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An examination of the rights of the Iñupiat in relation to the harvesting and conservation of marine species in the Chukchi Sea: implications for the offshore oil and gas leasing activities of the United States.

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1. Preface

1.1 Specification of Topic and Relevance

This thesis examines the legal basis behind sociocultural rights of indigenous peoples, and specifically the Iñupiat of North America to harvest marine mammals. It then examines the United States' oil leasing program in the Chuckchi Sea, with specific attention to any elements of the program which might demonstrate that the rights of the Iñupiat were insufficiently considered by the United States government. Finally, the thesis will focus on whether or not the United States has violated the human/sociocultural rights of the Iñupiat in the exercise of its right to utilize its natural wealth.

1.1.1 The Context of Law of the Sea

The international law of the sea lacks definition when applied to indigenous people's rights to marine resources. The problem of balancing the rights of a distinct cultural minority that exercises some degree of autonomy, with the sovereignty or the exclusive sovereign rights over resources possessed by a coastal state, in its territorial sea and exclusive economic zone, is one that has yet to be addressed. This defect is problematic when it is necessary to clearly resolve issues of mutual resource utilization in the maritime parcels adjacent to state.

The struggle to reach a balance between the rights of indigenous groups and states has been primarily conducted in the arenas of international and domestic law. It is therefore unlikely that the Law of the Sea is the appropriate legal regime in which this issue will be resolved. Human rights, and international resource management law are the primary legal lenses through which questions, such as those posed in this thesis, can be addressed. Both these fields of law provide the primary positive legal sources for this thesis.

1.2 Sources of International Law and Methodology

This thesis examines legal developments which have established sociocultural rights for indigenous peoples in domestic and international law since the latter part of the nineteenth century. It will show that the right to hunt marine mammals has evolved from an “exemption” in internationally imposed catch bans into an actual right upon which indigenous people can utilize under the ambit of normative legal sources. It will show that the right to pursue this activity is essential to sustaining their culture and that this activity depends upon the utilization of their traditional lands and harvesting its natural resources.

The thesis will provide background into the evolution of Iñupiat marine mammal harvesting rights using the Bering Sea Fur Seal Arbitration, The Fur Seal Treaty of 1911, and the Russian-American Polar Bear Treaty, and the International Convention for the Regulation of Whaling as the primary positive legal bases for the determination of indigenous people’s rights to hunt marine mammals. The United States has signed/participated in all of these legal developments and is bound by them to the extent they remain in force.

Next, there will be an assessment of the International Covenant on Civil and Political Rights, and the *Poma Poma v. Peru* ruling by the UN Human Rights Committee in order to determine the status of the indigenous people’s rights as they pertain to the utilization of the land and its natural resources in a fashion that is unique to indigenous peoples and cultures.

Once a determination is made regarding the status of Iñupiat marine mammal hunting rights, and the sociocultural rights over culturally significant waters, an analysis will be done on how these rights directly apply to the Chuckchi Sea and any actions undertaken by the United States in this area.

Then an assessment of the United States’ offshore energy Leasing Program 193 will occur, and this analysis will particularly focus on the measures undertaken by the United States to ensure that its enjoyment of its right to exploit its own natural

resources does not inadvertently hinder the Iñupiat rights, pertaining to the harvesting of marine mammals.

A final analysis will examine the current oil leasing program in the Chuckchi Sea in light of these rights and assess whether the mutual utilization of resources in the Chukchi Sea is resulting in an infringement of the Iñupiat rights in relation to marine mammal hunting.

1.3 Sources of International Law

1.3.1 Sources of International Law

Art 38 (1) of the ICJ statute is perhaps the most widely accepted authority for what constitutes a source of international law. The sources for international law as defined by ICJ statute 38 (1) include law include custom, international treaties, principles, and judicial/arbitral decisions.¹

The thesis utilizes treaties to which the United States is party to, as well as, judicial decisions from an arbitration it was a party to, and finally a determination of the United Nations Human Rights Committee regarding the interpretation and application of the ICCPR (to which the United States is also a party.)

Article 38 describes custom as “evidence of a general practice accepted as law”. This thesis examines state practice regarding the indigenous right to hunt marine mammals, and argues that the right to hunt marine mammals stems from sociocultural practices and is a recognized right of the Iñupiat people based upon their indigenous minority status

This will in turn show that there is a substantial basis for the right of indigenous peoples to harvest marine mammals as customary international law. It will further prove that under the ICCPR and the interpretation of the *Poma Poma v. Peru* case that the

¹ "Statute of the Court | International Court of Justice." 2014. 27 Jun. 2015 <<http://www.icj-cij.org/documents/?p1=4&p2=2>>

exercise of indigenous marine mammal hunting practices is one which is protected as a civil right manifest in the Iñupiat people's continuation of their culture.

1.3.2 Source Material

Primary sources will include documents related to the Bering Fur Seal Arbitration, the Bering Fur Seal Treaty of 1911, the Russian-American Polar Bear Management Treaty, the 1972 Polar Bear Management treaty, the International Convention for the Regulation of Whaling, the evolution of the indigenous exemption within the ICRW.

Further analysis will be done on the International Covenant on Civil and Political Rights, materials from the Poma Poma v. Peru case, and how the process of whaling by itself constitutes a cultural right which extends special rights to the Iñupiat over the marine space and natural resources of the Chukchi Sea.

Finally, documents related to BOEM's Lease Sale 193 due diligence activity will be assessed to determine the modality of the US Chukchi Sea lease sale, and any instruments incorporated therein to enhance the involvement of indigenous peoples in the decision-making process.

Secondary sources will include academic writing and commentary on the issues, treaties, developments, history, and implications of events which are covered throughout the analysis of this thesis.

1.3.3 Methodology

In order to determine the existence of state custom with regard to indigenous marine mammal hunting, an analysis of treaties and judicial decisions will occur. The author will analyse these decisions/treaties and then state how in particular they apply to the Iñupiat in the Chukchi Sea.

Once there is sufficient data to prove custom and obligation on part of the United States, the author will then assess Lease Sale 193, and the measures the United States has taken to incorporate its obligations under international human law within the program.

Following this assessment, an analysis will occur delineating the specific steps the United States has taken and comparing and contrasting those actions with its obligations to ensure Iñupiat access to marine mammals. Determinations will be made of the ability of the United States government to ensure mutual access to beneficial natural resources to the Iñupiat and to its own agents, and of its efficacy in ensuring that its exercise of sovereign rights does not hinder the sociocultural rights of the Iñupiat.

2. The History of Joint Socioeconomic use of Maritime Space in the Chukchi Sea

This section will analyse the joint use of the Chukchi Sea by both Western and Iñupiat peoples to depict the history of this maritime space from an anthropocentric lens. This analysis will introduce the traditional Iñupiat use of the area, and how that use has defined existence for the Iñupiat. Further analysis will note use by western actors, and how joint use of the Chukchi has historically resulted in harm to the Iñupiat society due to direct implications on their marine mammal stocks.

The analysis of historical cultural ties to the use of the marine space, coupled with an analysis of programmes/economic activity of the United States will allow the reader to understand that economic exploitation of the region is nothing new. Further it will become apparent that the United States has an obligation to ensure its economic activity no longer implicates the well-being of the Iñupiat as it had in the past.

2.1 Iñupiat use

Iñupiat use of the Chukchi has occurred since the first peoples crossed Beringia and inhabited the North-western portion of Alaska. Coastal Iñupiat communities depend on marine spaces for the majority of their yearly caloric consumption, mostly based on the harvest of marine mammals, and to a lesser degree fish, birds, and wild berries.² Iñupiat dependence on marine mammal hunting has created a culture which is defined by the continuation of subsistence activity, and an intergenerational exchange of knowledge necessary to ensure the continuation of their culture and way of life.

At present, the average Iñupiat village obtains the vast majority of its subsistence food tonnage from marine mammal harvests. This creates a societal dependence on access to the marine mammal stocks, and makes inland settlements

² Johnson, J. S., Nobmann, E. D., Asay, E., & Lanier, A. P. (2009). Dietary intake of Alaska Native people in two regions and implications for health: the Alaska Native Dietary and Subsistence Food Assessment Project. *International Journal of Circumpolar Health*, 68(2).

impractical for the Iñupiat. Presently, around 95%³ of the population remains near the shore for access to the sea ice and the marine mammals that live there. All coastal villages are located in a geographic position strategically aligned to take advantage of both sea ice and the migratory routes of Bowhead and Beluga whales.

The Iñupiat culture, seasons, and concept of time has developed in conjunction with the harvest of marine mammals. The importance of each type of mammal to the people is due to the fact that stocks are seasonally accessible throughout most of the year, and provide an immense quantity of calories per animal hunted. Species which could be found year round include Pacific Walrus (Aiviq), bearded Seal (Uguruk), Polar Bear (Nanuq), ringed seal (Natchiq), while migratory species include caribou (Tutu), Beluga (Qilalugaq), and most importantly the Bowhead whale (Agviq). The hunt of the dominant seal species above traditionally occurs year round, and involves individual hunters taking to the sea or ice. The hunting of polar bear usually requires a group of hunters, and is often exceedingly dangerous, especially considering the predisposition of the bears to wander near villages during the winter and spring (due to the existence of animal remains in the vicinity that are discarded in a traditional fashion.)

Community members get the majority of their caloric sustenance through the harvest of the migratory whale species, yet hunting a whale is immensely challenging even in the present day. The Iñupiat have been harvesting whales for millennia, and for the majority of that time, their harvest utilized equipment that resembled pre-bronze age technology. It can truly be said that the harvest of bowhead whales requires the effort of the entire village, the labour is steeped with tradition and transcends both gender and age divisions which were present throughout the division of labour found in the villages at any other time.

The process necessary to ready the equipment of the whaling crews is seen as ritualistic, as it requires the pooling of both traditional knowledge, manpower, and material resources in the village. The take of Bowheads in particular requires

³ North Slope Borough (2012) North Slope Borough Census

significant traditional knowledge; which is passed from the Elders of the community to the younger members. This knowledge included hunting locations, knowledge of ice hazards, hauling methodology, boat construction, tool fabrication, etc..⁴ This intergenerational exchange of knowledge was especially vital before the Iñupiat had adopted Western methods of whaling, as the traditional tools used for whaling required an immense amount of both skill and understanding to procure and create with the scant resources available on Alaska's North Slope. Throughout the long winters, these tools would be created, and traditions and knowledge would be transferred in a communal building known as the Qargi.

Following the completion of the Bowhead hunt, meat is distributed in a festival called "Nalukataq." The festival has two central events. In the first, the skins that form the siding of the Umiats (whale hunting skiffs) are used to toss village members in celebration. In the second, successful crews share the quaq (whale meat) with village members, elders, and those not capable of playing a role in the hunt. The stories of that year's successful hunts, its captains and crews and their hunting methods, tales of heroism, and other oral renditions of the hunt ultimately become an addition to both the cultural history and collective traditional knowledge base of that community.^{5 6}

The degree to which the Iñupiat depend on the marine mammal harvest for their basic food security cannot be overstated. They are a people who have survived for millennia on the take of marine mammals (some weighing 75 tonnes) without any metal tools, pulleys, or vessels longer than 16 meters. To do this, the Iñupiat had to promote the best hunting practices that their culture could provide with the resources at hand,

⁴ Gupta, R. (1999). Indigenous Peoples and the International Environmental Community: Accommodating Claims through a Cooperative Legal Process. *NYUL Rev.*, 74, 1741.

⁵ Krupnik, I. (2005). When our words are put to paper. Heritage documentation and reversing knowledge shift in the Bering Strait region. *Études/Inuit/Studies*, 67-90.

⁶ Supra source 2 page 1748

making the culture itself a key element of their ability to continue the pursuit of a hunter-gatherer lifestyle in the Arctic.

While the continued harvest of Arctic marine mammals, is crucial to the continuation of Iñupiat culture, their ability to continue these practices is presently under great stress due to the climactic changes presently occurring in the Arctic. The loss and retreat of shore bound ice means that the coastal Iñupiat face substantially greater fuel expenses to get to the sea ice where seals, walrus, and polar bear are now found. Subsistence tonnage has declined due to the loss of sea ice, and the difficulty in finding and accessing sea ice poses a risk to the food security of the native villages, as well as a risk to their ability to practise their subsistence lifestyle, a cornerstone of the Iñupiat culture.⁷

2.2 The Yankee Whaler Era

The Yankee Whaling Era began in the late 19th century and continued until the close of the First World War. American whalers from the New England area (and subsequently based out of San Francisco) hunted the bowhead whales for their blubber and their baleen.⁸ These men were coined the “Yankee Whalers” by the Inupiaq, and along with whalers from Great Britain and the US West Coast, plied the Arctic for baleen and blubber. The Yankee Whalers were perhaps the most prolific of all of these, and many of them decided to settle in the native villages following the “disaster of 1870.”⁹

Ultimately, the Yankee whalers’ industrialized trade practices proved to be too effective. Lacking a quota or better knowledge of ecosystems based management, the

⁷ Wohlforth, C. (2005). “The whale and the supercomputer: on the northern front of climate change.” Macmillan.

⁸ Bockstoce, John R, and Daniel B Botkin. The historical status and reduction of the western Arctic bowhead whale (*Balaena mysticetus*) population by the pelagic whaling industry, 1848-1914. Dist. by Old Dartmouth Historical Society, 1980.

⁹ New Bedford Whaling Museum (2013) An overview of North American Whaling, <http://www.whalingmuseum.org/learn/research-topics/overview-of-north-american-whaling/whales-hunting> 08/07/15

stock of bowhead whales in the Chukchi Sea was all but eliminated. According to Howard Braham in his review of the species for the *Marine Fisheries Review*, the Yankee Whalers killed almost 60% of the Western Arctic bowhead stock by the time commercial whaling had subsided in the region.¹⁰ Adult whales were hunted with more intensity (due to the higher price of their larger baleen); this led to much lower population replacement rates for the stock.

To this day, the Yankee Whaler era is looked at through a grim lens by the Iñupiat people, since the commercial exploitation of the bowhead led to a massive shortage in Iñupiat subsistence landings. This reduced harvest, compounded by the social stressors of the Yankee Whaler fleets occasionally coming into the villages, caused a significant amount of societal and cultural loss. Furthermore, the rapid depletion of the Western Bowhead whale stock severely jeopardized the food security of the Iñupiat. The culmination of these factors, and the indifference shown by American policy makers toward the societal and ecological impacts of the whaling fleets, has resulted in the development of a very defensive mentality toward Federal policies that is a cultural tenet within the Iñupiat community.

The Yankee Whalers are relevant to the research question embodied in this thesis. When examined using a historical lens, the exploitation of the North-western bowhead whale stocks was the first time large-scale unregulated resource exploitation occurred in the Chukchi Sea. Little regard was given for the dire needs of the Iñupiat communities for their own subsistence taking, and the Native peoples suffered greatly due to a lack of understanding by both policymakers, and whaler crews at the time. The population loss, while caused by the combined effects of both disease and famine, illustrates just how dependent the coastal communities were on the annual whale hunts, as the lack of access to this natural wealth contributed directly to catastrophic population loss.

¹⁰ Braham, H. W. (1984). The bowhead whale, *Balaena mysticetus*. *Marine Fisheries Review*, 46(4), 45-53.

The lessons learned by the peoples during the Yankee Whaler era proved to be effective in developing the Iñupiat culture in a manner which sought to preserve and protect the marine mammals (and the marine areas they inhabit). The inter-generational exchange of oral history ensured that the lessons learned four generations ago are present in the current mindset of the Iñupiat people.

2.3 The Offshore Drilling Programmes prior to Lease Sale 193

Exploration of the Chukchi seas for mineral resources occurred in two primary phases. The first exploration took place by the United States Government in 1968 and mostly consisted of seismic activity. The next phase occurred some 20 years later when the MMS offered Chukchi Sea leases in 1988. Shell, Chevron, and Exxon purchased rights and utilized both seismic and modular drilling rigs which drilled some 3 wells during the summers of 1989, 1990, 1991.

The United States first conducted exploratory seismic activity in the Chukchi Sea in 1968. It found that the geology of the area indicated an immense oil pocket. However, no further seismic or exploratory drilling took place. Throughout this effort, there was an almost complete lack of communication between the government and the Iñupiat peoples. As a result, the operations were conducted in a manner which was not considerate of the culture and subsistence rights of the Iñupiat. The lack of communication and consultation resulted in the United States government conducting the majority of its seismic surveying during the Bowhead migration, which severely disrupted that year's harvest.

These surveys left communities very wary of future development, through the recitation of oral history many of the present communities are acutely aware that the seismic survey led to Bowhead populations avoiding their normal migratory route. This in turn prevented every village in the Chukchi sea area from landing a whale (according to tribal members).¹¹

¹¹ University of Alaska Coastal Marine Institute. (2010) Traditional knowledge regarding Bowhead whales in the Chukchi Sea near Wainwright, Alaska. Minerals Management Service and the School of Fisheries and Sciences. P.9

In its 2010 assessment of Traditional Knowledge, the MMS noted that the Iñupiat whaling captains “base their concerns upon their past experiences and available information about current and planned activity.¹²” The MMS assessment stresses that it is a commonly held belief that development in a manner which lacks the incorporation of subsistence needs, and conducts seismic in a manner which does not consider the time of year or the migratory route of the bowhead, drives the whales further offshore, resulting in longer and much more demanding hunts.

2.4 2008 MMS Lease sale 193

The Minerals Management Service (MMS, later BOEM) is the primary agency which researches, recommends, and develops the regulatory regime necessary for the US government to sell or lease a parcel of marine space for energy generation purposes. As early as 2004 the MMS began developing necessary research to establish a credible Environmental Impact Statement to determine the course of action the Bush administration could take in the Chukchi Sea via lease sale 193.

Lease 193 was located on the Hanna Shoal, which is an underwater ridge that provides an area rich in biodiversity and is critical to pinniped populations of the Arctic Ocean.¹³ Due to its importance to sustaining the Arctic marine food web there is a real threat that development in this area could affect the subsistence lifestyle of the Iñupiat, who live adjacent to the coastline.¹⁴

Lease Sale 193 progressed by incorporating risk metrics which were based on Iñupiat subsistence need, sociocultural wellbeing, and environmental justice. As far as regulatory measures were concerned, the new lease sale encompassed new statutory requirements which required the companies to both develop a programme that centred

¹² *Ibid.* p 12

¹³ Alaska Audubon. "Hanna Shoal" 2015. 26 Jun. 2015
<http://ak.audubon.org/sites/default/files/documents/hanna_shoal_description_final_0.pdf>

¹⁴ NW Arctic Borough "Northwest Arctic Borough oil spill workshop..." 2013. 26 Jun. 2015
<https://crrc.unh.edu/sites/crrc.unh.edu/files/media/docs/Workshops/nwab_12/NWAB_workshop_report_appendices.pdf>

on conflict avoidance (with subsistence activity), and to implement the usage of subsistence advisors on industry functions in waters which are used for subsistence.

Lease Sale 193 is an immense departure from the oil activity in 1968, and 1988 due to its incorporation of subsistence hunting specific obligations. This adaptation shows an understanding that there is need to accommodate the right of the Iñupiat to continue hunting in a manner which is in conformity with their culture. In this sense, these regulatory shifts are a notable adaptation which will be assessed in Section 6 of this paper.

2.5 Summary of Joint Sociocultural Chukchi Sea Usage

The communities of the Chukchi Sea have developed a rich history and a robust culture due to their remote location and complete dependence on a distinctive marine ecosystem. The author hopes to demonstrate that the preservation of this culture is a legitimate legal issue when it comes to the plans and activities of the United States government in the utilization of the Chukchi Sea.

Throughout the US' history as sovereign of Alaska there has been a western sociocultural force which focuses on extracting resources of the North Slope, and an Inuit sociocultural force which seeks to enrich their communities by preserving their culture, continuing a subsistence lifestyle, and at the same time allowing prudent and non-impactful extraction.

When it comes to the utilization of the Chukchi Sea, it is obvious that balance between these two forces has never really been in equilibrium. For the past 200 years, western forces have adversely affected the Iñupiat. The blatant disregard of these people and the ecosystem on which their cultural existence depends is clearly written in history.

It is imperative for a reader of this paper to understand the balance of interests and power between the west and the Iñupiat in making decisions that utilize the resources of the Chukchi Sea, and that while there is a substantial history of joint usage, that joint usage has at times severely affected the subsistence hunting lifestyle of the Iñupiat.

3.0 *Applicable International Treaties/Developments*

The Treaties in this section are unique in that they reflect the development of a legal norm dealing with peoples in an area of the world that was only brought under the auspices of a western style legal system in the middle of the 20th century.

Despite the delay in application of the western-centric legal development to the peoples of the Chukchi Sea, the legal basis for the rights of indigenous peoples has been present within the western system for more than 120 years.

All the Treaties mentioned within section 3 are ratified by the United States, and as such, are relevant when determining the obligations of the US to preserve the rights of the Iñupiat to harvest marine mammals in the Chukchi Sea.

The Section starts with the Bering Fur Seal Arbitration, an arbitration which sought to determine the rights of the United States to control the harvest of seals in the high seas. The arbitration also acknowledged the exceptional nature of indigenous harvesting rights.

Then the focus will shift to the development of the Bering Fur Seal Convention of 1911, a convention which establishes that the indigenous exception was maintained and affirmed by the United States when it sought to develop a treaty to manage the Bering Sea fur seal stock.

From there, analysis of the International Convention on the Regulation of Whaling demonstrates how that Convention reinforced the concept of an indigenous right to continue the hunt of marine mammals in international legal law.

Finally, analysis of the Russo-American Polar bear harvest treaty shows that the marine mammal harvest rights attributed to the natives of the Chukchi exist on a bilateral level between the United States and the Russian Federation, and that international practice has evolved to include indigenous people's representatives in the implementation of a quota over their subsistence resources.

After noting the pertinence of these treaties to the rights of the Iñupiat to hunt marine mammals, two articles of the International Covenant on Civil and Political Rights will be assessed with an emphasis placed on understanding the legal position of both the United States and the Iñupiat. There will also be a brief assessment of the Inuit Circumpolar Council's Declaration of Arctic Sovereignty, and what bearing it might have on the thesis topic.

3.1 The Bering Fur Seal Arbitration

The Bering Fur Seal Arbitration occurred in 1880 and stemmed from a dispute between Great Britain and the United States. The dispute arose when the United States seized numerous British sealing vessels actively hunting fur seals in waters the US claimed to be their sovereign domain. The Pribilofs were home to an abundant seal population which was hunted to the point of near extinction. Due to the possibility of the fur seal stock's collapse, the US Congress passed Acts in 1868 and 1873¹⁵ to effectively prohibit the take of seals in the waters immediately adjacent to the Pribilofs save for the Alaska Commercial company (a United States business.)¹⁶

The arbitration largely focused on the concept of coastal state rights, and the advancement of policies on behalf of the United States, which reflected an ideology in line with the concept of *mare clausum*.¹⁷ The dispute focused on whether or not the United States could prohibit the commercial exploitation of a species in areas beyond its terra firma and its territorial waters. The United States had argued that because of the seals' dependence on the islands they were inherently a resource under the ambit of US sovereignty, Britain on the other hand protested that freedom of the seas allowed

¹⁵ Tanaka, M. Y. (2013). A dual approach to ocean governance: the cases of zonal and integrated management in international law of the sea. Ashgate Publishing, Ltd..

¹⁶ "Award between the United States and the United Kingdom ..." 2013. 27 Jun. 2015 <http://legal.un.org/riaa/cases/vol_XXVIII/263-276.pdf>

¹⁷ Supra source see generally p.37-38

their ships the ability to take the seals so long as the seals were taken outside the 3nm territorial sea, and that US interdiction could only be tolerated in the case of piracy.¹⁸

Both parties agreed to submit specific questions to an international arbitral panel [complete ... the questions were as follows]

In its Award the Tribunal ruled that there were two distinct maritime zones one inside the 3nm area where the United States could exercise jurisdiction, and the high seas located beyond the same point where it could not.

In its award the Tribunal also established a moratorium on hunting within 60 nautical miles of the Pribilofs,¹⁹ rules regarding what tools could be utilized in the hunting season,²⁰ and a fixed hunting season²¹ so that the seal population would have time to recover from exploitation. The Panel sought to provide a solution that both reinforced the idea of high seas freedom and implemented a fixed set of rules that put into place a seasonal ban, hunting gear bans, and other conservational measures necessary to ensure seal stocks were not harvested in the manner which they were prior to the arbitration.

3.1.1 The Indigenous exception mentioned in the Tribunal's Award

¹⁸ *Supra* source 25 page 265

¹⁹ *Ibid.* ARTICLE 1. The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture or pursue at any time and in any manner whatever, the animals commonly called fur seals, within a zone of sixty miles around the Pribilov Islands, inclusive of the territorial waters. The miles mentioned in the preceding paragraph are geographical miles, of sixty to a degree of latitude.

²⁰ *Ibid.* ARTICLE 6. The use of nets, fire arms and explosives shall be forbidden in the fur seal fishing. This restriction shall not apply to shot guns when such fishing takes place outside of Behring's sea, during the season when it may be lawfully earned on.

²¹ *Ibid.* ARTICLE 2. The two Governments shall forbid their citizens and subjects respectively to kill, capture or pursue, in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring sea, which is situated to the North of the 35th degree of North latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article 1 of the Treaty of 1867 between the United States and Russia, and following that line up to Behring straits.

The Award also made a particular reference to indigenous peoples.. The Tribunal had the foresight to see that the seasonal restrictions, in particular, should not apply directly to the indigenous peoples of the area, as they would impact the societal and cultural well-being of those peoples.

Article 8 of the award noted that “The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur seal fishing ...[they will] not [be] transported by or used in connection with other vessels and propelled wholly by paddles, oars or sails and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person. This exemption shall not be construed to affect the Municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian Passes. Nothing herein, contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur sealing vessels as heretofore.”²²

The Award recognizes that ban within 60 miles of the Pribilofs would have immense sociocultural implications on the indigenous peoples of the islands. It is submitted that the inclusion of the “Indigenous exemption” within the award was yet another unique and proactive element of the Bering Fur Seal Arbitration, due to both its scope and focus, and how it reflected an interest or claim on behalf of the United States. .

As the award largely dealt with state rights in an international setting, the inclusion of the indigenous right seems at the outer end of the arbitral panel's jurisdiction. The inclusion of the exemption in favour of the native peoples of Alaska demonstrates the interest of the United States in accommodating indigenous interests.

²² *Ibid.* Award

By including the exemption the United States, Great Britain, and the Arbitral panel agreed that the right of indigenous hunting ought to be excluded from the 60-mile moratorium. The exemption had to take into mind that the preservation of the seal stock could not serve as a limiting factor on the indigenous people's ability to exist, and to hunt in a manner which amplifies their cultural practices.

3.2 The Fur Seal Treaty of 1911

In the decades following the Arbitration, the United States and Great Britain developed what is known as "the Fur Seal Convention." The Convention sought to establish an internationally acceptable management plan for the Bering Sea. Signatories of the Treaty included Great Britain, Russia, Japan, and the United States, all of whom plied the Bering Sea for seal skins at the time. The Treaty sought to reaffirm the US' jurisdiction on the management of on-shore seal hunts, while providing seal quotas or subsidies to the other parties so long as they complied with the terms of the quota system and so long as the Fur Seal Treaty remained in effect.^{23 24} Coincidentally, the Fur Seal Treaty was also the world's first transboundary wildlife management treaty and set out a framework by which states party were to manage the Bering Fur seal stock.

The Treaty itself included a provision which reflected the *ratio legis* of the indigenous hunting exemption which the Arbitral Tribunal had established in the Bering Fur Seal Arbitration. The inclusion of the indigenous people's exemption in the drafting

²³ "The Fur Seal Treaty of 1911 - NOAA - Pribilof Islands." 2013. 27 Jun. 2015
<http://pribilof.noaa.gov/documents/THE_FUR_SEAL_TREATY_OF_1911.pdf>

²⁴ "**ARTICLE IV.** It is further agreed that the provisions of this Convention shall not apply to Indians, Ainos, Aleuts, or other aborigines dwelling on the coast of the waters mentioned in Article I, who carry on pelagic sealing in canoes not transported by or used in connection with other vessels, and propelled entirely by oars, paddles, or sails, and manned by not more than five persons each, in the way hitherto practiced and without the use of firearms; provided that such aborigines are not in the employment of other persons or under contract to deliver the skins to any person."

of the Fur Seal Treaty (at the insistence of United States Secretary of State John Hay and environmentalist Henry Wood Elliot) shows that maintaining the indigenous people's exemption was a legitimate national interest of the United States.

The Fur Seal Treaty also illustrates that signatory states recognised that an indigenous peoples exemption to the quotas in the Treaty was an important paradigm of the new resource management regime. The deliberate incorporation of the Exemption within the Bering Sea Fur Seal Arbitration, and the later integration (and ratification) of the exemption within the Bering Sea Fur Seal Treaty was the first positive legal source which affirmed that ability to harvest marine mammals is a right which is derived from cultural practice. Both treaties stressed that indigenous peoples could maintain their ability to hunt seals, but were particularly clear that the exemption applied only to customary harvesting practices (vessel-crew size, killing instruments, hunting not done on the prerogative of another vessel, etc.)

The indigenous exemption had at this point had been both submitted (twice) by the United States as an important element of any regulation pertaining to the marine mammal stocks of Alaska, its implementation within the Fur Seal Treaty of 1911 exemplifies the fact that indigenous people's societal rights formed a precept that subsequent inter-state policy must incorporate. The inclusion of indigenous exemptions further illustrates the concept of a right which is intrinsically tied to the physical and cultural existence of indigenous peoples. Further, this right had been recognised at the international level. The right to hunt for the purpose of sustenance was acknowledged to be a practice indispensable to the societal existence of these peoples.

The author submits that the repeated inclusion of this particular exception for indigenous hunters by the United States establishes it as a standard for any subsequent resource management in Alaskan waters, and could serve as proof of both domestic and international acknowledgement of the critical role the process of subsistence harvest plays in the continued exercise of indigenous sociocultural existence. At a minimum, the inclusion of this provision in the Treaty is evidence of some state practice (albeit limited) that states should incorporate indigenous

subsistence rights as a foundation within treaties which deal with resources critical to the sustainment of their culture and well-being. Such an inclusion might detail how those rights ought to be preserved and their relative priority (even in the face of the imposition of an international moratorium).

The next section examines the treatment of indigenous harvesting rights in the context of whaling.

3.3 The International Convention for the Regulation of Whaling

The global regulation on the management, conservation, take, and regulation of whales is found under the ambit of the International Convention for the Regulation of Whaling (ICRW). The ICRW includes a schedule of regulations. Any amendment to the Schedule must be affirmed by a three-quarters majority of states voting.

To oversee the development and implementation of the Schedule, the ICRW created the International Whaling Commission (the IWC), the IWC's role was to regulate the conduct of whaling activities by each state party to the agreement, as well as to periodically review and revise the Schedule to the ICRW.

In 1982, the IWC implemented a ban on the commercial take of whales in the schedule (known as the moratorium) which has been in effect ever since. Unlike the 1911 Fur Seal Treaty, and the 1931 Convention for the Regulation of Whaling²⁵, the ICRW did not contain an express exemption for indigenous whaling although the first schedule to be adopted did contain a specific exemption for the indigenous take of Grey and Right Whales. In doing so the whaling regime continued the practice of providing a distinction in policy between indigenous sustenance whaling and commercial whaling endeavours.

²⁵ Gambell, R. (1993). International management of whales and whaling: an historical review of the regulation of commercial and aboriginal subsistence whaling. *Arctic*, 97-107.

In 1977, the International Whaling Commission removed the indigenous exception for both the Right and Grey Whale stocks. The decision was rooted in the fear of the IWC's scientific committee that a continuation of subsistence bowhead whale hunting (which lacked a quota at the time) could jeopardize the Western Arctic Bowhead stock. The Committee made the decision on what it deemed a scientific and precautionary basis; but at the same time failed to take into account the sociocultural dependence on the bowhead hunt to the Iñupiat of Alaska, who at the time were still living in communities with subsistence economies and rampant food insecurity (stemming from quotas imposed within the US on the take of Caribou in western Alaska.)²⁶

The decision served as a conceptual point of departure from the legal development found within both the Fur Seal Treaty and the 1931 Convention for the Regulation of Whaling. Both of these documents had stressed that there was a difference between indigenous harvesting and commercial harvesting and that the two practices ought to be regulated in a very different light. However, the IWC noted that distinction should no longer apply because the Native populations had adapted methods from the Yankee Whaler fleets, including the use of bomb-darts which had the potential to maim and later kill whales. In his article *"International management of whales and whaling: an historical review of the regulation of commercial and aboriginal subsistence whaling"* Ray Gambell notes that IWC had identified that around 12 whales were landed, while about 79 were injured.²⁷

The IWC had been assembling this data from around 1972. It was not until the ban in 1977 that the United States began to convey this information to the native communities of Alaska, who did not take the imposition of a ban lightly. Seeing a defining element of their way of life temporarily banned (based on stock population data they disagreed with) roused the Iñupiat community into action. Native

²⁶ Firestone, J., & Lilley, J. (2005). Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs. *Journal of International Wildlife Law & Policy*, 8(2-3), 177-219.

²⁷ *Supra* source 33, p.102

communities formed a national level whaling commission that lobbied the Government of the United States to support an amendment of the subsistence whaling ban contained within the IWC's schedule.²⁸

The imposition of the moratorium put US policy makers in an awkward position. The basic cultural rights of Alaskan natives and Washington's political support of the ICRW's moratorium on commercial whaling were not coherent. The US eventually decided not to object to the moratorium through official channels for political reasons. In her work for the Congressional Research Service, Kristina Alexander noted that the US was reluctant to act through official forums because "the United States [would] become the first nation to challenge the catch limit, [and] the United States' role as an advocate for the conservation of whales could be jeopardized."²⁹

Subsequently, the United States government was able to persuade the IWC to develop a discretionary authority to allow indigenous whaling, although at some costs to its stance as an anti-whaling state. The United States government was able to convince the IWC to allocate a small quota for its native peoples by promising to conduct a more extensive bowhead population estimate (in addition to conducting a cultural needs assessment),³⁰ and giving concessions to some of the pro-whaling states in exchange for their support.³¹

The IWC was reluctant to allocate the full quota the US had pressed for and continued to stress that caution be exercised in its allowed of a catch limit. The precautionary approach of the IWC, coupled with the human rights implications of a ban on subsistence whaling led the IWC to create a special working group (the

²⁸ *Ibid.* para 3.

²⁹ Alexander K. (2013) The International Whaling Convention (IWC) and legal issues related to aboriginal rights, Congressional Research service, <https://fas.org/sgp/crs/row/R40571.pdf> 26/06/2015 p.12

³⁰ *Ibid.* para 5

³¹ M.S. Wilson and E.H. Buck (1979) Changes in Eskimo whaling methods, *Carnivore*, Vol. 2, No. 1, pp. 35-42

Technical Committee Working Group) to assess Iñupiat Bowhead hunts, and develop a management regime for the indigenous subsistence hunts. To this end, the IWC tasked three working groups to provide the Technical Committee Working Group with information on the viability of the biological and wildlife stock data, and on the sociocultural wellbeing and nutritional needs of the native communities.³²

The groups determined that no alternative to the food provided by whale hunts could be found which would not have significant cultural impacts to the communities, and that any attempt to implement constraints on the subsistence take of whales should include consultation with the native communities to best understand their impacts. These findings left the IWC at a significant impasse, as data still suggested that the Bowhead populations were still low enough to justify a precautionary approach towards the implementation of their population management controls.

The IWC decided that the needs of the Native peoples to hunt the stock should be documented by the US government, and be based on six criteria. The Criteria included

1. The importance of Bowhead in the traditional diet
2. Possible adverse effects of shifts to non-native foods
3. Availability and acceptability of other food sources
4. Historical take
5. The integrative functions of the bowhead hunt in contemporary [Iñupiat] society and the risk to community identity from an imposed restriction on native harvesting of the bowhead
6. To the extent possible, ecological considerations.”³³

It was therefore left the United States to justify the need for the indigenous peoples to acquire an exemption, while at the same time implementing a domestic management plan which would establish reporting and data requirements and specific catch limits. The IWC agreed on broad objectives for the management of the stock,

³² *Supra* Source 33 p.102

³³ *Supra* source 33 p.102

which reflected a balance between the cultural rights of the Iñupiat, and the conservation and preservation of the Bowhead Stock.

3.3.1 Indigenous whaling as mentioned in the first schedule

Following the developments of the early 1980s and in accordance with the assessment process of state application utilized by the IWC during the Bowhead incident, the IWC established the Aboriginal Subsistence Whaling Subcommittee and a formal process for assessing and recognizing indigenous whale hunt.. States were required to present the commission with data proving need, history, impact (and other criteria similar to those the United States submitted on behalf of the Iñupiat) to the IWC in order to have a recognised indigenous hunt under the schedule. When the IWC implemented these changes to the schedule, they noted (in the resolution) that it “recognises the importance and desirability of accommodating, consistent with effective conservation of whale stocks, the needs of aboriginal people who are dependent upon whales for nutritional, subsistence and cultural purposes.”

Article V of the Convention authorizes the Commission to determine the catch quotas for indigenous subsistence whaling. Each subsistence quota must be adopted by a three-quarters majority in order to be incorporated within the Schedule (as required for all other amendments to the Schedule).³⁴ The third part of the first schedule explains the interpretation of the provisions found in the ICRW as it relates to the allocation of rights to indigenous peoples to hunt whales. 13 (b) 1 in particular notes that aboriginal whaling in the Bering-Chukchi-Beaufort Seas is allowed pending incorporation in the Schedule so long as the harvested meat is consumed exclusively by the local population.

In sum, the inclusion of the indigenous exemption in the 1911 Fur Seal Treaty and the 1931 International Covenant for the Regulation of Whaling established a 60-year custom to distinguish between indigenous and commercial whaling. During the 1977 Bowhead Subsistence hunting ban, further review by the ICW’s working groups

³⁴ *Supra* source 35 p.12

confirmed that special rules should apply to the hunting of whales by indigenous peoples following a formal assessment method.

The Bowhead Crisis of 1977 allowed the IWC to assess the basis for indigenous subsistence hunts founded on the indigenous people's right to continue a lifestyle which is based on their traditional cultural practises. From a pragmatic sense, it becomes apparent that the indigenous exemption which is incorporated within the ICRW's Schedule is based off a unique set minority rights allotted only to indigenous people because of their sub-national level autonomous status, and their close cultural ties to the land and sea and the resources contained therein.

3.4 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was developed in the midst of the Cold War era. It was part of the United Nation's attempt to assemble an international bill of human rights. The ICCPR largely focuses on those rights inherently tied to civil and political competencies, and stresses the importance of acknowledging and protecting the political and civil rights of all peoples. Other international instruments including International Labour Organization Convention number 69 and the United Nations Declaration on the Rights of Indigenous peoples deal more specifically with the rightht of indigenous peoples but the United States has never ratified ILO 169 and initially objected to the UN Declaration. However, these instruments will have little to no impact on the United States until they begin to reflect a custom of international law. That said, both instruments stress the semi-autonomous state of indigenous peoples groups, their ability to continue their traditional existence, and the rights they have over land and resources which are culturally significant.

The ICCPR has relevant provisions to determine both the political and social rights of indigenous people, and the work of the Human Rights Committee emphasises the link between living one's culture in a meaningful way, and the need to have access to the lands/resources on which that culture depends.

When examining the ICPPR to discern its relevance for the peoples of the Arctic region, it is important to note that the ICPPR plays an enormous role as the primary

positivistic legal basis for the obligation of states to respect and enhance the civil and political functioning of indigenous peoples rights. In examining the specific rights of indigenous peoples to harvest marine mammals, we will look at two articles to better understand the positive legal basis: Articles 1 (2) and Article 27. This is followed by an analysis of the Inuit Circumpolar Council's declaration of sovereignty as an example of the Circumpolar Inuit community asserting their right to existence and their right to autonomy, and to continue to live out their culture in a meaningful fashion.

3.4.1 Article 1 paragraph 2

ICPPR Article 1(2) recognizes\declares that "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." Article 1 para 2 of the ICPPR establishes, in particular, the resource-based rights which have inherent ties to the political and cultural autonomy mentioned in the entirety of Article 1.

Article 1(2)^{35 36} of the ICPPR is strongly worded and seeks to establish the unalienable rights which all peoples should have over their natural wealth. The ability to freely dispose of one's natural wealth affords a people the capacity to (in their own way) utilize their natural wealth in a manner they see as fit. Aside from simply offering a political scope, the Covenant stresses that the scope of operation is also related to economic rights and societal security. As both articles are inherently connected (more

³⁵ United Nations, International Covenant on Civil and Political Rights 1966.
<<https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>>

³⁶ Article 1. ICPPR

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

on this in the next section) the ICPPR stressed that those economic liberties which inherently underpin the society's well-being (and in the case of indigenous peoples) their utilization of natural resources necessary for basic societal continuity ought to be protected. The Article then goes on to note that "In no case may a people be deprived of its own means of subsistence."

The ability to determine the utilization of a state's natural wealth is one of the only ways which a people are capable of living in a manner similar to that of their ancestors. During the colonial era there were examples of many peoples who did not maintain this right, and their ability to maintain or create a strong culturally sustaining form of governance was undermined by the inherent lack of control they had over their own resources. This is why the treaty stresses the importance of "bas[ing] the free disposal of natural wealth] upon the principle of mutual benefit and international law."

Mutual benefit ensures that the indigenous people's status (even if acting in a manner under their own will) should not trade resources in a manner where a party in the exchange is operating in bad faith. The latter part of this Article stresses the importance of international law, and infers that the disposal of wealth should be based on principles within the system and should not seek to undermine or contradict legal obligations, or in some cases, legal custom.

3.4.2 ICCPR Article 27 and Poma Poma v. Peru

Article 27 of the ICCPR states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Article 27 is in place to guard the rights of ethnic minorities who live under the governance of another culture or society. The article focuses on preserving the ability of that minority to preserve the societal elements which make them culturally unique.

The international right of an indigenous people to claim access to means of preserving self-determination allows indigenous forms of government the ability to access greater rights than those given to a municipality serving a simple minority within

the jurisdiction of a state. It gives the indigenous government the right to manage land, natural resources, culture, religion, and other elements essential to authentic self-determination and self-governance. It provides international recognition that minority groups which have never possessed the tie of sovereignty or territorial rule lack. Peoples' rights tend to be directly tied to the people; minority rights are simply attached to the individuals within the minority group, not the collective minority group.³⁷

Perhaps the best explanation of this Article's applicability in relation to the rights of indigenous peoples as a minority was the Human Rights Committee's opinion in *Poma Poma v Peru*. The United Nations Human Rights Committee (HRC) concluded that Article 27 possessed an individual right which could be invoked should a right of a minority group be violated by a state.³⁸

In this opinion the HRC noted that if an individual belonged to a minority group which was an indigenous society; that an individual's right to enjoy their culture "may consist in a way of life which is closely affiliated with territory and the use of its resources."³⁹ The Committee further noted the relevance of Ms. Poma Poma's profession (llama herding) as one which met the threshold for being a cultural activity which satisfied the close affiliation with the land and its resources, and could be depended on as a right pertaining to an indigenous minority status.⁴⁰

The Committee further determined that Article 27 did not constitute an absolute right for the individual, Rather it recognised that a state has a right to adopt measures to promote its own economic development. However, such measures must not have

³⁷ See Generally Gilbert, G. (2001). *Autonomy and minority groups: A right in international law*. Cornell Int'l LJ, 35, 307.

Chicago

³⁸ Göcke, K (2010) "The Case of Angela Poma Poma v. Peru before the Human Rights Committee the concept of free prior and informed consent and the application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous People's rights" Max Plank Institute. <http://www.mpil.de/files/pdf3/mpunyb_08_goecke_14.pdf>

³⁹ *Ángela Poma Poma v. Peru* note1, para 7.2 referring to comment no.23 para 3.2

⁴⁰ *Ibid.* para 7.3

the effect of denying its minorities the right to practise their culture.⁴¹ In Poma Poma, the Committee observed that the state had an obligation to ensure that a minority had the ability to participate within the decision-making process, noting that such participation extended beyond mere consultation and required “free prior and informed consent of the community.”⁴² The Committee also determined that the State’s project had to be proportional to the point as to “not endanger the very survival of the community and its members.”⁴³

It is important for the purpose of clarity to stress that indigenous peoples have a distinct nature under international law. The primary difference of an indigenous people from a cultural minority is that an indigenous people possess collective individual rights under the international legal regime. These rights stem from both article 1 (1) and (2) of the ICPPR amongst other conventions,⁴⁴ and convey the right to self-determination to the people. Minority groups, by comparison do not possess the right to self-determination, but enjoy rights protecting their posterity from the majority culture,

The right to self-determination stems from the ownership indigenous societies had over both their land and resources in the times prior to the colonial era. Even though they were assimilated into modern states, the indigenous peoples in most states still preserve the mind-set that they maintain rights attributed to their former status as sovereign. The assignment of minority rights thus inadequate for indigenous peoples, as minority rights do not encompass the right to self-determination, or the right to some degree of control over land and resources.

⁴¹ *Ibid.* para 7.6

⁴² *Ibid.* para 7.6

⁴³ *Ibid.* para 7.6

⁴⁴ Including Article 1 (2) of the United Nations Charter, and article 1 (1) of the International Covenant on Economic, Social, and Cultural Rights

It can thus be concluded that the ICCPR imposes on the state a positive obligation to preserve, and not to infringe upon, the societal rights possessed by indigenous groups. Indigenous societies, and individuals within that group have a right to enjoy their culture in a meaningful way and states have an obligation to that end.

This logic is reinforced by ICCPR article 1.1⁴⁵, as the indigenous people has a right to exist, that existence is inherently one which is not only based on the physical well-being of its people, but also in its ability to live a meaningful existence in accordance with the sociocultural tenets of their traditional lifestyle, and the ability to ensure their people's continual cultural progression.

States with indigenous communities who are party to this agreement must observe limits on their right to develop the lands and resources that are integral to the physical and sociocultural well-being of these societies. They have an obligation through the ICCPR to ensure the meaningful existence of their indigenous minority.

Examined through the lens of the *Poma Poma* decision, a state is obligated to ensure that the members of its indigenous communities are entitled to continuously and meaningfully practise their culture, which by extension would include utilizing their territorial lands and resources in a manner to which their societies are accustomed. Any state activities that may serve to deny access to the rights peoples are entitled to, would require the free, prior, and informed consent of these communities, and require their actual involvement within the decision-making process.

3.43 Does the take of marine mammals fall within the meaning of Article 1 ICCPR

Article 1 (1) ICCPR notes that a people are able to “freely pursue their own economic, social, and cultural development.”⁴⁶ As a people the Iñupiat are then entitled to develop their own economic, social, and cultural development through the self-determinate ability allocated to a people.

⁴⁵ 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development

⁴⁶ *Ibid.* 37 Art 1 (1)

Throughout their history the Iñupiat have utilized marine mammals as both a means of social and cultural development (through both their physical and socioeconomic value to the culture) and as an economic resource (when looking at a hunter-gatherer society.) The ability to hunt marine mammals in the present day allows the Iñupiat to further enhance their culture and society by restoring and preserving traditional cultural and societal practices.

The Iñupiat are also able to utilize marine mammals in two economic senses, the first (as it was in the hunter gatherer economy) allows the communities to add a considerable supply of meat in areas which have high costs associated with imported non-subsistence food.⁴⁷ The second way the harvest of marine mammals allows for Iñupiat economic development, is the harvest allows for the Iñupiat to fashion cultural goods from the hide, bone, and other materials to sell in the wider market economy of the United States.^{48 49}

The act of whaling constitutes the enjoyment of natural resources by the Iñupiat people, and allows them to develop their economy, their society, and their culture. No singular other activity provides as much food, nor extends the existence of the unique culture as the Iñupiat marine mammal hunts. As an act of resource enjoyment, it provides the majority of the North Slope's caloric sustenance, and as an act of cultural prolongation it promotes the traditional subsistence lifestyle, and the development/enrichment of the Iñupiat society, by allowing the entire village to contribute in some way to the hunt by crafting cultural hunting tools, participating in the hunt itself, or assisting with the harvest.

⁴⁷ Borjas, G. J. (2004). Food insecurity and public assistance. *Journal of Public Economics*, 88(7), 1421-1443.

⁴⁸ Lee, M. (2003). " How Will I Sew My Baskets?": Women Vendors, Market Art, and Incipient Political Activism in Anchorage, Alaska. *The American Indian Quarterly*, 27(2), 583-592.

⁴⁹ See *generally* Graburn, N. H. (2004). Authentic Inuit Art Creation and Exclusion in the Canadian North. *Journal of Material Culture*, 9(2), 141-159.

Subsistence harvests of marine mammals constitutes an act which is critical to the basic survival, economic enhancement, the exercise of culture and the meaningful existence of the Alaskan Iñupiat. As such, the ambit of the ICCPR must also apply to the Iñupiat right to subsistence marine mammal harvests in the Chukchi Sea.

3.4 The US-Russian Polar Bear Management Treaty

The first international agreement for the Conservation of Polar Bears was signed by Arctic states in 1973. This agreement laid the groundwork for Arctic states to begin the proper management of the circumpolar polar bear populations.⁵⁰ The agreement established a framework to better regulate the legal take and viability of polar bear stocks. The agreement banned the take of polar bears for any other reason other than scientific killings, grievous damage to the environment, and traditional/indigenous take of the animals.

Similar to the Bering Sea Fur Seal Convention and the ICRW, the 1973 Polar Bear Agreement recognized the rights of indigenous people to access resources that they have relied on for subsistence and culture sustainment. The Polar Bear Agreement noted that; there is a right to marine mammal hunts maintained by the indigenous people of the Arctic, and polar bear remains a species which is hunted for both subsistence and indigenous commercial endeavours (which include indigenous-led trophy hunts), and the use of polar bear products in native craft businesses.

In 2000 the US and Russia concluded a bilateral polar bear management treaty which sought to establish the definitive management programme for the Chukchi polar bear stock.⁵¹ This treaty was a specialized bilateral development of the original 1973 Regional Agreement.

⁵⁰ "1973 Agreement on the Conservation of Polar Bears." 2009. 30 Jun. 2015
<<http://pbsg.npolar.no/en/agreements/agreement1973.html>>

⁵¹ "2000 U.S.-Russia Bilateral Agreement on Polar Bear Conservation." 2015. 30 Jun. 2015
<<http://www.state.gov/e/oes/ocns/opa/arc/releases/212163.htm>>

The target stock of the 2000 treaty is the Chukchi polar bear population which is a threatened species that faces immense ecological stress due to receding sea ice, and ⁵²a marine mammal which is hunted for subsistence and cultural purposes by the Inuit in Chukotka and Alaska.

Both Governments recognised that the coordination of conservation measures over the Chukchi stock was critical. At the same time, they recognized that the imposition of a quota which failed to give adequate regard for subsistence and socio-cultural rights must not be implemented. The treaty established a four-member commission which is staffed by one governmental and one tribal member from each of Russia and the United States. The commission approves a quota which is then passed on to both state's national level indigenous hunting management group, who then allocates the allotted quotas to its members.

Both the 2000 US-Russian agreement and the 1973 International Agreement mention that there is an indigenous right to hunt the species which the signatory state(s) will preserve regional polar bear stocks through the development of wildlife management frameworks developed subsequent to the treaty.

This element of the 1973 Polar Bear Management Treaty cannot be understated. Once again, party states reaffirmed the right of indigenous people to hunt marine mammals, and that this right should be respected by other states, as well as their domestic government, in the implementation of policy.

The US-Russian Polar Bear Management Treaty adds to the recognition of the right by providing for some degree of coordination and participation by indigenous peoples in setting and administering policy that governs their land and sea resourced. The treaty provides for a management regime which is more responsive to the indigenous people's human and sociocultural rights by stipulating that representatives of these peoples are included within the management regime. This greatly augments

⁵² IUCN Red List <http://www.iucnredlist.org/details/22823/0> 39 Jul. 2015

the management activities through incorporating the societal needs of the peoples themselves as a parameter in decision making.

Following the human rights development found within the ICCPR and *Poma Poma v. Peru*, states are now tasked with ensuring their activities do not prohibit indigenous peoples from the enjoyment of their culture, natural resources, or their land. By providing these people the ability to act in a capacity to develop and enact conservation policies over their subsistence and wildlife resources, the US-Russian Polar Bear treaty should be seen as a modern development drafted upon the basis established almost 100 years ago in the Bering Fur Seal Treaty of 1911, and at the same time enhancing these rights in a manner which reflects the subsequent development of international human rights law.

4. Indigenous People's rights over maritime space in the Chukchi

The primary indigenous right which ties the Iñupiat people to the governance of the Chukchi region is their ability to hunt marine mammals. As demonstrated in Section 3.0, there is a substantial treaty basis which confirms that there is an indigenous right to harvest marine mammals and that this right has been recognised numerous times by the United States. Furthermore with its adherence to the ICCPR, the United States is under an obligation to preserve the rights to self-determination and autonomy of the Iñupiat minority as well as their cultural rights. These rights are fundamentally grounded in their collective ability to engage in subsistence hunting.

Both the right to harvest marine mammals, and the obligation the United States has to ensure their cultural continuity and well-being when utilizing its sovereign rights, give the Iñupiat a legal standing to participate in any policy development or activities affecting the Chukchi Sea.

The Iñupiat have a substantial legal basis to object when development, in particular, could affect their indigenous rights. In this sense, much like what the HRC had determined in *Poma Poma v. Peru*, any project which could impact their well-being must have their free, prior, and informed consent. In cases where the development threatens the continuation of their culture, the principle of proportionality should limit the United States in exercising its development rights.

It is submitted that the right to harvest marine mammals, and to perpetuate and extend a culture which is fundamentally based off of the continuation of the subsistence harvests also affords the Iñupiat the right to actively participate in any decision of the United States which could implicate the well-being of the marine mammal stocks upon which they have historically depended. The United States has an obligation not to jeopardize the existence of the Iñupiat.

It now becomes necessary to look at the US leasing programmes in order to assess if the rights illustrated above were considered, or acted upon in any way, in the United States' lease sale in the Chukchi Sea.

5. MMS Lease 193 and the US' Arctic Extractives Programme

Before the Bureau of Ocean Energy Management (BOEM) is able to lease tracts, they must do a comprehensive assessment of the region, its characteristics, its risks, and the nature of the oil deposit beneath it. During this time, BOEM develops standards to be included in the terms of any subsequent lease.

According to the BOEM, its task is “to manage the orderly leasing, exploration, development, and production of oil and gas resources on the Federal OCS, while simultaneously ensuring the protection of the human, marine, and coastal environments; and the public receives a fair and equitable return for these resources.”⁵³

The US government, while not being party to many international treaties does incorporate some concepts of international legal development within its domestic policy.⁵⁴ One such example is the inclusion of social impact assessments within offshore leasing programme, and the inclusion of extensive stakeholder consultation.

In the case of the Chukchi Sea area, the MMS was especially conscious of this obligation as Lease Sale 193 was auctioned months into the oil price surge between 2007-2008. Despite two unsuccessful exploratory attempts in the mid 80s, the price of oil in the late 2000s justified the massive cost of production necessary to start up extraction in the Arctic.

Not only was extraction a very likely result of this lease sale, but in all reality the sale would face opposition from both the local indigenous communities and environmental groups, and that opposition would take the form of lawsuits which would

⁵³ "Chukchi Sea Planning Area Oil and Gas Lease ... - BOEM." 2015. 25 Jun. 2015
<http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Leasing/Lease_Sales/Sale_193/2015_0127_LS193_Final_2nd_SEIS_Vol1.pdf> p ES-2

⁵⁴ Schiffman, H. "US Membership in UNCLOS: what effects for the marine environment." *ILSA J. Int'l & Comp. L.* 11 (2004): 477.

seek to use any holes in the MMS' environmental impact statement against the government's proposed lease plan.

Due to this parcel's proximity to the North Slope of Alaska, the MMS knew it had to address the fact that its potential extractive and exploratory activities could interfere with indigenous subsistence activity, and have the potential to affect the societal wellbeing of the Iñupiat. As such, the MMS had implemented specific requirements to ensure that sensitivity to the subsistence and sociocultural wellbeing of the Iñupiat included within the MMS' environmental impact assessment, and as a regulatory constraint which any company hoping to develop offshore would need to address.

5.1 What rules apply to the permitting of oil and gas development in the Chukchi Sea?

Since the 1980s the Government of the United States developed offshore oil exploration and drilling regulations which contained indigenous specific parameters. The main difference in the government's regulatory approach between the 1980s and now is the incorporation of mechanisms to make Arctic offshore developers attend to the sociocultural rights and customs (including the subsistence hunting of marine mammals) of the Iñupiat. This is enacted through assessments which stress how the proposed development plans minimize the risks and impacts on cultural rights. This regulatory adaptation is most evident in the extensive sociocultural risk assessment chapters BOEM now requires private parties to develop as part of any lease proposal in the Arctic.

These regulatory adaptations were included in the first Environmental Impact Statement (EIS) produced in 2007. This EIS contained numerous provisions which were unique to the North Slope of Alaska and were focused on the impacts of offshore oil and gas development activity on subsistence hunting.⁵⁵

⁵⁵ Minerals Management Service (2007) "Volume I final environmental impact statement-." 30 Jun. 2015
<http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Environment/Environmental_Analysis/2007-026-Vol%20I.pdf>

To incorporate impacts within the EIS, the MMS included both a sociocultural and environmental justice analysis, both of which examined community health and analyzed the various ways in which the community utilized the surrounding marine and littoral environment, specifically in regards to subsistence hunting.

Initially, the MMS concluded that there was a very small chance of the lease sale jeopardizing the marine hunting practices of the Iñupiat through direct pollution, or through operations undertaken in the coastal area.⁵⁶ To ensure this, numerous constraints were placed on leaseholders to ensure that their operations would not affect Iñupiat subsistence hunting or impede their access to marine hunting grounds.⁵⁷

The native Village of Point Hope litigated the basis that it underestimated potential oil spill quantities, and the damaging effects that larger spills would have on subsistence marine mammal hunting. The Village referred to its fear of a major oil spill and its effects on their subsistence hunting activity. The Village was successful and the court ordered the Government to redraft the EIS to account for a more accurate worst-case discharge, and to account better for the impacts their development could have on indigenous marine mammal hunting in the area.⁵⁸

BOEM took this opportunity to implement a specialized sociocultural impact assessment of the proposed lease sale's worst-case discharge, and the effect it could have on the Iñupiat communities. The assessment noted that a high volume spill, though unlikely, would have devastating effects for the region, largely due to the degradation of the marine mammal populations.

The EIS noted that a large oil spill would have damaging effects on the Iñupiat subsistence way of life, and that the impact would likely be felt for generations. Despite this information, the Secretary of the Interior approved Royal Dutch Shell's drilling plan,

⁵⁶ *Ibid.* page II.9, II-10,

⁵⁷ *Ibid.* See generally BOEMS Development scenario allotment

⁵⁸ *Native Village of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014).

as the chance of a severe spill was small enough to warrant the economic benefit of resource extraction (at least in the Department's eyes).

The EIS utilized a 77-year offshore development scenario, including potential high volume oil spills, continued seismic surveying, and the logistical modality necessary for a major offshore development. BOEM had described the process as “[analysing the impact of offshore operations on the] sociocultural systems of the North Slope Borough, Northwest Arctic Borough, Bering Strait region, and Russian Chukotka regions as the umbrella for analysing cause-and-effect relationships among different variables (political, social, cultural), as well as concepts underlying the “sociocultural system” milieu (subsistence [marine mammal hunting] practices, community health, and environmental justice).”⁵⁹

The EIS noted that that the oil and gas development that has occurred in the region had occurred in isolation from the indigenous communities, and that while oil and gas operations had provided a windfall reserve of cash, the Iñupiat of the North Slope maintained livelihoods heavily based on subsistence.⁶⁰

The EIS listed concerns that were brought up in BOEM's community sessions. These concerns included: societal concern regarding the impact of operations, the permanent damage oil spills could have on subsistence stocks, and any long lasting effects on the Iñupiat people in terms of halting or preventing subsistence activities.⁶¹

5.1.1 Environmental Justice as a metric in BOEM's Environmental Impact Statement

⁵⁹ BOEM (2014) "Oil and gas lease Sale 193 draft second SEIS Vol. 1. 27 Jun. 2015 <http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Leasing/Lease_Sales/Sale_193/Lease_Sale_193_DraftSSEIS_vol1.pdf>

⁶⁰ *Ibid.* p.129

⁶¹ *Ibid.* p.130

Executive Order 12898 also mandated BOEM to conduct an Environmental Justice assessment as part of the EIS.⁶² An Environmental Justice assessment is designed to assess the potential of the proposed development to have “disproportionately high adverse human health and environmental effects on minority populations and low-income populations.”⁶³

In order to develop the metrics to be used in the Environmental Justice assessment, the MMS had to consult with the communities in the potentially affected area. The communities articulated their concerns regarding the development and its potential effects on their community. After this meeting “Environmental Justice-related concerns are taken back to MMS management and incorporated into environmental study planning and design, environmental impact evaluation, and the development of new mitigating measures that are incorporated into the EIS.”⁶⁴

Communities raised numerous concerns regarding the impact development could have on the littoral spaces near their coasts (scaring away or augmenting migration patterns of marine mammals, interfering with hunting activity, etc.), and how the potential for oil spills in the region could decimate the marine mammal stocks and hunting access that indigenous communities depend on to exercise their cultural lifestyles.

Thanks to these meetings, BOEM was able to define five prominent community concerns regarding the proposed development of Lease sale 193 as follows:

- Assessment of areas important to subsistence use

⁶² "Executive Order 12898 - national archives and records ..." 2005. 27 Jun. 2015
<<http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>>

“Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” and an accompanying Presidential memorandum. The Executive order requires that each Federal agency consider environmental justice to be part of its mission. Its intent is to promote fair treatment of people of all races and income levels, so no person or group of people bears a disproportionate share of the negative effects from the country’s domestic and foreign programmes.

⁶³ Supra source 56p.38

⁶⁴ Supra source 36 III-129

- Climate change and changing bowhead whale hunting practices Deflection of subsistence resources by noise and development
- Mitigation measures to protect subsistence practices and bowhead whale health
- Concerns related to Arctic food security issues and human health
- Vessel transits and effects on bowhead whales and subsistence activities Discharges near areas where food is taken or eaten directly from the water
- Impacts of oil spills and oil-spill responses on resources, subsistence activities, and Iñupiat physical and cultural well-being, and Concerns related to increasing scientific and traditional knowledge as they interrelate when analysing sensitive habitats having multiple uses.”⁶⁵

All five parameters revolve around the take of subsistence resources, two of which in particular stress the impacts on areas related to the harvest of marine mammals, specifically interference with hunting activities directly associated with the Bowhead whale hunt.

The Environmental Justice metric was unique to Lease Sale 193, due to the fact so many of the metrics necessary to assess impacts on societal well-being were dependent on the communities’ marine mammal hunting practices. It shows that with the adaptation of the environmental justice criteria the United States has included Iñupiat subsistence needs as a parameter for the determination of development. This is perhaps the only mechanism within the US’ offshore leasing which incorporates the anthropocentric value of marine mammal harvests as a parameter for offshore leasing.⁶⁶

As a result of this analysis BOEM was mandated to adopt parameters within its leasing programme to mitigate the impact (or the potential impact) of oil development on subsistence activities, as they would directly affect the societal wellbeing of Iñupiat communities.

The next section assesses the rules that were developed to accommodate the concerns raised in the EIS and the Environmental Justice consultation.

⁶⁵ *Supra* source 56

⁶⁶ *Supra* source 56 II-40

5.1.2 Address of Indigenous Concerns in Rule-making

After determining the specific issues that communities wished to have addressed, BOEM set about incorporating regulations to mitigate the effects development could have on the marine zones within the Chukchi. BOEM developed three such requirements. The first was the imposition of a 25 nm from shore quiet or exclusionary zone, the second was the mandatory use of subsistence advisors by developers, and the third was a requirement for producers to have a conflict avoidance agreement with the Alaska Eskimo Whaling Commission (AWEC.)

The first regulatory adaptation was the implementation of an exclusionary zone (or “quiet zone”) near the coastal bowhead migratory route (which included the vast majority of subsistence marine mammal hunting grounds). The data on the impact development activity (supply vessels and helicopter usage) in littoral regions gave regulators a problem, as any offshore development would end up utilizing the communities of Barrow and Wainwright for logistical hubs, and any travel route they took would be likely to cause disturbance to the normal use of the Bowhead migratory route.⁶⁷

These zones were withdrawn from the lease sale so that no development could occur directly within 25 nm of shore as this was the most utilized parcel of the Chukchi Sea for subsistence marine mammal hunting according to BOEM’s consultations with the communities. Resource development (and the processes that go with it) would have a direct impact on the ability of the Iñupiat to hunt in these regions. BOEM also established regulations to limit the ability of oil producers to use both vessels and aircraft in the area.

In regards to aircraft, developers must require their pilots to have a minimum altitude of 1,500 feet. This was done largely due to the known impact low-flying aircraft

⁶⁷ Department of the Interior Review, *Shell’s 2012 Alaska offshore oil and gas exploration programme 6* available at www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf (2013)

have on walrus and seal populations (they cause a stampede) which not only displaces marine mammals but has a drastic effect on the mortality rate of younger pinnipeds which are often crushed in the ensuing stampede. In regards to boats, developers must minimize their presence in the area by doing all travel in particular time frames, cease travel during designated hunting seasons, and have a subsistence advisor aboard each vessel.

BOEM's second regulatory implementation was to require operators to use subsistence advisors for all marine activities (including on stationary rigs). BOEM first adopted this requirement following its stakeholder engagement in Lease sale 195 (in the adjacent Beaufort Sea). The change tasked developers to hire Iñupiat people to provide environmental and cultural guidance to operators to minimize the effect of development on the subsistence hunting activity of the local communities.⁶⁸ The Subsistence Advisor has the ability to halt operations if they feel they are having an adverse effect on wildlife, or if the activity is directly affecting subsistence hunting of the local community.

The final adaptation BOEM made was the requirement for developers to seek a conflict avoidance agreement with the Alaska Eskimo Whaling Commission. This stipulation was a regulatory incorporation from another lease sale (Lease Sale 195, in the adjacent Beaufort Sea.)

Due to the proximity (27-30 nm offshore) from the village of Kaktovik, both the USFWS and NOAA required that Shell have "either a plan of cooperation or information that identifies what measures will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses."

⁶⁸ *Ibid.* p.130 "Major Environmental Justice concerns expressed at these meetings include

- "the need for larger "Quiet Zone" deferral areas that protect the bowhead whale migration route from seismic sound disturbance; that protect subsistence staging, pursuit, and butchering areas; and that protect critical whale feeding and calving areas;...
- the need to employ monitors and observers from local communities on seismic vessels; "

Shell's formalized conflict avoidance agreement with the Alaska Eskimo Whaling Commission⁶⁹ triggered an adaptation of US policy that came to be black letter law with the implementation of 50 C.F.R. §216.104(a)(12),^{70 71} a specific provision for the Arctic area that adopted the modality of stakeholder consultation with the end goal of developing a conflict avoidance agreement. This code obliges companies to consult with indigenous communities and to develop a conflict avoidance scheme before they are able to acquire the incidental take authorization (a permit necessary to start drilling in marine spaces in proximity to known marine mammal populations depended on for subsistence.)

BOEM incorporated the same process in the Chuckchi Sea after both the US Fish and Wildlife Service (USFWS) and the National Oceans and Atmospheric Administration (NOAA) required Royal Dutch Shell to sign a conflict avoidance agreement with the Alaska Eskimo Whaling Commission (a congress of all Iñupiat

⁶⁹ BOEM (2012) "*Appendix H plan of cooperation addendum.*"

<http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Programme/Plans/Regional_Plans/Alaska_Exploration_Plans/2012_Shell_Beaufort_EP/Appendix%20H%20-%20Plan%20of%20Cooperation%20Addendum.pdf>

⁷⁰Ibid "Where the proposed activity would take place in or near a traditional Arctic subsistence hunting area and/or may affect the availability of a species or stock of marine mammal for Arctic subsistence uses, the applicant must submit either a plan of cooperation or information that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses. A plan must include the following:

- (i) A statement that the applicant has notified and provided the affected subsistence community with a draft plan of cooperation;
- (ii) A schedule for meeting with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding any aspects of either the operation or the plan of cooperation;
- (iii) A description of what measures the applicant has taken and/or will take to ensure that proposed activities will not interfere with subsistence whaling or sealing; and
- (iv) What plans the applicant has to continue to meet with the affected communities, both prior to and while conducting the activity, to resolve conflicts and to notify the communities of any changes in the operation."

⁷¹ Board, O. S. (2000). Marine mammals and low-frequency Sound:: progress since 1994. National Academies Press.

whaling captains) as a requirement to receive their incidental harassment authorizations for Bowhead Whales.

As part of this obligation Shell must develop communications centres in the Alaskan villages to allow both Shell and the villagers to keep up to date on hunting activity, oil development activity, or any other sort of activity that could potentially cause conflict over access to a specific marine area and its wildlife resources.

Secondly, it required that Shell hired both subsistence advisors (SAs) and protected species observers (PSOs) that should remain onboard all vessel traffic and aboard the rig at all times. The PSOs have the capacity to halt operations if they see marine mammals in the immediate area of the drilling rig (or operations vessels),⁷² while the SAs are responsible for giving an operator up to date information on both fishing and hunting information, and how operations could be conducted in a manner which did not impact subsistence activity or the native communities of the North Slope.

5.2 How do those rules take account of Iñupiat rights and interests both procedurally and substantively?

The sale of lease 193 was a major adaptation of the lax regulatory climate that regulated the first Arctic drilling in the 1980s. This adaptation demonstrates a shift in focus in United States policy to recognize the unique nature of the Iñupiat people's dependence on the harvest of marine mammals. BOEM had the mandate to implement the concerns of the Iñupiat in such a way as to actually mitigate the effect of oil development activity on coastal zones, and the Iñupiat people had a voice in the subsequent regulatory adaptation.

The procedures BOEM used to understand local risks and to incorporate regulations aimed at mitigating them allows the agency to promulgate policy and manage activity in accordance with concerns raised by coastal communities.

⁷² NOAA (2013) "National standards for a protected species observer and ..." 26 Jun. 2015 <http://www.nmfs.noaa.gov/pr/publications/techmemo/observers_nmfsopr49.pdf>

Furthermore, BOEM's incorporation of the exclusionary zone, PSOs, and a conflict avoidance system illustrates that the methodology of prescribing regulations for the area has resulted in a balancing of rights. On one hand, this balance provides a regulatory climate which allows for development of important resources, and on the other it seeks to ensure Iñupiat concerns related to that development on their subsistence activities and their way of life are heard before the regulations are adopted.

Ultimately the procedural process adopted for lease sale 193 illustrated that the prescription of regulations in the region seeks to minimize the impact development will have on the rights of native peoples. Within this process, the role of the Iñupiat is simply to state their concerns; the decision to grant development, or the decision to place restraints on developers is exclusively a right of the US Government.

The BOEM does not articulate how its prescriptions address both the state's right to develop, and the Iñupiat right to maintain access to marine mammal hunting.

If the analysis provided in the *Poma Poma* case is applied to BOEM's conduct in granting MMS Lease 193, it is apparent that BOEM and the entire lease sale fails to meet the dictates of the ruling.

The project requirements seek to ensure that there is free, prior, and informed *consultation*, but stop short of providing the Iñupiat any choice to allow or disallow extraction. Hence the regulations and methodology used by BOEM do not qualify as outreach for the purpose of seeking the free, prior, and informed *consent* of indigenous peoples which is required if the state proposes to authorize activities which deny a minority group its right to enjoy its culture. Rather BOEM had sought to simply acquire input, and implement regulations seeking to mitigate damages the Iñupiat fear could come from development.⁷³

⁷³ Supra source 43 para 7.5-7.6

The lease terms fail to give native organizations a direct say in whether or not they wanted the development (within the community there is both support for development and opposition).

It is readily apparent that there is a risk of this programme interfering with the subsistence rights enjoyed by the Iñupiat. The circumstances which brought BOEM to the Arctic (developing an oil based lease) pose the risk of interfering with aboriginal hunting rights.

When the village of Point Hope litigated against BOEM to examine the worst case discharge scenarios in the EIS statement, BOEM was ordered to reassess. BOEM's subsequent adaptation by making three regulatory changes do not adequately seek the consent of the Iñupiat, but rather seek to make development (or the risk posed by it) more acceptable to the community.

5.3 How has this worked in practice?

BOEM has sought adapt its regulatory process to the Chukchi area and has tried directly to implement regulations which address the concerns of Iñupiat communities. As part of this process, they have developed three regulations (conflict avoidance agreement, exclusionary zone, subsistence advisor). All three of these programmes address fears of subsistence interference, and all have been adopted within the legal framework of the lease. Royal Dutch Shell is currently the only developer actively seeking to utilize their lease tracts and has implemented controls on their operations to reflect the regulatory requirements imposed by BOEM.

The regulatory climate has adapted to the Iñupiat, and adjusted in such a way as to minimize the impact of developers on native subsistence activity. It has not, however (in conformity with *Poma Poma's* logic on indigenous minority rights) adequately incorporated the concept of seeking their consent.

This is especially important to note, as BOEM had considered the implications of a Deepwater-Horizon like spill for subsistence resources. It noted that a large spill would essentially halt subsistence activity for years, which, even as a precautionary manoeuvre to preserve the stock, would surmount to a violation of indigenous rights.

It is submitted that an infringement of this sort could drastically jeopardize the subsistence-based rights of the Iñupiat and thus more than meets the threshold recognized by *Poma Poma* for imposing a free, prior, informed consent requirement before a project can be permitted to proceed.

6. Conclusions

The first conclusion is that there is a well-established right for the Iñupiat peoples to hunt marine mammals in a fashion which maintains their culture and provides direct sustenance to their communities. This right has implications for the manner in which the United States seeks to develop the resources of the Chukchi Sea as it gives rise to questions of cultural existence and indigenous sociocultural preservation.

This right has evolved from the US initial exclusion of indigenous peoples from the hunting restrictions found within the *Bering Fur Seal Arbitration*, and the *Fur Seal Treaty of 1911*, into a right to hunt marine mammals which can be found in the ICRW, The 1973 Agreement on the Conservation of Polar Bears, and the US-Russian Polar Bear Conservation Treaty of 2001. This evolution into a right possessed by the Iñupiat shows that there is considerable state practice to consider the right of the Iñupiat to hunt marine mammals customary law under Art 38 (1) of the Statute of the International Court of Justice.

The second conclusion is that the United States has a correlative legal obligation to ensure the protection of the Iñupiat and their subsistence activity in the Chukchi. ICPPR 1.1, 1.2 and ICCPR 27 provide a primary legal basis for the international legal rights of the Iñupiat in relation to domestic US law. The United States should seek to follow the logic utilized by the Human Rights Committee in *Poma Poma v. Peru* and craft domestic policy in such a way as to seek at all times to preserve indigenous minorities rights, which encompass a specific set of rights closely associated with land and animal usage.

Furthermore, the Human Rights Committee adapted its interpretation of consultation and inclusion within the decision-making process of any development within its *Poma Poma* opinion. Whereas, it was formerly considered adequate (for the purposes of including indigenous peoples in the decision-making process) to provide simple consultation, the *Poma Poma* Opinion demanded a much more inclusive modality for indigenous peoples within the decision-making process. The Human Rights Committee noted that “mere consultation” does not constitute sufficient

inclusion of the indigenous community within the developments decision making process.⁷⁴

This logic would imply that consultation with the Iñupiat communities in hopes of mitigating interference with their cultural practices, would not constitute sufficient inclusion of the indigenous peoples in the decision making process. As there was never the ability for the Iñupiat to have an effective say in whether or not to lease the area for oil extraction, the process whereby the United States leased the land did not seek to (at any point) gain the consent of the Iñupiat prior to leasing the area.

The United States should seek to ensure that if it exercises its rights in the Arctic in any manner which could implicate the indigenous people's right to their own existence, that it have the clear, prior, and informed consent of the indigenous community. It should also seek to implement institutional changes by seeking the involvement and consent of indigenous peoples in its decision making process in areas which are significant for the meaningful exercise of their culture. These areas should also encompass the US' outer continental shelf as they are areas which Iñupiat society is socioculturally dependent upon.

While BOEM had conducted stakeholder consultation, there was no regulatory requirement which actually took into consideration the opinion of the Iñupiat. As the Iñupiat possessed no capacity to approve or halt the project, there can be no free, prior, and informed consent of the Iñupiat. BOEM states that they sought Iñupiat input to make better regulatory parameters for development. It is concluded that through the ICPPR (arts 1.2 and 27) that there is an obligation for the United States to seek incorporation of the Inupiaq people in the decision-making process in matters which affect their marine mammal subsistence harvest.

Further, if the US' exercise could implicate access to the land or to a resource in such a way as to jeopardize the community, it must not allow development under the principle of proportionality (once again determined by the Human Rights

⁷⁴ *Supra* source 41 para 7.6

Committee.) The principle seeks to ensure that state action does not adversely affect civilians or citizens who reside near the development. BOEM had conducted a revised major spill analysis and concluded that there is a very small chance that the development of Lease Sale 193 would result in catastrophic damage to the Iñupiat people.

There isn't a clear threshold for determining when a societal risk level should deter a state from development activity, so on this end it can be assumed that BOEM's risk parameters accurately encompass risk levels, and extraction would not directly jeopardize the marine mammals depended upon by the Iñupiat.

As the Iñupiat have a direct human rights tie to the wellbeing of Chukchi marine mammal stocks, due to their role as former sovereign as well as through their cultural dependence on subsistence, legal principles established in the ICCPR obligate the United States Government to seek clear, prior, and informed consent of the Iñupiat before allowing oil exploration/extraction to occur in waters where the majority of their marine mammals exist and are harvested.

It can be concluded that the normative process utilized by BOEM to develop oil in the Chukchi Sea is not in conformity with the treaty obligations of the United States, as it fails to give adequate regard for the status of Indigenous people groups; who should be granted the ability to consent to allow or disallow the project to occur.

Normative US policy allows the Iñupiat to comment and has shown willingness to adapt in a manner which incorporates the suggestions made by the Iñupiat. The incorporation of a conflict avoidance agreement, subsistence advisors, and the exclusionary zone were substantive changes within the programme, and while more progressive elements of regulation were incorporated, they did little to further empower the local communities' choice in limiting the offshore programme.

What is needed to make the programme conformant with the rights of the Iñupiat under its obligations to the ICCPR is a procedural change to the leasing programme, which requires the approval of the tribal government before allowing extractive activity

in areas which are critical for the wellbeing of subsistence marine mammals, and the communities themselves.

The US failed to seek the approval of the tribal communities which depend on the take of marine mammals in the Chukchi and oil and gas exploration activity is occurring in marine space which is critical for the well-being of native communities in the Northwestern portion of Alaska. These communities have rights attributed to their status as a people which are based on both self-determination and cultural rights protected under ICCPR Art 27. Both of these rights afford the Iñupiat the right to have ownership in the decision-making process over areas of the Chukchi significant to their ability to meaningfully practise their culture.

Under the US' normative legal structure, the Iñupiat people do not have the ability to allow or disallow development in the waters of the Chukchi Sea.

The current United States energy development programme in the Chukchi Sea constitutes a risk to marine mammals and the subsistence lifestyle of its Arctic peoples. It has promulgated a regulatory system which allows offshore oil extraction without allowing the Iñupiat people the ability to approve or disapprove of the development, inherently excluding them from the decision-making process.

The current United States extractives programme is in conflict with its international agreements, and with the customary subsistence harvesting rights of the Iñupiat people; in that it denies the ability of the Iñupiat to provide their free, prior, and informed consent on whether or not to allow offshore oil extraction in waters to which their subsistence lifestyle depends.

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