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Indigenous Whaling post-Japanese IWC Withdrawal

Malgosia Fitzmaurice & Agnes Rydberg

Abstract

Indigenous whaling is one of the whaling activities under the regulatory power of the International Whaling Commission (IWC). Prior to Japanese IWC withdrawal, indigenous whaling played a rather limited role within the general context of whaling. The main focus of the International Convention on the Regulation of Whaling (ICRW) was on Japanese scientific whaling, which resulted in the case before the International Court of Justice (ICJ) in 2014. Commercial whaling – subject to the moratorium – is at the moment only conducted by Norway. Iceland no whale hunting took place in 2019, 2020, and 2021 (mainly because it is not economically viable). Hvalur (a private whaling licensed company), however hunted in 2022, and again in 2023. The current, very robust debate in Iceland, indicates that it is possible that a new license will not be issued to Hvalur when the current one expires in 2023). was subject to controversy, and Japan made several attempts to reverse the moratorium. Japan has at several times also claimed the acknowledgement of small coastal whaling by the IInternational Whaling Commission in the same category as indigenous whaling. Furthermore, the recent trend in indigenous whaling is to increase the quotas assigned by the IWC. After the moratorium on commercial whaling staying in place and scientific whaling losing its significance, this chapter demonstrates that indigenous whaling will assume the leading role in types of whaling regulated by the IWC post-Japanese withdrawal. Furthermore, it shows that the raising quotas for indigenous whaling, the ambiguous definition of indigenous whaling, and the inefficient and cruel aboriginal killing methods compared to modern killing methods are already subject to debate and controversy.

1. Introduction

On 26 December 2018, Japan announced that it would withdraw from the International Whaling Commission (IWC) and expressed its intention to begin commercial whaling within its coastal waters and Exclusive Economic Zone (EEZ) for the first time in 30 years.[1] As of 30 June 2019, Japan is no longer bound by the International Convention for the Regulation of Whaling (ICRW).[2] The ICRW distinguishes between three types of whaling activities: commercial whaling, scientific research whaling, and aboriginal subsistence whaling (ASW). Commercial whaling has basically been terminated by the IWC's moratorium on commercial whaling, which in 1982 established a 'catch zero limit'. The moratorium is binding on all Member States except for Norway, Russia and Iceland.[3] Russia however stopped commercial whaling in 1990, and in 2020, Accordingly, only Norway and

[1] At the time, the Ministry of Foreign Affairs of Japan stated that: "From July 2019, after the withdrawal comes into effect on June 30, Japan will conduct commercial whaling within Japan's territorial sea and its exclusive economic zone, and will cease the take of whales in the Antarctic Ocean/the Southern Hemisphere. The whaling will be conducted in accordance with international law and within the catch limits calculated in accordance with the method adopted by the iwc to avoid negative impact on cetacean resources". See Ministry of Foreign Affairs of Japan, Statement by Chief Cabinet Secretary, 26 December 2018, <https://www.mofa.go.jp/ecm/fsh/page4e_000969.html> accessed 4 August 2022.

[2] International Convention for the Regulation of Whaling 1946. The Japanese government justified the resumption of commercial whaling by asserting that the IWC has "refused to agree to take any tangible steps towards reaching a common position that would ensure the sustainable management of whale resources", see ibid. For an overview of the consequences of Japanese withdrawal, see Nikolas Sellheim, *International Marine Mammal Law* (Springer 2020).

[3] Norway objected, Iceland left the Convention but re-joined with a reservation; See Couzen's chapter in this volume.

Iceland areat present engaged in commercial whaling in its EEZ. Scientific whaling is allowed by Article VIII of the ICRW.[4] The special scientific permits are granted by the Member States but under review and monitoring by the IWC. Scientific whaling conducted by Japan culminated in the case before the International Court of Justice (ICJ) in 2014, which concluded that its whaling activities were not for the purpose of scientific research, and therefore fell outside the ambit of the ICRW.[5]

The third type of whaling activity, ASW, is not expressly recognised in the ICRW itself and lacks clear legal contours. It is referred to in the Schedule to the ICRW and managed by a subcommittee of the IWC. Today, four member countries conduct ASW: Denmark (Greenland), Russia (Chukotka), St Vincent and the Grenadines (Bequia) and the United States (Alaska, and also potentially a resumption of hunts previously undertaken by the Makah Tribe of Washington State).[6] In addition, ASW is undertaken by nationals of certain non-Member States outside the purview of the ICRW, including Canada, Equatorial Guinea, Indonesia and the Philippines.[7]

ASW is subject to deep intercultural controversy, particularly over the appropriateness of killing whales as such, and over the aboriginal killing methods, which may be more cruel than modern and quicker techniques.[8] It is, in its core, protected by Article 27 of the International Covenant on Civil and Political Rights[9] and Article 25 of the UN Declaration on the Rights of Indigenous Peoples.[10] However, relevant legal terms and key concepts, such as 'non-commercial hunt', 'indigenous people' and 'indigenous culture' are difficult to apply, and it may therefore be difficult to distinguish ASW from commercial whaling. In addition, the type of whaling foreseen in the ICRW has since 1949 been substantially modified through IWC practice and case-law, with commercial and scientific whaling being basically zero.

This chapter provides an overview of indigenous whaling, and analyses whether Japan's withdrawal had an impact on the regulation of ASW within the IWC. It argues that in compensation for the closure of commercial and scientific whaling, ASW will assume the leading role in types of whaling regulated by the IWC, and that the withdrawal of Japan has turned the attention of the international community of IWC States, non-governmental organisations (NGOs), and civil society to indigenous whaling.[11] It also demonstrates that the issue of ASW remains controversial, particularly due to: i) the imprecise and ambiguous definition of ASW, rendering the distinction

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[4] Paragraph one reads as follows: '1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted'.

[5] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) ICJ Rep 2014 p 226.

[6] See map in Sellheim's and Morishita's chapter in this volume.

[7] See for instance Doug Bock Clark, *The Last Whalers: Three Years in the Far Pacific with a Courageous Tribe and a Vanishing Way of Life* (Little, Brown and Company 2019).

[8] The Indigenous methods of whaling has given rise to questions regarding cruelty, an issue which can also be analysed within the paradigm of animal rights. '…ASW tend to be less efficient than those used in commercial whaling operations, with the result that (a) times to death are longer, (b) instantaneous death rates are lower, and (c) "struck and lost" rates are higher. Although the IWC has adopted several resolutions seeking improvements in the humaneness of ASW operations, IWC resolutions are not binding on parties. 'Aboriginal Subsistence Whaling', Animal Welfare Institute', https://awionline.org/content/subsistence-whaling (last accessed 3 June 2023).

[9] International Covenant for Civil and Political Rights (ICCPR), 1966.

[10] UN Declaration on the Rights of Indigenous Peoples, 2007.

[11] Anne Peters, *Animals in International Law*, Académie de Droit International de la Haye, Offprint from Collected Courses of The Hague Academy of International Law - Recueil des cours, Volume: 410 (Brill Nijhoff 2020) 201-203.

between indigenous and commercial whaling blurred; ii) the recent trend to increase the quotas assigned to indigenous whaling by the IWC; iii) the inefficient and cruel aboriginal killing methods compared to modern killing methods; and iv) the question of whether the resumption of whaling by Makah Indians qualifies as ASW or not.

As ASW should be analysed within the general context of rights of indigenous peoples, this chapter proceeds in section 2 to provide a brief assessment of the legal regime pertaining to indigenous peoples' cultural diversity. Section three gives an historical outline of ASW within the IWC, and section 4 discusses ASW under the IWC at present. Section 5 analyses ongoing ASW operations under the IWC purview and explores the potential impact of Japanese IWC-withdrawal on the focus of the ICW and ASW more generally. Section 6 concludes.

2. Indigenous Peoples' Rights

A full legal analysis of the legal regime pertaining to indigenous peoples' cultural diversity is beyond the scope of this chapter, but since some indigenous peoples consider whaling as an expression of their cultural identity, a general introduction is called for. Indigenous peoples may be defined as "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".[12] Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which is central to the rights of minorities and indigenous peoples,[13] stipulates that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

It may be noted that the wording of Article 27 of the ICCPR may appear also to apply to Japanese coastal whaling communities. However, despite several attempts of Japan, the legal status of Indigenous whaling was not accorded to these communities.[14]

Furthermore, General Comment 21 to the Covenant on Economic, Social and Cultural Rights (CESCR) refers to the right to culture of indigenous peoples.[15] Paragraph 37 is of particular importance, stipulating that indigenous peoples enjoy collective rights:

> Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources […]. States parties

[12] GP Donovan, 'The International Whaling Commission and Aboriginal/Subsistence Whaling: April 1979 to July 1981' in GP Donovan (ed), *Aboriginal/Subsistence Whaling (with Special Reference to the Alaska and Greenland Fisheries* (Reports of the International Whaling Commission Special Issue 4, Cambridge 1982) 79, 83.

[13] Athanasios Yupsanis, 'Article 27 of the ICCPR Revisited: The Right to Culture as a Normative Source for Minority/Indigenous Participatory Claims in the Case Law of the Human Rights Committee' (2013) 26 Hague Yearbook of International Law 359, 410.

[14] See further Junichi Takahashi, Arne Kalland, Brian Moeran and Theodore C. Bestor, 'Japanese Whaling Culture: Continuities and Diversities' (1989) 2(2) Maritime Anthropological Studies 128.

[15] See General Comment 21, paras 36 and 37.

should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.

It should, however, be mentioned that the character of indigenous peoples' collective rights (including cultural rights) is somewhat controversial. The legal integrity of collective rights of indigenous peoples, as opposed to their individual rights, is not universally accepted. Nevertheless, the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is unambiguous, and stipulates that "[i]ndigenous people possess collective rights which are indispensable for their existence, well-being and integral development as peoples".[16] Such a collective right is vital for the self-realisation and survival of indigenous peoples as a societal group.[17]

The right to culture based on dignity is also a cornerstone of the approach adopted in relation to indigenous peoples, as enshrined in Article 15(1) of UNDRIP. This provision provides that "[i]ndigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information". The cultural rights of indigenous peoples have to be approached and understood in harmony with the fundamental rights underlying the Declaration, as part of the holistic nexus of indigenous rights. Therefore, such rights have to be viewed together with the right of self-determination,[18] and the right to autonomy or self-government in matters relating to their internal and local affairs and to financing their autonomous function.[19]

Furthermore, indigenous peoples' right to culture is intertwined with their rights to land and natural resources (Articles 25 and 26), and their special relationship with land and nature distinguishes them from other types of social minorities.[20] The cultural rights of indigenous peoples are also set out in UNDRIP Articles 11–14. Article 11 grants indigenous peoples the right to practise and revitalise their traditions and culture, Article 12 concerns indigenous peoples' right to practise their spiritual and religious traditions, Article 13 refers to indigenous peoples' intangible heritage, and Article 14 concerns their right to establish and control their educational systems. The HRC has also reaffirmed the right to culture of indigenous peoples in a range of cases. In *Kitok v. Sweden*[21] and *Ominayak v. Canada,*[22] the Commission extended the cultural guarantees under Article 27 ICCPR to the economic and social activities relied upon by the indigenous group.[23] It is, however, important to note that such a right of indigenous peoples to cultural diversity is neither unlimited nor absolute; rather, it is subject to a balancing act by the State authorities, as is the case of other human rights, for instance the right

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[16] Preamble of the 2007 United Nations Declaration on the Rights of Indigenous Peoples, adopted 13 September 2007.
[17] See e.g. '[The] shift away from positivist, state dominated dialogue toward a more inclusive framework that is much more responsive to the ideals enshrined in the Charter of the United Nations ... has created [for indigenous peoples] a space for them to move an agenda of promoting and encouraging respect for their human rights within this formal international organization, including the collective rights to their culture, their land, and self-government as an essential part of their individual self-realization.' International Law Association, The Hague Conference 2010, Rights of Indigenous Peoples, Professor Siegfried Wiessner, Chair; Dr Federico Lenzerini (Italy), Rapporteur, 3.
[18] Article 3: 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'
[19] Article 4: 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.'
[20] Wiessner (n) 143.
[21] *Kitok v. Sweden*, Comm. No. 197/1985, Supplement No. 40 (A/43/40), 221–30, 27 July 1986; CCPR/C/33/D/197/1985.
[22] *Ominayak, Chief of Lubicon Lake Band v. Canada*, Comm. No. 267/1984. Report of the HRC, UN GOAR, 45th Sess., Supp. No. 2 at 1.
[23] James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' [2004] 21 AJICL 9, 29.

to privacy. Therefore, as the HRC observed in *Länsman and Others v. Finland*, the interests of the broader society must be taken into account.[24]

Accordingly, from the general state of human rights law and the practice of human rights bodies, it seems that indigenous peoples enjoy the right to whaling so long as it is a *bona fide* expression of their traditional way of life and their traditional use of natural resources. However, it has been recognised, in the case of indigenous peoples, that there has been a trend towards a greater recognition of customary law and self-governing rights, without any retreat or backlash.[25] Nonetheless, certain indigenous practices have been viewed as culturally conservative and restricting upon individual freedoms due to their overly communitarian and/or traditionalist character, and as expressing a desire for cultural isolationism.[26] Some argue that, inadvertently, social conservatism, traditionalism and isolationism are elevated to 'sacred obligations' in order to silence, manage or otherwise 'delegitimise' group members who want to change such practices.[27] After all, all, Indigenous groups are not immune from inevitable social changes within their own communities, and a regime of collective rights – while unquestionably progressive given that it safeguards the cultural identity and relative autonomy of groups surrounded by outsider dominant cultures – should not lend itself to intra-community oppression when its principal overall purpose is to resist domination and oppression from forces extraneous to the group, such as the State and the dominant culture that envelops such ethnic groups.

3. The IWC and Indigenous Whaling

International recognition of AWS predated the ICRW; the special position of whaling rights of aboriginal communities was already recognised and included in the 1931 Geneva Whaling Convention.[28] Article 3 of this Convention stated that it did not apply to aborigines dwelling on the coasts of the Parties, provided that:

> (1) they only use canoes, pirogues or other exclusively native craft propelled by oars or sails; [29]
> (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.

However, an equivalent provision was neither included in the 1937 London Agreement nor in the 1938 Protocol amending the 1937 London Agreement.[30] While the 1946 ICRW does not itself include any special provision regulating aboriginal subsistence whaling, the Schedule to the ICRW recognises

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[24] *Lansmänn and Others v. Finland*, Comm. No. 511/1992, HRC, UN Doc. CCPR/C/52/D/ 511/1992 (8 November 1994).
[25] Malgosia Fitzmaurice, *Whaling in International Law* (CUP 2015).
[26] Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (OUP 2007) 149.
[27] ibid.
[28] Convention for the Regulation of Whaling 1931.
[29] It may be noted that in the Arctic context both sails and motors arrived around the same time and are exogenous technologies embraced, along with firearms, by indigenous peoples. This approach when considered in relation to Article 3 of the GWC may indicate why motorised whale craft are in some cases perceived as commercial craft (ie, in Japan), but not others (Inupiat whale boats).
[30] Protocol amending the International Agreement of 8 June 1937 for the Regulation of Whaling (entered into force 24 June 1938) 196 LNTS 131. For the Parties to the 1931 Convention, Article 3 was in force.

its special position by excluding it from the definition of, and the provisions relating to, commercial whaling.

When the ICRW was originally concluded, the second paragraph of the Schedule prohibited the taking and killing of gray whales and right whales due to their fragile status. It stated that "[i]t is forbidden to take or kill 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".[31] This prohibition did not apply where the whaling of such species was conducted for local consumption of meat and other products by indigenous peoples. Thus, it appears that even when conducted by indigenous whalers, the whaling of gray whales or right whales either for commercial purposes or when the meat or products were to be distributed extensively outside the communities of those indigenous peoples was prohibited.[32]

In 1979, the IWC Anthropology Panel adopted an unofficial definition of 'subsistence whaling' as comprising:

> (1) the personal consumption of whale products for food, fuel, shelter, clothing, tools or transportation by participants in the whale harvest;
> (2) 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. A generalised currency is involved in this barter and trade, but the predominant portion of the products from each whale is ordinarily directly consumed or utilised in their harvested form within the local community; and
> (3) the making and selling of handicraft articles from whale products, when the whale is harvested for the purposes of (1) and (2) above.

ASW was again defined in 1981 by the IWC's Technical Committee Working Group on Development of Management Principles and Guidelines for Subsistence Catches of Whales by Indigenous (Aboriginal) Peoples as comprising whaling conducted for "purposes of local aboriginal consumption, carried out by or on behalf of aboriginal, indigenous or native people who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales".[33]

These definitions are capable of giving rise to complex issues. For instance, the interchangeable use of the terms 'aboriginal', 'native' and 'indigenous' is confusing, particularly as within different indigenous communities, these terms have different meanings.[34] This ambiguity perhaps could permit the inclusion of Japanese, Icelandic and Norwegian whaling, which to a great extent is argued as culture based.

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[31] See Hisashi Hamaguchi, 'Aboriginal Subsistence Whaling Revisited' in Nobuhiro Kishigami, Hisashi Hamaguchi and James M. Savelle (eds), *Anthropological Studies of Whaling* (Senri Ethnological Studies 2013) 81-82.
[32] ibid.
[33] Report of the Cultural Anthropology Panel, reprinted in: International Whaling Commission, 'Aboriginal/Subsistence Whaling (with special reference to the Alaska and Greenland fisheries)' [1982] Reports of the International Whaling Commission – Special Issue 4, 35–50, <www.iwcoffice.org/cache/downloads/ebvrl7xp4e80w40804cssc4s8/RIWC-SI4-p p34-73.pdf> accessed 4 August 2022. It may be observed that this definition which at present is exclusively applicable to Indigenous peoples, could also include Japan even considering that coastal whalers provide whale meat to urban residents in cities as large as Tokyo who share the tradition.
[34] Randall Reeves, 'The Origins and Character of "Aboriginal Subsistence " Whaling : A Global Review' (2002) 32 Mammal Review 71, 77.

There has for example been discussion as to whether whaling in Greenland can qualify as aboriginal. The 1979 definition of 'subsistence use of whale products', coined by cultural anthropologists, is more restrictive as to the area in which the distribution of whale products is permitted; and it does not recognise the distribution of whale products that involve monetary exchanges, as in aboriginal subsistence whaling.[35] It may also be noted that the report proposing the definitions was perhaps inconsistent as it states that, in some cases, products are distributed to, and used by, communities away from the coastal areas where whaling is actually conducted; and in some areas, the practice of trading to meet subsistence needs has emerged. Further, the IWC ad hoc Working Group stated that it was arguable whether there is a difference in principle between the sale of whale products in order to buy essential goods and the direct exchange of whale products for such goods.

According to Hamaguchi, this is indicative of the fact that even the ad hoc Working Group's definition did not completely deny all cases of extensive distribution of whale products or distribution involving monetary exchanges for whale-related goods.[36] At the outset, therefore, it appears that confusion arose due to the lack of any conclusive definition of what constitutes 'commercial' whaling, which, at times, makes the distinction between 'aboriginal' and 'commercial' whaling blurred, despite the efforts of the ad hoc Working Group to distinguish between them. These two forms of whaling are considered to be different due to their different objectives, which also include management and catching. The main objective of the management of ASW was to maintain individual stocks at the highest possible level, and the main purpose of catching whales was to fulfil the nutritional and cultural needs of the indigenous peoples contemplated by the relevant agreements. The main objective of commercial whaling was to maximise yields from individual stocks and to ensure the longevity of the respective whaling industries of the State Parties to the ICRW, and the main purpose of catching whales was to sell their products. To this end, it has been observed that 'these differences indicate that aboriginal subsistence whaling prioritizes quality (the cultural aspect) and commercial whaling prioritizes quantity (the economic aspect)'.[37]

Nevertheless, the distinction between commercial whaling and ASW remains ambiguous.[38] The Aboriginal Subsistence Whaling Sub-Committee (ASWS) was established in order to consider documentation on needs relating to aboriginal whaling and to advise the IWC Technical Committee on the setting up of proper management measures. The field of aboriginal subsistence whaling was, consequently, subdivided into the following: 1) subsistence whaling; 2) nutritional whaling; 3) cultural whaling. As it was above-mentioned, the definition of Indigenous (Aboriginal) Whaling is rather obscure, without well set contours and rather broad, including such elements as culture and nutrition. Nations, such as Norway and Iceland with a very long tradition of (commercial) whaling have argued that it forms an element of their culture and history. Whaling obviously also has a very strong nutritional aspect in these States. Therefore, a suggestion may be made that, taking all these into account, ASW may be also extended to modern whaling nations with a long-standing tradition.

Thus, the definitions of aboriginal set out above indicate that aboriginal whaling should be local and non-commercial in nature. However, this conflicts to some extent with the definition of

[35] Hamaguchi (n) 86.
[36] ibid.
[37] ibid.
[38] Reeves (n) 77.

'consumption', which allows the sale of by-products.[39] Therefore, "in practice […] the 'subsistence requirement' seems to be a kind of main category, including 'food' by definition, whereas nutritional and cultural needs are subcategories to 'Aboriginal Subsistence Whaling', which are closely connected to each other".[40] Apart from this, however, there are a number of problems relating to the definition of the three categories themselves and to their interrelationship. Indeed, State practice indicates that the submission of the required evidence proving 'nutritional and cultural need', which is a fundamental requirement for allocation of quotas for aboriginal peoples, has frequently been very difficult to achieve.[41]

Furthermore, the distinction sought to be made by the IWC between subsistence and nutritional needs conflicts with the interpretation of the UN Human Rights Committee (UNHRC), which interpreted traditional livelihoods and means of subsistence (including traditional diet) as an integral part of indigenous culture under Article 27 ICCPR.[42] Additionally, the UNHRC allows the inclusion of some commercial elements within the definition of 'aboriginal subsistence' and, indeed, stresses the economic viability of a livelihood as a material criterion of the fulfilment of the provisions of Article 27 ICCPR.[43] Although Indigenous peoples are heard at the forum of the IWC through their states, significant changes have taken place in relation to their position therein. It was recommended at the workshop held in 2015 that the IWC:

> [C]onsider exploring options regarding how the IWC could stay better informed of current developments regarding indigenous peoples' rights; look at mechanisms to improve the status of indigenous delegates to IWC meetings to establish a more timely, distinct and steady approach to ASW issues; discuss the appointment of an IWC representative to attend a session of the UN Permanent Forum on Indigenous Issues; and explore the potential benefits of joining the UN Inter-Agency Support Group on Indigenous Issues, through its Secretariat.

The workshop also recommended that the term 'need statement' be replaced by the term 'Description on the [insert name] hunt relevant to catch/strike limit requests' and that a draft outline be developed, taking into account the need for flexibility, to avoid any indication of prescription or compulsion, and to minimise the effort involved and avoid duplication.[44]

4. Current Regulation of ASW under the IWC

Today, the IWC's three objectives for management of ASW are as follows:

1. To ensure that the risks of extinction to individual stocks are not seriously increased by subsistence whaling;

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[39] Alexander Gillespie, 'Aboriginal Subsistence Whaling: A Critique of the Interrelationship between International Law and the IWC' [2001] 12 CJIELP 77.
[40] Heinämäki (n) 45.
[41] ibid 44.
[42] See above.
[43] Heinämäki (n) 45
[44] IISD, 'IWC Report Details Recommendations on Aboriginal Subsistence Whaling,' 20 October 2015, <http://sdg.iisd.org/news/iwc-report-details-recommendations-on-aboriginal-subsistence-whaling> aaccessed 4 August 2022.

2. To enable aboriginal people to harvest whales in perpetuity at levels appropriate to their cultural and nutritional requirements, subject to the other objectives;
3. To maintain the status of whale stocks at or above the level giving the highest net recruitment and to ensure that stocks below that level are moved towards it so far as the environment permits.[45]

In general, the IWC has identified four specific whaling operations as qualifying for the status of ASW:

> (i) minke and fin whales (formerly also humpback whales) in Greenland;
> (ii) humpback whales in the Lesser Antilles (specifically the island of Bequia, St Vincent and the Grenadines);
> (iii) bowhead whales (and formerly also gray whales) in the US (Alaska), and gray whales in Russia (Chukotka); and
> (iv) bowhead and gray whales in the US (Alaska).[46]

On the basis of the above objectives and criteria, ASW is allowed at present for the following countries:

> (i) Denmark (in relation to the Inuit peoples of Greenland) – fin and minke whales;
> (ii) Russian Federation (Siberia) – gray and bowhead whales;
> (iii) St Vincent and the Grenadines (Bequia) – humpback whales; and
> (iv) the US (Alaska and Makah Indigenous peoples) – bowhead and gray whales.[47]

In brief, there are two fundamental requirements for the allocation of quotas for ASW: ensuring that hunts do not seriously increase risks of extinction and that hunted whale populations are then maintained at healthy, relatively high levels; and enabling native people to hunt whales at levels appropriate to cultural and nutritional requirements (known as 'cultural and nutritional needs').

National governments provide the IWC with evidence of the needs of their indigenous people. This is presented in the form of a 'Needs Statement' that details the cultural, subsistence and nutritional aspects of the hunt, products and distribution. The Scientific Committee provides advice on the sustainability of proposed hunts and safe catch limits.[48]

An ASW Sub-Committee was established in 1983 to review quota applications and provide advice on technical management measures. The IWC has subsequently focused on reducing the numbers of whales struck but not landed,[49] ensuring the sustainability of specific aboriginal hunts[50]

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[45] IWC, 'Aboriginal Subsistence Whaling', <https://iwc.int/aboriginal> accessed 4 August 2022. It may be noted that the modern definition of ASW is consistent with the modern whaling practices of Norway, Iceland and Japan. It may open a possibility of merging Japanese coastal whaling with ASW.
[46] ibid.
[47] ibid.
[48] ibid.
[49] IWC, Resolution 1981-4: Resolution to the Government of the United States on the Behring Sea Bowhead Whale.
[50] Richard Caddell, 'Marine mammals at the Poles' in Karen N. Scott and David L. VanderZwaag, *Research Handbook on Polar Law* (Edward Elgar 2020) 241; IWC, Resolution 1998-9: Resolution on Directed Takes of White Whales; Resolution 1994-4: Resolution on a Review of Aboriginal Subsistence Whaling.

and improving humane killing methods.[51] At the IWC meeting in September 2018, a number of new initiatives were endorsed in order to facilitate a more straight-forward process when catch limits are next considered at the 2024 meeting of the Commission. The new initiatives include a:

a) new timetable for sharing information from the hunts, and receiving feedback, maximising discussion time and transparency;
b) agreement that status quo catch limits would be renewed automatically, assuming a series of agreed steps continue to be completed;
c) commitment to establish closer ties with international and inter-governmental organisations focusing on indigenous rights.[52]

Furthermore, the IWC has for many years been developing the Aboriginal Whaling Management Scheme (AWMS), which aims to include two elements:

(i) a quota-setting mechanism (which is already in place); and
(ii) a supervision and control scheme in order to establish the future management of aboriginal subsistence whaling.

Until 2018, Aboriginal subsistence quotas under the quota-setting mechanism were adopted for a period of five years. Since 2018, the period was extended to six years and automatically renewed if no IWC member objects. [53]Under the IWC, there is a marked limitation in the number of species of whales that have been singled out as eligible for Aboriginal hunting, as indicated by the inclusion of bowhead whales in the Moratorium. Eventually, the AWMS (including the Aboriginal Whaling Management Procedure (AWMP) once it becomes fully operational) will provide guidelines and will set requirements for surveys and data as well as case-specific elements. It is also likely to cover certain scientific, logistical and regulatory aspects of aboriginal whaling, including the inspection/observation of catches.

Discussions regarding Aboriginal whaling quotas can be highly divisive in the IWC. An example of this is the 2009 meeting, where the primary issue was a discussion regarding a request for a catch of 10 humpback whales for Greenland.[54] The debate focused on the statement from the IWC Scientific Committee as to whether such a catch would not harm the stock of these whales and whether Denmark (on behalf of Greenland) had adequately made the case for the 'needs' of Inuit peoples for humpback whales, both of which are necessary conditions for the allocation of quotas for Aboriginal subsistence whaling. In the event, Denmark's request was unsuccessful, although it gained approval later on.[55] It may be added that there are also voices that support the view that there are insufficient quotas assigned to Russia's Chukchi people. It accordingly appears to be a general trend

[51] IWC, Resolution 1993-2: Resolution on Pilot Whales; IWC, Resolution 1995-1: Resolution on Killing Methods in the Pilot Whale Drive Hunt.
[52] International Whaling Commission, https://iwc.int/aboriginal (last accessed 4 August 2022).
[53] https://lauda.ulapland.fi/bitstream/handle/10024/63587/Sellheim.Nikolas.pdf?isAllowed=y&sequence=1 accessed 3 June 2023.
[54] Malgosia Fitzmaurice, 'Indigenous Peoples in Marine Areas: Whaling and Sealing' in Stephen Allen, Nigel Bankes and Øyvind Ravna (eds), *The Rights of Indigenous Peoples in Marine Areas* (Hart Publishing 2019) 85.
[55] See below.

in relation to Indigenous peoples that they will try to argue for higher allocations than those awarded to them.[56]

That said, there are many limitations concerning Indigenous (Aboriginal) whaling. They relate to the species that can be hunted, the method of hunting and an overall duty of ecological approach in general environmental law of preservation of endangered species, which is based on the premise that the taking of animals by Indigenous peoples can only be done if sustainable.[57] This is consistent with a Resolution adopted by the IWC in 1983 on Indigenous whaling, which states that ISW should be "consistent with effective conservation of whale stocks".[58] The term 'effective conservation' is very vague and it is unclear to which aspect of conservation it refers.[59] In addition, Indigenous peoples have little say in the matters of Aboriginal whaling; it is up to respective governments to represent them in the IWC.[60] This lack of legal clarity and consistency in the drafting of paragraph 13 and in state practice makes the politicisation of Aboriginal whaling inevitable. By gaining a three-quarters majority in the IWC, any form of whaling that possesses some elements of ASW could potentially be considered and thus endorsed by the IWC as ASW. Consequently, such whaling, which seems to have all the hallmarks of ASW, would not be endorsed by the IWC if, say, marginally more than a quarter of IWC members vote against it.

It has been suggested that ASW should be approved only on condition that there is a cultural, nutritional and economic need for it, and that the whales being harvested are not threatened with extinction.[61] Presumably, if the IWC members feel strongly about this lack of legal certainty and can form some majority to push for this, they could adopt some statement or declaration to shed more light on what constitutes ICRW-compliant ASW. Such a development could address the seeming inconsistency in the IWC and thus enhance the integrity of the regime in the minds of all its members. It is reasonable to assume that Aboriginal whaling, whilst not without its controversies, seems more acceptable for many than commercial whaling, given that the former involves strong arguments in relation to the cultural rights of marginalised social groups. However, the fact that Aboriginal whaling may be less opposed than commercial whaling does not mean that it is not contentious.

A detailed analysis of ASW leads to the conclusion that it is equally problematic and involves its fair share of contentious issues that are questions of law and issues of ethics. The lack of agreement as to the definitive content of the term ASW and the ongoing disputes regarding the number of whale stocks open to Aboriginal whaling result in the inability of the IWC to manage and regulate ASW effectively and consistently. This is further compounded by the fact that ASW also takes place outside the remit of the IWC and, with regard to such whaling, the real dearth, in many cases, of statistical data, along with the unilateral regulation on the part of other states, significantly undermines the chances for the effective multilateral regulation of this type of whaling.

5. Aboriginal Whaling Under the IWC Purview

5.2 Current Operations

[56] Fitzmaurice, 'Indigenous Peoples in Marine Areas: Whaling and Sealing' (n) 85-88.
[57] Hilde Woker, 'The Rights of Indigenous Peoples to Harvest Marine Mammals in the Arctic' [2015]. <https://munin.uit.no/bitstream/handle/10037/8468/thesis.pdf?sequence=2> accessed 21 April 2023, 36.
[58] IWC, Report of the Thirty-Fourth Meeting, Chair ' s Report (1983), 38 Appendix 3, cited in Woker (n) 37
[59] Woker (n) 37.
[60] ibid 38.
[61] See discussion in Fitzmaurice, 'Indigenous Peoples in Marine Areas: Whaling and Sealing' (n).

A considerable amount of ASW takes place outside the purview of the IWC in States that are not party to the ICRW, such as Equatorial Guinea, Indonesia, Canada and the Philippines. For these States, there are no quotas allocated by the IWC for aboriginal whaling. These examples illustrate the difficulties in assessing the impact of aboriginal whaling on the whale population, due to the lack of correct data is some countries[62]Within the IWC, whaling by the Makah peoples, an indigenous people of the Pacific Northwest Coast living in Washington, is one of the most controversial cases of ASW. It has been the subject of much discussion at the IWC and still remains controversial in various ways, including the following:

> (i) it is an instance of a claim (there are others) to resume Aboriginal whaling after a period during which, for different reasons, whaling had been abandoned, in this case, a claim by the Makah people to resume whaling after a hiatus of several decades;
> (ii) there were also doubts as to whether their whaling was purely Aboriginal subsistence whaling or whether a commercial dimension was also present;
> (iii) the claim raised ethical concerns regarding the resumption of Aboriginal whaling; and
> (iv) it also raised the issue as to whether Aboriginal whaling constitutes a cultural exemption.[63]

These outstanding questions in relation to the Makah peoples can be said to reflect general confusion surrounding Aboriginal whale hunting. The last legal whale hunt the tribe was able to perform was in 1999, when it held its first hunt in more than 70 years. Nevertheless, in September 2021, an administrative law judge issued a recommendation to the US Department of Commerce, arguing the tribe should be granted a waiver under the Marine Mammal Protection Act to resume whaling.[64] The waiver would allow Makah tribe members to land up to three Eastern North Pacific gray whales in an even year and one in an odd year over a 10-year period. A final decision rests with an administrator in the National Marine Fisheries Service, a branch of the Commerce Department, and the question remains whether the Tribe's whaling activities would qualify as ASW or not.[65]

Furthermore, the ASW quotas for the catch of the Bering-Chukchi-Beaufort Seas stock of bowhead whales, taken by native peoples of Alaska and Chukotka, amount to a total of up to 392 bowhead whales in the period 2019–2025, with no more than 67 whales struck in any year, except that any unused portion of a strike quota from the three prior quota blocks shall be carried forward and added to the strike quotas of subsequent years, provided that no more than 50% of the annual strike limit is added to the strike quota for any one year. The quotas for Eastern North Pacific gray whales, taken by native peoples of Chukotka and Washington State, amount to a total of up to 980 gray whales in the period 2019 – 2025 provided that the number of whales struck in any year shall not exceed 140.

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[62] In Canada Aboriginal whaling takes place in the Canadian Arctic. Canadians kill about 600 narwhals per year. They kill 100 belugas per year in the Beaufort Sea, 300 in northern Quebec (Nunavik), and an unknown number in Nunavut. The total annual kill in Beaufort and Quebec areas varies between 300 and 400 belugas per year, see Randall Reeves and David S Lee, 'Bowhead Whales and Whaling in the Central and Eastern Canadian Arctic, 1970-2021 (2022) 23(1) Journal of Cetacean Research and Management 1.

[63] Heinämäki (n) 46 – 52.

[64] See https://www.washingtonpost.com/nation/2021/09/29/makah-whaling-judge-recommendation/ (last accessed 4 August 2022).

[65] See further https://www.nationalgeographic.com/environment/article/us-tribe-wants-to-resume-whale-hunts-will-conservationists-support-them (last accessed 4 August 2022).

In the context of Greenland, the Inuit people have about 200 years of history of whaling. In contemporary Iñupiat society, whaling is very important culturally, socially, spiritually, politically and nutritionally. Whaling is one of the factors defining their community identity. It appears that whaling is absolutely fundamental for Iñupiat cultural and social continuation of them as a people, given that members of this society regard it as a defining aspect of their cultural identity.[66] In 1999, Greenland began to draft its own regulations on the protection of beluga and narwhal whales. Hunts were to establish annual and regional quotas, prohibit the killing of females and calves, prohibit hunting using nets, and set trading quotas for meat and blubber (though no mention was made of narwhal tusks, which are the most sought-after part of the narwhal whale). However, up to 2004, the catches of both types of whale were not regulated by any legal act.

In 2004, Greenland, under its system of self government, adopted an Executive Order regarding quotas.[67] In June 2004, local quotas were set as from 2005. No hunting quotas were set for East Greenland, which is the part of the island where professional leisure hunters may hunt for narwhals. However, the hunting quotas for 2004 were three times higher than that recommended by marine biologists. The same applies to the hunting of beluga whales. For example, the estimated catch for the 1998 and 1999 harvests was to reach 700 a year; but in 1998 the catch actually reached 744. As has been noted,

> [t]hese large annual harvests, combined with the alarming scientific population estimates, have also caused the Greenlandic and Canadian Joint Commission on the Conservation and Management of Narwhal and Beluga to define the Greenlandic hunt as non-sustainable, and the Joint Commission has urged the Home Rule [i.e., Greenland's] government to intervene immediately.[68]

Greenland's government attempted to intervene and regulate this hunt; but due to the cultural and economic importance of beluga, this was not completely successful. However, one of the reasons given by Greenland to hunt larger than recommended quotas was the right of the Inuit peoples to cultural diversity. In relation to whaling by Greenland's Inuit within the remit of quotas set by the IWC, in 2012 Denmark requested on behalf of the Inuit an increase in whale quotas. This request was met with opposition from certain IWC members, causing additional tensions. One of the reasons for the rejection of this request was because some of the IWC's members were of the view that the proposed quota included an element of commercialisation and was higher than just to meet subsistence needs.[69]

Furthermore, Greenland's set quotas for the season 2013–14 (198 whales), were much to the concern of other IWC members. This action of Greenland was treated as an infraction by some States, which made a statement to the Infractions Sub-Committee. Denmark opposed a qualification of Greenland's action as an 'infraction'. This dispute was not resolved, partly due to the lack of a clear definition of what constitutes an infraction.[70] This illustrates the conflicting nature of aboriginal whale

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[66] See Nobuhiro Kishigami, 'Aboriginal Subsistence Whaling in Barrow, Alaska' in Kishigami, Hamaguchi and Savelle (n) 101, 116.
[67] The Greenland Home Rule Executive Order No. 2 of 12 February 2004.
[68] Frank Sejeresen, 'Hunting and Management of Beluga Whales (Delphinapterus leucas) in Greenland: Changing Strategies to Cope with New National and Local Interests' [2001] 54 Arctic 431, 434.
[69] Chris Wold and Michael S. Kearney, 'The Legal Effects of Greenland's Unilateral Aboriginal Subsistence Whale Hunt' [2015] 3 AUILR 561, 603.
[70] ibid.

hunting and cultural diversity issues; Aboriginal hunts of marine mammals are a highly complex ethical issue. It is true that the Inuit and their cousins have traditionally thrived on what they call natural food, caribou, seal, beluga, whales, and other marine mammals. They do not have much money with which to draw food from the cash economy, and they do not fare well on the kind of food eaten by Europeans and Americans. But it turns out that Greenland's hunt for whales is as much about profits as it is about aboriginal rights, and Greenlanders are not observing the terms of the IWC quota that permits the hunt '[to] be conducted solely for aboriginal subsistence purposes'.[71] The IWC quotas for 2019–2025 amount to the following: i) an annual strike limit of 20 minke whales; ii) annual strike limit of 2 West Greenland bowhead whales; iii) an annual strike limit of 19 West Greenland fin whales; iv) an annual strike limit of 164 West Greenland common minke whales; and v) an annual strike limit of 10 West Greenland humpback whales.

5.2 ASW Post-Japanese Withdrawal: Outstanding Controversies

The withdrawal of Japan from the ICRW is perhaps very indicative of how better understating of the position of Japan could in the future form Japan's whaling policy. The way forward post -IWC is to emphasise and publicise at the world for an importance of Japanese costal whaling and indicate its importance for culture, in line with the ASR. The common knowledge of Japan as a whaling hunting country can be shifted by evidencing of whaling to its culture and religion. Historically, whales were considered to be embodied deities (*shintai)*, and whale religions sprang up in coastal villages, called Hyochakushin (Drifting Ashore God) or *Yorikami Shinkyo* (The Religion of the Visiting Kami).[72] Hunting of small type cetaceans has been practised in Japan for many centuries, but the origins of what is referred to as Small Type Coastal Whaling can be found in the beginning of minke whaling off the Japan coasts in the 1930s, which is characterized, firstly, by the species of whale caught (minke, Baird's beaked and pilot whales), and secondly, by the small size of the whalingvessel (between 15 and 50 tons). [73]

Historically, and prior to Japanese withdrawal, the focus of the IWC has to a large extent centered on scientific whaling. However, the IWC has recently stressed that scientific whaling should

[71] Hardy Jones, 'Greenland Begins Humpback Whale Hunt' (New York City, *Huffington Post*, 24 August 2010) <www.huffingtonpost.com/ hardy-jones/greenland-begins-humpback_b_693054.html> accessed 21 April 2023.
[72] John D, 'The Whale as Kami', available at https://www.greenshinto.com/2013/08/14/the-whale-as-kami/ (last accessed 3 June 2023).
[73] Junichi Takahashi, Arne Kalland, Brian Moeran and Theodore C. Bestor, 'Japanese Whaling Culture: Continuities and Diversities' (1989) 2(2) Maritime Anthropological Studies 128.

be non-lethal.[74] At the IWC meeting in 2018,[75] States Parties adopted the Florianópolis Declaration, which stipulates that the IWC objective is 'non-lethal management', 'maintenance of healthy cetacean populations', and 'the recovery of cetacean populations to their pre-industrial levels'. By the Florianópolis Declaration, the IWC also seeks to "ensure that aboriginal subsistence whaling for the benefit of indigenous communities should meet the Commission's management and conservation objectives, taking into account the safety of hunters and the welfare of cetaceans". As commercial whaling is generally in decline – Norway and Iceland being the only States currently conducting this form of whaling within the IWC –[76] and scientific whaling limited to non-lethal activities, the withdrawal of Japan inevitably entails that focus will, for all practical purposes, be on AWS, which will be the only remaining whaling activity.[77] As a matter of fact, the withdrawal of Japan turned the attention of the international community of IWC States, NGOs, and civil society to indigenous whaling, and the focus of the IWC has shifted from scientific to indigenous whaling. We would like to emphasise again that the practices of Japan concerning whaling – being of cultural and nutritional importance (especially small costal whaling) - could be included in a general paradigm of the ASW to align Japanese whaling with that of rest of this type of whaling, even external to IWC.

That said, ASW is more often than not a thorny question, and certain outstanding issues remain, including: i) the definition of ASW and the divergence between indigenous and commercial whaling, especially given the fact that the application of the Aboriginal exception to the Moratorium has been inconsistent;[78] ii) the recent trend by the IWC to increase quotas for ASW catches; iii) the inhumane and inefficient methods of hunting and killing used by indigenous peoples; iv) whether the precautionary principle and the obligation to conduct an environmental impact assessment (EIA) is applied (or should be applied) in the allocation of quotas and hunting operations; and v) whether the whaling resumption by the Makah qualify as ASW or not.

The trend to increase ASW quotas and the plea to apply a precautionary approach in this regard has been visible for a number of years, and has caused some controversies. For example, in 2002, when St Vincent and the Grenadines submitted at the IWC a 'Needs Statement' for the increased quota of whales, New Zealand, Australia and the United Kingdom advocated that a precautionary

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[74] See IWC, Resolution 1995-8: Resolution on Whaling under Special Permit in Sanctuaries; IWC, Resolution 1998-3: Resolution on the Southern Ocean Sanctuary. The IWC adopted a Resolution 2014-5 on scientific whaling, which aimed at the implementation of the ICJ's proportionality test and instructed the Scientific Committee to review all scientific permits (new and previously issued) and the necessity of the lethal methods in order to achieve scientific objectives (Resolution 2014-5, 18 September 2014 on Whaling under Special Permit). In 2016, the IWC adopted the Resolution 2016-2 which stated that Japan had started NEWREP-A before the IWC's assessments (Resolution 2016-2, 28 October 2016 on Improving the Review under Special Permit). In 2017, the IWC's report stated that the NEWREP-NP does not justify taking of lethal samplings (Report of the Expert Panel for New Scientific Whaling Research Programme in the Western North Pacific (NEWREP-NP, 3 March 2017, SC/^&/A/REP/01, p.44). EU, represented by the Netherlands, encouraged Japan to follow the IWC's procedures which were set out in 2014 and 2016 Resolutions ('Whaling under Special Permit: Letter from the Netherlands of behalf of the EU Member States party to the ICRW', 18 January 2017 (SB/JAC/32251)). During the session at Florianópolis, the IWC assessed the NEWREP-A as not conforming to the criteria of special permits under Article VIII (Annex O of the IWC, Report of the 67th Meeting). In the Florianopolis Declaration, the lethal scientific killing was condemned as unnecessary (Florianopolis Declaration). In light of this, Japanese scientific whaling for the season 2019/2020 was subsumed by and merged with resumed commercial whaling (statement of the chief cabinet secretary, 26 December, 2018, <https://www.mofa.go.jp/ecm/fsh/page4e_000969.html> accessed 21 April 2023).

[75] The 68th meeting of the IWC was due to take place in 2020 but was postponed to 2022 due to the Covid-19 outbreak.

[76] See above.

[77] Peters (n) 186-194.

[78] ibid. Stone argues that the system of allocation of whale quotas for Aboriginal whaling leads to unexpected results, such as the Chukchi people feeding farmed foxes with allocated gray whale meat. He also presents a very interesting analysis of the Makah people resumption of whaling, asking if this is really good to step backwards (ibid 283).

approach be adopted, given the uncertainty of the scientific evidence of the stock, and thus the request should be turned down.[79] Whereas at IWC-63 in 2011 saw no changes to the limits regarding aboriginal subsistence whaling, delegates at IWC-64 in 2012 approved increased quotas for several aboriginal subsistence hunts, except Greenland's. IWC-65, held in 2014, adopted increased four-year catch limits for Greenland aboriginal subsistence whaling. Denmark's proposal to raise Greenland's quotas was supported by the EU and the US,[80] but met strong opposition within the IWC. Many states such as Monaco questioned the methods used to calculate 'need'. The Latin American group of countries questioned Denmark over not reporting Greenland's catches taken since the last meeting as infractions.[81] However, IWC-67 likewise increased the annual strike limit for common minke whales off East Greenland to 20 in order to satisfy ASW need in that area, and increased the annual strike limit for Eastern North Pacific gray whales to 140 in order to satisfy ASW need.[82]
Furthermore, the 'need statement' of Greenland has steadily expanded, raising concerns over an increasingly blurred boundary between subsistence and commercial whaling.[83] This blur can also be manifested through the parallel between aboriginal subsistence whaling and national/nutritional whaling by counties like Japan that is more populous and more industrial, but share the same strong tradition of local, coastal whaling as an element of their culture and history.

This has provoked an intriguing internal battle within the cohort of EU Member States party to the ICRW, where Denmark (as the representative of Greenland) has sought to reconcile its obligations towards its Indigenous communities with the EU's common position against excessive ASW quotas.[84] The formidable negotiating presence of the EU bloc has meant that Greenlandic quotas have often been arranged more through collective discussions at Brussels than within the IWC, with the EU proving to be both a vehicle for, and an obstacle against, ASW claims.[85]

The increased quota allocation has also met fierce opposition by NGOs and civil society. The Whale and Dolphin Conservation Society (WDCS), an NGO, has challenged the tonnage of whale meat that Greenland seeks because it is significantly more than all the marine protein currently being consumed by Greenlandic people from whales, seals and small cetaceans combined. Iceland and Norway were strongly criticised at the same meeting for their continuation of commercial whaling. The Animal Welfare Institute, opposed the Makah's recent ASW permit, argued that any whaling by the Makah Tribe, however limited, would place endangered groups of gray whales at risk of being

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[79] Hamaguchi (n) 152.
[80] 'More than 800 whales were condemned today just in the Greenland vote', Wendy Higgins of the Humane Society International (HSI) told Agence France Press (AFP) on the first day of the controversy-laden gathering in Slovenia. 'We are concerned that the new IWC quota will give Greenland more whale meat than its native people need for nutritional subsistence and that the surplus will continue to be sold commercially, including to tourists ', said the Animal Welfare Institute (AWI). See Celine Serrat, 'Whaling: Greenland Hunt Gets Okay, Iceland Blasted' (Yahoo News, 15 September 2014), <https://sg.news.yahoo.com/whale-huddle-braces-clash-over-japanese-hunting-004713650.html> accessed 21 April 2023).
[81] According to the AWI: 'When the non-governmental organizations were allowed to speak, the chair called on Whale and Dolphin Conservation, which spoke on behalf of itself and AWI and challenged the tonnage of whale meat that Greenland seeks because it is significantly more than all the marine protein currently being consumed by Greenlandic people, from whales, seals and small cetaceans put together' (AWI, '2014: IWC65 in Portoroz, Slovenia', <https://awionline.org/content/2014-iwc-65-meeting-slovenia> accessed 21 April 2023).
[82] IISD, 'Summary report, 10–14 September 2018' <https://enb.iisd.org/events/67th-meeting-international-whaling-commission-iwc67/summary-report-10-14-september-2018> accessed 4 August 2022.
[83] Caddell (n) 242; IWC, Annual Report of the International Whaling Commission 2012 (IWC, Cambridge, 2013), 22–4.
[84] Martin Hennig and Richard Caddell, 'On thin ice? Arctic Indigenous communities, the European Union and the sustainable use of marine mammals' in Liu, Kirk and Henriksen (n) 296, 328–34.
[85] ibid.

harpooned. Moreover, the group argues no whales should be killed, as the large marine mammals face numerous threats, including pollution, and ship strikes.[86]

The issue of the inhumane and inefficient hunting and killing methods used by indigenous peoples compared to more modern techniques likewise remains controversial. The IWC recognises that traditional methods used to hunt and kill whales for ASW tend to be less efficient than those used in commercial whaling operations, with the result that: a) times to death are longer; b) instantaneous death rates are lower; and c) 'struck and lost' rates are higher. Although the IWC has adopted several resolutions seeking improvements in the humaneness of ASW operations, IWC resolutions are not binding on parties. To date, efforts to improve the welfare of ASW hunts have been *ad hoc* and undertaken by interested governments rather than through an organised effort by the IWC. Despite the availability of modern weaponry and training of indigenous hunters by whalers from the US and Norway, outdated equipment and methods are still used.[87] Although several civil society organisations have expressed concern regarding methods of Indigenous hunting, [88] modern methods such as explosive harpoon gun used by Imupiat peoples are more humane.

Thus, ASW is subject to divisive approaches, and in relation to this type of whaling, there is a persistent question of discontent regarding the lack of any uniform approach to what constitutes 'needs'. There are also continuing discussions regarding the dividing line between commercial and Aboriginal whaling, certain views arguing that the IWC has a 'money fetish', which results in an approach that all whaling that brings in money must be by nature unsustainable.[89] That said, the regulation of ASW is a sensitive and political issue, and it remains to be seen what future approaches will be adopted by the IWC in this regard.

6. Concluding Remarks

At present, Some of whales are endangered and some critically endangered. [90] The overexploitation of marine mammals has been on the world agenda for a very long time.[91] At IWC-67,[92] States defined the role of the IWC as ensuring 'the recovery of cetacean populations to their pre-industrial levels and in [that] context reaffirms the importance in maintaining the moratorium on commercial whaling',[93] and confirmed that the temporary moratorium on commercial whaling will continue

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[86] See AWI, 'AWI Opposes Judge's Recommendation to Allow Makah Tribe to Hunt Gray Whales' <https://awionline.org/press-releases/awi-opposes-judges-recommendation-allow-makah-tribe-hunt-gray-whales> accessed 21 April 2023.

[87] AWI, 'Aboriginal Subsistence Whaling' <https://awionline.org/content/subsistence-whaling> accessed 21 April 2023.

[88] In particular, a cold harpoon (banned by the IWC for commercial whaling and an eight-foot lance is repeatedly stabbed at the animal in an attempt to puncture the whale's heart or lungs. In some cases, the whale is finally killed by a "bomb lance"—an exploding projectile discharged from a shoulder gun. 'Aboriginal Subsistence Whaling', Animal Welfare Institute, https://awionline.org/content/subsistence-whaling#:~:text=Most%20minke%20whales%20and%20all,primary%20and%20secondary%20killing%20methods. (last accessed 3 June 2023. See also Anne Peters (ed), *Studies in Global Animal Law* (Springer 2020).

[89] Milton R Freeman, 'Is Money the Root of the Problem? Cultural Conflicts in the IWC ', in Robert L Freidheim (ed), *Toward a Sustainable Whaling Regime* (UWP 2001) 129.

[90] North Atlantic Right Whale - Critically Endangered; ; Vaquita - Critically Endangered ; Atlantic Humpback Dolphin – Critically Endangered; North Pacific Right Whale – Endangered; Sei Whale – Endangered; Blue Whale – Endangered; Western Gray Whale – Endangered, see https://www.treehugger.com/most-endangered-whales-on-earth-4863926 (last accessed 3 June 2023).

[91] Evidenced by the *Bering Sea Arbitration, United Kingdom v United States,* (Award, (2007) XXVIII *RIAA* 263, (1898) 1 *Moore Int Arb* 755, 15th August 1893).

[92] The 68th meeting of the IWC was due to take place in 2020 but was postponed to 2022 due to the Covid-19 outbreak.

[93] See Preamble recitals.

indefinitely.[94] To this end, the IWC has markedly changed from a conservationist into a preservationist body,[95] and the objective of the ICRW regarding sustainable whaling and the organisation of the whaling industry has accordingly changed into preservation of whales for future present and future generations.[96]

However, the fact remains that the IWC has continuously increased the allocation of ASW quotas. Awareness concerning the welfare of whales and the growing support for the movement of rights of whales which is a part of the rights approach to animals may therefore be particularly important in this regard.[97] Promoting whale welfare has been a continuously expanding activity of the IWC. Already before the adoption of the moratorium on commercial whaling, the IWC had started to occupy itself with the 'humane killing' of whales. Since 1981, the use of the cold grenade harpoon for killing for commercial purposes has been prohibited.[98] In 1999, the IWC established a working group on Whale Killing Methods and Welfare Issues. The mandate of this working group is today to review information and provide advice to the Commission on issues relating to whale killing methods and all aspects associated with ensuring good welfare of cetaceans.[99]

Despite the availability of modern weaponry and training of indigenous hunters by whalers from the US and Norway, outdated equipment and methods are still used.[100] Therefore, an even stronger protection of whales would come through an acknowledgement of whales' rights as opposed to whale welfare.[101] Whales' rights comparable to human rights had already been asserted by some participants at a conference on the non-consumptive use of cetaceans in Boston in 1993. An interdisciplinary group of scholars, in 2010, adopted a 'Declaration of Rights of Cetaceans: Whales and Dolphin'. The preamble notes that 'the progressive development of international law manifests an entitlement to life by cetaceans'. The idea of animal rights is gaining traction. It may well be that the debate about a whale right to life will be reinvigorated by the new domestic case law on habeas corpus.[102] The ultimate goal would be granting the right to life to whales, but it seems unlikely at present. As it stands now, the functioning of the IWC has become less conformational and it will influence favourably and effectively the preservation of whales for present and future generations. The right to self-determination, when extended to indigenous peoples, means that indigenous peoples should be free to decide on the development of their culture. This should not, however, under any circumstances mean that indigenous peoples are free to engage in environmentally dangerous practices. If they are to be subjects of international law, they must necessarily be bound by the same

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[94] IWC, Chair's Report of the 67th Meeting, Rep2018 (Chair 67), September 2018; and IWC, 'The Florianópolis Declaration on the Role of the International Whaling Commission in the Conservation and Management of Whales in the 21st Century', Res 2018-5, September 2018).

[95] See Jefferies' and Stock's chapter in this volume.

[96] Fitzmaurice, *Whaling in International Law* (n) 86-87).

[97] Peters (n) 186-194. In line with this approach is the 2010 Declaration of Rights of Cetaceans: Whales and Dolphins (2010 Cetaceans Rights: Fostering Moral and Legal Change'.

[98] Article 6 of the Schedule.

[99] Peters (n) 228-229.

[100] https://awionline.org/content/subsistence-whaling.

[101] See in this regard, Russel Lawrence Barsh, 'Indigenous Peoples', in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 850; Heinämäki, 'Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of the Global Environment?' (2009) 11 International Community Law Review 3, 66; Nancy C. Doubleday, 'Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law' (1988-89) 17 Denv. J. Int'l L. & Pol. 17 373.

[102] Peters (n) 230-231.

environmental principles – such as the sustainability requirement and precautionary principle – as States.[103]

Accordingly, indigenous whaling should in principle conform, if not to animal rights approaches, at least to animal welfare approaches, that is to say, to ensure that pain and suffering is minimised. To this end, there have been a number of cases in which the UNHRC has clarified the rights of indigenous peoples regarding Article 27 ICCPR,[104] addressing, in particular, the issue of the use of modern technology within traditional indigenous hunting activities. Thus, in the 1994 *Länsman* case, the UNHRC stated that modern practices adopted by indigenous peoples did not prevent them from invoking Article 27 ICCPR.[105] In other words, Article 27 ICCPR allows for adaptation of those means to the modern way of life and its ensuing technology.[106] However, the use of traditional methods of killing whales by indigenous peoples is a very sensitive issue and of great concern. The contemporary approach of the IWC to the use of technology follows the stand adopted by the UNHRC.[107] However, this is not a uniformly accepted position, as the UNHRC acknowledgement of the evolving lifestyle of indigenous peoples and also their permissible use of modern technology is seen by certain States as a contentious issue within the IWC; whereas improved technology makes whaling safer, more efficient and more humane, it may be seen by some to compromise aboriginal authenticity.[108]

Therefore, as the practice of the IWC indicates, what it understands by culture and the method of ASW is not entirely clear. That said, it may be difficult to object to ASW provided that: a) such whaling fulfils a legitimate and continuing cultural, nutritional, and subsistence need; b) such killing is limited to only the number of whales needed; c) the targeted whale populations can sustain such kills; d) each whale is fully utilised by those responsible for the animal's death and not traded commercially; e) the whaling is conducted using the least cruel techniques available; and f) continuing efforts are made to increase the efficiency of the hunt and reduce the amount of time it takes individual whales to die. The regulation of ASW – not least as concerns maximum quota, humane killing methods using modern technologies, and sustainability – is therefore likely to be a key element in the future of the IWC agenda.

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[103] Benjamin J. Richardson, 'Indigenous Peoples, International Law and Sustainability', [2001] 10 RECIEL 1, 3.

[104] See e.g. HRC, *Ilmari Länsman et al. v. Finland*, Views adopted on 26 October 1994, Comm. No. 511/1992, UN Doc. CCPR/C/57/1, 75–85; *Jouni E. Länsman et al. v. Finland*, Views adopted on 30 October 1996, Comm. No. 671/1995, UN Doc. CCPR/C/58/D/671/1995.

[105] *Jouni E. Länsman et al. v. Finland*, para. 9.3

[106] *Apirana Mahuika et al. v. New Zealand*, Views adopted on 27 October 2000, Comm. No. 447/1993, UN Doc. CCPR/C/70/D/547/1993, para. 9.4.

[107] Report of the Panel Meeting of Experts on Aboriginal/Subsistence Whaling, reprinted in: International Whaling Commission, 'Aboriginal/Subsistence Whaling (with special reference to the Alaska and Greenland fisheries)', Reports of the International Whaling Commission – Special Issue 4 (1982), 7–9, <http://iwcoffice.org/cache/downloads/7h78clbatfggcw8gg00w8wo4o/RIWC-SI4-ppl-33.pdf> accessed 4 August 2022. See also Randall R. Reeves, 'The Origins and Character of "Aboriginal Subsistence" Whaling: A Global Review' [2002] Mammal Review 32 71, 98.

[108] International Whaling Commission, 'Aboriginal Subsistence Whaling' <http://iwc.int/aboriginal> accessed 4 August 2022.