.”

⁶ Harlan B. Miller's paper written on the occasion of this conference can be found in *Between the Species*. See Miller (1994).

“whale wars” of the 1980s, the year 1986 saw a victory of the conservationist countries with the approval of a five-year moratorium, implying a ban on commercial whaling that exempted only “aboriginal subsistence whaling” and “scientific whaling”.

In 1990, when the moratorium was renewed, the reform process accelerated, and the IWC condemned as unnecessary the killing “for research”. Just as the public opinion and the great majority of states responded favourably to the global anti-whaling movement, with the United States emerging at the forefront of the controversy as a supporter of the moratorium and unilaterally enacting legislation intended to augment the enforcement power of the IWC, however, a pro-whaling bloc crystallized. In the last two decades, this bloc made every effort to counter the progressive trend. Thanks to an “opt out” clause providing that member nations in opposition to any IWC regulation need only to file an objection to be considered exempt, Norway lodged an official objection to the moratorium and has continued to whale commercially since 1993; Iceland awarded itself a quota for “scientific” whaling; and Japan started a systematic program of “scientific research” directed by the government-linked Institute for Cetacean Research which, after the collection of data, directly markets whale flesh. Threatening to leave the IWC if it did not repeal the ban, in the last few years the three nations also proposed a plan designed to hasten the adoption of a Revised Management Scheme, or RMS, according to which the moratorium on commercial whaling should automatically end, with whaling restricted to coastal waters for five years, and allowed anywhere after that. Though in the following period member governments once voted to uphold the moratorium, and Australia passed a nonbinding resolution condemning “scientific” whaling, the resolutions based on the pro-whaling bloc’s proposal committed the IWC to proceed to completing a draft RMS for future adoption.

We are thus back to the recent IWC meetings. In 2010, in Agadir, just after the Declaration on Cetacean rights had been issued, what the IWC meeting saw was the presentation of a proposal that would have legitimized commercial whaling in the Southern Ocean, North Pacific and the North Atlantic, and, though the proposal did not go forward, the IWC agreed to enter a twelve-month ‘period of reflection’ and to revisit the subject of IWC reform through the ‘Future of the IWC’ process at the 2011 meeting. During the latest such meeting, held in July in Jersey, the topic of the Revised Management Scheme was temporarily set aside, with the Commission “rather directing its efforts to discussions on the Future of the IWC”.⁷ The following is a random list of the events that occurred in the

⁷ See IWC Press Release - Day 1 - 11 July 2011.

context of the meeting.⁸ Brazil and Argentina advanced the proposal of creating a South Atlantic Sanctuary; this agenda item was left open until the 2012 Meeting. A dramatic mass walk-out of the pro-whaling block stopped the meeting in its tracks. The Commission agreed to initiate a programme tentatively called 'the road to reform of 'Aboriginal Subsistence Whaling', including working to ensure that indigenous whalers improve the humaneness of the hunts, while actually confirming the present "strike limits." The Commission received the Report of its Working Group on Whale Killing Methods and associated Animal Welfare Issues, together with reports from Norway on the improvements it had made on killing methods thanks to its new "penthrite grenade". The Meeting discussed the safety at sea, stating that the Parties 'agree that the resolution of differences on issues regarding whales and whaling should not be pursued through violent actions that risk *human life and property at sea*."⁹

All considered, thus, if one should judge from this clearly anthropocentric outlook and conditioned ethical blindness, one could be pessimistic regarding the future of whales. However, seen in the long term and from a legal perspective, things may turn out to be quite different.

The *Opinio Juris* Argument

A few years ago, legal scholars Anthony D'Amato and Sudhir Chopra published a dense essay in which they claimed that it was time to extend to whales the most fundamental of all human rights—the right to life (D'Amato and Chopra). In support of such a claim, they advanced a juridical argument connected with the broadening world consciousness which has manifested itself in the history of the policies of the involved international institutions.

D'Amato and Chopra first allege that a detailed reconstruction shows how such policies moved through five incremental stages: the free resource stage, up to World War I; the regulation stage from 1918 to 1931; the conservation stage, seeing the entering into the 1945 Protocol which introduced "maximum catch quotas"; the protection stage, during which the International Whaling Commission was created; and the preservation stage, culminating in the enforcement of the moratorium on commercial whaling. Then, employing purposive as well as descriptive materials, in view of the fact that customary international law is

⁸ See the Whale and Dolphin Conservation Society's reports at <<http://www2.wdcs.org/blog/index.php/?archives/540-IWC-63-July-8th-Welcome-to-Jersey.html>>.

⁹ *Ibid.*, my emphasis.

a synthesis of qualitative and quantitative elements, they argue that this very progression naturally paves the way for a sixth stage—*entitlement*.

D’Amato and Chopra admit that the idea of entitlement implies a major theoretical change: to claim that whales are “entitled” to life means to recognize that they must be raised from the sphere of bare life exposed to an unconditioned threat of death to the favoured realm where rights and prerogatives apply. They nonetheless show how, even though involving a crucial shift, the entitlement stage can be logically construed as a mere incremental advance in the series of the progressive stages in question. For, set within the framework of international jurisprudence, what the involved historical process reveals is that trend in the component of customary international law which is called *opinio juris*. The development of international custom, the authors explicate, is a dynamic process, and to anticipate a customary trend is to argue that, in a sense, it already exists. In the case of whales, the practice of states has moved through phases that are best characterized as increases in international breadth of awareness, pushing forward even structurally reluctant institutions such as the IWC; and this combination of practice and awareness is just what formally constitutes the material and psychological elements of general custom. Since what states do becomes what they legally ought to do, by virtue of a growing sense that what they do is right, proper and natural, the dawning sense of duty to whales discloses a sense of obligation that constitutes the *opinio juris* component of binding customary international law. It is in this regard that it can be asserted that the attainment of the entitlement stage in its inevitability has already been anticipated in the law.

As D’Amato and Chopra stress, the idea of having an entitlement includes a notion of a moral right that can inform existing law or push it in a certain direction. In a legal context, when a court accepts the moral claim of right and recognizes it as somehow subsisting in the law all along, though legal precedent was to the contrary, it is said that the court “articulates” the pre-existing right. Along these lines, an international court could articulate a right to life of whales arising from the customary law practice of their preservation. This because cetaceans’ entitlement is already implicit in international law as resulting both from progression through the previous stages, and from a sense that further development is morally legitimate.

The Ground and Role of the Appeal to Tradition

What to say, then, of the claims advanced by those who oppose this step forward? On close inspection, there is only one notion around which, explicitly

or implicitly, all such claims revolve. It is the notion of cultural tradition. Quite often, the debate over global governance is contrived as a clash between a body of international laws and what is depicted as “national culture” (Paul 40). Actually, when national governments want to supersede international norms, they tend to claim cultural exceptions—that is, they make reference to their “cultural heritage.” This applies in our context too. All the practices whose official vindication stands in the way of the individual legal protection of whales—from continued whaling by Iceland, Japan and Norway to authorized “subsistence whaling” by aboriginals—are defended by appeals to traditional cultural practices or perspectives.

Do specific cultural traditions count from a normative point of view? Note that what we are here considering is not culture in its general role, to borrow a felicitous definition by Jean-Marie Schaeffer (321), of interface between individuals and the world in which they are immersed—a role to which we shall return—but instead some particular aspects of a social system of practices. Accordingly, one can safely claim that there is nothing sacred in cultural traditions. Though they are favored by the current prevalence of multicultural discourses—so much so that they are often reinvented to fuel processes of collective identity construction—cultural traditions are not a trump card. They may be important, being part of the symbolic capital of the nations,¹⁰ especially of the ones that feel they have long been dominated or despised—consider e.g. the recovery of local beliefs and perspectives by some African states or communities. All this, however, holds only *prima facie*, absent any further considerations. If the appeal to cultural traditions can play some role when what is at issue are peripheral matters like, e.g., specific exceptions to free trade, it cannot but yield when what is involved are questions of basic individual protection.

The word “tradition”, coming from a Latin term meaning “delivery”, refers to what is handed down as belief or practice; and, paraphrasing from John Stuart Mill’s comment on intuitions, one might say that traditions, dispensing with the obligation of justifying themselves by reason, and erected into their own all-sufficient justification, can consecrate deep-seated prejudices and give support to bad institutions (Mill 34). In fact, they are more often appealed to by those in power to maintain hierarchical and exploitative systems within their societies. Human slavery has been seen, and defended, as a traditional cultural practice for centuries.¹¹ And, at present, many Third World societies do object to the

¹⁰ For the notion of “symbolic capital”, or capital in prestige and honor, see Bourdieu (1991, part III, chapter 7).

¹¹ Even recently, in Myanmar (formerly Burma), the military elite sought to justify the use of slave labor by reference to custom and cultural practice. See e.g., Kawasaki and Kawasaki (1996) at <<http://www.brelief.org/articles2.htm>>. The question of slavery is particularly appropriate to evidence

universalism of women rights by invoking traditional views of women in their societies; and it even occurs that states agree to ratify conventions including women rights with the explicit reservation that they must be subject to cultural beliefs and practices,¹² while women's NGOs continue to work internationally to achieve effective equality.

Is the current dispute about whales' right to life equivalent? Can in this instance too cultural objections be openly rejected? Is what the appeal to cultural traditions tries here to forestall, contra the *opinio juris* of customary international law and the new consciousness of the world's peoples, a progressive step whose result would be the extension of basic rights to beings to whom they have been wrongly denied?

Concerning this aspect of perceived moral legitimacy, D'Amato and Chopra observe that, factually, the "extensionist" feature of this process is consonant with a global historical process which has seen the continuous widening of the circle of rights holders, with a progression in ascribing fundamental protection to formerly defenceless beings. Moreover, evaluatively, the substitution of hierarchical visions with presumptions in favour of equality is just what we see as moral progress. But the key point is that, while international legal theory has long emphasized its theoretical autonomy, recently many scholars have challenged this conventional model, regarding instead international law as at least partially founded on ethics.¹³ Thus, against this background, it may be in order to briefly consider the strictly ethical side of the case for whales' rights.

Whales as Persons

Ethics has as its object two sorts of theory of conduct. Morality in the broad sense is an all-inclusive theory of conduct, which includes precepts about the character traits to be fostered and the values to be pursued. Morality in the narrow sense, or social morality, consists instead of a system of constraints on conduct whose task is to prevent harm to others—first and foremost, in the two main forms of the infliction of suffering and the taking of life (Warnock 148;

the difference between specific cultural traditions and culture in its vital role. While in nineteenth-century the claim of privilege for cultural tradition was central in the defenses of American slave-holders, contemporary critical race studies have emphasized how tragically African-American slaves had been wronged by the destruction of their cultures.

¹² See e.g. the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) at <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>>.

¹³ See e.g. Teson (1992) or Buchanan (2004).

Strawson 1-17). In our philosophical landscape, the notion of person, usually contrasted with the notion of thing, has always played a relevant role with reference to the protection from such harms (Trendelenburg).¹⁴ For, while “person” is defined so that it is a descriptive term, whose conditions of application have to do with the presence or absence of some factual characteristics, the assignment of descriptive content is guided by moral considerations.¹⁵ And if, traditionally, to say of a being that it was a person meant to grant it a particular moral status, often meant to prevent its use as a mere means to others’ ends, the notion has gradually come to be especially tied to the question of the wrongness of killing. Accordingly, in present debates, to say of some being that it is a person is not only to ascribe it some rights, but most prominently to grant it the right to life (Feinberg).

Is the concept of person coextensive with the concept of “member of the species *Homo sapiens*”? Arguably not. On the one hand, the notion of person being a creature of ethical theories, it may be stressed that, historically, its theological use in connection with God has prevented it from simply becoming another term for human being. On the other, and more theoretically, in recent years an *ad hominem* argument directed at the paradigm of human equality has drawn philosophical attention to the inconsistency of denying a moral role to biological characteristics like race or sex while at the same time attributing a moral role to another biological characteristic such as species (Singer 9). Against this background, an important strand of thinking in contemporary moral philosophy, arguing that the facts which are morally relevant in themselves are not biological facts, but rather psychological facts, has claimed that the concept of a person is the concept, not of a being belonging to a certain species, but of a being endowed with certain mental traits (Cavalieri, *Animal Question* 117ff).

In particular, many authors have argued that the mental trait which is central to personhood is not so much rationality, as rather the property of being aware of oneself as a distinct entity, existing in time and endowed with a past and a future—in other words, self-consciousness.¹⁶ It is evident that what is at play here is the connection between personhood and the prohibition of killing, for if

¹⁴ The best-known formulation of the person/thing dichotomy can be found in Kant’s moral philosophy; see Kant (1997): 45.

¹⁵ On this, see generally the special issue of *Etica & Animali* devoted to “Nonhuman Personhood” (1998).

¹⁶ Such a perspective, though grown in the English-speaking world and detailedly developed in the context of contemporary bioethical discussions of the morality of abortion and euthanasia, has antecedents in continental philosophy as well. Leibniz, for example, connects personhood with consciousness of self and recollection of a former state (Leibniz 1710), and even Kant, in spite of all his insistence on rationality, claims that it is the fact of being able to represent to themselves their own selves that elevates persons above all living beings (Kant 1978, book I, part I).

a being is aware of oneself as an entity existing in time and endowed with a past and a future, it clearly has the possibility of conceiving of one's death as the discontinuance of one's existence, and of dreading, and being harmed by, this discontinuance; and if the function of rights is to protect interests,¹⁷ the interest of such a being in its continued existence ought to be protected by a right to life. In this context, then, the question becomes: Are whales self-conscious?

Despite the problems with studying the minds of beings as evolutionarily removed from us as whales—suffice it to think of how alien the acoustic-aquatic cetacean cognitive environment is for beings like us, whose natural environment is visual-terrestrial—it cannot be doubted that whale brains are impressive pieces of biological hardware, supporting a sophisticated type of awareness. In the first-ever comprehensive analysis of its kind, a study guided by psychologist Lori Marino used computed tomography to investigate the pattern of encephalization in some fossil cetacean species in the past 47 million years, and analyzed these data along with those for some modern species.¹⁸ Marino's conclusion is that the highly expanded brain size of cetaceans is, in a sense, convergently shared with humans, and that, while evolving along quite different paths, the brains of primates and cetaceans arrived at the same cognitive space.

On the other hand, field research into whale behavior clearly points to an ability to look to the past, present and future—functions on which consciousness of oneself as a distinct entity existing in time are mounted. A relevant backward-looking attitude is shown, for instance, when hordes of whales, returning to their original territory after long-distance trips, first sing the old songs of the previous year, and then the new songs.¹⁹ The existence of a conscious self in the present, with the attendant ability to attribute mental states to others, is apparent in cases of whales doing acrobatic manoeuvres to warn approaching vessels of their presence.²⁰ And female killer whales' tutoring of their offspring in the dangerous activity of shallow-water hunting, on which we shall return, offers clear evidence of the capacity for formulating and carrying out plans (Guinet and Bouvier).

Further proof of the cognitive skills in question comes from history. In the first half of the nineteenth century, a white sperm whale of prodigious size and strength terrorized whalers off Chile. Once attacked, Mocha Dick, as the whale came to be known, retaliated with courage and cunning. According to a report, once he suddenly breached to come to the aid of a distraught cow whose calf had

¹⁷ For this classic account, see e.g. Feinberg (1974).

¹⁸ See Marino *et al.*, "Reconstructing Cetacean Brain Evolution Using Computed Tomography" (2003).

¹⁹ See Clark, "Secrets of Whales' Long-Distance Songs Unveiled" (2005).

²⁰ See Timna, "Gray Whale Migration Update" (1998).

been slain by the whalers. When, old and half-blind, he was killed, he had stove three whaleships and a number of boats, killing more than thirty men, and, perhaps extending his hatred to all humans, he had also sunk an Australian trader and a French merchantman.²¹ Mocha wasn't the only whale who fought back. In 1821, the whaleship *Essex* was charged twice by a huge whale, who put a hole in the vessel below the water line, causing the subsequent, slow death of a dozen whalers;²² in 1835 the crew of the English whaleship *Pusie Hall* were forced into retreat by a "fighting whale"; in 1836, the *Lydia* and the *Two Generals* were both attacked; in 1850, the *Pocahontas* was destroyed by a whale attack; and in 1851 the *Ann Alexander* was drowned by a whale who, after being hit in the head, disappeared for a while, and then rushed at it at such a speed that the ship was shaken from stern to stern.²³ From these episodes, one can infer the presence not only of memory and planning, but also of that sense of revenge that the British moralists saw as a component of the sense of justice.²⁴

In the light of all this, whales turn out to be nonhuman persons. This conclusion fully supports from the ethical point of view D'Amato and Chopra's legal argument, and their request for an articulation of whales' right to life. But there is a further, specific aspect of the cetacean mode of being which deserves to be considered.

A Cultural Species

Whales are peculiar beings. Why are they so? It has been recently claimed that what we may define as a "cultural drive" is a principal or contributing cause as to why cetaceans have evolved large brains, self-awareness, and astute intelligences, since these characteristics probably coevolved as elements of a suite of mutually reinforcing characteristics including longevity, social complexity, and communal care of offspring (Weilgart *et al.* 285).

As an even cursory glance to the debate on the claim of privilege for cultural tradition with respect to whaling shows, the notion of culture—even in the absence of a universally accepted definition—is traditionally confined to the intra-human realm, so much so that it may be seen as "a sacrilege" to refer it to

²¹ For Mocha Dick, whose story clearly inspired Melville's *Moby-Dick*, see the first-hand report by the explorer J. N. Reynolds at <<http://mysite.du.edu/~ttyler/ploughboy/mochadick.htm>> (originally appeared in *The Knickerbocker, or New-York Monthly Magazine*, Vol. 13, No. 5, May 1839, pp. 377-92).

²² See Chase, *The Wreck of the Whaleship Essex* (1821).

²³ See Deblois, "Thrilling Account of the destruction of a Whale Ship by a Aperm Whale" (1851).

²⁴ See e.g. Sidgwick (1981, Book IV, Chapter III, §2).

nonhuman beings.²⁵ A primatologist recalls an exemplary episode. In a discussion of the concept of culture at a conference on *Changing Images of Primate Societies* in 1996, he was explaining how each wild chimpanzee community has its own specific culture. He had barely gotten the word ‘culture’ out of his mind, when the cultural anthropologists practically leaped across the table to berate him for using the word ‘culture’ and ‘chimpanzee’ in the same sentence. . . . “How dare you”, they said, “use a human term like ‘cultural diversity’? Say ‘behavioral variation,’ . . . not only can humans alone claim culture, culture alone can explain humanity.”²⁶

The situation is gradually changing, however. On the one hand, regarding the intra-human front, there is a powerful movement within contemporary cultural and social anthropology that would reject the theory of culture as traditionally conceived of in anthropology—e.g. culture as a system of symbolic representations or a set of abstract rules consciously apprehended—in favour of an innovative view of what culture is and of how it works that shows a growing interest in the body as the locus of experience (Hastrup; Csordas). According to Tim Ingold, one of its leading advocates, the new perspective undermines the long-standing, intertwined assumptions that cognition consists of a process of matching sensory experience to stable conceptual schemata, that humans can understand one another to the extent that their cultural orderings are founded on consensus, and that the acquisition of such orderings involves a process of internalisation. (*Perceptions of the Environment* 153ff; “Culture, perception, and cognition” 99-119).²⁷ Indeed, the founding father of this movement, Pierre Bourdieu,²⁸ has defended the view that culture should be properly seen as a *habitus*, a system of schemes of action and perception capable of regulated improvisation which are “deposited, in their incorporated state, in every member of the group” (*Outline* 17, 21) and whose schemes owe their specific efficacy to the fact that they function below the level of consciousness and language, beyond the reach of introspective scrutiny or control by the will (*Distinction* 467).²⁹

²⁵ See e.g. Boesch (2001).

²⁶ Craig Stanford, *Significant Others*. New York: Basic Books, 2001, quoted in Corbey (2005): 185.

²⁷ Ingold is also interested in nonhuman cognition, and has brought to bear this perspective on some of the relevant discussions: see Ingold (1998; 2001).

²⁸ There are of course different interpretations of Bourdieu’s stance on culture. However, it has been convincingly argued that such differences are mainly due to the presence of two main perspectives, one focusing on Bourdieu’s sociological view of culture, and the other revolving instead around his anthropological approach. See Lizardo (2011, 19) Lizardo’s conclusion is that “the current ‘double’ status of Bourdieu as both a ‘postcultural’ (in anthropology) and a ‘cultural’ theorist (in sociology and cultural studies) is thoroughly artificial; the cognitive anthropologists are correct; Bourdieu is a post-cultural (practice) theorist.”

²⁹ More technically, *habitus* is a system of durable dispositions, or “structured structures predisposed

It is clear that this different approach not only demolishes “the oppositions between mind and world, and between knowledge and practice, upon which the whole programme of cognitive anthropology is founded” (Ingold, *Perceptions* 120) but also flies in the face of “gnoseocentrism,” or of that focus on knowledge which from its inception characterized Western thought.³⁰ Even more relevant, however, though perhaps scarcely noticed, is the fact that it undermines as well the conventional opposition between humans and nonhumans. A notion such as that of *habitus*, whose roots in French *ethnologie* can be traced as far back as Marcel Mauss, and which is meant to express the idea that the core of culture lies in a common code and in a system of generative dispositions that, contra any intellectualist traditions, must be seen not as forms of consciousness but as dispositions of the body (Bourdieu, *Practical Reason* 54) is a theoretical tool which can bridge the gap between the over-intellectualized view of human cognition and the under-intellectualized view of animal minds. In fact, in Bourdieu one even finds the claim that the principle of the strategies for biological, social and cultural reproduction that groups implement is “a kind of socially constituted instinct” (*The Logic of Practice*, 161) and that “agents are possessed by the habitus more than they possess it” (*Outline* 18).³¹ Evidently, all this has the effect of clearing the way of the traditional obstacles to the idea of the presence of culture in nonhumans.

On the side of the anthropological study of nonhuman cognition, on the other hand, in 1999, in a pioneering article, starting from the view that “a cultural behavior is one that is transmitted repeatedly through social or observational learning to become a population-level characteristic”, a group of scientists argued that differences in the behavioral repertoires detected in chimpanzees suggest significant cultural variation, and that the combined repertoire of these behaviors in each chimpanzee community is a phenomenon characteristic of human cultures previously unrecognized in non-human species (Whiten *et al.* 682). As regards whales, an analogous conclusion came from a 2001 study where, on the basis of a review of the existing literature, two leading cetologists, after defining culture as information or behavior acquired directly from conspecifics through forms of social learning, claim that there is no evidence supporting a cultural dichotomy

to function as structuring structures”, that is, as principles which generate and organize practices and representations. See Bourdieu (1990): 53.

³⁰ On the notion of gnoseocentrism and its connections with the thesis of human uniqueness see Schaeffer (2007): 28.

³¹ Bourdieu also claims that the “kind of acquired mastery, which can make it possible to respond instantaneously to all the uncertain and ambiguous situations of practice, functions with the automatic reliability of an instinct” (Bourdieu *The Logic*, 104), and speaks of habitus as a “second nature” (Bourdieu, *Outline* 79). See as well his mention, in this context, of Karl Marx’s idea that, in consuetudinary right, sanctions work as a sort of blind and unconscious instinct (Bourdieu, “Entretien”).

between humans and nonhumans, and that observational studies of behavior, vocalizations and populations together offer strong proof that cetaceans “do have culture” (Rendell and Whitehead 382).³²

Here are a few examples. A fascinating instance of group-specific, socially acquired behavioral pattern can be seen in the community-specific “greeting ceremonies” of killer whales observed when resident pods of one community meet. Female sperm whales, on the other hand, display culturally acquired vocal dialects—groups emit typical “codas” of several clicks partially overlapping, and individuals from different vocal clans jointly modify their codas into identical patterns. Since dialects will survive for several generations, and since whales in groups with different dialects tend to interact with each other quite often, cetaceans can be said to offer nonhuman examples of multicultural societies (Dieli Colburn; Whitehead 309, 342).

Evidence of rapid-spread, horizontal (or within-generation) cultural transmission can be clearly detected with reference to the patterns of communicative vocalization known as whale songs—complex sequences of vocalizations which resemble human musical compositions in that they have similar structure and length, employ rhythms and themes, and contain both rhymes and percussion (Payne, Chap. four)—that are emitted at a much greater wavelength than human-produced sounds. On their winter breeding grounds, both male humpback whales and bowhead whales produce at any given time nearly identical songs which evolve structurally over time, while unknown means of learning enable them to keep singing in unison; and it can happen that, when some humpback whales migrate, they teach humpbacks in their new neighbourhood to start singing differently (Noad, *et al.* 537). In general, moreover, innovations spread rapidly in social units, with many members of the group abandoning traditional habits in favour of new habits introduced by creative individuals—witness, among others, the quick diffusion among humpbacks on their summer feeding grounds of novel feeding techniques like e.g., “lobtail feeding”, during which whales twist as they dive, slapping their huge tails on the water surface to stun the fish (Weinrich, *et al.*).

Cetologists have also found evidence for vertical (or parent-offspring) cultural processes, including e.g. the fact that young humpback whales follow their mothers on initial migrations between breeding and feeding grounds, and then repeat them faithfully throughout their lives (Rendell and Whitehead 313). We even have descriptions of what, according to accepted definitions, can be described

³² The involved forms of social learning can comprise exposure, social support, matched dependent learning, stimulus enhancement, observational conditioning, imitation, goal emulation and more. See *ibid.*, pp. 310-11.

as teaching, as in the already mentioned case of intentional stranding by female killer whales tutoring their juveniles in the activity of shallow water capture by pushing them up the beach and then back down the beach.³³ Indeed, vertical cultural transmission is so crucial that menopause, previously thought a unique human characteristic, has now been detected in several species, among which short-finned pilot whales, arguably in connection with the importance of increasing the life span of older females—the matriarchs—who are the main source of information for the group.³⁴

In the intra-human realm, cognitive scientists, stressing the psychological mechanism of knowing one's self through interaction, argue that the brain creates the self through relationship. Over millions of years, the brains of whales developed through a similar process as those of humans—the need for complex societies and relationships. Actually, they not only present mirror neurons, but also those spindle cells, or von Economo neurons, that are thought to process social emotions and play an important role in empathy and intuitions about the feelings of others, and that had previously been considered a prerogative of the hominoid line.³⁵

According to Hal Whitehead, who has produced the most complete study of a whale so far, the sperm whale (Whitehead), the fact that whales can have an existential sense of themselves is quite conceivable because they live in a situation where social relationships and culture are very important: “Because whales live in a very large three-dimensional habitat and they don't have a physical structure that is home for them, they are always on the move. The most important part of the environment for a whale is probably other whales. Social life is vital. As they move around, everything is changing except their social lives.”³⁶ So, whales need social intelligence—it is not only important to nourish the social relationships which they depend on, but also to make good use of the information directly flowing among these social partners. In such a situation, “things like the theory of mind—having a concept of what others know and therefore a concept of self—

³³ See note 28. See also Rendell and Whitehead (2001).

³⁴ See Johnstone and Cant, “The Evolution of Menopause in cetaceans and Humans: the Role of Demography” (2010).

³⁵ Indeed, whales have three times more spindle cells than humans. See Bekoff and Pierce 30. In fact, many are the accounts of whales displaying empathy. For example, a pod of false killer whales once remained with an injured member of their group for three long days, in water so shallow that they were exposed to sunburn and risked becoming stranded, and stayed with the injured whale until he finally died; and two male orcas appeared to be grieving over the death of their mother, as, after she died, they swam together, apart from other orcas in their pod, retracing her movements on the last few days of her life. Orcas are also known to grieve for lost calves. See Bekoff and Pierce 101-02.

³⁶ See Hoare (2011).

become more likely. In turn, this would lead to one to contemplating the self in the environment and how they fit together.” As whales are a cultural species, Whitehead concludes, ideas might be being passed between individuals and down through generations which relate to the whale’s place in the world.³⁷ Moreover, when culture is both sophisticated and important, new processes which begin to operate—cultural group selection, conformism, cultural ethnicity with symbolic markers, as well as, one might add in a Rousseauian vein, group perfectibility, change both the nature of society and individual roles within societies.³⁸

It seems, therefore, that that presence of personhood in whales that grounds the case for their right to life is both confirmed and partially explained by their being a cultural species. But has this further aspect any moral implications? Can it shed more light on our present ethical treatment of whales? To answer this question, one must consider in culture the previously mentioned vital role of interface between individuals and their world—the role, i.e., of providing that rootedness in an embracing environment which is a relevant part of what has been called “niche construction”, or of the process whereby various beings reshape their living conditions (Day *et al.* 330-31).

Culture, Trauma and Genocide

The term “genocide” is presently used in many ways and contexts. There is, however, a more definite employment of the word, one inherent in a line of thought that goes back to the very coining of the term by Polish jurist Raphael Lemkin in 1943 (*Axis Rule* 79-95) and that culminates in discussions within the field of the “new genocide studies” that developed at the end of the past century.³⁹ When Lemkin created the notion, he defined genocide as the destruction of the essential foundations of the life of specific nations or groups—a definition where the notion of “foundations” points to the cardinal element of a woven cultural fabric. And, though he also referred to a coordinated plan of different actions “aiming” at such destruction, the so-called intentionality clause⁴⁰ soon faded in the

³⁷ *Ibid.*

³⁸ See note 22. For Rousseau’s discussion of perfectibility, or improvability, see Rousseau (2008): 179ff.

³⁹ For the “new genocide studies” see Docker (2008, Preface). For a different, and impressive, application of Lemkin’s notion of genocide to animal exploitation at human hands see Karen Davis (2011).

⁴⁰ On the question of the “intentionality clause” and of some specific objections to it, coming from structuralist and Marxian perspectives see Andreopoulos (1977): 7ff. The UN pronouncements are somewhat ambiguous; for if Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 states that genocide means any of various specified acts committed “with intent to

background, leaving center stage to the basic aspect of coordinated destruction—an aspect on whose basis it became possible, both for Lemkin and for his disciples, to encompass group massacres, such as those involved by violent processes of colonization, at whose core lie economic interests rather than a deliberate plan of destruction.

Can it be argued that, due to the cultural aspect of cetacean communities, whaling and other invasive human activities not only violate whales' individual rights, but also inflict on them genocidal damages, or damages affecting them as members of groups embedded in cultural worlds that protect and nourish them, and whose disruption can be lethal? To see whether this is so, we shall apply to the situation of whales the most significant among the elements of a list included in Lemkin's "Revised Outline for Genocide Cases"⁴¹—elements that, within the relevant field, are still seen as characterizing genocidal practices. They are: misrepresentation; rationalization of crime; economic exploitation; accessibility of victim group; massacre and mutilation; slavery; deprivation of livelihood; disruption of families; destruction of leadership; and prohibition of cultural activities or codes of behavior.

In the first place, the whale hunt clearly takes place against the typically genocidal background of a propaganda consisting of *misrepresentation* and *rationalization of crime*: for while historians would celebrate the myth of those who could "destroy in its own element the mighty monarch of the ocean" (Beale Chap. XI), writers would praise "the whale-ship, that cleared the way for the missionary and the merchant" (Melville 125); and contemporary defenders of whaling are keen on underrating whale intelligence and on granting "ecological value" to cetacean hunts.

As for the basic conditions facilitating genocide, *economic exploitation* and *accessibility of victim group*, the former clearly holds for whales even more than for humans; for whales were, and are, killed for economic profit: they have been hunted for food and oil; sinews provided cordage, and bones were used for tools and construction. Apart from the periods in which only the blubber was pillaged,⁴² traditionally, at the shore station, whales were winched up a slipway to a platform

destruction, in whole or in part, a national, ethnical, racial or religious group, as such" (<<http://www.hrweb.org/legal/genocide.html>>), the General Assembly resolution of 1946 defined genocide simply as the denial of the right of existence of entire (human) groups, as homicide is the denial of the right to live of individual beings (<http://www.armenian-genocide.org/Affirmation.227/current_category.6/affirmation_detail.html>)

⁴¹ The text of this undated and unpublished paper can be found in McDonnell and Moses (2005): 504ff.

⁴² See e.g. the impressive description of the killing, the removal of blubber, and the immediate "dumping" of the largest blue whale of which we know of in Payne (1995): 25-26.

where blubber was peeled off, cut up, and boiled; then bones were sawed up and boiled with inedible meat for low-grade oil; the residue was dried and ground for fertilizer or animal feed. Not haphazardly, “total carcass utilization” was the slogan of the leading companies.⁴³ Regarding the accessibility of victim group, on the other hand, initially the whalers’ targets were the coastal species; then, with the refinement of technology, pelagic whales became reachable. The catch of the fastest and heaviest cetaceans—the rorqual whales—was lastly made possible by steam-powered ships and harpoon cannons, and, subsequently, by the extensive use of radio communication and airplanes (later helicopters) to spot individuals.

Turning to the methods and techniques of genocide, it may suffice to read any description of a hunt to realize how *massacre and mutilation* are central to whaling. We also know that progressively smaller whales were taken as overhunting decimated the blue, the fin and humpback whales between the 1940s and 1970s; and that when, e.g., whaling shifted to the North Pacific, in the Antarctic around one million and a half whales had been killed. Moreover, though whales are in general too large to be easily kept in servitude, also the practice of *slavery* has been successfully introduced: orcas, or killer whales, are imprisoned and exhibited just like the smaller dolphins. Even the *deprivation of livelihood* typical of genocide can be patently detected in the case of the forced abandonment of preferred foraging areas induced in cetaceans by their being savagely hunted. Finally, the *disruption of families* is obviously part of whaling activities, even purposely: since whales attempt to protect their offspring, hunters have exploited such urge by injuring calves to “bait” females that can then be harpooned when they try to help.⁴⁴

What interests us particularly in this context, however, is the aspect of the relation between genocide and group culture. For, as we have stressed, genocide amplifies the damages it inflicts by destroying the protective shield that culture provides to the victim groups—and this both in terms of crucial information and of coordinating social structures. And, as for the category of *destruction of leadership*, it is clear that this is exactly what the massacre of the older members of the group causes, since we know e.g. that during warm “El Nino” years when food runs scarce in some regions, sperm whales survive by moving straight to regions a thousand kilometers away where the matriarchs had found fair feeding during

⁴³ “Whaling”, article from the Encyclopaedia Britannica, at <<http://newsletters.britannica.com/articles/jan04/whaling.html>>. It’s interesting to note that right whales, typically hunted for valuable “economics products” such as oil and baleen, gained their name because they were the “right whales” to take.

⁴⁴ Whaling also includes more directly biological forms of damage to families. For instance, the forerunners of commercial whaling, the Basques, caught northern right whales as they gathered to breed. Docile, slow-moving, and sleeping on the surface, the whales were chased by rowboat, struck by harpoon, “played” like fish, and then lanced (*ibid.*).

previous Ninos (Weilgart *et al.* 284), or that, in killer whales, it is just the accumulated knowledge of food distribution that allows the regular use of specific areas by different pods—not to mention of course the more global effects on the role of guidance that the matriarchs can play in the matriline by coordinating collective behavioral changes with some type of vocal lead (Victoria, “Acoustic Measurement”). Still, the most complex category is the one that has been broadly defined as *prohibition of cultural activities or codes of behavior*. Clearly, with respect to the vertical cultural transmission, as it is the case for instance with specialized feeding behaviors, even the disruption of families implies the loss of codes of behavior. At the community level, however, the notion can be more generally applied to the outcome of the loss or dispersion of the vocalizations informing and coordinating the social interplay on which whales depend, such as the forms of communication employed in navigation or in the localization of conspecifics, the markers in individual messages appearing to be clan symbols, and the conformist traditions maintaining stability within groups in situations of frequent interaction.

What can the aftermath of these practices for whales be? Apart from the occurrence of some typical responses to genocide—escape and resistance among the active ones, and terror among the passive (Lemkin, “Revised Outline”)—what is their impact on the surviving members of the victim groups and their descendents? The answer to this question should be obvious, as intra-human experiences have shown us the devastating effects of genocide, encompassing bereavement and intense grief, chronic sense of fear, mental problems and somatic symptoms, asocial attitudes and withdrawal from society, twisted development and inability to cope with hardship and crisis (Hinton, 12ff). But if this answer may seem speculative, since it is not easy to draw inferences from human beings to nonhuman individuals who are both phylogenetically distant from and difficult to observe closely, its soundness can be confirmed by the indications coming from a group of nonhumans which is almost as distant from us, but which, in contrast, we know quite well—namely, elephants.⁴⁵

A group of scientists has in fact argued that many of the features of the most studied among whale societies, that is, sperm whale society, can be found in elephant society, thus illustrating an example of convergent evolution that they aptly named “the colossal convergence” (Weilgart *et al.*). Sperm whales and elephants—the largest brains in the ocean and on land—strikingly resemble each other, and the closest resemblance is found in their complex social organization,

⁴⁵ The use of such parallels is quite common in the intra-human realm. See e.g. Schaeffer (2007): 318, where a hypothesis about Neolithic times is tested against comparable historical events.

based on females living in highly social permanent units that may travel together as a coordinated group relying on complex forms of communication, and on males leading a more solitary existence often in loose-knit “bachelor” groups where the adults curb and guide the development of the younger members. Both elephants and sperm whales live long lives and raise a few well-tended offspring, with adults providing communal child care, and in both cases the matriarchs serve as the leaders of their societies, and as reservoirs of stored knowledge passed on through cultural transmission.⁴⁶

What do we know, then, of the long-term repercussions for elephants of mass killing and disruption of groups and their cultural environments? Together with the nonhuman great apes and cetaceans, elephants are thought to meet the criteria for personhood and, accordingly, for basic moral protection (Poole).⁴⁷ And yet, as we know, elephant society in Africa has been decimated by mass deaths and social breakdown from poaching, “culls,” and habitat loss. One of the psychological consequences of such breakdown is that elephants display symptoms associated with human post-traumatic stress disorder (PTSD) observed in Kosovo and Ruanda. These symptoms include abnormal startle response, depressions, unpredictable asocial behavior and hyper-aggression. Elephant orphans who have witnessed their mothers being killed by poachers during the early days at the orphanage wake up screaming with nightmares (Bradshaw).⁴⁸ On the other hand, since social bonds guide elephants’ development, and young elephants are embedded in complex layers of extended family, trauma globally affects their societies through the collapse of traditional community structures and cultural transmission. Thus, if the individuals who survive death may face a lifelong struggle with depression, suicide or behavioral dysfunctions, their young and families can exhibit similar symptoms, including infant rejection and domestic violence. Moreover, the absence of compensatory social structures, such as the supportive stratum of the matriarchs and the second socialization induced in adolescents by older males may make recovery impossible, leaving behind instead inexperienced mothers and “rogue” young males prone to killing rampages (Slotow *et al.* 245-46). Finally, the disruption of elephant cultural environment due to the loss of stored knowledge about their natural environment caused by the slaughter of

⁴⁶ It should be added that, like whales, elephants too have sometimes retaliated. In the face of frequent reports of herds of elephants destroying African villages without apparent cause, some scientists are speculating that elephants might be attacking humans in revenge for years of abuse. According to Joyce Poole, “they are certainly intelligent enough and have good enough memories to take revenge.” See “Study: Elephants might seek revenge,” (2006) at www.physorg.com/news10914.html.

⁴⁷ For the opening of a discussion about the legal status of elephants see Glennon (1990).

⁴⁸ From an estimated ten million elephants in the early 1900s, there are only half a million left today (*ibid.*).

the matriarchs leaves the survivors in a state of confusion and vulnerability, unable to face famine, draughts or critical migrations.

It can be plausibly claimed that, for centuries, the scenery has been the same for whales; and that, at present, a similar fate is still suffered by some of them and is impending on all unless the genocidal practice of “whaling” is totally and definitively abolished.⁴⁹

The Declaration Again

We can now see more clearly what lies behind the declaration. In brief, the philosophers and scientists who participated in the Conference globally argued that whales are relevantly similar to us in that they possess self-awareness and sophisticated intelligence; that their lives are embedded in a precious cultural environment analogous to the one found in humans; that assigning whales an entitlement to life is the consequence of developments in customary international law in a period close to one hundred years; and that a consistent application of the criteria for both eligibility for personhood and liability to genocidal damages to evidence about their psychological and cultural qualities shows that it is time to internationally articulate their rights to life, freedom and well-being.

This means that in the case of whales as well, just as in the case of women and other dominated human beings, cultural objections should be rejected in favor of that extension of fundamental rights that is not only already implicit in the *opinio juris* of customary international law, but is also due on the basis of sound ethical argument grounded in reason and consistency.

In other words, in the case of these nonhuman beings too, what we face is a fundamental step in moral and legal progress—a step that should be taken contra any possible opposition coming from specific “cultural” traditions ingrained in prejudices and exploitative systems. Since the 1970s, questions have been raised about the IWC role, and proposals made calling for the UN to assume jurisdiction. This idea is even more relevant today. An institution created with the goal of regulating exploitation is no longer the best organization to deal with whale protection.⁵⁰ If, as the articulation of whales’ right to life turns out to be legally and morally mandatory, and if the IWC fails to act accordingly, the times are

⁴⁹ For an analysis of the present situation of whales see Cavalieri (2011).

⁵⁰ It should be noted that, at the 2011 IWC meeting, the representative of India suggested that the IWC should from now on work on threats to the whales, and that, considering the diverse role that the Commission has to play, the body should be renamed as the International Whale Commission. See the Whale and Dolphin Conservation Society’s reports, quoted in note 8.

ripe to remove this task from its hands, and to create an different body with the goal of effecting and implementing the new vision.

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宣告鯨權

摘要

二〇一〇年五月於赫爾辛基大學發起的《鯨權宣言》可說是將一段過程又帶回起點。這段過程起始於一九四六年國際捕鯨委員會的創立，一九八六年正式通過商業捕鯨禁令，至二〇〇五年時，國際捕鯨委員會正式決議譴責「科學捕鯨」，使得這段過程在當代全球反對獵殺鯨魚的聲浪中達至高峰。本文不擬從關於國際法令的相關爭論來處理鯨類生命權的議題，而是從近期對鯨類智能與文化的科學發現的角度，探求鯨類生命權的根基與含義。

關鍵字：鯨魚，生命權，國際習慣法，倫理，文化，種族滅絕，自我意識