

# **The Rights of Indigenous Peoples to Harvest Marine Mammals in the Arctic**

*Perspectives from International Human Rights Law and the Law of the Sea*

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## Introduction

We live in a time in which the protection and preservation of marine biodiversity is gaining increasing importance. The United Nations Convention on the Law of the Sea (UNCLOS or LOSC) in 1982 already incorporated various environmental protection elements, and the 1992 Convention on Biological Diversity gave the protection and preservation of biodiversity legal status.<sup>1</sup> Since then, the protection and preservation of marine biodiversity and sustainable development have been important international and national goals. The International Convention for the Regulation of Whaling (ICRW or the International Whaling Convention) and the Agreement on the Conservation of Polar Bears (the Polar Bear Agreement) both offer extensive conservation measures, with a moratorium on whaling, and an overall ban on polar bear hunting in the Arctic.

We also live in a time in which the protection of human rights is increasingly important, especially for indigenous peoples. The modern framework for the protection of indigenous rights started to develop in 1989 with the adoption of ILO Convention 169 on the rights of indigenous and tribal peoples. This was followed by a long period of negotiation about a draft declaration on the rights of indigenous peoples, which finally led to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. The most important right for indigenous peoples is the right of self-determination, allowing them to have a degree of autonomy so that they are able to continue their traditional way of life. Linked to that is the right to culture, and the right to lands and natural resources.

These increasingly important rights and duties at a first glance might clash. How can an indigenous people's right to harvest marine mammals coincide with a state's duty to protect and preserve those animals? Both the International Whaling Convention and the Polar Bear Agreement offer solutions for this potential conflict. The Polar Bear Agreement is always used as an example of successful cooperation between the Arctic states, and the "whale has emerged as a symbol of the world environmental movement and has come to represent, perhaps better than any other single issue, the difficulty of reconciling the need to conserve biological diversity, protect cultural and indigenous

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<sup>1</sup> *Convention on Biological Diversity* (1992).

<sup>2</sup> Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law*

values, and give effect to economic needs.”<sup>2</sup> In that context, both treaties proclaim a duty to protect and preserve the marine mammals, but both offer an exemption from that duty to indigenous peoples.

Within this context, how does international law recognize the rights of indigenous peoples to harvest marine mammals? The answer to this question can be seen not only through the eyes of a human rights lawyer, who focuses solely on the international human rights instruments and case law available to her, but also via the perspective of international law of the sea and environmental law, drawing from the Law of the Sea Convention, and the whaling and polar bear conventions themselves. This thesis will take on both these perspectives, to provide an account of the recognition of indigenous peoples’ rights to harvest marine mammals. The two different perspectives have several things in common, and this thesis argues that they should be used and interpreted complementary to each other.

The first chapter of this thesis aims to clarify the meaning of the term ‘indigenous peoples.’ It will describe the historical context to the question, and compare the human rights definitions and the law of the sea meaning of the word. It will also distinguish indigenous peoples from other minorities. By doing so, it will clarify the most essential elements of a definition of indigenous peoples for the purposes of this thesis. Having established the interpretational background, the second chapter will then reflect on the rights of indigenous peoples to harvest marine mammals as seen from the eyes of the human rights lawyer. It will draw upon the right to self-determination and the right to culture, and how that ties into the marine mammals debate. The third chapter will offer the perspective of the international law of the sea scholar, by looking at UNCLOS, the ICRW, and the Polar Bear Agreement. The origins of the indigenous exemptions will be explored, as will the actual substance, and some limitations. Whilst doing so, it will become clear how the law of the sea perspective subtly relies on human rights law, and thus how the two fields of law are complementary to each other in the context of the rights of indigenous peoples to harvest marine mammals.

This thesis relies upon both primary and secondary sources. Primary sources include the various treaties, reports and decisions from the Human Rights Committee, preparatory works, and reports from the International Whaling Commission (IWC), the

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<sup>2</sup> Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2012), 423.

organizational body of the ICRW. Due to the nature of this thesis, there is a stronger reliance on secondary sources, especially in the parts on the ICRW and the Polar Bear Agreement. This is a potential shortcoming, and further research, with more time and space, would therefore want to pursue even more primary sources, such as all the various reports by the IWC.

## 1 Defining Indigenous Peoples

There is no internationally legally binding definition of indigenous peoples, and therefore the term can cause confusion. For example, the Government of Japan has long argued that its small type coastal whaling (STCW) should fall under the aboriginal subsistence whaling exception of the ICRW. However, many people would not associate the Japanese with the term 'indigenous peoples'. People would rather think of the Inuit or First Nations in Canada, the Native Americans in North and South America, the Sami in Scandinavia and Russia, or the aboriginals in Australia. Why are only those people considered indigenous, and not the Japanese? What, actually are indigenous peoples? How is the term defined in human rights law, and how in international environmental law and law of the sea?

This chapter will deal with these questions, as it is crucial to understand who we mean by indigenous peoples, before going in to analyse what rights these people actually have. Also with regards to the issue of the Japanese whaling, defining indigenous peoples would help the International Whaling Commission in deciding which groups of people qualify for an aboriginal subsistence whaling quota, and which do not. The chapter will take a three-tier approach. First of all, the term "indigenous peoples" will be explored from a human rights based perspective. Secondly, it will look at how indigenous peoples are defined or referred to in international environmental law and the law of the sea. Thirdly, this chapter will discuss the distinction between minorities and indigenous peoples within human rights law. The outcomes of these three discussions help us to understand what and who indigenous peoples are, and it will allow us to form a common understanding for the purpose of this thesis.

### 1.1 International Human Rights Law

Mattias Åhrén explains how there are two ways of defining a people for international legal purposes. In Westphalian times, peoples were defined as "the aggregate of the individuals that happened to reside within the borders of the states that took form [after the Peace of Westphalia in 1648]."<sup>3</sup> This definition never applied to indigenous peoples,

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<sup>3</sup> Mattias Åhrén, "International Human Rights Law Relevant to Natural Resource Extraction in Indigenous Territories – An Overview," *Nordisk Miljörättslig Tidskrift / Nordic Environmental Law Journal* 1 (2014), 22.

because of the allegedly primitive nature of their societies. This meant that, for as long as that definition prevailed, indigenous peoples were not recognized as a sovereign entity, and as such were not able to exercise sovereign rights to natural resources.<sup>4</sup>

Throughout time, however, a new definition was born. Peoples were now referred to as “groups united by common ethnicity and culture.”<sup>5</sup> With the creation of the United Nations in 1945, things started to improve concerning the rights of indigenous peoples. In 1966, two major international human rights documents were adopted, the international Covenant for Civil and Political Rights (ICCPR) and the International Covenant for Economic, Social and Cultural Rights (ICESCR). Both documents have a high level of ratification, and solidify the right to self-determination, the right to culture, and other important rights. In 1989, things developed further, with the adoption of ILO 169, which established specific group rights for indigenous peoples. From then onwards, indigenous peoples have been included in decision-making processes, awareness about indigenous peoples has been created, and now, with the UNDRIP adopted in 2007, there is an official UN Declaration on the rights of indigenous peoples. It is evident that culture started playing an important role when defining a people. There has thus been a “paradigm shift” with regards to the definition of peoples, as a people is no longer exclusively understood in terms of passports, but also in terms of ethnic/cultural communalities, at least in the context of indigenous peoples.<sup>6</sup> The recognition of the importance of culture, and its applicability to indigenous peoples, is the foundation upon which the indigenous rights regime is based.

Still, there is no recent legally binding definition for indigenous peoples. UNDRIP does not include a definition on indigenous peoples. However, there is some (soft) legal guidance that is often referred to. First of all, José Martínez Cobo offered a statement, which is now known as the Cobo definition:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant

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<sup>4</sup> See S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004), 27.

<sup>5</sup> Åhrén, “International Human Rights Law Relevant to Natural Resource Extraction in Indigenous Territories,” 22. See also Anaya, *Indigenous Peoples in International Law*, 7; 49-72.

<sup>6</sup> Mattias Åhrén, “Indigenous Peoples Rights,” seminar as part of the course Indigenous Peoples Rights at UiT – The Arctic University of Norway (2nd March 2015).



sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>7</sup>

This definition has now been used, for lack of a legally binding one, to define indigenous peoples. A problem concerning the non-dominant element of this definition of indigenous peoples is that one could argue that the Inuit in Greenland are not really indigenous peoples for the sake of human rights, as they are the dominant group in their country of Greenland. However, they are not the dominant group in the Kingdom of Denmark. This issue could potentially threaten the Inuit's indigenous hunting opportunities.

The Indigenous and Tribal Peoples Convention (ILO 169), although not explicitly defining indigenous peoples, provides that the Convention applies to

peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>8</sup>

Additionally, ILO 169 affirms that self-identification as indigenous is a “fundamental criterion” for determining the groups to which the Convention applies.<sup>9</sup>

Legal scholars have also shed some light on the definition of indigenous peoples. According to S. James Anaya, a highly recognized legal scholar in the field of indigenous studies, the term indigenous “refers broadly to the living descendants of preinvasion habitants of lands now dominated by others,” and he adds that “[i]ndigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest.”<sup>10</sup> The four main elements within international human rights law thus are: self-identification, distinctiveness, non-dominant, and a connection to a territory, whilst retaining their own societal structure.

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<sup>7</sup> José Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations* (1986), U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, para. 379.

<sup>8</sup> *C169 Indigenous and Tribal Peoples Convention* (No. 169) (1989), Article 1(1)(b).

<sup>9</sup> *Ibid.*, Article 1(2).

<sup>10</sup> Anaya, *Indigenous Peoples in International Law*, 3.

## 1.2 Law of the Sea and International Environmental Law

There is less discourse on a definition of indigenous peoples within the law of the sea or international environmental law. The Law of the Sea Convention, for example, makes no mention of indigenous peoples. However, the International Whaling Commission has examined how to define indigenous peoples, noting that aboriginal subsistence whaling is whaling carried out by or on behalf of “aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales.”<sup>11</sup> This definition thus relies on community, familial, social and cultural ties to an historical and present reliance on whaling.

The Polar Bear Agreement refers to “local people using traditional methods,” emphasizing the importance of the historical and present ties to the tradition.<sup>12</sup> Additionally, even though the word “indigenous” is not used, the term “local people” still affirms the importance of the land and natural resources. Comparing this definition to that used within human rights law, it becomes evident that within law of the sea, there is more emphasis on distinctiveness and the special connection to the land and natural resources, with their own societal structure. The other two elements referred to within human rights law, self-identification and the relational elements, are less important within the law of the sea.

## 1.3 Distinction between Minorities and Indigenous Peoples

As will be explained in the following chapter of this thesis, Article 27 of the ICCPR establishes rights for minorities. Although the provision applies explicitly to members of a minority, it is also applicable to members of an indigenous group. However, indigenous rights are not directly applicable to other minority groups. There are many minorities, such as the Basques or the Kurds, who in no case would identify themselves as indigenous peoples, whereas the indigenous peoples regime would offer them more extensive and autonomous rights. The distinction between minorities and indigenous

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<sup>11</sup> G.P. Donovan, “The International Whaling Commission and Aboriginal/Subsistence Whaling: April 1979 to July 1981,” in International Whaling Commission, “Aboriginal/Subsistence Whaling (with Special Reference to the Alaska and Greenland Fisheries), Special Issue 4 (1982), <https://archive.iwc.int/?r=464&k=dd5e19effe> (accessed 20 July 2015), 79; 83.

<sup>12</sup> *Agreement on the Conservation of Polar Bears* (1973), Article III(1)(d).

peoples, and the justifications for their differing rights, helps to clarify the distinctive elements of a definition of indigenous peoples.

When one compares the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (the Minorities Declaration) to UNDRIP, it follows that UNDRIP provides a more extensive set of rights. But if the criteria of belonging to a minority group and an indigenous group are quite similar, what, then, explains the difference? In 2000, the Commission on Human Rights issued a working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples. It consisted of a paper by Asbjørn Eide, an expert on minorities, and Erica-Irene Daes, an expert on the rights of indigenous peoples. Mr Eide's paper discussed how the Minorities Declaration "aim[s] at ensuring a space for pluralism in togetherness," whereas the instruments concerning the rights of indigenous peoples – UNDRIP was still in its draft stage at the time of the paper – "are intended to allow for a high degree of autonomous development."<sup>13</sup> The Minorities Declaration, taking an integrationist approach, thus focuses on effective participation in the larger society (as shown by Articles 2(2) and 2(3)), whereas the draft UNDRIP and ILO 169 allocate authority to indigenous peoples to be able to make their own decisions, included in the right to self-determination (as illustrated by Articles 7 and 8 of ILO 169, and Articles 4, 23 and 31 of the draft indigenous declaration).<sup>14</sup> This observation also applies to the final form of UNDRIP (as reflected in Article 3, 4, and 5). Another difference between the two Declarations is that there is no recognition of rights of minorities concerning lands and natural resources. One can thus conclude that the connection to lands and natural resources is a defining difference between the identity of indigenous peoples and those of other minorities. A third clear distinction is that the rights of minorities inhere in individuals, whereas indigenous rights refer to peoples or groups.<sup>15</sup> Article 27 of the ICCPR, for example, applies to "persons belonging to such minorities," rather than the minority as a collective.<sup>16</sup>

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<sup>13</sup> United Nations Commission on Human Rights – Sub-Commission on the Promotion and Protection of Human Rights, "Prevention of Discrimination Against and the Protection of Minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples," (2000), UN Doc. E/CN.4/Sub.2/2000/10, para. 8.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, para. 9.

<sup>16</sup> *International Covenant on Civil and Political Rights* (1966), Article 27.

Mr. Eide concludes that what is normally held to distinguish indigenous peoples from other groups is “their prior settlement in the territory in which they live,” combined with “their maintenance of a separate culture which is closely linked to their particular ways of using land and natural resources.”<sup>17</sup> Indigenous peoples are distinguished from other minorities because of their historical pre-colonial presence, claim and traditions to their land and resources, their will to stay relatively autonomous, and their tradition of group life.

#### **1.4 Concluding Remarks**

By comparing the definition of indigenous peoples to the definition of minorities, and by comparing the human rights definition to the definition used by the ICRW and the Polar Bear Agreement, it is possible to extract the common elements to a general definition of indigenous peoples. In this thesis, the strict formalities regarding the definition do not matter as much. Neither the IWC, nor the Polar Bear Agreement have a very strict definition with explicit stipulated criteria, but rather assume a group is indigenous, and then check whether that group could qualify for indigenous hunting rights. The existing regimes focus more on defining the criteria for the activity (hunting), rather than defining the groups who are eligible to perform that activity. For now, the most important elements for defining indigenous peoples are the fact that they have a special relationship with their lands and natural resources, and that they have a distinct societal structure and culture, both dating from pre-colonial periods.

In the future, however, it might be useful for the IWC and the Polar Bear Agreement to have an agreed definition of indigenous peoples, with a clear set of criteria, as it would make the granting of indigenous quotas a lot easier. It is likely that, after a UN declaration on indigenous peoples, there might, in the near future, also be a binding convention on indigenous peoples, with presumably a definition. This definition could then possibly be used for designating indigenous hunting rights. For now, however, it is up to the IWC to decide whether an indigenous group can qualify for an aboriginal subsistence whaling quota.

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<sup>17</sup> United Nations Commission on Human Rights, “Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples,” para. 24.

## 2 The Rights of Indigenous Peoples to Harvest Marine Mammals from a Human Rights Law Perspective

It is possible to investigate the rights of indigenous peoples to harvest marine mammals, from the perspective of human rights law, and from that of law of the sea and environmental law. This section will analyse the rights of indigenous peoples to harvest marine mammals as recognised in human rights law, primarily focusing on the International Covenant for Civil and Political Rights, the United Nations Declaration on the Rights of Indigenous Peoples, and relevant case law and reports.

### 2.1 The Right to Self-Determination

The right to self-determination is enshrined in both the ICCPR and the ICESCR. UNDRIP has also affirmed this right. This section will look at the relevant provisions, after which the scope of the right to self-determination will be discussed with regards to the harvest of marine mammals by indigenous peoples.

Common Article 1 of the ICCPR and the ICESCR states that “[a]ll peoples have the right to self-determination.”<sup>18</sup> Subparagraph 2 of Article 1 provides that “[i]n no case may a people be deprived of its own means of subsistence.”<sup>19</sup> This latter element is often referred to as the economic element of self-determination. Self-determination is widely known to be a norm of customary international law, and even *jus cogens*.<sup>20</sup> For a while, it was never clear whether Article 1 of the ICCPR applied to indigenous people, because the traditional human rights definition of indigenous peoples was still used. Many states were afraid that if Article 1 were applicable to indigenous peoples it would allow them the right to secede. However, Article 3 of UNDRIP has now confirmed that indigenous peoples have the right to self-determination, although Article 46(1) provides that the scope of this right to self-determination does not extend to the right to secede.<sup>21</sup> The Human Rights Committee has also confirmed the applicability of the right to self-

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<sup>18</sup> *International Covenant on Civil and Political Rights*, Article 1(1); *International Covenant on Economic, Social and Cultural Rights* (1966), Article 1(1).

<sup>19</sup> *International Covenant on Civil and Political Rights*, Article 1(2); *International Covenant on Economic, Social and Cultural Rights*, Article 1(2).

<sup>20</sup> Anaya, “Self-Determination: A Foundational Principle,” in *Indigenous Peoples in International Law*, 97.

<sup>21</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), Article 3; Article 46(1).

determination to indigenous peoples, as it has applied the right of self-determination numerous times to indigenous peoples in its country reports.<sup>22</sup> Article 4 of UNDRIP goes a bit further, by stating that the right to self-determination also consists of having the right to “autonomy or self-government in matters relating to their internal and local affairs.”<sup>23</sup> Finally, Article 20 of UNDRIP states that indigenous peoples have the right to “be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities,” which expands Article 1(2) of the ICCPR.<sup>24</sup>

Although UNDRIP is a declaration and not a legally binding treaty, some elements of the Declaration do represent customary international law and in this case Article 3 represents an authoritative statement by most states that the right of self-determination extends on a non-discriminatory basis to indigenous peoples, and brings indigenous peoples within the scope of common Article 1 of the ICCPR and the ICESCR. Therefore, we can agree with Mattias Åhrens that the right to self-determination as reflected in UNDRIP is indicative of customary international law.<sup>25</sup>

S. James Anaya claims that self-determination, as opposed to the right to form one’s own state, means “that peoples are entitled to participate equally in the constitution and development of the governing institutional order under which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis.”<sup>26</sup> It is thus based on the concepts of freedom and equality. In an article about the Makah Indian tribe’s exercise of cultural self-determination and the practice of whaling, Miller defines cultural self-determination as “the right of a distinct and identifiable group of people or a separate political state to set the standards

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<sup>22</sup> See for example CCPR/C/79/Add.105; A/55/40; CCPR/CO/74/SWE; CCPR/C/79/Add.109; CCPR/C/CAN/CO/5; CCPR/C/NOR/CO/5; CCPR/C/79/Add.112; CCPR/CO/82/FIN; CCPR/CO/75/NZL.

<sup>23</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, Article 4.

<sup>24</sup> *Ibid.*, Article 20(1).

<sup>25</sup> Åhren, “International Human Rights Law Relevant to Natural Resource Extraction in Indigenous Territories,” 33-34.

<sup>26</sup> S. James Anaya, “The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era,” in Claire Charters and Rodolfo Stavenhagen, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: Eks-Skolens Trykkeri, 2009), 189.

and mores of what constitutes its traditional culture and how it will honour and practice that culture.”<sup>27</sup>

The question with regards to the applicability of the economic aspect of the right to self-determination to the harvest of marine mammals by indigenous peoples is whether the hunt for whales and polar bears can truly be viewed as subsistence. Only then will the right to self-determination be applicable. To analyse what subsistence entails, it is useful to look at how the IWC has dealt with this question. Both regimes require the whale hunt to be necessary for subsistence purposes, and this is one of those instances in which law of the sea and human rights law can be complementary to each other. One should be cautious, however, because the same term used in different treaties could have a different meaning, a point that the International Tribunal for the Law of the Sea (ITLOS) has made in the MOX Plant Provisional Measures Order.<sup>28</sup> In any case, one could argue, that at the very least, indigenous peoples should have the right to participate on the international plane with regards to discussions about aboriginal subsistence whaling quotas for example.

## 2.2 The Right to Culture

In addition to the right to self-determination, indigenous peoples have the right to culture. The right to culture is enshrined in the ICCPR and UNDRIP. First, this section will look at the relevant provision in the ICCPR, Article 27. Then, the General Comment by the Human Rights Committee (HRC), the treaty body of the ICCPR, will be analysed, after which the analysis will end with relevant decisions by the HRC. Secondly, the relevant provision in UNDRIP will be analysed. Both sections will offer a short conclusion on whether the right to culture extends to the right to harvest marine mammals by indigenous peoples.

### 2.2.1 Article 27 ICCPR

Article 27 of the ICCPR reads:

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

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<sup>27</sup> Robert J. Miller, “Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling,” *American Indian Law Review* 25 (2000/2001), 206.

<sup>28</sup> The Mox Plant Case (*Ireland v. United Kingdom*) Request for Provisional Measures: Order of 3 December 2001, International Tribunal for the Law of the Sea, para. 451.

of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>29</sup>

Even though there is no specific reference to indigenous peoples in this provision, it is still applicable to their situation, as they are by definition an ethnic, religious or linguistic minority within the state, as explained in the first chapter of this thesis. It must be noted that this is an individual right. It does not apply to Peoples, or other forms of groups, but only to individuals who belong to a minority group. This is often problematic for indigenous peoples, as they identify themselves as a group, and argue for collective rights.

The Human Rights Committee issued General Comment No. 23 in 1994, in which it evaluates Article 27, and provides some guidance for interpretation of the article. The General Comment concludes that the protection of the right to culture is “directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.”<sup>30</sup> It thus puts the concept of culture in the context of religion and language. It affirms that the right is an individual right, “conferred on individuals belonging to minority groups,” and that the right must be distinguished from other individual rights mentioned in the Covenant.<sup>31</sup> Accordingly, the right to culture is distinguished from the right to self-determination, due to the fact that the right to self-determination is not recognized under the first Optional Protocol to the ICCPR.<sup>32</sup> This means that individuals, whose countries are state parties to the ICCPR and the Optional Protocol, can submit a claim of violations of their right to culture to the HRC.<sup>33</sup> This is not possible for the right to self-determination.

Following from the wording of Article 27, the protection it offers seems limited because the threshold for breach is high. This is because of the phrase “shall not be denied the right,” which means that only actions that completely deny the indigenous peoples’ enjoyment of their culture seem to be prohibited. However, the Human Rights

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<sup>29</sup> *International Covenant on Civil and Political Rights*, Article 27.

<sup>30</sup> UN Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, <http://www.refworld.org/docid/453883fc0.html> (accessed 18 August 2015), para. 9.

<sup>31</sup> *Ibid.*, para. 1.

<sup>32</sup> *Ibid.*, para. 3.1.

<sup>33</sup> *Optional Protocol to the International Covenant on Civil and Political Rights* (1966), Article 1; Article 2.



Committee in its General Comment stated that although it is expressed in negative terms, Article 27 “does recognize the existence of a ‘right,’” and that states parties are required to take positive measures “to ensure that the existence and the exercise of this right are protected against their denial or violation.”<sup>34</sup> The Human Rights Committee went even further, and argued that states may also need to take positive measures “to protect the identity of a minority and the rights of its members to enjoy and develop their culture [...] in community with the other members of the group.”<sup>35</sup>

Furthermore, the Human Rights Committee recognized that “to enjoy a particular culture” may mean “a way of life which is closely associated with territory and use of its resources.”<sup>36</sup> It also observed that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.”<sup>37</sup> At first sight, it might be difficult to bring the hunt of whales and polar bears under “the use of land resources,” but the Human Rights Committee has concluded that the right to culture “may include such traditional activities as fishing or hunting.”<sup>38</sup> This way, according to the HRC, the right to culture thus extends to the harvesting of whales and polar bears by indigenous peoples.

The decisions by the Human Rights Committee also shed some light on the matter. *Poma Poma v. Peru*, for example, concerns a dispute over the allocation of water, threatening the indigenous Aymara people’s means of subsistence. It established a distinction between measures “whose impact amounts to a denial of the right of a community to enjoy its own culture,” and “measures with only a limited impact on the way of life and livelihood of persons belonging to that community,” of which the latter, according to the Human Rights Committee, would not satisfy the threshold of Article 27.<sup>39</sup> Furthermore, the Human Rights Committee introduced the threshold of a “substantive negative impact.”<sup>40</sup> On the other hand, in the *Länsman* cases, it was provided that no proportionality test is allowed, meaning that to prove a violation of

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<sup>34</sup> Human Rights Committee, *General Comment No. 23*, para. 6.1.

<sup>35</sup> *Ibid.*, para. 6.2.

<sup>36</sup> *Ibid.*, para. 3.2.

<sup>37</sup> *Ibid.*, para. 7.

<sup>38</sup> *Ibid.*

<sup>39</sup> UN Human Rights Committee, *Ángela Poma Poma v. Peru* (27 march 2009), CCPR/C/95/D/1457/2006, para. 7.4.

<sup>40</sup> *Ibid.*, para. 7.5.

Article 27, one would only have to establish that the, albeit quite high, threshold is met.<sup>41</sup> The “substantive negative impact” thus does not have to be balanced against a gain of the larger society for example.

The question remains whether the denial of harvesting marine mammals would only be a “limited impact on the way of life,” or whether it would be a “denial of the right of a community to enjoy its own culture.” However, the fact that the Human Rights Committee in its General Comment emphasized that culture can mean a way of life which is associated with the use of resources, and recognized that those resources can refer to fishing or hunting, it can be concluded that the denial of the polar bear or whale hunt can constitute a violation of the right to culture as enshrined in Article 27. Conversely, it can also be concluded that the right to culture in Article 27 provides that indigenous peoples have a (cultural) right to harvest marine mammals.

### 2.2.2 Articles 8, 11, 12, 25, 26 and 34 UNDRIP

UNDRIP expands the right to culture, and makes it directly applicable to indigenous peoples. First of all, Article 8 generally states that “[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”<sup>42</sup> It then elaborates this general claim, and includes two provisions which might be of use with regards to the harvest of marine mammals. Paragraph 2(a) and 2(b) assert that the state shall “provide effective mechanisms for prevention of, and redress for [...] [a]ny action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities,” and “[a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources.”<sup>43</sup> Of course, the latter could seem problematic, as it might be difficult to argue that whales, which will either be in the state’s territorial sea or EEZ, would qualify as “their resources.” On the other hand, a less literal interpretation would conclude that the provision also applies to denial of access to resources which they might have the right to harvest. In any case, paragraph 1 still stands as a general provision. To be able to decide on this question of interpretation, one must look at the Vienna Convention on the

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<sup>41</sup> This is contrast to the right to property, where there is in fact a proportionality test. UN Human Rights Committee, *Illmari Länsman et al v. Finland* (26 October 1994), CCPR/C/52/D/511/1992 and *Jouni E. Länsman et al v. Finland* (30 October 1996), CCPR/C/58/D/671/1995.

<sup>42</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, Article 8(1).

<sup>43</sup> *Ibid.*, Article 8(2)(a); Article 8(2)(b).

Law of Treaties (VCLT). According to the VCLT, a provision should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>44</sup> Although each case should be weighed by its own merit, in this particular scenario, it can be argued that the provision also applies to denial of access to resources which they might have the right to harvest.

Article 11 of UNDRIP affirms the right of indigenous peoples to "practice and revitalize their cultural traditions and customs," including the right to "maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."<sup>45</sup> Additionally, Article 12 provides that indigenous peoples have the right to

manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial object; and the right to the repatriation of their human remains.<sup>46</sup>

Relatively clearly, the first sentence of Article 11 is very applicable to the harvest of marine mammals. The remainder of the text offers examples and cannot be read as excluding the harvest of marine mammals by indigenous peoples. Article 12, on the other hand, is more specific. It offers an exhaustive list, and it may be more questionable whether aboriginal subsistence whaling and the indigenous polar bear hunt would fall under "spiritual and religious traditions, customs and ceremonies."

Article 25 and Article 26(1) of UNDRIP are the main provisions for cultural rights over land and land resources. Article 25 states that indigenous peoples have the right to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources."<sup>47</sup> Obviously, the "other resources" phrase would be applicable to polar bears and whales. However, because of the wording of this article, it is quite unclear

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<sup>44</sup> *Vienna Convention on the Law of Treaties* (1969), Article 31(1).

<sup>45</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, Article 11(1).

<sup>46</sup> *Ibid.*, Article 12(1).

<sup>47</sup> *Ibid.*, Article 25.

whether these “other resources” should also be “traditionally owned or otherwise occupied and used,” or whether that latter phrase only applies to lands, territories, waters and coastal seas. In the first scenario, indigenous people would have to prove that the hunt of whales and polar bears constitutes a tradition.

Article 26(1) affirms that “[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”<sup>48</sup> Paragraph 3 states that states shall “give legal recognition and protection to these [...] resources,” which shall be conducted “with due respect” to the customs and traditions of the indigenous peoples.<sup>49</sup> This provision is said to be customary international law.<sup>50</sup> Thus, it constitutes a legally binding obligation on states to give legal recognition and protection to the resources. Of course, this provision could still be ruled inapplicable to the harvest of marine mammals by indigenous peoples, if one were not able to prove that marine mammals qualify as “resources which they have traditionally [...] used or acquired.”

Article 34 of UNDRIP, although not necessarily reflecting a general right to culture, provides that indigenous peoples have the right to “promote, develop and maintain” their “distinctive customs, spirituality, traditions, procedures, [and] practices,” as long as they are in accordance with international human rights standards.<sup>51</sup> Arguably, indigenous whaling and the polar bear hunt constitute distinctive custom, traditions or practices, and so indigenous peoples have the right to maintain the custom of harvesting marine mammals. The customs, traditions and practices must be in accordance with international human rights standards. If it were to say ‘international law’ rather than “international human rights standards,” it might cause a problem, as one would then have to balance this right against a state’s duty to protect and preserve the marine environment. However, because of the fact that it only states “international human rights standards,” the provision declares a right to maintain the tradition of whaling and hunting for polar bears.

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<sup>48</sup> Ibid., Article 26(1).

<sup>49</sup> Ibid., Article 26(3).

<sup>50</sup> Siegfried Wiessner, “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges,” *The European Journal of International Law* 22 no. 1 (2011), 137.

<sup>51</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, Article 34.

As previously mentioned, UNDRIP is merely a declaration adopted by the United Nations General Assembly, and as such does not have any legally binding authority. However, this thesis has already argued that the right to self-determination applies in a non-discriminatory way to indigenous peoples. In essence, “the Declaration may be understood to embody or reflect, to some extent, customary international law.”<sup>52</sup> In an article on the legal status of the Declaration, Anaya and Wiessner conclude that the provisions related to culture and tradition are indicative of customary international law. In a survey of state and international practice they undertook in 1999, it was already affirmed that “indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life.”<sup>53</sup> According to Anaya and Wiessner, state practice in the states that have an indigenous population “largely conforms to these legal tenets.”<sup>54</sup> Furthermore, the International Law Association, in a report from 2010, concluded that rules of customary law related to the rights of indigenous peoples are a reality, and that these rules of customary law correspond to, inter alia, the right to recognition and preservation of their cultural identity and the right to their traditional lands and natural resources.<sup>55</sup>

To conclude, the right to culture does indeed extend to the harvest of marine mammals by indigenous peoples, and that, arguably, that right is reflected in customary international law. Article 11 and 12 of UNDRIP provide a general right to culture, which by itself can already be applicable to the harvest of marine mammals. In addition, Articles 25 and 26(1) extend the right to culture to the use of resources, which includes the harvest of marine mammals. Furthermore, Article 34 provides for a specific right to maintain distinctive customs, traditions and practices. Therefore, indigenous people have a right to harvest marine mammals, through the right to culture as reflected in both the ICCPR, Article 27, and the relevant articles in UNDRIP.

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<sup>52</sup> S. James Anaya, “The United Nations Declaration on the Rights of Indigenous Peoples,” *International Human Rights and Indigenous Peoples* (New York: Aspen Publishers, 2009), 80.

<sup>53</sup> S. James Anaya & Siegfried Wiessner, “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment,” in Anaya, *International Human Rights and Indigenous Peoples*, 100.

<sup>54</sup> *Ibid.*

<sup>55</sup> International Law Association, “Rights of Indigenous Peoples,” Interim Report, The Hague Conference (2010), <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (accessed 18 August 2015), 51.

### 3 Indigenous Peoples' Rights to Harvest Marine Mammals from a Law of the Sea/International Environmental Law Perspective

Every discussion on matters related to the law of the sea starts with the Law of the Sea Convention. Therefore, as this chapter illustrates the indigenous peoples' right to harvest marine mammals from a law of the sea perspective, it will start by analysing the relevant provisions of UNCLOS, namely Articles 64, 65 and 120. From then on, this chapter will be split up according to species. First, it will look at the regulations governing the aboriginal subsistence whaling regime under the International Whaling Convention. Secondly, this chapter will turn to examine the Polar Bear Agreement. There are also two other Polar Bear agreements, one between the US and Russia with regards to the Alaska-Chukotka population, and the other between Greenland and Nunavut.<sup>56</sup> There is also an agreement between the Inuvialuit of Canada and the Inupiat of the United States.<sup>57</sup> Due to time and length restraints, however, this thesis will not cover those (bilateral) agreements, although these agreements stress the importance of indigenous hunting for subsistence or traditional purposes.

#### 3.1 Law of the Sea Convention

The Law of the Sea Convention aims to strike a balance between different groups of nations, coastal states, flag states, and arguably to some extent port states. The Convention is a framework convention, and adopts both a zonal approach, as a thematic approach. The first chapters of the convention take on the zonal approach and regulate the rules applicable in the different maritime zones, such as the Exclusive Economic Zone (EEZ) and the High Seas, whereas the last chapters take on the thematic approach and deal with specific themes, such as marine scientific research, or the protection and

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<sup>56</sup> *Agreement between the Government of the United States of America and the Government of the Russian Federation on the conservation and management of the Alaska-Chukotka polar population* (16 October 2000), <http://pbsg.npolar.no/en/agreements/US-Russia.html> (accessed 19 August 2015); *Memorandum of Understanding between the Government of Canada, the Government of Nunavut, and the Government of Greenland for the Conservation and Management of Polar Bear Populations* (30 October 2009), <http://pbsg.npolar.no/en/docs/GN-MOU-PB.pdf> (accessed 19 August 2015).

<sup>57</sup> *Inuvialuit - Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea* (4 March 2000), <http://pbsg.npolar.no/en/agreements/USA-Canada.html> (accessed 19 August 2015).

preservation of the marine environment. The Law of the Sea Convention is a package deal, referring to the fact that compromises were made. Therefore, no reservations are allowed.<sup>58</sup> LOSC is concerned with the rights and duties of states as subjects of international law and as such does not deal with internal matters such as the duty of a state to permit the harvest of marine mammals by indigenous peoples. It is thus not surprising that indigenous peoples are not mentioned at all in the text. With that said, it must be noted that, although LOSC is a very extensive treaty, it never aimed to regulate everything related to the law of the sea.<sup>59</sup>

Part V sets out the rights and duties of states in the EEZ. The EEZ, a relatively new concept within the law of the sea, confers upon coastal states sovereign rights “for the purpose of exploring and exploiting, conserving and managing the [living or non-living] natural resources” of the water column, seabed and subsoil to a distance of 200 nautical miles.<sup>60</sup> It is a sui generis zone, with its own distinctive regime.<sup>61</sup> The majority of the fisheries in the world reside within the 200 nautical miles, and so the EEZ regime’s primary aim is to regulate the exploitation of marine living resources.<sup>62</sup> In that context, Article 61 confers upon the coastal state the duty to conserve marine living resources by establishing the total allowable catch and the maximum sustainable yield.<sup>63</sup> Furthermore, Article 62 provides that coastal states shall “promote the objective of optimum utilization.”<sup>64</sup>

LOSC contains two short provisions with regards to the conservation of marine mammals. Article 64, the provision on highly migratory species, provides that States which fish for highly migratory species in the region have to cooperate as to ensure conservation and promote the objective of optimum utilization.<sup>65</sup> Because cetaceans are

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<sup>58</sup> *United Nations Convention on the Law of the Sea* (1982), Article 309.

It is sometimes argued that the “package deal” has been violated due to the allegation that the Implementation Agreement relating to Deep-Sea Mining not only implemented Part XI, but in fact amended it. This, however, is a matter for another discussion.

<sup>59</sup> See for example the Preamble: “Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law.” *United Nations Convention on the Law of the Sea*, Preamble.

<sup>60</sup> *United Nations Convention on the Law of the Sea*, Article 56(1)(a).

<sup>61</sup> Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010), 84.

<sup>62</sup> *Ibid.*, 82.

<sup>63</sup> *United Nations Convention on the Law of the Sea*, Article 61.

<sup>64</sup> *Ibid.*, Article 62(1).

<sup>65</sup> *Ibid.*, Article 64(1).

listed as highly migratory species under Annex I, this provision is thus also valid for the conservation of cetaceans.

Article 65 is said to be a *lex specialis* for marine mammals.<sup>66</sup> It provides that

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.<sup>67</sup>

It can be seen as an exemption from Part V, although paragraph 2 of Article 64 confuses that idea, as it states that the provision on optimum utilization applies “in addition to the other provisions of this Part.”<sup>68</sup> However, it is said that Article 65 nonetheless “removes all marine mammals from the full application of Part V in that optimum utilization is not required.”<sup>69</sup> Through Article 120, Article 65 also applies to the conservation and management of marine mammals in the high seas. It is, however, disputed whether it also applies for the territorial sea.<sup>70</sup>

The precise meaning of the latter part of Article 65 is much debated. First of all, it is questioned whether states are allowed to exploit marine mammals without cooperating with the “relevant international organizations,” and secondly, whether the plural usage of “organizations” “undermines the primacy of the IWC as the organization with which states must work when dealing with cetaceans.”<sup>71</sup> A third comment with regards to Article 65 is that the duty to “work through” the international organizations needs clarification.<sup>72</sup> It is unclear whether to “work through” means that coastal States should become a full member of the appropriate organization, or whether mere dialogue would be sufficient.

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<sup>66</sup> E.J. Molenaar, “Ecosystem-Based Fisheries Management, Commercial Fisheries, Marine Mammals and the 2001 Reykjavik Declaration in the Context of International Law,” *International Journal of Marine and Coastal Law* 17 (2002), 586-587.

<sup>67</sup> *United Nations Convention on the Law of the Sea*, Article 65.

<sup>68</sup> *Ibid.*, Article 64(2).

<sup>69</sup> Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment* (Oxford: Oxford University Press, 2009), 724.

<sup>70</sup> *Ibid.*, 724, footnote 94.

<sup>71</sup> Nigel Bankes, “The Conservation and Utilization of Marine Mammals in the Arctic Region,” in Erik J. Molenaar, Alex G. Oude Elferink and Donald R. Rothwell, *The law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (Leiden: Martinus Nijhoff Publishers, 2013), 300.

<sup>72</sup> Yoshifumi Tanaka, “Conservation of Marine Living Resources,” *The International Law of the Sea* (Cambridge: Cambridge University Press, 2012), 229.



The first and second questions, especially, are important. Canada withdrew from the ICRW as soon as the moratorium was set in place, and granted indigenous hunting rights to its indigenous population. Does this mean that Canada violated its obligation under Article 65 of the Law of the Sea Convention because it permits indigenous whaling? Article 65 only provides that nothing in the provisions on the EEZ restricts the rights of coastal states and international organizations to regulate the exploitation of marine mammals more strictly. It only suggests that a coastal state does not have a duty to ensure optimum utilization. The first part of the provision is thus not an obligation, and can therefore not be violated. However, the second part of Article 65 is, in fact, an obligation. According to Nigel Bankes, a simple reading of the provision provides that “coastal states cannot proceed unilaterally in the conservation, management or study of cetaceans but must work through appropriate organizations.”<sup>73</sup> It is obvious that the provision implicitly refers to the IWC, as it clearly sets apart the conservation, management and study of cetaceans from other marine mammals. However, due to the plural form used, and the duty under the VCLT to interpret the treaty according to its ordinary meaning, the provision as it now stands could also refer to the North Atlantic Marine Mammal Commission (NAMMCO), or possible other organizations dealing with the conservation of cetaceans.<sup>74</sup> Birnie suggests that the IWC has primacy, but explains the argument that the plural reference is there to include fisheries organizations due to the issue of incidental catch.<sup>75</sup> However, the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS) suggests that the FAO and UNEP are also international organisations under Article 65, in addition to the IWC.<sup>76</sup> In that case, Canada did not violate Article 65, as it can still work through “appropriate international organizations” for the conservation of whales.

In any case, even though the provisions in the Law of the Sea Convention do not prohibit the exploitation of marine mammals, nor do they include any provision on the

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<sup>73</sup> Bankes, “The Conservation and Utilization of Marine Mammals in the Arctic Region,” 300.

<sup>74</sup> *Vienna Convention on the Law of Treaties*, Article 31(1).

<sup>75</sup> P. Birnie, “UNCED and Marine Mammals,” *Marine Policy* 17 (1993), 509.

<sup>76</sup> United Nations Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* 31 (1996), 82; T.L. McDorman, “Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention,” *Ocean Development & International Law* 29 (1998), 185.

rights of indigenous peoples to harvest marine mammals, the Law of the Sea Convention does provide an open door to the IWC and the ICRW, and to the Polar Bear Agreement.

### 3.2 International Whaling Convention

The problem of overexploitation of whales was already present during the time of the League of Nations.<sup>77</sup> States concluded the first multilateral Convention for the Regulation of Whaling in 1931. Unfortunately, this convention was not as successful as hoped, and therefore, in 1937, 9 states signed a new International Agreement for the Regulation of Whaling. This Agreement included additional species and prohibited the taking of female whales accompanied by calves. The current treaty, the International Convention for the Regulation of Whaling, was concluded in 1946. According to its Preamble, it undertook to provide “for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”<sup>78</sup> The Convention established the International Whaling Commission (IWC), which is responsible for the regulatory measures. The IWC was initially a resource-focussed body, “designed to promote the continued hunting of whales” by ensuring that heavily depleted species, such as the blue whale, were given an opportunity to overcome extinction.<sup>79</sup> Now, however, the IWC has transformed from an economic, resource-based body, to a body primarily aimed at conservation.<sup>80</sup> Attached to the Convention is the Schedule, which includes regulatory measures for the protection and conservation of whales, and can be updated regularly. Through Article I(1) of the ICRW, the Schedule is “an integral part” of the Convention, and is therefore also legally binding upon the parties.<sup>81</sup>

In 1982, the IWC adopted a moratorium on commercial whaling on all whale stocks from the 1985/85 whaling season.<sup>82</sup> This was possible because there was now a majority of anti-whaling states within the IWC, so that the Schedule could be amended.

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<sup>77</sup> Tanaka, “Conservation of Marine Living Resources,” 230.

<sup>78</sup> *International Convention for the Regulation of Whaling* (1946), Preamble.

<sup>79</sup> Rothwell and Stephens, *The International Law of the Sea*, 308.

<sup>80</sup> *Ibid.*; Alexander Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham, UK: Edward Elgar Publishing Limited, 2005).

<sup>81</sup> *International Convention for the Regulation of Whaling*, Article I(1). Through Article V(3), parties are allowed to make reservations to the amendments to the Schedule, so that, for example, Norway was able to opt out of the moratorium.

<sup>82</sup> International Whaling Commission, *International Convention for the Regulation of Whaling, 1946: Schedule* (September 2014), <https://archive.iwc.int/?r=3606&k=db23125011> (accessed 20 July 2015), Rule 10(e).

Since then, whaling under the International Whaling Convention has been prohibited, with two exceptions. These exceptions, by definition, need to be non-commercial, so that the moratorium does not apply. The first of these exceptions is scientific whaling, a controversial issue as illustrated by the recent case before the ICJ.<sup>83</sup> The second exemption to the moratorium is aboriginal subsistence whaling.<sup>84</sup>

The next section examines the origins of the aboriginal subsistence whaling exception, drawing from the predecessors of the ICRW and IWC reports. Then, this section will go into more detail regarding the substance of the provision, focusing especially on nutrition, subsistence, and culture. Some limitations with regards to aboriginal subsistence whaling will also be discussed.

### 3.2.1 The Origins of the Aboriginal Subsistence Whaling Provision

Aboriginal subsistence whaling has been recognized by international treaty for over 70 years “as in some ways being different and having a distinctive character, making it susceptible to other controls than those on the larger-scale commercial whaling operation.”<sup>85</sup> Firestone and Lilley confirm that the “international community has long treated aboriginal hunting of marine mammals differently than commercial hunting.”<sup>86</sup> As early as 1911, there was already a distinction between commercial hunting and aboriginal hunting, in the 1911 Fur Seal Treaty. The Treaty was not to apply to “Indians, Ainos, Aleuts, or other aborigines” who hunted for seals in canoes.<sup>87</sup>

The 1931 Convention endorsed the concept of a special exception for aboriginal subsistence whaling. Article 3 of that Convention stipulated that the Convention would not apply to:

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<sup>83</sup> Whaling in the Antarctic (*Australia v. Japan: New Zealand Intervening*), Judgment of 31 March 2014, International Court of Justice, <http://www.icj-cij.org/docket/files/148/18136.pdf> (accessed 31 August 2015).

<sup>84</sup> International Whaling Commission, *International Convention for the Regulation of Whaling, 1946: Schedule* (September 2014), Rule 13.

<sup>85</sup> Ray Gambell, “International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling,” *Arctic* 46, no 2 (1993), 102.

<sup>86</sup> Jeremy Firestone and Jonathan Lilley, “Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs,” *Journal of International Wildlife Law & Policy* 8 (2005), 194.

<sup>87</sup> *Convention between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals* (July 7, 1911) (no longer in force), Article IV in Firestone and Lilley, “Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs,” 194.

aborigines dwelling on the coasts of the territories of the High Contracting Parties provided that:

- (1) They only use canoes, pirogues or other exclusively native craft propelled by oars or sails;
- (2) They do not carry firearms;
- (3) They are not in the employment of persons other than aborigines;
- (4) They are not under contract to deliver the products of their whaling to any third person.<sup>88</sup>

The Whaling Agreement of 1937 did not include any provision on aboriginal subsistence whaling. However, aboriginal whaling for bowheads nevertheless continued in Alaska, and to a lesser extent in Canada.<sup>89</sup> The 1946 International Whaling Convention also failed to include the aboriginal subsistence whaling provision of the 1931 Convention. However, the International Whaling Conference in Washington in 1946, which adopted the text of the treaty, supported the taking of gray whales in the Bering and Chukotsk seas “when the meat and products of such whales are to be used exclusively for local consumption by the aborigines of the Chukotsk and Korjaks areas.”<sup>90</sup> Thus the exemption appeared in the first Schedule to the 1946 Convention, which stated that it was forbidden to take gray whales or right whales, “except when the meat and products of such whales are to be used exclusively for local consumption by the aborigines.”<sup>91</sup>

In the late 1960s and early 1970s, aboriginal subsistence whaling was not considered to be an important issue at the IWC.<sup>92</sup> Nevertheless, concerns regarding aboriginal subsistence whaling continued to arise, and so when the proposed moratorium was debated, it was soon clear that it would not apply to indigenous whaling.<sup>93</sup> However, there were some concerns regarding the “potentially unsustainable nature” of aboriginal subsistence whaling, and so a special working group was created to examine the entire issue and propose a sustainable regime for aboriginal hunting.<sup>94</sup> The working group was divided into three panels, consisting of specialists in cultural

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<sup>88</sup> *Convention for the Regulation of Whaling* (1931) reprinted in P. Birnie, *The International Regulation of Whaling* (New York: Oceana, 1985), Article 3.

<sup>89</sup> Gambell, “International Management of Whales and Whaling,” 101-102.

<sup>90</sup> Resolution 10 of the International Whaling Conference, Washington, 1946, reprinted in Birnie, *The International Regulation of Whaling*.

<sup>91</sup> International Whaling Commission, “Schedule” in *Report of the Second Meeting* (1950), <https://archive.iwc.int/?r=1827&k=02fcaa0da1> (accessed 20 July 2015), 15.

<sup>92</sup> Gillespie, “Aboriginal Subsistence Whaling,” 195.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, 196.

anthropology, nutrition, and wildlife science. These panels established some basic principles, which were formalized in 1983 by a resolution, stating:

the Commission also recognizes 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 [...] [T]he Commission believes it appropriate and desirable to establish principles and guidelines for the management of aboriginal subsistence whaling which recognize and seek to accommodate conservation, nutritional, subsistence and cultural needs.<sup>95</sup>

The IWC also established the Aboriginal Subsistence Whaling Sub-Committee, which was to examine the aboriginal subsistence whaling applications brought before the IWC. The Aboriginal Subsistence Whaling Sub-Committee is a sub-committee of the Scientific Committee of the IWC. To apply, States need to file a “Needs Statement,” which “details the cultural, subsistence and nutritional aspects of the hunt, products and distribution” so that they can propose an amendment to the Schedule.<sup>96</sup> This amendment to the Schedule will then either be adopted by consensus, or otherwise voted upon in the now biennial meetings.<sup>97</sup>

In the current schedule, the aboriginal subsistence whaling provisions state that catch limits for aboriginal subsistence whaling “to satisfy aboriginal subsistence need” shall be established in accordance with the principles stipulated in Rule 13(a) of the Schedule.<sup>98</sup> Furthermore, the aboriginal taking of bowhead whales from the Bering-Chukchi-Beaufort Seas stock and from the West Greenland feeding aggregation, gray whales from the Eastern stock in the North Pacific, minke whales from the West Greenland and Central stocks, fin whales from the West Greenland stock, and humpback whales from the West Greenland feeding aggregation is permitted, but “only when the meat and products [...] are to be used exclusively for local consumption.”<sup>99</sup> This criterion is common to all three provisions on aboriginal subsistence whaling in the Schedule, although the taking of whales in the Greenland area does not require the meat and

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<sup>95</sup> International Whaling Commission, *Report of the Thirty-Fourth Meeting: Chair’s Report* (1983), <https://archive.iwc.int/?r=37&k=243b573226> (accessed 20 July 2015), 38, Appendix 3.

<sup>96</sup> International Whaling Commission, “Aboriginal Subsistence Whaling,” [https://iwc.int/index.php?CID=html\\_65](https://iwc.int/index.php?CID=html_65) (accessed 20 August 2015).

<sup>97</sup> In 2012 the IWC decided it would move from annual to biennial meetings. The 65th Meeting of the IWC in 2014 was the first meeting on the biennial meeting cycle.

<sup>98</sup> International Whaling Commission, *International Convention for the Regulation of Whaling, 1946: Schedule* (September 2014), Rule 13(a).

<sup>99</sup> *Ibid.*, Rule 13(b)(1); Rule 13(b)(2); Rule 13(b)(3).

products to be used exclusively for local consumption “by the aborigines.”<sup>100</sup> Perhaps this is due to the fact that the Inuit in Greenland do not necessarily fit the international definition of indigenous peoples, as they are allegedly not subordinated in their territory.<sup>101</sup> The specification “local consumption” therefore already effectively deals with the issue.

### 3.2.2 The Substance of Aboriginal Subsistence Whaling

As the Resolution of 1983 already illustrated, there are three justifications of aboriginal subsistence whaling, namely nutrition, subsistence and culture. Furthermore, Freeman et al. identify several additional reasons why Inuit whaling is important today. They claim that whaling is of social importance, important as a source of food, of cultural importance, important because of nutrition and health, of economic importance, and important because of spirituality.<sup>102</sup> The IWC defines Aboriginal Subsistence Whaling as:

Whaling, for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or narrative peoples who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales.<sup>103</sup>

The same IWC report defines “local aboriginal consumption” as “the traditional uses of whale products by local aboriginal, indigenous or native communities in meeting their nutritional, subsistence, and cultural requirements.”<sup>104</sup> The IWC thereby confirms the three elements to aboriginal subsistence. Furthermore, Jenkins and Romanza argue that the distinction in one of the three broad management objectives for an aboriginal subsistence whaling quota, which was “to enable aboriginal people to harvest whales in perpetuity at levels appropriate to their cultural and nutritional requirements,” shows that the test to qualify as aboriginal subsistence whaling is twofold.<sup>105</sup> The indigenous group wanting a quota needs to show, through their government, cultural need and nutritional-subsistence. Jenkins and Romanzo thus conclude, when writing on the

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<sup>100</sup> Ibid., Rule 13(b)(3).

<sup>101</sup> See Chapter 1 of this thesis on the definition of indigenous peoples.

<sup>102</sup> Milton M.R. Freeman et al., *Inuit, Whaling, and Sustainability* (Walnut Creek, California: Altamira Press, 1998), 29-56.

<sup>103</sup> Donovan, “The International Whaling Commission and Aboriginal/Subsistence Whaling: April 1979 to July 1981,” 79; 83.

<sup>104</sup> Ibid.

<sup>105</sup> Leesteffy Jenkins and Cara Romanzo, “Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium?” *Colorado Journal of International Environmental Law & Policy* 9, no. 1 (1998), 78-79.

question of whether the Makah Indians, residing in the State of Washington, US, could qualify for the aboriginal subsistence quota, that in order to qualify for a quota, the indigenous group must demonstrate “an actual cultural need to whale based on a continuing traditional dependence upon whaling activities” and “a nutritional-subsistence need to whale for the limited purpose of local aborigine consumption.”<sup>106</sup>

Before going on to analyse the three justifications for indigenous whaling, it should be stressed that the most important aspect of aboriginal subsistence whaling is that it is conducted by indigenous peoples. The discussion on the joint proposal by the USA, the Russian Federation and St Vincent and The Grenadine in the Sixty-Fourth Meeting of the IWC illustrates this. Responding to the joint proposal, many states questioned the aboriginal nature of the hunt. For example, the Dominican Republic claimed that “there had been no aborigines in the Carribean for over 300 years.”<sup>107</sup> Ecuador could not support the St Vincent and The Grenadines proposal “as it was not aboriginal subsistence whaling.”<sup>108</sup> Mexico, too, stated that the whaling in St Vincent and The Grenadines “was not carried out by aboriginal peoples.”<sup>109</sup> Also Colombia, Chile, Argentina, Peru and Brazil expressed their concern.<sup>110</sup> In the end, the joint proposal did not receive consensus, but was still adopted by a majority vote. Mexico explained that it had voted in favour of the US and Russian quota because the international conventions “required it to safeguard the rights and promote the knowledge and the culture of indigenous people.” However, Mexico would have opposed the St Vincent and The Grenadines quota, because

While there was precedent of approval of quotas for that country, there were persistent problems that have been unresolved for over three decades and those problems were related to the lack of sufficient information on the history and continuity of this whaling activity and how they respond to nutritional and socio-cultural needs.<sup>111</sup>

This scenario shows, although the proposal was adopted due to the fact that it had otherwise ignored the rights of the indigenous populations in the US and Russia, that to

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<sup>106</sup> Ibid., 79.

<sup>107</sup> International Whaling Commission, *Report of the Sixty-Fourth Meeting: Chair's Report* (2012), <https://archive.iwc.int/?r=67&k=dbb00dd1be> (accessed 31 August 2015), 20.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid., 21.

begin with, aboriginal subsistence whaling must actually possess an aboriginal character.

### 3.2.2.1 Nutrition

According to Gillespie, nutrition has long been an important justification for aboriginal whaling.<sup>112</sup> However, it is quite a strong element, because indigenous groups applying for a quota often have to prove that there are no, or few, nutritional alternatives. The 1979 meeting of the IWC Cultural Anthropology Panel confirmed that “[t]he position of whaling as a pivotal, cultural activity and the extremely high valuation placed on the bowhead products as food makes such replacement impossible.”<sup>113</sup> Furthermore, Jenkins and Romanzo conclude that as the Makah can meet their nutritional needs by relying on other sources of food than whale meat, they do not satisfy the nutritional need requirements for an aboriginal subsistence whaling quota.<sup>114</sup> These two statements imply that irreplaceability plays an important role when it comes to determining the nutritional element. Freeman et al. claim that not only are whales part of the Inuit diet, “but in many aspects they are irreplaceable, for many Inuit find that imported foods cannot provide suitable substitutes.”<sup>115</sup> Of course, the question is always whether they are nutritionally irreplaceable, or socially. In any case, even though it is alleged that whale meat is irreplaceable for most Inuit, it is still quite hard to fulfil the criteria, as irreplaceability is quite a high threshold to meet.

Gillespie notes that when applying for an aboriginal subsistence whaling quota, the indigenous group needs to demonstrate nutritional need by either using biological criteria, which comes down to hunger and lack of nutritional alternatives, or social and psychological criteria, which includes culture and poverty.<sup>116</sup> These are alternative bases. There are only two examples of successful claims based on to the biological criteria, those of Greenland and of the native population of Chukotka. Gillespie points out that “[t]he key point about both the Greenland and Chukotka examples is that

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<sup>112</sup> Gillespie, “Aboriginal Subsistence Whaling,” 208.

<sup>113</sup> Report of the Cultural Anthropology Panel in International Whaling Commission, “Aboriginal/Subsistence Whaling (with Special Reference to the Alaska and Greenland Fisheries),” Special Issue 4 (1982), 35.

<sup>114</sup> Jenkins and Romanzo, “Makah Whaling,” 86.

<sup>115</sup> Freeman et al., *Inuit, Whaling, and Sustainability*, 36.

<sup>116</sup> Gillespie, “Aboriginal Subsistence Whaling,” 208.



hunger would result if these ASW claims were not satisfied.”<sup>117</sup> However, it is quite hard to prove that there is no alternative source of food, or that hunger would result if the indigenous group would not get the aboriginal subsistence quota. As Gillespie points out, throughout history, there has often been a break in whaling, leaving the indigenous group to find alternative means of nutrition.<sup>118</sup> This immediately undermines a claim based on the biological criteria. Alternatively, the indigenous group may resort to a second set of criteria, namely the psychological and social criteria.

The IWC established the psychological and social criteria as a response to the Alaskan claim. In addition to biological terms, the psychological and social criteria provide for examination of nutritional claims in terms of “possible adverse effects of shifts to non-native foods [...] and [the] acceptability of other food sources.”<sup>119</sup> As mentioned before, the psychological and social nutrition criteria basically come down to culture and poverty. The cultural aspect is illustrated by the request of the Makah who contended that “any deviation from present dietary requirements could risk introducing diseases of civilization.”<sup>120</sup> It is alleged by the Makah that because of their cultural reliance on whale meat, colonialism and the replacement of the traditional diet with Western sources of food would pose a risk to the health of the Makah.<sup>121</sup> Furthermore, a lot of Inuit express the fear that resort to other sources of food than whale meat would affect their health.<sup>122</sup> On the other hand, the poverty argument was put forward by St Vincent and the Grenadines, who argued that “in a developing country any additional food source is important.”<sup>123</sup> The poverty argument works both ways. The proposal by Denmark (on behalf of Greenland) during the IWC’s Sixty-Fourth Meeting in 2012 was met with criticism. New Zealand commented “that the issue of need was especially problematic for Greenland which had access to the social and economic support

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<sup>117</sup> Ibid., 209.

<sup>118</sup> Ibid., 210.

<sup>119</sup> International Whaling Commission, “Appendix 4: Resolution on Bering Sea Bowhead Whales” in *Report of the Thirty-First Meeting: Chair’s Report* (1980), <https://archive.iwc.int/?r=34&k=0d55a5b7c0> (accessed 21 July 2015), 35.

<sup>120</sup> International Whaling Commission, “*Report of the Forty-First Meeting: Chair’s Report* (1990), <https://archive.iwc.int/?r=44&k=7386e34eb0> (accessed 21 July 2015), 25.

<sup>121</sup> Gillespie, “Aboriginal Subsistence Whaling,” 210.

<sup>122</sup> See Freeman et al., *Inuit, Whaling, and Sustainability*, 45-48.

<sup>123</sup> “Report of the Aboriginal Subsistence Whaling Sub-Committee, IWC/51/13, Agenda Item 11.2.1.1 in Gillespie, “Aboriginal Subsistence Whaling,” 211.

structures of the Kingdom of Denmark.”<sup>124</sup> However, in 2014, New Zealand voted in favour of Greenland’s proposal, even though the previously declined strike limits had been proposed again, because it “recognized the progress made through the revised needs statement.”<sup>125</sup>

The Makah also made a claim based upon the poverty argument. They argued that “the people now live in poverty and the whale meat will help their nutrition.”<sup>126</sup> However, in response to that, Gillespie points out that one needs to be careful with this second way of identifying nutritional need, as “such an avenue may provide an open door for claims from almost any group occupying a lower socioeconomic position.”<sup>127</sup> This would threaten the special nature of the indigenous hunt. However, this critique is equally applicable to the biological criterion of nutritional need, since any pro-whaling community that once relied on whale meat could argue the need for whale meat for nutritional purposes.

### 3.2.2.2 Subsistence

The Cultural Anthropology Panel defined subsistence as “the personal consumption of whale products for food, fuel, shelter, clothing, tools, or transportation by participants in the whale harvest.”<sup>128</sup> According to Gillespie, this means that aboriginal subsistence whaling hunts must first of all be non-commercial, and secondly, they must be local in orientation.<sup>129</sup>

The requirement of the non-commercial nature of aboriginal whaling was already evident in the 1911 Fur Seals Convention and in the 1931 whaling convention which stipulated that the whaling aborigines were not allowed to be in employment of

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<sup>124</sup> International Whaling Commission, *Report of the Sixty-Fourth Meeting: Chair’s Report*, 24.

<sup>125</sup> International Whaling Commission, *Report of the Sixty-Fifth Meeting: Chair’s Report* (2014), <https://archive.iwc.int/?r=3683&k=ffc495ad6d> (accessed 22 July 2015), para. 67.

<sup>126</sup> International Whaling Commission, *Report of the Forty-Ninth Meeting: Chair’s Report* (1998), <https://archive.iwc.int/?r=1470&k=2002ecccf0> (accessed 22 July 2015), 29.

<sup>127</sup> Gillespie, “Aboriginal Subsistence Whaling,” 211.

<sup>128</sup> “Report of the Cultural Anthropology Panel,” in International Whaling Commission, “Aboriginal/Subsistence Whaling (with Special Reference to the Alaska and Greenland Fisheries),” *Special Issue 4* (1982), 35; 49.

<sup>129</sup> Gillespie, “Aboriginal Subsistence Whaling,” 212.

others.<sup>130</sup> In a similar fashion, the Polar Bear agreement specifies that the skins may not be sold for profit, as does the 1957 Convention on the Conservation of North Pacific Fur Seals.<sup>131</sup> The non-commercial nature of aboriginal whaling is crucial to the presence of the aboriginal subsistence whaling provision, as this element still safeguards the result of the commercial whaling moratorium. Mexico stressed the importance of this requirement in the discussion on the joint proposal, including the quota of St Vincent and The Grenadines, in the IWC's Sixty-Fourth Meeting. It expressed its dislike of the ST Vincent and The Grenadines proposal since the whaling "was in fact closer to commercial whaling than to aboriginal whaling."<sup>132</sup> Furthermore, Brazil and Ecuador, in response to the proposal by Denmark (on behalf of Greenland), claimed it "did not meet the definition of Aboriginal Subsistence Whaling because of its strong commercial component."<sup>133</sup> During the Sixty-Fifth Meeting, Mexico again objected to Greenland's proposal, because allegedly "the numbers exceeded those needed for aboriginal use," and thus suggested that commercial use was involved.<sup>134</sup>

The other requirement of subsistence is that the whales should be utilized on a local scale. The Cultural Anthropology Panel stipulated in their report that "the meat and products of such whales are to be used exclusively for local consumption by the aborigines."<sup>135</sup> Furthermore, it defined local use as "the barter, trade, or sharing of whale products in their harvested form with relatives of the participants in the harvest, with others in the local community or with persons in locations other than the local community with whom local residents share familial, social, cultural, or economic ties."<sup>136</sup> However, as Gillespie argues, in practice this definition has been expanded "to include utilization of the whales caught under ASW auspices in international, national,

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<sup>130</sup> *Convention between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals* (July 7, 1911) (no longer in force), Article IV; *Convention on the Regulation of Whaling* (1931), Article 4.

<sup>131</sup> *Agreement on the Conservation of Polar Bears* (1973), Article III(2); *Interim Convention on the Conservation of North Pacific Fur Seals* (1957), Article VII.

<sup>132</sup> International Whaling Commission, *Report of the Sixty-Fourth Meeting: Chair's Report*, 20.

<sup>133</sup> *Ibid.*, 22.

<sup>134</sup> International Whaling Commission, *Report of the Sixty-Fifth Meeting: Chair's Report*, para. 66.

<sup>135</sup> "Report of the Cultural Anthropology Panel," in International Whaling Commission, "Aboriginal/Subsistence Whaling (with Special Reference to the Alaska and Greenland Fisheries)," Special Issue 4 (1982), 35; 49.

<sup>136</sup> *Ibid.*

and regional contexts.”<sup>137</sup> Gillespie claims that the IWC might be acting in an inconsistent way when calculating the importance of local utilization. On the one hand, the IWC drew a bright line when it refused the Japanese small-type coastal whaling request because “it was linked to both national and regional networks.” On the other hand, “the question of regional or national distribution networks does not appear to have been critically examined” in the case of applications from Alaska, Greenland, and St Vincent and the Grenadines.<sup>138</sup>

### 3.2.2.3 Culture

Whaling is a very important aspect of Inuit culture, and a common theme in songs, legends, art, dance, in their minds, and even in their annual calendar.<sup>139</sup> According to Freeman et al., the whale, as a source of food, “has cultural as well as psychological importance, for it meets enduring aesthetic, emotional, and symbolic needs.”<sup>140</sup> Furthermore, the Inuit share the whale meat with the rest of the community, and the sharing of animals is an important cultural value for them and their identity of group life.<sup>141</sup>

As described in the previous chapter, indigenous peoples have a right to maintain their culture under both Article 27 of the ICCPR and general international human rights law. Within international environmental law, on the other hand, culture also plays an important role. There are frequent references to culture in aboriginal subsistence applications going back as far the 1979 bowhead whale debate, when the IWC requested the Cultural Panel to analyse “the cultural activities and cultural identity of the aboriginal people and the relationship of this harvest to their well-being.” The Panel concluded that aboriginal hunting was of “vital importance.”<sup>142</sup> Thereafter, Japan,

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<sup>137</sup> Gillespie, “Aboriginal Subsistence Whaling,” 214.

<sup>138</sup> Ibid., 215.

<sup>139</sup> See Freeman et al., *Inuit, Whaling, and Sustainability*, 38-44.

<sup>140</sup> Freeman et al., *Inuit, Whaling, and Sustainability*, 38.

<sup>141</sup> Ibid., 40; J.R. Miller, “Indians and Europeans at the Time of Contact,” *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 2000), 3-25.

<sup>142</sup> R. Gambell, “The Bowhead Whale Problem and the International Whaling Commission,” in International Whaling Commission, “Aboriginal/Subsistence Whaling (with Special Reference to the Alaska and Greenland Fisheries),” Special Issue 4 (1982),4; International Whaling Commission, *Report of the Thirty-Fifth Meeting: Chair’s Report*, (1984), <https://archive.iwc.int/?r=38&k=e2a521041f> (accessed 22 July 2015), 22.

Greenland, St Vincent and the Grenadines, Russia and the Makah have relied on cultural premises for their aboriginal subsistence whaling application.<sup>143</sup> The IWC commented that “the cessation of Minke whaling in these communities has affected individuals economically, socially, spiritually and culturally, in a manner that threatens the vitality and viability of the communities.”<sup>144</sup> Gillespie notes that the “ASW hunt by St Vincent and the Grenadines has always been recognized as ‘cultural rather than nutritional in character.’”<sup>145</sup> Also the Makah have suggested that “whaling [...] has been of central importance to their culture.”<sup>146</sup>

Although the importance of culture at the IWC seems evident, there is little guidance on what culture means for the purpose of obtaining an aboriginal subsistence quota. According to Jenkins and Romanzo, the debate in the IWC with regards to the Alaskan bowhead quota reveals that “the ‘cultural’ requirement means more than simply cultural heritage – rather, it connotes that whaling must be an absolute cultural necessity.”<sup>147</sup> Only two guidelines have been established so far. First of all, “the act of whaling must be central to the culture,” illustrated by the Alaskan Inuit example in which hunting was “the single most important event.”<sup>148</sup> Secondly, the loss of the practice “would be likely to have a significant detrimental impact upon the society in question.”<sup>149</sup> As such, Gillespie concludes that “the role of culture in evaluating ASW claims has proven to be ambiguous and problematic.”<sup>150</sup> It should be noted that these guidelines seem to resemble the components of the right to culture under Article 27 of the ICCPR. The requirement that the loss of the whaling practice would have a

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<sup>143</sup> See Gillespie, “Aboriginal Subsistence Whaling,” 217-218.

<sup>144</sup> International Whaling Commission, “Resolution on Japanese Community-Based Minke Whaling,” *Report of the Forty-Fifth Meeting: Chair’s Report* (1994), <https://archive.iwc.int/?r=48&k=f1d2dabe63> (accessed 31 August 2015), 21, appendix 3.

<sup>145</sup> Gillespie, “Aboriginal Subsistence Whaling,” 218; International Whaling Commission, *Report of the Forty-Second Meeting: Chair’s Report* (1991), <https://archive.iwc.int/?r=45&k=87d65480e8> (accessed 31 August 2015), 31.

<sup>146</sup> ; International Whaling Commission, *Report of the Forty-Ninth Meeting: Chair’s Report* (1998), <https://archive.iwc.int/?r=1470&k=e8b706e32f> (accessed 31 August 2015), 28.

<sup>147</sup> Jenkins and Romanzo, “Makah Whaling,” 79.

<sup>148</sup> Gillespie, “Aboriginal Subsistence Whaling,” 221; Gambell, “the Bowhead Whale Problem and the International Whaling Commission,” 3.

<sup>149</sup> Gillespie, “Aboriginal Subsistence Whaling,” 221.

<sup>150</sup> Alexander Gillespie, “Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship Between International Law and the International Whaling Commission,” *Colorado Journal of International Environmental Law & Policy* 12, No. 1 (2001), 120.

“significant detrimental impact” sounds very similar to the threshold of a “substantive negative impact” introduced by the Human Rights Committee in the *Poma Poma v. Peru* case.<sup>151</sup>

There seems to be a vague criterion with regards to the cultural element of aboriginal subsistence whaling, namely that the cultural practice should be long-standing and unbroken.<sup>152</sup> This criterion of culture as an unbroken and established practice causes difficulties for indigenous groups with relatively new traditions. Gillespie notes, as an example, St Vincent and the Grenadines, who have been questioned about how their claim, “based on a relatively recent [150 years old] tradition reflected traditional indigenous practices.”<sup>153</sup> The case of the Makah illustrates another difficulty. One of the main problems with the Makah application is the community’s 70 year break in whaling, which suggests that the whaling is culturally less important and therefore fails to satisfy the very vague requirements of the cultural element of aboriginal subsistence whaling.<sup>154</sup> Similarly, the Chukotka and at least one Alaskan community took a break from whaling, either voluntarily or somewhat forced by the former Soviet Union.<sup>155</sup> This vague criterion of a long-standing and unbroken cultural tradition poses a problem for the revitalization of cultures that used to hunt for whales. As it stands, the problem of cultural revitalization, for the purposes of aboriginal subsistence whaling, has not been considered as a sufficient justification.<sup>156</sup> As a solution to this problem, Gillespie suggests that by “retrospectively stretching the precept advanced by the Cultural Anthropology Panel that the loss of whaling practice did (as opposed to was likely to) have a significant detrimental impact upon previously whaling indigenous cultures, it could then be suggested that revitalization could be a sufficient justification.”<sup>157</sup> Although this makes sense, it delves into philosophical questions on whether the act of whaling can be “central to the culture”, when that culture has been infringed upon before, and whether reparative justice, which this would essentially

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<sup>151</sup> See Section 3.2.1. Article 27 ICCPR of this thesis; *Ángela Poma Poma v. Peru*, para. 7.5.

<sup>152</sup> Gillespie discusses this issue, without including the source of the argument at Gillespie, “Aboriginal Subsistence Whaling,” 221.

<sup>153</sup> Gillespie, “Aboriginal Subsistence Whaling,” 222.

<sup>154</sup> See International Whaling Commission, *Report of the Forty-Eighth Meeting: Chair’s Report* (1997), <https://archive.iwc.int/?r=51&k=7d2011d983> (accessed 31 August 2015), 26.

<sup>155</sup> Gillespie, “Aboriginal Subsistence Whaling,” 223.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

come down to, is a sufficient justification for granting an aboriginal subsistence whaling quota.<sup>158</sup>

### 3.2.3 Limitations to Aboriginal Subsistence Whaling

Although there are many justifying elements to the aboriginal subsistence whaling provisions, there are also limitations on the right of indigenous peoples to whale. This section discusses three overall limitations: the specific boundaries to the allowable catches set by the IWC, the requirement of sustainability and conservation, and the issue of indigenous representation at the IWC.

The IWC has placed straightforward limitations on the aboriginal whaling catches. First of all, the IWC, through its Schedule, specifies which whale species are allowed to be taken, and which are not. Furthermore, the IWC's Schedule now forbids the hunting of calves or suckling whales, immature whales, or female whales which are accompanied by calves.<sup>159</sup> There has also been a development with regards to the means of hunting. Traditional hunting practices have often been replaced by humane killing alternatives.<sup>160</sup> This is partly due to the fact that the IWC abandoned the approach of identifying legitimate aboriginal subsistence whaling claims because of their traditional, somewhat inhumane, hunting practices, an approach that was already present in the first Whaling Convention of 1931.<sup>161</sup>

The Schedule specifies the specific species which can be taken as part of its overall duty to preserve endangered species. Gillespie suggests that while there is no specific provision in the ICRW to this effect, "such a mandate is part of customary international environmental law."<sup>162</sup> Gillespie suggests that are several treaties support the rule that taking animals for indigenous need should only be done if the practice is sustainable. These treaties include the Convention on the Conservation of Migratory Species of Wild Animals (CMS), the Berne Convention on the Conservation of European Wildlife and Natural Habitats, the Protocol Concerning Protected Areas of Wild Fauna and Flora in the Eastern African Region, and the 1990 Protocol Concerning Specially

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<sup>158</sup> For more extensive discussions on cultural responsibility and liability within the IWC, see Gillespie, "Aboriginal Subsistence Whaling," 223-224.

<sup>159</sup> International Whaling Commission, *International Convention for the Regulation of Whaling, 1946: Schedule* (September 2014), Rule 13(a)(4); Rule 14.

<sup>160</sup> Gillespie, "Aboriginal Subsistence Whaling," 225.

<sup>161</sup> *Ibid.*, 227.

<sup>162</sup> *Ibid.*, 225.

Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wide Caribbean Region, the 1974 Agreement for the Protection of Migratory Birds and Birds in Danger of Extinction, the Agreement on the Conservation of African-Eurasian Migratory Waterbirds, and the 1966 Inter-American Convention for the Protection and Conservation of Sea Turtles.<sup>163</sup> The Resolution Concerning Aboriginal Subsistence Whaling implies that aboriginal subsistence whaling should be “consistent with effective conservation of whale stocks.”<sup>164</sup> In general, the Schedule is now concerned with the conservation (rather than the exploitation) of whale species, whether referring to commercial whaling, scientific whaling, or aboriginal subsistence whaling. That is why the IWC limits aboriginal subsistence whaling quota to a specific number and species. It is questionable what “effective conservation” means, whether the prohibition on taking females with calves, for example, satisfies this, or whether it refers to the limited number and species of whales that are allowed to be taken. In any case, it forms a limitation imposed upon indigenous whaling.

Another limitation on aboriginal subsistence whaling, albeit of a different character, is the fact that indigenous peoples do not have much of a role to play within the IWC, even though in 1982 the Commission recognised their full participation as essential.<sup>165</sup> As Hossain explains, the only way for an indigenous people to have their quota extended, or even granted in the first place, is to act through their national authority.<sup>166</sup> That national authority can then make a formal proposal on their behalf to the IWC. There is no specific treaty provision that requires a state to apply for an ASW, although arguably Article 1 and Article 27 of the ICCPR support such a duty. The

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<sup>163</sup> *Convention on the Conservation of Migratory Species of Wild Animals* (1979); *Convention on the Conservation of European Wildlife and Natural Habitats* (1982), Article 9(1); *Protocol Concerning Protected Areas of Wild Fauna and Flora in the Eastern African Region* (1985), Article 12; *Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wide Caribbean Region* (1990), Article 14; *Agreement for the Protection of Migratory Birds and Birds in Danger of Extinction* (1974), Article II(1)(d); *Agreement on the Conservation of African-Eurasian Migratory Waterbirds* (1995); *Inter-American Convention for the Protection and Conservation of Sea Turtles* (1966), Article IV.3.

<sup>164</sup> International Whaling Commission, *Report of the Thirty-Fourth Meeting: Chair's Report* (1983), 38, Appendix 3.

<sup>165</sup> *Ibid.*

<sup>166</sup> Kamrul Hossain, “Hunting by Indigenous Peoples of Charismatic Mega-Fauna: Does Human Rights Approach Challenge the Way Hunting by Indigenous Peoples is Regulated?” *International Community Law Review* 10 (2008), 306.



indigenous peoples are thus in any case dependent on their national authority to act on their behalf.

Indigenous people are, indirectly, also dependent on other national governments. The amendment to the Schedule has to be adopted either by consensus, or through a vote at the IWC. Indirectly, the indigenous peoples' opportunity to continue aboriginal whaling is thus subject to politics. Greenland's proposal for the amendment of the Schedule, for example, was rejected in 2012, due to the fact that the other states were not convinced of the need.<sup>167</sup> In addition to the fact that indigenous people depend on their national government to argue their case, their case is subject to politics.

### 3.2.4 Concluding Remarks

This section has explored the origins of aboriginal subsistence whaling, the substance, including three justifications for aboriginal subsistence whaling: nutrition, subsistence and culture, and several limitations. Heinämäki concludes that although it seems as if the three elements to aboriginal subsistence whaling are separate, in practice, however, the requirement of subsistence seems to be a main category, including 'food' by definition, whereas nutritional and cultural needs would be subcategories.<sup>168</sup> However, she also states that "[t]he fact that the IWC has started increasingly to recognize and emphasize the cultural value of whaling, instead of nutritional need, reflects the present rules of international law, according to which the right to culture and traditional livelihoods of indigenous peoples have a well-established and profound status."<sup>169</sup>

Through this quote, Heinämäki illustrates the interdisciplinary character of the issue in this thesis. To be able to establish how the rights of indigenous peoples to harvest marine mammals are recognized in international law, one should draw from various bodies of law. This thesis argues that, for the purposes of indigenous harvesting rights, different areas of international law complement each other. Within the IWC framework, international human rights law can play a very important role. Evidence of this is already visible in the most recent IWC Reports. During the Sixty-Second Annual Meeting in 2010, the Greenland Minister of Fisheries, Hunting and Agriculture, in the

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<sup>167</sup> International Whaling Commission, *Report of the Sixty-Fourth Meeting: Chair's Report*, 23.

<sup>168</sup> Leena Heinämäki, "Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of the Global Environment?" *International Community Law Review* 11(2009), 45.

<sup>169</sup> *Ibid.*, 46.

discussion on the proposed Schedule amendment from Denmark, argued that the UN Declaration on the Rights of Indigenous Peoples “would be violated if a satisfactory solution Greenland’s request could not be obtained at the current meeting.”<sup>170</sup> In particular, she referred to UNDRIP’s articles on the right of indigenous peoples to determine their own identity and membership, as well as their self-determination and their own means of subsistence and economic and social development.<sup>171</sup> This was confirmed by the Chairman of the Organisation of Fishermen and Hunters in Greenland.<sup>172</sup>

Furthermore, other countries at that meeting spoke in support of the rights of indigenous peoples and the need for aboriginal subsistence whaling quotas.<sup>173</sup> Most importantly, they believed the IWC was required to “act in the spirit of the UN Declaration on the Rights of Indigenous Peoples.”<sup>174</sup> During the Sixty-Third Meeting in 2011, in a discussion on the US proposal to establish an ad hoc Aboriginal Subsistence Whaling Working Group, Sweden argued for the IWC to take a more modern approach to statements of need by arguing that “the United Nations Declaration on the Rights of Indigenous Peoples as well as its Convention on the Law of the Sea shaped a completely different background for the Commission to operate under instead of the one that prevailed 65 or 80 years ago.”<sup>175</sup> Furthermore, Switzerland recognised UNDRIP and “was of the opinion that the IWC should act in the spirit of that declaration.”<sup>176</sup> During the Sixty-Fourth Meeting, Switzerland reiterated the importance of UNDRIP, and “highlighted the need to maintain institutions, cultures and traditions and the ability to engage freely in all traditional and economic activities.”<sup>177</sup> The European Union states, too, committed to aboriginal subsistence whaling “to satisfy aboriginal needs in the wider context of protecting the rights of indigenous peoples and their livelihoods.”<sup>178</sup>

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<sup>170</sup> International Whaling Commission, *Report of the Sixty-Second Meeting: Chair’s Report* (2010), <https://archive.iwc.int/?r=65&k=d31c1a872a> (accessed 31 August 2015), 18.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*, 20.

<sup>174</sup> *Ibid.*

<sup>175</sup> International Whaling Commission, *Report of the Sixty-Third Meeting: Chair’s Report* (2011), <https://archive.iwc.int/?r=66&k=9a9f223f3a> (accessed 31 August 2015), 18.

<sup>176</sup> *Ibid.*

<sup>177</sup> International Whaling Commission, *Report of the Sixty-Fourth Meeting: Chair’s Report*, 22.

<sup>178</sup> *Ibid.*, 23.

This shows how international human rights law can influence the outcome in the IWC, and how international human rights law, the law of the sea and international environmental law are intertwined.

### 3.3 Polar Bear Agreement

The Agreement on the Conservation of Polar Bears of 1973 was the first international agreement between the five Arctic states. It provides for a ban on polar bear hunting, with several exceptions, including one that applies to indigenous peoples. This section will look at the historical background to the Polar Bear Agreement, the relevant provisions regarding the indigenous polar bear hunt, some interpretational issues relating to terminology, and some limitations.

#### 3.3.1 Historical Background

One of the main triggers for a discussion on polar bear conservation was the fact that the Soviet Union had banned the polar bear hunt in 1965, and argued that other Arctic states should follow suit.<sup>179</sup> The Soviet Union requested the International Union for the Conservation of Nature and Natural Resources (IUCN) to encourage the other four Arctic governments to ban all polar bear hunting for five years. However, this was not possible for the other Arctic nations, as polar bear hunting was often part of the culture and economic base of indigenous peoples.<sup>180</sup> At the same time, the Arctic states realized the importance of an international agreement on the conservation of polar bears. In 1972, the IUCN submitted a draft version of an agreement. One factor that complicated negotiations was that negotiations were also ongoing at the time for the Law of the Sea Convention. Besides discussions on the jurisdictional boundaries, the need for indigenous people to maintain their hunting was also discussed, although there was no representation of indigenous peoples at the meeting.<sup>181</sup> The official negotiations for a polar bear agreement started in Oslo in November 1973 and concluded with the signing of the treaty on 15<sup>th</sup> November 1973.<sup>182</sup>

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<sup>179</sup> Thor S. Larsen and Ian Stirling, "The Agreement on the Conservation of Polar Bears – its History and Future," Norwegian Polar Institute, Rapportserie no. 127 (2009), 7.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid., 10.

<sup>182</sup> Donald C. Baur, "Reconciling Polar Bear Protection Under United States Laws and the International Agreement for the Conservation of Polar Bears," *Animal Law* 2 (1996), 27.

### 3.3.2 The Indigenous Polar Bear Hunting Provisions

In the current Polar Bear Agreement, Article I states that “[t]he taking of polar bears shall be prohibited except as provided in Article III.”<sup>183</sup> Article III provides that:

Subject to the provisions of Articles II and IV any Contracting Party may allow the taking of polar bears when such taking is carried out:

- a) for bona fide scientific purposes; or
- b) by that Party for conservation purposes; or
- c) to prevent serious disturbance of the management of other living resources, subject to forfeiture to that Party of the skins and other items of value resulting from such taking; or
- d) by local people using traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party; or
- e) wherever polar bears have or might have been subject to taking by traditional means by its nationals.<sup>184</sup>

Subparagraph (d) and (e) are applicable to the indigenous polar bear hunt. Article II requires Contracting Parties to take action to protect the polar bears’ ecosystem.<sup>185</sup> Article IV prohibits “[t]he use of aircraft and large motorized vessels for the purpose of taking polar bears,” except “where the application of such prohibition would be inconsistent with domestic laws.”<sup>186</sup>

Paragraph 2 of Article III provides that the skins and other items of value resulting from the taking of polar bears shall not be available for commercial purposes, but only in reference to subparagraphs (b) and (c).<sup>187</sup> Thus, bears taken by a Contracting Party for conservation purposes, or to prevent serious disturbance of the management of other living resources, cannot be used for commercial purposes. However, this provision does not apply to the indigenous take. Thus, indigenous peoples are allowed to use the skins and other items of value for commercial purposes, unlike the situation regarding aboriginal subsistence whaling.

In an earlier draft of the final Agreement, Article III limited the taking of polar bears to local people “who depend on the resource.”<sup>188</sup> However, although the US and Norway approved of this clause, Canada insisted upon removing the reference to

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<sup>183</sup> *Agreement on the Conservation of Polar Bears*, Article I(1).

<sup>184</sup> *Ibid.*, Article III.

<sup>185</sup> *Ibid.*, Article II.

<sup>186</sup> *Ibid.*, Article IV.

<sup>187</sup> *Ibid.*, Article III(2).

<sup>188</sup> International Union for the Conservation of Nature and Natural Resources, *Draft Interim Agreement on the Conservation of Polar Bears* (September 1973), 4 cited in Baur, “Reconciling Polar Bear Protection Under United States Laws and the International Agreement for the Conservation of Polar Bears,” 32.

dependence. According to Baur, Canada was afraid that the clause would “preclude taking for cultural purposes.”<sup>189</sup>

### 3.3.3 Terminology

Somewhat surprisingly, the term “indigenous” was not used in the Polar Bear Agreement, even though the negotiations did cover indigenous hunting rights specifically. The Agreement used “local people” instead, because under the Alaska State Constitution wildlife privileges cannot be based on race.<sup>190</sup> According to Hossain, even though the term “local people” is used, it obviously refers to indigenous peoples, as there are no other local people in the Arctic states that could have possessed traditional hunting rights of polar bears.<sup>191</sup> Even so, this has led to some problems with the population on Svalbard. The Norwegians living in Svalbard argued that they should also be recognized as a local people, and thus should be allowed to continue polar bear hunting. In response, the Norwegian government rejected these domestic claims, as the population in Svalbard is a very temporary one – Norwegians normally only live 5 years on the archipelago before moving back to the mainland again, and do not exercise “traditional rights.”<sup>192</sup>

The phrase “traditional rights” has created some controversy by itself. Does the Inuit sport hunting business fall under the provision, for example? “Traditional rights” are not defined in the Polar Bear Agreement. Neither are “traditional means”, as included in subparagraph (e) of Article III, but it has been claimed that this may refer to “traditional killing methods, not necessarily traditional subsistence purposes.”<sup>193</sup> Traditional rights, however, do not have such a presumed definition, although it can be useful to look at how Canada defines the legally recognized concept of “inherent rights of aboriginal peoples” in Canada. There, inherent rights include “traditional livelihoods and cultural practices manifested before the European Contact, thus explicitly excluding livelihoods that have emerged only after the process of colonization.”<sup>194</sup> Furthermore, the Supreme Court of Canada proclaimed that for any practice, tradition or custom to be

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<sup>189</sup> Baur, “Reconciling Polar Bear Protection Under United States Laws and the International Agreement for the Conservation of Polar Bears,” 32.

<sup>190</sup> Larsen and Stirling, “The Agreement on the Conservation of Polar Bears,” 12.

<sup>191</sup> Hossain, “Hunting by Indigenous Peoples of Charismatic Mega-Fauna,” 308.

<sup>192</sup> Larsen and Stirling, “The Agreement on the Conservation of Polar Bears,” 12.

<sup>193</sup> Heinämäki, “Protecting the Rights of Indigenous Peoples,” 62.

<sup>194</sup> *Ibid.*

regarded as an aboriginal rights, it must be “distinctive,” central and integral to the Aboriginal culture.<sup>195</sup>

Baur has illustrated that there is a substantial difference between subparagraph (d) and (e) of Article III. Subparagraph (d) states that Contracting Parties may allow the taking of polar bears “by local people using traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party.”<sup>196</sup> Subparagraph (e) provides that polar bears may be taken “wherever polar bears have or might have been subject to taking by traditional means by its nationals.”<sup>197</sup> When reading these two provisions together, there are two ways to interpret them. First, Baur explains how organisations concerned about polar bear conservation believe that the provision (e) provides that only the State’s nationals can hunt for polar bears “wherever bears have or might have been subject to taking by traditional means.”<sup>198</sup> This view is supported by the reasoning that if the “by its nationals” phrase “must be given meaning beyond geographic considerations,” because otherwise subparagraph (d) would be superfluous.<sup>199</sup>

Baur, on the other hand, is of the opinion that subparagraph (e) provides that anyone is allowed to hunt polar bears, as long as the hunt takes place in areas where nationals have or might have taken polar bears by traditional means.<sup>200</sup> He claims there are areas in the Arctic that would not satisfy the geographical requirement of (e), meaning that in these areas no prior take of polar bears by traditional means has occurred, or was likely to have occurred.<sup>201</sup> This means that this area would be excluded from the application of subparagraph (e), whereas local people, under subparagraph (d) are allowed to hunt polar bears “anywhere in accordance with the laws of [the Contracting Party], so long as traditional methods are used, even in areas where take would not be allowed under exception (e).”<sup>202</sup>

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<sup>195</sup> Ibid.

<sup>196</sup> *Agreement on the Conservation of Polar Bears*, Article III(1)(d).

<sup>197</sup> Ibid., Article III(1)(e).

<sup>198</sup> Baur, “Reconciling Polar Bear Protection Under United States Laws and the International Agreement for the Conservation of Polar Bears,” 35-37.

<sup>199</sup> Ibid., 37.

<sup>200</sup> Ibid., 37-42.

<sup>201</sup> Ibid., 38.

<sup>202</sup> Ibid.

### 3.3.4 Limitations to Indigenous Polar Bear Hunting

Although the provisions on indigenous polar bear hunting seem more flexible than the aboriginal subsistence whaling regime, there are still some limitations. The most important limitations discussed here relate to conditions of means and methods, the permissive nature of the provisions, and indigenous representation.

One of the limits to the traditional hunting rights of indigenous peoples in the Polar Bear Agreement is the requirement that “local people” should use traditional means to conduct the hunt. The use of “aircraft and large motorized vessels” is prohibited, unless such prohibition is inconsistent with national legislation.<sup>203</sup>

A second limitation is the fact that all of the exemptions to the hunting prohibition are “permissive,” meaning that a Contracting Party may allow the taking of bears for these purposes.<sup>204</sup> The agreement does not impose a duty to do so and thus as with the whaling regime, indigenous peoples depend on their national authorities to enact an exemption. Furthermore, “local people” are only allowed to hunt polar bears under exemption (d) “in accordance with the laws of that Party,” which also forms a condition for indigenous hunting.<sup>205</sup>

Unlike the International Whaling Convention, the Polar Bear Agreement does not have any institutional mechanism such as a Conference of Parties, although, as Nigel Bankes argues, “as a matter of practice, the Polar Bear Specialist Group (PBSG), a subgroup of the Species Survival Commission of IUCN/World Conservation Union, monitors the implementation of the Agreement and in effect serves as a scientific advisory committee for the Agreement.”<sup>206</sup> Indigenous Peoples are allowed to participate in the meetings of the PBSG, as it has been recognized that traditional knowledge is both valuable and important when it comes to polar bear management.<sup>207</sup> However, the fact remains that indigenous peoples are dependent on their national governments when it comes to voting or deciding on matters related to the indigenous polar bear hunt.

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<sup>203</sup> *Agreement on the Conservation of Polar Bears*, Article IV.

<sup>204</sup> Baur, “Reconciling Polar Bear Protection Under United States Laws and the International Agreement for the Conservation of Polar Bears,” 30.

<sup>205</sup> *Agreement on the Conservation of Polar Bears*, Article III(1)(d).

<sup>206</sup> Nigel Bankes, “Polar Bears and International Law,” in Natalia Loukacheva, *Polar Law Text Book II* (Copenhagen: Nordic Council of Ministers, 2013), 123.

<sup>207</sup> Resolution from the 11th meeting of the PBSG in Copenhagen (1993) cited in Heinämäki, “Protecting the Rights of Indigenous Peoples,” 59.

## Conclusion

Both human rights law and the law of the sea recognize the right of indigenous peoples to harvest marine mammals. The human rights law perspective is based on the right to self-determination enshrined in the ICCPR and the ICESCR, and the right to culture, as reflected in Article 27 of the ICCPR and general international law. Through the eyes of the law of the sea scholar, indigenous peoples are entitled to harvest marine mammals based on the aboriginal subsistence whaling exemption in the ICRW system, and the “local people” exception to the polar bear hunt prohibition in the Polar Bear Agreement.

Although both fields of law recognize an indigenous people’s right to harvest marine mammals, they differ in scope and application. This is already evident in the way both fields of law define indigenous peoples. Within international human rights law, the definition of indigenous peoples includes four elements: self-identification, distinctiveness, non-dominant, and a connection to a territory, whilst retaining their own societal structure. On the other hand, within law of the sea, indigenous peoples are defined according to their historical ancestral link to the lands, natural resources, and their traditional, distinctive, societal structure. When one also adds the definition of minorities into the mix, it becomes clear that the definition of indigenous peoples, for the purposes of this thesis, evolves around the concepts of historical ancestral links and distinctive societal structure and autonomy.

Within that context, human rights law and the law of the sea complement each other in the recognition of the rights of indigenous peoples to harvest marine mammals. Culture plays an important role within the ICRW system, being one of the elements to the aboriginal subsistence whaling provision, as one of the justifications for the provision in the first place, and a major element in the “local people” provision under the Polar Bear Agreement.

In the end, the human right to self-determination constitutes the major building block for the rights of indigenous people to harvest marine mammals and must as well inform the proper interpretation of LOSC and other instruments. The right to self-determination, in this context, means that indigenous peoples shall not be deprived of their means of subsistence, and shall have a relatively large degree of autonomy over



matters of their own. Hossain pulls this even further. According to common Article 1(2) of the Human Rights Conventions:

All peoples may, for their own end, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.<sup>208</sup>

Hossain argues that it is suggested that indigenous peoples have the right mentioned in Article 1(2), which thus would mean that they have the option of withdrawing from the international regulation of whales and polar bears, and “decide for them[selves] whether these international regimes, and national regulations, serve their own interests.”<sup>209</sup> This would mean that indigenous peoples would be allowed to opt out of the IWC, or opt out of the Polar Bear Agreement, without obtaining consent of the states in which they reside. It is highly doubtful that States consented to an indigenous peoples’ right to self-determination which could overturn the State’s sovereignty, however. Furthermore, the fact that, under the current system, indigenous peoples only get an aboriginal subsistence whaling quota if their state applies on their behalf, would cause difficulty in a system in which indigenous peoples have the autonomy to withdraw or sign up to the ICRW on their own behalf. It is a very far-reaching claim to make, but it does trigger interesting thoughts on the extent of the right of self-determination in relation to the rights of indigenous peoples to harvest marine mammals, and how international human rights law and law of the sea intertwined.

Working towards a possible future legally binding convention on the rights of indigenous peoples, and a binding definition of aboriginal subsistence whaling within the ICRW, it is important that these two fields of law continue to cooperate and complement each other. Especially in the case of indigenous hunting, both fields of law are necessary to navigate oneself in a world in which the protection of human rights on the one hand, and the protection and preservation of marine biodiversity on the other hand are very important aspirations.

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<sup>208</sup> *International Covenant on Civil and Political Rights*, Article 1(2); *International Covenant on Economic, Social and Cultural Rights*, Article 1(2).

<sup>209</sup> Hossain, “Hunting by Indigenous Peoples of Charismatic Mega-Fauna,” 317.

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