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INTEGRATING INDIGENOUS RIGHTS INTO MULTILATERAL ENVIRONMENTAL AGREEMENTS: THE INTERNATIONAL WHALING COMMISSION AND ABORIGINAL SUBSISTENCE WHALING

CHRIS WOLD*

Abstract: Although the international community has addressed whether environmental harm violates human rights norms, only recently has it asked whether international organizations must implement those norms. That changed when Greenland posited that the International Whaling Commission (IWC) has a duty to implement aboriginal subsistence whaling (ASW) in light of customary international human rights norms, including the rights to cultural identity and resources. This article explains why international organizations have an obligation to implement customary international human rights law. Implementation, however, may be challenging because the content of some rights is not clear. In addition, these rights are not absolute. Actions may interfere with human rights provided they can be reasonably and objectively justified, as the United Nations Human Rights Committee has concluded, or are necessary, legitimate, and proportional, as the Inter-American Court of Human Rights has stated. The article concludes that the IWC's ASW management regime interferes with certain customary international human rights, but that it can be reasonably and objectively justified or is necessary, legitimate, and proportional. Nonetheless, the IWC could strengthen implementation of human rights by, for example, clearly articulating criteria for preparing and evaluating "need statements"—the statements submitted to support an ASW quota.

INTRODUCTION

In recent years, scholars and international commissions have paid increasing attention to the question of whether certain environmental harms constitute violations of human rights norms and who might be responsible for such harm.[1] Others have looked at these questions in the specific context of indige-

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[1] *See, e.g.*, Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,

nous peoples.[2] Even with respect to global environmental problems that may affect human rights, such as climate change, the questions have focused on how the human rights regime can complement and support international environmental discussions.[3]

The need to protect the environment as a prerequisite for protecting fundamental human rights, such as rights to food, water, health, property, and culture, is widely recognized.[4] Nonetheless, few are asking whether the international environmental institutions themselves have responsibilities to incorporate human rights into their decisions and programs of work. This is beginning to change. For example, the International Whaling Commission (IWC)[5] has begun exploring how to incorporate indigenous human rights in the context of aboriginal subsistence whaling (ASW).[6] At their most recent meeting, the parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[7] established a working group to consider whether "to take into account the need for inter alia, food and nutrition security, preserva-

¶ 72, U.N. Doc. A/HRC/31/52 (2016) (concluding that "climate change threatens the enjoyment of a vast range of human rights").

[2] *See, e.g.*, U.N. Env't Programme [UNEP], Climate Change and Human Rights (2015), http://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights.pdf [https://perma.cc/38QM-E283].

[3] *See, e.g.*, Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439 (2009).

[4] *See, e.g.*, *id.*; Human Rights Council Res. 10/4 Human Rights and Climate Change, U.N. Doc A/HRC/10/L.11, at 15 (Mar. 25, 2009) ("Noting that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.").

[5] The International Convention for the Regulation of Whaling (ICRW) established the International Whaling Commission (IWC). International Convention for the Regulation of Whaling art. III(1), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW]. The schedule, which includes the rules for whaling, is an integral part of the ICRW. *Id.* art. I(1). The schedule was last amended at the Sixty-fifth Annual Meeting of the IWC in September 2014. At the moment, however, the IWC's website only provides a link to the schedule as amended in 2012. *See* International Convention for the Regulation of Whaling, 1946: Schedule as Amended by the Commission at the 65th Meeting (2014) [hereinafter Schedule]. The 2014 amendments can be found in Int'l Whaling Comm'n [IWC], Summary of Main Outcomes, Decisions and Required Actions from the 65th Meeting, at 6 (Sept. 18, 2014), http://iwc.int/iwc65docs [https://perma.cc/23CN-5BBS].

[6] *See, e.g.*, Int'l Whaling Comm'n, Report of the IWC Expert Workshop on Aboriginal Subsistence Whaling (ASW), § 2.2, IWC/66/ASW Rep01 (2015), https://archive.iwc.int/pages/view.php?ref=5664&k= [https://perma.cc/MM9N-N2N5] [hereinafter Int'l Whaling Comm'n, Report of the IWC Expert Workshop on ASW].

[7] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES].

tion of cultural identity and security of livelihoods" when making decisions to protect species.[8]

The IWC's support for ASW[9] and its rejection of an ASW quota for Greenland in 2012[10] underscore the tension faced by many international environmental organizations as they simultaneously attempt to implement indigenous rights and achieve their environmental or conservation goals. Recognizing the complexity of these issues, the IWC held an expert workshop to discuss them,[11] particularly in the context of "need statements,"[12] the document submitted by IWC Members on behalf of their indigenous peoples to support an ASW quota.[13] The workshop participants described how the rights to 1) self-determination; 2) land, territories, and resources; and 3) cultural integrity of indigenous peoples should inform how the IWC approaches ASW.[14] None of

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[8] Conference of the Parties to the Convention on International Trade in Endangered Species of Flora and Fauna, *Draft Resolution on Livelihoods and Food Security*, at 2, CoP17 Doc. 17 (2016), https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-17.pdf [https://perma.cc/2AB9-Z6T2].

[9] *See* Schedule, *supra* note 5, ¶ 13; Greg Donovan, Some Thoughts on Facilitating the Process to Agree Catch Limits for Aboriginal Subsistence Whaling (ASW): An Update of IWC/63/13, at 1, IWC/S15/ASW/4 Rev1 (Oct. 15, 2015), https://archive.iwc.int/pages/view.php?ref=5676&search=%21collection1573&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=3&restypes= [https://perma.cc/98YF-EF8C] (describing the process for approving ASW quotas at IWC annual meetings); Int'l Whaling Comm'n, Report of the Aboriginal Subsistence Whaling Working Group, app. 5, at 15, IWC/64/ASW5 Rev1 (May 28, 2012), https://iwc.int/private/downloads/6tHTVDkxoYwGaRhtHlXm8Q/64-ASW%205%20Rev1%20-%20with%20Appendices.pdf [https://perma.cc/8K4J-258D] (describing the history of ASW).

[10] *See* Press Release, Int'l Whaling Comm'n, Press Release: Day 4 (2014), https://archive.iwc.int/pages/view.php?ref=3476&search=press%2C+release&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=0 [https://perma.cc/R7Q5-VCD3] (discussing the impasse within the IWC over Greenland with a vote of twenty-five in favor, thirty-four against, and three abstentions).

[11] *See* Int'l Whaling Comm'n, Chair's Report from Ad Hoc Aboriginal Subsistence Whaling Working Group Meeting with Native Hunters, app. 2, at 6, IWC/65/ASWRep01 Rev1 (Sept. 12, 2014), https://archive.iwc.int/pages/view.php?ref=3540&search=%21collection98&order_by=relevance&sort=DESC&offset=0&archive=0&k=..&curpos=3&restypes= [https://perma.cc/G8C7-B5SV] [hereinafter IWC, Chair's Report from ASW Working Group Meeting].

[12] *Id.* (stating that "an important focus [of the workshop] must be on consideration of 'need statements' in the broad sense").

[13] *See infra* Section II (discussing the origins of need statements).

[14] *See* Dalee Sambo Dorough, Presentation on: The Arctic Council and its Recent Initiatives; and the International Human Rights Standards Specifically Responsive to the Distinct Cultural Context of Indigenous Peoples (Sept. 15, 2015), https://archive.iwc.int/pages/view.php?ref=5675&search=%21collection1573&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=4&restypes= [https://perma.cc/Y53Q-6768]; Jessica Lefevre, Subsistence Whaling Through the Lens of International Human Rights (2015), https://archive.iwc.int/pages/view.php?ref=5674&search=%21collection1573&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=5&restypes= [https://perma.cc/8TQL-J2F4]; Martin Mennecke, The Relevance of International Law "Outside" the ICRW for the IWC, at 1 (2015), https://archive.iwc.int/pages/view.php?ref=5673&search=%21collection1573&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=6&restypes= [https://perma.cc/UVQ3-E7QC]; Elsa Stamatopoulou, Presentation on: A. Subsistence Rights as Part of In-

them, however, provided a clear framework for how the IWC should implement ASW in light of the IWC's duty to manage whale stocks globally. Instead, they indicated that the IWC's decision-making process should be revised to take account of these rights. Equally significant, none of the participants presented compelling legal arguments explaining why human rights obligations apply to international organizations.

This article assesses the legal status of indigenous rights in international law and explains why international organizations such as the IWC have a legal obligation to implement those indigenous and other human rights that have become customary international law. Section II begins by summarizing the history of ASW management by the IWC, as well as the reasons for the IWC's rejection of Greenland's ASW quota in 2012. Section III evaluates the status and content of the right to self-determination, the right to cultural identity, and the right to lands, territories, and resources. Notably, it concludes that while these rights are or will become customary international law, they are not absolute; states and international organizations may interfere with these rights so long as they do not infringe them. As the United Nations Human Rights Committee (Human Rights Committee or Committee)[15] has stated, actions may affect human rights provided that those actions are subject to "reasonable and objective justification."[16] Section IV concludes that customary international law binds international organizations such as the IWC either directly because they possess international legal personality or indirectly because the individual member states composing the international organization have responsibilities to implement them. While international organizations cannot derogate from jus cogens norms, they can create rules that derogate from non-jus cogens norms; none of the human rights norms discussed in this report have attained the status of jus cogens. Section V concludes that the IWC's current management regime for ASW can be reasonably and objectively justified and does not need to be changed. Nonetheless, the IWC could take steps to strengthen implementation of human rights by, for example, clearly articulating criteria for preparing and evaluating need statements.

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digenous Peoples Cultural Human Rights; B. Subsistence Rights as Part of the New Development Paradigm; and C. Some Policy Conclusions and Recommendations, at 3 (Sept. 14–18, 2015), https://archive.iwc.int/pages/view.php?ref=5672&search=%21collection1573&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=7&restypes= [https://perma.cc/67RW-7PQT].

[15] The Human Rights Committee oversees the state parties' implementation of the International Covenant on Civil and Political Rights. *See Monitoring Civil and Political Rights*, UNITED NATIONS HUM. RTS.: OFF. HIGH COMMISSIONER, http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx [https://perma.cc/CW68-FWCE].

[16] Lovelace v. Canada, Human Rights Committee, Comm. No. R.6/24, ¶ 16, U.N. Doc. A/36/40 (1981).

I. ASW IN THE IWC

The IWC has long recognized the importance of ASW for certain aboriginal groups. During the drafting of the International Convention for the Regulation of Whaling (ICRW) in 1946, negotiators from Canada and the Soviet Union complained that the ICRW did not include an exception for ASW.[17] As a consequence, negotiators included a formal statement in the ICRW's Final Act supporting the continued taking of gray whales in the Bering and Chukchi Seas, provided the meat and other products were used "exclusively for local consumption by the aborigines of the Chokotsk and Korjaksk areas."[18] They also included a provision in the initial Schedule, the IWC's binding set of regulations, exempting the killing of gray and right (also known as bowhead) whales from a whaling ban, provided the meat and other products were used exclusively for local consumption by aborigines.[19]

From 1948 to 1961, ASW occurred under these basic provisions. In 1961, when the IWC started limiting the killing of humpback whales, it expanded the ASW exception by allowing Greenlanders to continue killing up to ten humpback whales annually.[20] In 1964, the IWC amended the schedule to allow a government to kill gray and right whales on behalf of aborigines, provided that the meat and other whale products were used "exclusively for local consumption by the aborigines."[21]

From its inception, then, the ICRW and the IWC have recognized the important role that whale products play in the nutritional and cultural life of some indigenous peoples.[22] At the same time, the ICRW and the IWC have allowed ASW to occur despite growing restrictions on other forms of whaling. In other words, they have treated ASW as an exception by limiting the number of

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[17] *See generally* Michael F. Tillman, *The International Management of Aboriginal Whaling*, 16 REVIEWS FISHERIES SCI. 437, 438 (2008) (providing an excellent overview of the early years of ASW). They also made clear that restricting aborigines to "traditional" methods, such as hunting in canoes without firearms, was unacceptable due to challenging Arctic conditions. *Id.*

[18] *See id.* at 438–39 (quoting from the Final Act of the Washington Conference at which negotiating states adopted the ICRW).

[19] *Id.* at 439.

[20] *See* Int'l Whaling Comm'n, *Chairman's Report of the Twelfth Meeting*, 12 REP. INT'L WHALING COMMISSION 14, 31 app. III (1961) (finding nothing wrong with a proposal to allow the killing of ten humpback whales for local consumption in Greenland).

[21] Int'l Whaling Comm'n, *Chairman's Report of the Sixteenth Meeting, Including the Amendments to the Schedule of the International Whaling Convention, 1946, Made at That Meeting*, 16 REP. INT'L WHALING COMMISSION 15, 20 app. III (1966).

[22] *See Aboriginal Subsistence Whaling*, INT'L WHALING COMMISSION, http://iwc.int/aboriginal [https://perma.cc/M8P7-CPYM] (noting that the two major objectives of IWC regulation of ASW are to maintain healthy populations of whale and to allow aboriginal groups to maintain cultural practices of whaling).

whales that may be killed based on the specific needs of specific indigenous groups.[23]

ASW is now enshrined in paragraph 13 of the schedule. Notwithstanding the provisions applicable to commercial whaling, the IWC may approve ASW quotas "to satisfy aboriginal subsistence need" provided that certain conditions are met.[24] In addition to ensuring that ASW is sustainable and the relevant IWC member has national legislation to regulate ASW, paragraph 13 also requires that any meat and products of such whales be used exclusively for local consumption by the aborigines.[25]

Nonetheless, the IWC's approval of ASW quotas has sometimes met resistance. For example, some IWC members have challenged Greenland's request for fin and humpback whales[26] as well as the taking of humpback whales in St. Vincent and the Grenadines.[27] However, the ASW debate significantly intensified in 2012 when the IWC rejected Greenland's request for an ASW quota starting with the 2013 season.[28] IWC members expressed concerns over the size of the quota, Greenland's conversion factors used to calculate the yield of meat from each whale, and evidence of the commercial sale of whale meat, including in restaurants.[29]

In the wake of that rejection, Greenland unilaterally established ASW quotas for 2013 and 2014 and allowed the 2013 hunt to go forward.[30] Although

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[23] *See* Chris Wold & Michael Kearney, *The Legal Effect of Greenland's Unilateral Aboriginal Subsistence Whale Hunt*, 30 AM. U. INT'L L. REV. 561, 583–85 (2015).

[24] Schedule, *supra* note 5, ¶ 13(a).

[25] *See id.* ¶ 13(b).

[26] In 2008, the IWC rejected Greenland's proposal to add humpback whales to its ASW quota. *See* Int'l Whaling Comm'n, *Chair's Report of the 61st Annual Meeting*, 2009 ANN. REP. INT'L WHALING COMMISSION 5, 22–24. In 2010, Greenland's ASW quota was approved only after Greenland agreed to reduce the number of fin whales and humpback whales killed for aboriginal subsistence purposes in its proposal. *See* Int'l Whaling Comm'n, *Chair's Report of the 62nd Annual Meeting*, 2010 ANN. REP. INT'L WHALING COMMISSION 5, 17.

[27] A frequent concern of the IWC is the ongoing killing of what many consider to be calves by those engaged in ASW in St. Vincent and the Grenadines. *See, e.g.*, Int'l Whaling Comm'n, *Chairman's Report of the Fifty-Second Annual Meeting*, 2000 ANN. REP. INT'L WHALING COMMISSION 11, 18–19; *see also* Whale & Dolphin Conservation Soc'y, *Analysis of the Reports of the IWC's Infraction Sub-Committee from 1991 to 2004: Review of Compliance at the IWC* (June 2005) (reviewing the history of attempts to label this killing as an infraction).

[28] *See* Press Release, Int'l Whaling Comm'n, *supra* note 10.

[29] *See* Int'l Whaling Comm'n, *Chair's Report of the 64th Annual Meeting*, 2012 ANN. REP. INT'L WHALING COMMISSION 7, 22–23 (describing concern from Brazil, Ecuador, and Argentina over Greenland's ASW whaling practices). For a detailed description of the factual and legal issues surrounding the IWC's rejection of Greenland's ASW quota and Greenland's subsequent unilateral decision to conduct ASW in the absence of an IWC-approved quota, see Wold & Kearney, *supra* note 23.

[30] *See* Int'l Whaling Comm'n, *Chair's Report of the 65th Meeting*, 2014 ANN. REP. INT'L WHALING COMMISSION 7, 30–31; *see also Whale Quotas Create Rift Between Greenland and Denmark*, COPENHAGEN POST (July 11, 2013, 3:59 PM), http://cphpost.dk/news/whale-quotas-create-rift-between-greenland-and-denmark.5962.html [https://perma.cc/AL4H-ZUA2]. Prior to establishing its unilateral quota, Greenland solicited comments from IWC Members on its proposal to allocate ASW quotas to

some IWC members supported Greenland's unilateral hunt,[31] other members argued that Greenland was precluded from conducting ASW until the IWC approved a new quota.[32] Greenland submitted a new ASW proposal to the IWC

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itself for 2013 and 2014, without IWC approval. *See* Letter from Jens K. Lyberth, Deputy Minister, Green. Ministry of Fisheries, Hunting, & Agric., to IWC Comm'rs, Regarding Greenland Quotas on Large Whales (Nov. 30, 2012) (on file with author).

[31] In an email, the Acting IWC Commissioner for the United States said the following:

> Denmark/Greenland is now considering issuing catch limits for the years 2013 and 2014 at the same levels that Denmark proposed in Panama. The United States supports catch limits that are consistent with a documented needs statement and that are supported by advice of the IWC Scientific Committee. If Denmark/Greenland were to issue catch limits for 2013 and 2014 at the same levels as their 2012 catch limits, it would likely garner wider support within the IWC and create a more positive atmosphere at IWC65. Further, we support Denmark/Greenland's intention to propose a new schedule amendment to the IWC in 2014 for catch limits through 2018.

E-mail from Ryan Wulff, Acting U.S. IWC Comm'r, to Gitte Hundaul, Den. Comm'r to the IWC, and Jens K. Lyberth, Deputy Minister, Green. Ministry of Fisheries, Hunting, & Agric. (Dec. 14, 2012) (on file with author); *see also* NAT'L MARINE FISHERIES SERV., NAT'L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR ISSUING ANNUAL QUOTAS TO THE ALASKA ESKIMO WHALING COMMISSION FOR A SUBSISTENCE HUNT ON BOWHEAD WHALES FOR THE YEARS 2013 THROUGH 2017/2018, at 1 (June 2012) ("It is possible that the IWC might not update the catch limit, notwithstanding IWC Scientific Committee management advice that the hunt is sustainable. If so, it should be noted that NOAA is considering issuing annual quotas for the time periods described in the Alternatives under the current IWC Schedule language"). At the IWC's 2012 meeting and as reported in the Chairman's report, St. Lucia commented:

> [T]he proposed Schedule amendment had not been for a zero quota, but instead was for a specific quota. Given that the previous quota was expired, it commented that what the Commission had actually said to Denmark/Greenland was to go forth and manage their fishery on their own. It considered that whaling would continue despite the outcome of the vote because the outcome effectively meant no quota advice was given.

Int'l Whaling Comm'n, *Chair's Report of the 64th Annual Meeting*, *supra* note 29, at 23.

[32] *See* Letter from Donna Petrachenko, Austl.'s Comm'r to the IWC, to Gitte Hundahl, Den.'s Comm'r to the IWC (Dec. 17, 2012), iwc.int/document_3159.download [https://perma.cc/52WP-CCCC] (objecting to Greenland's proposal). On behalf of EU IWC commissioners from EU member states, the IWC Commissioner for Cyprus wrote:

> Cyprus had already expressed, on behalf of the above-listed EU IWC Commissioners, the coordinated position on the proposal submitted by Denmark (Greenland) at IWC 64 in Panama, in July of this year. As we had stated on that occasion, we were ready to support a roll-over proposal from Greenland, just as we supported the other, joint, proposal submitted to the IWC by the USA, Russia and St. Vincent and the Grenadines. At this stage, I am compelled to inform you that this position remains unaltered and that, consequently, we remain unable to support your suggested approach.
>
> We would also be interested to understand how you, together with the Government of Denmark, would see the next steps unfolding, particularly in the light of the IWC Rules of Procedure and the possibility of making use of IWC Rule E.4, considering that the next IWC meeting will take place in 2014.

Letter from Myroula Hadjichristoforou, IWC Comm'r for Cyprus, to Jens K. Lyberth, Deputy Minister, Green. Ministry of Fisheries, Hunting, & Agric. (Dec. 14, 2012) (on file with author); *see also* *2014 IWC 65 Meeting in Slovenia*, ANIMAL WELFARE INST., https://awionline.org/content/2014-iwc-

in 2014 for 2014 through 2018, which the IWC adopted.[33] At the same meeting, several IWC members called on the IWC to declare Greenland's 2013 and 2014 whaling an infraction[34] that Denmark, which ratified the ICRW on Greenland's behalf,[35] must prosecute and punish.[36] Clearly, the issue was not resolved to the satisfaction of many IWC members.

Recognizing the complexity of the topics involved in ASW and the need to revise the process for approving ASW quotas, the IWC agreed in 2014 to hold an expert workshop to improve long-term management of ASW.[37] The IWC drafted the terms of reference for the workshop broadly to address a range of issues affecting ASW, but it intended the workshop to focus on need

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65-meeting-slovenia [https://perma.cc/MM6R-PST7] (providing that at the IWC's 2014 meeting, Argentina, Chile, Uruguay, and other members of the Latin American group of countries known as the Buenos Aires Group stated that Denmark's failure to report Greenland's ASW as commercial whaling constituted an infraction). Even Denmark seemed to take this position. *See Whales Quotas Create Rift Between Greenland and Denmark*, *supra* note 30 (reporting that "[t]he Danish government argues that by setting its own independent quota, Greenland is contravening IWC regulations"). Denmark also said it would have to withdraw from the IWC as a result of Greenland's ASW hunt. *Id.*

[33] *See* Int'l Whaling Comm'n, Summary of Main Outcomes, *supra* note 5, at 6 (amending the schedule to allow ASW). The schedule amendment for Greenland's quota achieved the necessary three-fourths majority with forty-six members voting "yes," eleven members voting "no," and three members abstaining. *See* Int'l Whaling Comm'n, Status of Agenda Items at IWC/65 as of Monday, 15 September 2014, IWC/65/Status, at 1–2 (2014), https://archive.iwc.int/pages/view.php?ref=3577 [https://perma.cc/4VYS-5TNR]. Greenland's 2014 proposal differed from its 2012 proposal by just twelve minke whales. *See* Denmark, Proposed Schedule Amendment (IWC 64) (Greenland Catch limits), IWC/64/12, at 1 (2012), https://iwc.int/private/downloads/wZY8vPNeplVotBRS6w4Jiw/64-12.pdf [https://perma.cc/DVD6-7ZVC] (providing that the number of minke whales struck from the Central stock and West Greenland stock shall not exceed twelve and 178 respectively for the years 2013, 2014, 2015, 2016, 2017, and 2018).

[34] *See* Int'l Whaling Comm'n, Report of the Infractions Sub-Committee, IWC/65/Rep04, at 2 (Sept. 11, 2014), https://archive.iwc.int/pages/view.php?ref=3580 [https://perma.cc/23RN-QZRJ].

[35] Greenland is an autonomous territory within Denmark. When Denmark ratified the ICRW, it did so implicitly on behalf of Greenland. Denmark's instrument of ratification does not explicitly state that Denmark is ratifying on behalf of Greenland. *See* Email from Francis J. Holleran, Depositary Officer, U.S. Dep't of State, to Chris Wold, Professor, Lewis & Clark Law School (Sept. 15, 2006) (on file with author) (providing the English translation of the Declaration of the Kingdom of Denmark of Accession to the International Convention on the Regulation of Whaling). However, Lord McNair, a renowned international law scholar, has stated that when a treaty does not include a territorial application clause, "the treaty applies to all the territory of the contracting party, whether metropolitan or not" unless a government expressly indicates otherwise. LORD MCNAIR, THE LAW OF TREATIES 116–17 (1961). This rule was codified in the Vienna Convention, which states that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." Vienna Convention on the Law of Treaties art. 29, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. As the ICRW does not include any provisions for applying the convention to territories, the general rule applies.

[36] *See* ICRW, *supra* note 5, art. IX (requiring prosecution and punishment of infractions by the "government having jurisdiction over the offence" and a requirement to report infractions and actions taken to the IWC).

[37] *See* IWC, Chair's Report from ASW Working Group Meeting, *supra* note 11, at 4 (charging the United States, Denmark, and the IWC's Head of Science with developing a proposal for a workshop "to address those long term issues that are of greatest concern" for ASW).

statements,[38] including "types of subsistence need (for example, cultural and nutritional); cultural and sociological variation across whaling communities with regard to conditions of the hunt and methods of distributing products, including changes over time; methods used to present information on need to the Commission in an informative manner; consideration of approaches to objectively review 'need statements' presented to the Commission; and food security considerations."[39] Although not included among the named topics to be considered, an assessment of human rights law as it relates to ASW became a very significant focus of the workshop.[40]

Several participants spoke on the need to incorporate human rights related cultural and subsistence issues within the context of ASW. In particular, they focused on the need to view ASW in relation to the economic, social, cultural, political, and spiritual dimensions of indigenous peoples' rights.[41] Such a need, they claimed, is consistent with the Indigenous and Tribal Peoples Convention (more commonly known as ILO Convention 169)[42] and the United Nations Declaration on Indigenous Rights (UNDRIP).[43] Article 23(1) of ILO Convention 169, in particular, "affirms the linkage between culture, subsistence economy, economic self-reliance, and sustainable and equitable development"[44] by providing that:

> Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.[45]

From this uncontroversial premise, the workshop participants then highlighted the rights of indigenous peoples to their own means of subsistence and traditional economies; to develop and use their lands, territories, and resources; to

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[38] *See* IWC, Chair's Report from ASW Working Group Meeting, *supra* note 11, app. 2, at 6 (stating that "an important focus must be on consideration of 'need statements' in the broad sense").

[39] *See id*; *see also* Int'l Whaling Comm'n, Report of the IWC Expert Workshop on ASW, *supra* note 6, § 2.2.

[40] *See* Int'l Whaling Comm'n, Report of the IWC Expert Workshop on ASW, *supra* note 6, § 3.1.

[41] *See, e.g.*, Dorough, *supra* note 14, at 1 (stating that "[t]he main point of [her] presentation is the need to view Aboriginal Subsistence Whaling in relation with all of the other economic, social, cultural, political and spiritual dimensions of Arctic Indigenous peoples' rights").

[42] *See* Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO Convention 169].

[43] *See* G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

[44] Dorough, *supra* note 14, at 4.

[45] ILO Convention 169, *supra* note 42, art. 23(1).

self-determination; and to cultural integrity.[46] Importantly, they also acknowledged that indigenous societies can evolve, but that does not make these societies any less indigenous or diminish their rights.[47]

Despite concluding that these rights are customary international law,[48] they did not make a credible legal claim that the IWC, as an international organization, had the duty to implement these rights.[49] Nor did they propose concrete ideas for how the IWC might incorporate these rights. Dalee Sambo Dorough "urge[ed] the members of the ASW working group and the IWC . . . to apprise themselves of these legally-binding provisions and to incorporate them into all of their future work."[50] More concretely, she called for the IWC to create, with the direct participation of indigenous peoples, more robust standards to protect ASW.[51] Elsa Stamatopoulou concluded that the "IWC could consider joining the 40-some intergovernmental entities of the Inter-

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[46] Dorough, *supra* note 14, at 5–6; Lefevre, *supra* note 14, at 2–4, 6, 8 (stating that "[i]t is the right of all people, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong" and that the right to culture and to engage in economic activities inter-relates with the right of a people not to be deprived of its own means of subsistence); Stamatopoulou, *supra* note 14, at 5–7.

[47] Dorough, *supra* note 14, at 7–8.

[48] *See id.* at 6–7.

[49] One participant emphasized aspects of the Vienna Convention on the Law of Treaties relating to interpretation of a treaty in light of the treaty's context. Mennecke, *supra* note 14, at 6, 8–10. Pursuant to Article 31(1) of the Vienna Convention, "[a] treaty shall 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." Vienna Convention, *supra* note 35, art. 31(1) (emphasis added). He argued that the IWC has a duty to interpret terms in the ICRW in light of human rights law because human rights law has become part of the context for interpreting the ICRW; because treaties such as the ICRW must be interpreted as evolving instruments, as opposed to the drafters' intent, human rights norms that are customary international law have become part of the context upon which the terms of the ICRW should be interpreted. *See* Mennecke, *supra* note 14, at 6, 8–10. However, the Vienna Convention limits "context" to agreements relating to the treaty made between all parties in connection with the conclusion of the treaty or an instrument made by one or more parties in connection with the conclusion of a treaty and accepted by other parties to the treaty. Vienna Convention, *supra* note 35, art. 31. Human rights law, as reflected in customary international law, does not fall within either of these categories. As described in Section IV, however, valid legal arguments can be made that impose obligations on international organizations directly or indirectly. *See infra* Section IV.

[50] Dorough, *supra* note 14, at 4.

[51] *Id.* at 10. Dorough's exact words are:

> In regard to the IWC and its future actions, especially in light of climate change, there is a greater urgency to protect Aboriginal Subsistence Whaling and a greater urgency to establish robust standards to do so. To assist in the preparation of such standards, the direct participation of Inuit [and other Indigenous peoples concerned] must be recognized and respected. In this way, the IWC will help to ensure the future of Aboriginal Subsistence Whaling in the Arctic and elsewhere, in a manner that upholds the fundamental human rights of Indigenous peoples and is consistent with their distinct cultural context.

Id. (alteration in original).

Agency Support Group on Indigenous Issues in order to share experiences and good practices with others at [The Permanent Forum on Indigenous Issues] and at other levels."[52] The workshop report includes as a main recommendation the need for IWC members "to reflect the specific status and human rights of Indigenous peoples in their application and interpretation of the ASW framework under the International Convention on the Regulation of Whaling."[53] The workshop report, like the presentations, does not articulate how the IWC should do that.

II. Human Rights Claims Relevant to International Environmental Organizations

The IWC's expert workshop helped raise the issue of the need for international organizations such as the IWC to consider human rights law in their decisionmaking. It also highlighted which human rights law is most relevant to the IWC and which is likely to be relevant to other resource-related international bodies, such as CITES.

The workshop, however, is but a first step towards integrating human rights into international organizations because several key issues went unaddressed. First, none of the workshop participants described the content of these rights. For example, what exactly does the right to self-determination allow indigenous peoples to do? What is the scope of the right to lands, territories, and resources? Second, they did not describe the limitations of the rights. As the following section makes clear, the Human Rights Committee and the Inter-American Court of Human Rights have noted that these rights are not absolute and that rights can be affected without being abrogated. These issues are discussed in this Section. Third, the workshop participants did not describe whether international organizations have the duty to implement these rights. As described in Section IV, a strong case can be made that international organizations like the IWC have an obligation—either directly as an international organization or indirectly through the actions of the individual IWC members—to implement human rights and other legal norms that have attained the status of customary international law.

A. Background on Customary International Law

Customary international law, along with treaties and general principles of law, constitute the three sources of international law.[54] Customary international law is significant because, unlike treaties, it binds all nations, not just those

[52] Stamatopoulou, *supra* note 14, at 9.
[53] Int'l Whaling Comm'n, Report of the IWC Expert Workshop on ASW, *supra* note 6, § 3.1.
[54] *See* Statute of the International Court of Justice art. 38(1), June 26, 1945, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945).

that have consented to it, "not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."[55] Customary international law has always proved challenging because it is difficult to identify in practice. The standard formula for identifying a norm of customary international law is to determine whether sufficient state practice implementing the norm exists and whether states conduct themselves consistently with state practice out of a sense of legal obligation, a concept called opinio juris.[56] Sufficient state practice is defined in terms of consistent, not necessarily universal, practice among states.[57] Opinio juris can be found from a State's acceptance of the norm in treaties, declarations, resolutions, and perhaps even from state practice itself.[58]

In the case of human rights, the relevant sources of law are numerous. The International Covenant on Civil and Political Rights (ICCPR),[59] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[60] ILO Convention 169,[61] and the American Convention on Human Rights (American Convention)[62] provide important treaty sources of human rights law. In addition, the Universal Declaration of Human Rights[63] and UNDRIP provide important non-treaty evidence of human rights norms. UNDRIP, for example, represents a massive, global effort to identify the rights of indigenous people.[64]

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[55] *See* The Scotia, 81 U.S. 170, 187–88 (1871); Asylum (Colom./Peru), Judgment, 1950 I.C.J. 266, 276 (Nov. 20) (stating that "[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party").

[56] For a discussion of the challenges of identifying custom, see Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001).

[57] *See, e.g.*, Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, 23–26 (July 25) (stating that the twelve-mile limit for a territorial sea "appears now to be generally accepted" and that there is "an increasing and widespread acceptance of the concept of preferential rights for coastal States . . . in a situation of special dependence on coastal fisheries"); *Asylum*, 1950 I.C.J. at 276 (stating that a rule invoked as custom must have "a constant and uniform usage practised by the States in question").

[58] *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar./U.S.), 1986 I.C.J. 14 (June 27); North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).

[59] *See* International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

[60] *See* International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

[61] *See* ILO Convention 169, *supra* note 42.

[62] *See* American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978), https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf [https://perma.cc/54L9-TU2Z] [hereinafter American Convention].

[63] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[64] UNDRIP was adopted by 143 states, with just four states voting against it and eleven abstaining. S. James Anaya & Siegfried Wiessner, *The U.N. Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST (Oct. 3, 2007, 8:01 AM), http://www.jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php [https://perma.cc/QQ8K-XGKR]. Australia, Canada,

As United Nations General Assembly resolutions, UNDRIP and the Universal Declaration of Human Rights are not legally binding, but this does not mean that some of their provisions do not reflect customary international law. In fact, some provisions of UNDRIP undeniably articulate customary international law,[65] although scholars disagree about the extent to which UNDRIP in its entirety can be considered representative of customary international law.[66] As explained below, the rights to self-determination, lands, territories and resources, and cultural identity are customary international law. What is less clear is the content of these rights.

B. The Right to Self-Determination

UNDRIP states that indigenous peoples have the right to self-determination; that is, they have the right to "freely determine their political status and freely pursue their economic, social and cultural development."[67] Even the four States that rejected UNDRIP—the United States, Canada, Australia, and New Zealand—have demonstrated varying levels of recognition of the right to self-determination for indigenous people[68] and have subsequently endorsed it.[69]

Although UNDRIP is not legally binding, the general right to self-determination (that is, the right not specific to indigenous peoples) does exist in other legally binding treaties. For example, the ICCPR and the ICESCR both begin by declaring that "[a]ll peoples have the right to self-

New Zealand and the United States voted against adoption of UNDRIP while Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, the Russian Federation, Samoa and Ukraine abstained. *Id.*; *Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS HUM. RTS.: OFF. HIGH COMMISSIONER, http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx [https://perma.cc/W6GS-7HP2]. All four States that voted against UNDRIP later supported it. *See, e.g.*, Press Release, Office of the Spokesman, U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), https://2009-2017.state.gov/r/pa/prs/ps/2010/12/153027.htm [https://perma.cc/SQ5M-8N4U].

[65] *See* Int'l Law Ass'n, Sofia Conference, *Rights of Indigenous People: Final Report*, 28–29 (2012), http://www.ila-hq.org/download.cfm/docid/227B560E-F0F5-4773-BECC974CFC6A11B8 [https://perma.cc/CT4P-LTSG].

[66] *See* Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT'L L. 141, 163 (2011) (stating that "while some argue that the declaration goes beyond other international legal instruments in terms of recognizing indigenous rights, others insist that the declaration adds no new rights but rather is simply a statement of what already exists in customary international law") (footnote omitted).

[67] UNDRIP, *supra* note 43, art. 3.

[68] *See* Anaya & Wiessner, *supra* note 64. For example, the U.S. government has recognized Indian tribes as political entities with powers of self-government over a "broad range of internal and local affairs." *Id.*

[69] Sven Pfeiffer, *Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing*, 5 GOETTINGEN J. INT'L L. 287, 293 (2013).

determination."[70] The right to self-determination is even a foundational principle of the United Nations (U.N.), with Article 1 of the U.N. Charter stating that one purpose of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[71] These treaties and others like them, reflect that self-determination is widely recognized as customary international law.[72]

However, the legal status of the right to self-determination as it applies to indigenous peoples is not clear. One author writes that indigenous self-determination "is or will become customary international law, even though a few states may continue to oppose it."[73] The International Law Association's Committee on the Rights of Indigenous Peoples is silent on the question of whether self-determination for indigenous peoples has become customary international law, while proclaiming other rights to be customary international law.[74] Others strongly imply that the right to self-determination for indigenous peoples has become customary international law.[75]

In addition, the actual substantive content of that right is debatable, especially in the context of indigenous peoples.[76] As renowned international schol-

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[70] ICCPR, *supra* note 59, art. 1(1); ICESCR, *supra* note 60, art. 1(1).

[71] U.N. Charter art. 1, ¶ 2.

[72] *See* S. JAMES ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW 75 n.28 (2nd ed. 2004). Self-determination is sometimes called a jus cogens norm as well. Isabelle Schulte-Tenckhoff, *Treaties, Peoplehood, and Self-determination: Understanding the Language of Indigenous Rights*, *in* INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION 64, 77 (Elvira Pulitano ed., 2012).

[73] Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT'L L. & FOREIGN AFF. 1, 27 (2010); *see also* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 47 (2004) (stating that "[i]t is . . . evident that certain minimum standards concerning indigenous land rights, rooted in accepted precepts of cultural integrity, property, nondiscrimination, and self-determination, have made their way not just into conventional law but also into general or customary international law") [hereinafter Anaya, *The Move Toward the Multicultural State*].

[74] *See* Int'l Law Ass'n, The Hague Conference, *Rights of Indigenous Peoples: Interim Report*, 9–12 (2010), http://www.ila-hq.org/download.cfm/docid/9E2AEDE9-BB41-42BA-9999F0359E79F62D [https://perma.cc/RVR3-2ELM]. The International Law Association states that the Interim Report "should be considered an integral part" of the 2012 Final Report "as well as an essential element of the overall work of the Committee." Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 2. The final report was also silent on the question of whether self-determination for indigenous peoples had become customary international law. Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 3–7. On the other hand, it affirmatively stated that "a specific rule of customary international law has developed recognizing the right of indigenous peoples to recognition and preservation of their cultural identity." Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 17.

[75] *See* Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 137–38 (2011).

[76] *See, e.g.*, Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HUM. RTS. L. REV. 609, 610 (2011) (stating that the right of self-determination "remains one of the most unsettled norms in international law" with its application beyond the colonial context "'plagued by an excess of indetermina-

ar James Crawford has written, "as almost all would agree, self-determination is . . . *lex obscura*. No one is very clear what it means, at least outside the colonial context."[77] Thus, even if self-determination for indigenous peoples has become customary international law, identifying which aspects of the right to self-determination are customary international law is not self-evident.

The lack of clarity over the right begins with its scope. Scholars and courts often divide the right to self-determination into two distinct types—external and internal. Internal self-determination refers to how people exercise the right to self-determination within the context of an existing state through such means as participating in the political process.[78] External self-determination operates outside the bounds of an existing state; it relates to the construction of a new, independent state. The Supreme Court of Canada, when assessing the legality of Quebec seceding from Canada under international law and Canadian law, defined external self-determination as the "'establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people.'"[79]

A right to external self-determination, in the sense of a class of people being able to establish their own state from within an existing state, exists for a few classes of peoples. The Canadian Supreme Court, for example, stated that the right to external self-determination exists, at best, for only the first two of the following three internationally recognized classes of peoples: 1) those in the situation of former colonies or under colonial rule; 2) those under foreign military occupation; and 3) those that, as a defined group, are "denied meaningful access to government to pursue their political, economic, social and cultural development."[80] The essence of this third class of people is that it is "blocked from the meaningful exercise of its right to self-determination internally."[81] According to the court, only the first two classes—those under colonial rule and those under foreign occupation or subjugation—undeniably have the right to external self-determination.[82] It further stated that under "an estab-

cy both in terms of scope and content'") (footnotes omitted) (quoting Catriona Drew, *The East Timor Story: International Law on Trial*, 12 EUR. J. INT'L L. 651, 658 (2001)).

[77] James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, *in* PEOPLE'S RIGHTS 7, 10 (Philip Alston ed., 2001). He also states that self-determination "is an intensely contested concept in relation to virtually every case where it is invoked." *Id.* at 38.

[78] ANAYA, *supra* note 72, at 105–06.

[79] Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 126 (Can.) [hereinafter *Secession of Quebec*].

[80] *See id.* ¶ 138.

[81] *Id.* ¶ 134.

[82] *See id.* ¶¶ 132–133.

lished international law standard" it is "unclear" whether the third class of people actually possesses the right to external self-determination.[83]

With respect to indigenous peoples, the general consensus in international law is that the right to self-determination "operates within the overriding protection granted to the territorial integrity of 'parent' states."[84] In fact, many States issued official declarations during the UNDRIP voting process echoing this sentiment.[85] The Philippines, for example, expressed its understanding that "the right to self-determination as expressed in article 3 . . . shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign or independent State."[86] Argentina said that it specifically voted in favor of UNDRIP because of the addition of Article 46(1),[87] which specifies that "[n]othing in this Declaration may be interpreted as . . . authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[88] Thus, the right to external self-determination in the sense of creating an independent state exists only under customary international law for peoples under colonial rule or foreign occupation.[89]

This conclusion does not deny that indigenous peoples have a right to self-determination. As James Anaya has written, "[i]t is a rare case in the post-colonial world in which self-determination, understood from a human rights perspective, will require secession or the dismemberment of states."[90]

In any event, indigenous peoples have the right to engage in some nation-like activities as a group.[91] For example, Article 36(1) of UNDRIP states that

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[83] *Id.* ¶ 135.

[84] *Id.* ¶ 131. James Anaya has written that the right to self-determination "does not mean that every group that can be identified as a people has a free standing right to form its own state or to dictate any one particular form of political arrangement." S. James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, *in* MAKING THE DECLARATION WORK 184, 189 (Claire Charters & Rodolfo Stavenhagen eds., 2009). There may be, of course, indigenous groups that fall within the first two classes of peoples identified by the court in *Secession of Quebec* and that have the right to external self-determination.

[85] *See* Int'l Law Ass'n, The Hague Conference, *supra* note 74, at 9.

[86] *Id.*

[87] See U.N. GAOR, 61st Sess., 107th plen. mtg. at 19, U.N. Doc. A/61/PV.107 (Sept. 13, 2007).

[88] UNDRIP, *supra* note 43, art. 46(1).

[89] The Committee on the Elimination of Racial Discrimination has said that the right to self-determination for ethnic and religious groups does not include external self-determination, suggesting that external self-determination has not become customary international law for some groups. *See* Report of the Committee on the Elimination of Racial Discrimination, annex VIII(B), at 125, U.N. Doc. A/51/18, (Sept. 30, 1996).

[90] S. James Anaya, *Why There Should Not Have to Be a Declaration on the Rights of Indigenous Peoples*, *in* INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 58, 60 (S. James Anaya ed., 2009).

[91] *See* Int'l Law Ass'n, The Hague Conference, *supra* note 74, at 10.

"[i]ndigenous peoples . . . have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders."[92] Other than this, the essence of the right to self-determination for indigenous people relates to internal self-determination.[93]

Other aspects of UNDRIP elaborate on the elements of internal self-determination; that is, the ways in which indigenous peoples are able to "freely determine their political status and freely pursue their economic, social and cultural development."[94] For example, Article 19 requires states to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain . . . consent before adopting and implementing legislat[ion]" that could affect them.[95] This provision exemplifies internal self-determination because it aims to ensure participation of indigenous people in the political process by requiring states to seek their input and consent on legal measures that may affect them. This right applies when a national government implements legislation or a measure that could "produce a 'differentiated effect' to the prejudice of an indigenous community."[96]

Although Article 19 of UNDRIP requires governments to obtain the "consent" of indigenous people, the requisite state practice does not exist to say that under customary international law indigenous peoples have a general right to veto by refusing consent.[97] In some matters, international courts have required states to obtain the free, prior, and informed consent of an indigenous peoples,

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[92] UNDRIP, *supra* note 43, art. 36(1).

[93] *See* Stefania Errico, *The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview*, 7 HUM. RTS. L. REV. 741, 748–49 (2007) ("[T]he right of self-determination that indigenous peoples may exercise has, essentially, an *internal* dimension. . . . In other words, the right to self-determination in this context would imply constitutional formulae of different kinds through which States and indigenous peoples are called to accommodate the latter's aspirations.") (second emphasis omitted); *see also* Crawford, *supra* note 77, at 22, 25 ("The key point about self-determination, and about all other human rights, is that these rights are primarily asserted against one's own state. . . . [T]he reference to self-determination [in the Draft UNDRIP] is to internal self-determination, and that indigenous peoples are to work out their future within the boundaries of the state in which they happen to be.").

[94] UNDRIP, *supra* note 43, art. 3. James Anaya rejects the dichotomy between external and internal self-determination. Nonetheless, his general framework for the right to self-determination embodies the participation, consultation, and consent elements of external and international self-determination. As he says, "self-determination 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 live within a governing order in which they may live and develop freely on a continuous basis." S. James Anaya, *The Contours of Self-Determination and Its Implementation: Implications of Developments Concerning Indigenous Peoples*, *in* JUSTICE PENDING: INDIGENOUS PEOPLES AND OTHER GOOD CAUSES 5, 12 (Gudmundur Alfredsson et al. eds., 2002).

[95] UNDRIP, *supra* note 43, art. 19.

[96] Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 3.

[97] For a full discussion on whether and when consultation or consent is required, see *id.* at 3–7.

while other courts have framed a state's duty as simply to engage in a good faith consultation with the indigenous people affected by their actions.[98] The International Law Association[99] concluded in its 2012 report that states "are not obliged to obtain the consent of indigenous peoples before engaging in *whatever kind* of activities which may affect them," but states are required to obtain informed consent when the absence of such consent "would translate into a violation of the rights of indigenous peoples that States are bound to guarantee and respect."[100] The International Law Association says that consent is required for relocation of indigenous people from their territories or when the state wants to issue permits for the economic exploitation of indigenous lands.[101] The U.N. Committee on Economic, Social and Cultural Rights has stressed that that free and informed consent of indigenous people is especially important when "the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk."[102]

Taken together, these aspects of the right to self-determination provide indigenous people rights vis-à-vis the states in which they live. As Erica-Irene A. Daes, the former Chair of the U.N. Working Group on Indigenous Populations, said, the right to self-determination as articulated in Article 3 of UNDRIP should be "ordinarily interpreted as the right of these people to negotiate freely their political status and representation *in the states in which they live*."[103] It is the state that has the duty "to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically."[104]

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[98] *See* Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf [https://perma.cc/36AV-KXXT]. The Inter-American Court of Human Rights concluded in the *Saramaka* case that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions." *Id.* ¶ 134.

[99] The International Law Association is a highly influential non-governmental organization. *See About Us*, INT'L L. ASS'N, http://www.ila-hq.org/en/about_us/index.cfm [https://perma.cc/5MUN-HGXX]. It should not be confused with the International Law Commission, which is a United Nations sponsored body. *See About the Commission*, INT'L L. COMMISSION, http://legal.un.org/ilc/work.shtml [https://perma.cc/5ESD-UWFT].

[100] Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 7.

[101] *Id.* at 6–7.

[102] U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Political Rights, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights), ¶ 55(e), UN Doc. E/C.12/GC/21 (Dec. 21, 2009).

[103] Erica-Irene A. Daes, *An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations*, 21 CAMBRIDGE REV. INT'L AFF. 7, 23 (2008) (emphasis added).

[104] *Id.* at 24.

C. The Right to Traditional Lands, Territories, and Resources

Indigenous people undoubtedly possess the right to their traditional lands, territories, and resources as a matter of customary international law. As the International Law Association has written, "the fact that indigenous peoples' land rights are protected by customary international law is not reasonably disputable."[105] James Anaya, the Special Rapporteur on Indigenous Rights, has written that "[i]t is . . . evident that certain minimum standards concerning indigenous land rights, rooted in accepted precepts of cultural integrity, property, nondiscrimination, and self-determination, have made their way not just into conventional law but also into general or customary international law."[106]

Scholars have looked to various treaties, declarations, and decisions of human rights courts and commissions to support their claim that the right to land, territories, and resources is customary international law. For example, UNDRIP states that indigenous people have the right to the lands, territories, and resources "which they have traditionally owned, occupied or otherwise used or acquired."[107] Under UNDRIP, this right includes the "right to own, use, develop and control the lands, territories and resources that they possess."[108]

The Inter-American Court of Human Rights stated in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (the *Awas Tingni* case)[109] that "[i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory" and that the right to property in the American Convention includes the right to communal lands.[110] Similarly, the African Commission on Human and Peoples' Rights in the *Endorois Welfare Council* case concluded that "indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in the absence of official title deeds."[111] Relevant state practice indicates that some sort of restitution for lands lost is a

[105] Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 27; *see also* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 55 (2001) (arguing that the right of indigenous peoples to property and other rights are customary international law).

[106] Anaya, *The Move Toward the Multicultural State*, *supra* note 73, at 47; *see also* Anaya & Weissner, *supra* note 64.

[107] UNDRIP, *supra* note 43, art. 26(1).

[108] *Id.* art. 26(2).

[109] *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71 (Aug. 31, 2001).

[110] *Id.* ¶¶ 149, 151. The Inter-American Court of Human Rights did not base its decision on customary international law; that may have been considered beyond its remit. Nonetheless, "such a radical re-interpretation of the treaty can only be based on a significant shift in the normative expectations of the states . . . found in the same material that has been adduced to prove customary international law: pertinent state practice and *opinio juris*." Weissner, *supra* note 75, at 137.

[111] Ctr. for Minority Rights Dev. *ex rel.* Endorois Welfare Council v. Kenya, No. 276/2003, Decision, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 207 (Nov. 25, 2009), https://www.escr-net.org/sites/default/files/Endorois_Decision.pdf [https://perma.cc/U47K-QMKU] [hereinafter *Endorois Welfare Council*].

key component of this right. The African Commission in *Endorois Welfare Council* affirmed that "the members of indigenous peoples who have unwillingly lost possession of their lands . . . are entitled to restitution thereof or to obtain other lands of equal extension and quality."[112]

With respect to indigenous peoples, the right to land, territory, and resources is more than just a traditional property right in the sense of having the "exclusive absolute right to use, enjoy and dispose of a thing;" instead, it is a right possessing a spiritual or cultural purpose.[113] In other words, the right's purpose is to maintain the special link between an indigenous people and their traditional lands in order to preserve their distinct cultural identity.[114] It is also closely associated and entwined with their right to self-determination.[115] UNDRIP links them by stating that "[i]ndigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories."[116] The Inter-American Court of Human rights expressly linked the two rights, as well as the right to culture, in the *Awas Tingni* case by emphasizing that:

> [T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land [is] not merely a matter of possession and production but a material and spiritual element which they must fully enjoy . . . to preserve their cultural legacy and transmit it to future generations.[117]

Because the right to lands and resources is so closely tied to cultural, spiritual, and existential purposes, the right to land and resources must be developed on a case-by-case basis, depending on what is necessary to maintain the indigenous people's distinct identity and culture.[118] Thus, whereas one indigenous group may have a right to salmon as a result of its distinct identity and culture, another group may have a right to a different resource.

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[112] *Id.* at ¶ 209. In this case, the Commission did not conclude that the right to land existed as customary international law. However, after assessing a variety of sources of national and international law, it concluded that "[t]he encroachment is not proportionate to any public need and is not in accordance with national and international law." *Id.* ¶ 238 (emphasis omitted).

[113] Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 27.

[114] *Id.*

[115] *See* Int'l Law Ass'n, The Hague Conference, *supra* note 74, at 11; ANAYA, *supra* note 72, at 141. Anaya writes that "modern notions of cultural integrity, nondiscrimination, and self-determination join property precepts in the affirmation of sui generis indigenous land and resource rights." ANAYA, *supra* note 72, at 142.

[116] UNDRIP, *supra* note 43, art. 32(1).

[117] *Awas Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶ 149.

[118] Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 28.

For the same reason, the right to lands, territories, and resources should be interpreted broadly and consistent with the particular indigenous peoples' worldview and cultural identity.[119] In fact, the Inter-American Court of Human Rights has used this logic to conclude that "the cultural and economic survival of indigenous and tribal peoples, and their members, depend on their access and use of the natural resources in their territory," that this need to access and use natural resources is related to their culture, and that Article 21 of the American Convention protects their right to such natural resources.[120] Consequently, the court concluded:

> [M]embers of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. That is, the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.[121]

At the same time, the exact substance and extent of that right is not certain.[122] For example, the right to lands, territories, and resources traditionally possessed and controlled but no longer possessed and controlled is not clear.[123] Similarly, the right to resources on lands never possessed and controlled, par-

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[119] Int'l Law Ass'n, The Hague Conference, *supra* note 74, at 21.

[120] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 120. Article 21(1) of the American Convention on Human Rights establishes, inter alia, that "[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society." American Convention on Human Rights, *supra* note 62, art. 21(1).

[121] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 121 (footnote omitted). Consequently, the relevant state has the duty to protect indigenous people's right to use their lands in their traditional ways (i.e., hunting and fishing), and a prohibition on relocating them without their free, prior, and informed consent, as well as appropriate compensation. Lands taken from them without their free, prior, and informed consent should be returned, or as briefly discussed above, the state should provide some sort of restitution or compensation. Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 28.

[122] *See* Int'l Law Ass'n, The Hague Conference, *supra* note 74, at 47; Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 27 (stating that "the fact that indigenous peoples' land rights are protected by customary international law is not reasonably disputable as a matter of positive law").

[123] *See* Int'l Law Ass'n, The Hague Conference, *supra* note 74, at 21; Errico, *supra* note 93, at 754 ("[T]he Declaration does not specify what are exactly the resources which indigenous peoples have the right 'to own, use, develop and control.' Do they encompass sub-soil resources or are they rather to be understood merely as surface resources?").

ticularly in the marine environment, is not clear. In fact, an earlier draft of UNDRIP provided that "[i]ndigenous peoples have the right to own, develop, control and use the lands and territories, *including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources* which they have traditionally owned or otherwise occupied or used."[124] The final version omits reference to "*the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources*." Instead, it provides, in Article 26(1), that indigenous peoples have the right "to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[125] Moreover, Article 26(2) provides that indigenous peoples have the right "to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."[126] In other words, Article 26(1) provides a right to lands and resources currently and historically possessed or used; it does not provide a right to actually use and develop those resources.[127] Article 26(2) provides the right to use and develop resources, but only those presently possessed.[128]

The available *travaux préparatoires* does not shed light on the reasons for (1) the omission of the italicized draft text above and, thus, whether marine resources are included within the right, or (2) the distinction that is made in Articles 26(1) and 26(2) and, thus, whether indigenous peoples have rights to use resources that they do not possess or have otherwise acquired. The omission in Article 26(1) of the phrase "*the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources*" could indicate that negotiators considered reference to specific resources unnecessary because the term "resources" encompasses the resources included in the deleted list or, in contrast, that they wanted to exclude certain resources.[129]

For two reasons, however, it seems more likely that the negotiators wanted to exclude certain resources. First, Article 25 refers to the right of indigenous peoples "to maintain and strengthen their distinctive spiritual relationship

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[124] Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, art. 26, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Apr. 20, 1994) [hereinafter Draft Declaration on the Rights of Indigenous Peoples] (emphasis added).

[125] UNDRIP, *supra* note 43, art. 26(1). The final text of Article 26(1) provides, in full, that "[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." *Id.*

[126] *Id.* art. 26(2).

[127] *See* Jérémie Gilbert & Cathal Doyle, *A New Dawn over the Land: Shedding Light on Collective Ownership and Consent*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 289, 298 (Stephen Allen & Alexandra Xanthaki eds., 2011).

[128] *See id.*

[129] *Compare* UNDRIP, *supra* note 43, art. 26(1), *with* Draft Declaration on the Rights of Indigenous Peoples, *supra* note 124, art. 26.

with their traditionally owned or otherwise occupied and used lands, territories, *waters and coastal seas* and other resources and to uphold their responsibilities to future generations in this regard."[130] It seems unlikely that they would retain language referencing coastal resources in one provision while expressly excluding a similar phrase elsewhere unless they intended some distinction. The principle *expressio unius est exclusio alterius* directs treaty interpreters to exclude an item when that item is not expressly included;[131] this canon of interpretation seems particularly apt when that item is expressly mentioned elsewhere.[132]

Second, some state negotiators generally worried about potential overly broad interpretations of the phrase "other resources, which [indigenous people] have traditionally owned or otherwise occupied or used." The United States, for example, expressed concern that the language was too broad and could be construed to give ownership to indigenous people of land currently owned by non-indigenous people.[133] Similarly, other governments, including Russia and Canada, wanted to ensure that Article 26 was interpreted so as not to force the eviction of those currently occupying the land.[134] While these concerns did not speak directly to the issue of marine resources, they show that some state negotiators sought to narrow the scope of Article 26.

Nonetheless, Article 26(1) refers to the right to lands, territories, and resources that indigenous peoples have traditionally owned, occupied, or "otherwise used."[135] The phrase "otherwise used," when used in reference to resources, could apply—and arguably should apply—to coastal resources since those resources have been important to a large number of indigenous peoples. Moreover, if the use of a marine resource is at the core of a peoples' culture, then the right to that resource could reasonably be within an indigenous peoples' rights to resources, culture, and self-determination. At the same time, Article 26(1) does not speak to a right to use such resources—only a right to the resources. This distinction is significant because Article 26(2) only recognizes

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[130] UNDRIP, *supra* note 43, art. 25 (emphasis added).

[131] OPPENHEIM'S INTERNATIONAL LAW 1279–80 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). The phrase *expressio unius est exclusio alterius* means when one or more things of a class are expressly mentioned, others of the same class are excluded. *Expressio uniusest exclusion alterius,* BLACK'S LAW DICTIONARY (10th ed. 2014).

[132] *See* UNDRIP, *supra* note 43, art. 46.

[133] Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, ¶ 99, U.N. Doc. E/CN.4/2000/84 (Dec. 6, 1999).

[134] *Id.* at ¶ 110 (stating that Russia wanted to ensure that "the relevant articles on land should not lead to an infringement on the State or an encroachment upon peoples already living on the land"); Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session, at 54, U.N. Doc. E/CN E/CN.4/2006/79 (Mar. 22, 2006) (stating that Canada wanted Article 26 to "tak[e] into account *present* and *historical* circumstances") (emphasis added).

[135] *See* UNDRIP, *supra* note 43, art. 26(1).

a right to the right to own, use, develop, and control lands, territories, and resources that are currently possessed or otherwise acquired.[136]

In light of these opposing arguments, and with no clear statement on the matter, it is not possible at this time to say with any certainty whether indigenous peoples have the right to use resources, including those in the marine environment, beyond their lands and territories.[137]

As with the right to self-determination, the right to lands, territories, and resources is not absolute. For example, UNDRIP allows military activities to take place on the lands and territories of indigenous peoples provided those activities are "justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned."[138] The American Convention declares that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."[139] In addition, indigenous peoples may not have rights to subsurface minerals.[140] After reviewing the drafting history of UNDRIP, one observer has concluded that "it is believed that there is indeed very little room left for arguing that the Declaration differentiates itself from the general practice denying indigenous peoples control over subsoil resources."[141]

The American Convention also limits the right to lands, territories, and resources by granting indigenous peoples and others the right to use and enjoy property but also stating that the "law may subordinate such use and enjoyment to the interest of society."[142] The Inter-American Court of Human Rights

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[136] UNDRIP, *supra* note 43, art. 26(2).

[137] Presumably one distinction UNDRIP seeks to make is whether lands must be returned to indigenous peoples that they do not currently possess or whether restitution is required. *See* UNDRIP, *supra* note 43, art. 27–28.

[138] *Id.* art. 30(1).

[139] American Convention, *supra* note 62, art. 21(2).

[140] In Latin America, the rights to subsurface resources typically belong to the state. *See* Osvaldo Kreimer, *Report of the Rapporteur*, at 15, Permanent Council of the Org. of Am. States, OEA/Ser.K/XVI (Feb. 20, 2003), http://www.oas.org/consejo/cajp/docs/cp10830e04.doc [https://perma.cc/87U5-ZLU2]. Anaya writes that Articles 14 and 15 of ILO 169, while affirming indigenous peoples' right to land and resources, "falls short of upholding rights to mineral or subsurface resources in cases in which the state generally retains ownership of those resources." ANAYA, *supra* note 72, at 143; *see also* Gaetano Pentassuglia, *Towards a Jurisprudential Articulation of Indigenous Land Rights*, 22 EUR. J. INT'L L. 165, 169 (2011) (stating that under UNDRIP, "the crucial question of natural (sub-surface) resources has been left essentially unresolved"). Nonetheless, he says, they should be granted such rights when those rights are granted to other landowners. *See* ANAYA, *supra* note 72, at 143.

[141] Stefania Errico, *The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 329, 340–41 (Stephen Allen & Alexandra Xanthaki eds., 2011). Errico later concludes that UNDRIP "encounters a major limitation with regard to subsoil resources, as States normally retain ownership of such resources." *Id.* at 365.

[142] American Convention on Human Rights, *supra* note 62, art. 21(1).

has explicitly said that the right to property and resources found in the American Convention "should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within [indigenous or tribal] territory."[143] Thus, the court has held that:

> [I]n accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.[144]

The Inter-American Court of Human Rights has explained that the necessity of legally established restrictions depends on whether they are designed to satisfy "an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose."[145] In addition, proportionality "is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right."[146] Lastly, the restrictions "must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right."[147]

Moreover, when a restriction affects indigenous peoples, it must "not deny their survival as a tribal people."[148] The acceptability of such restrictions also depends on whether indigenous peoples or other minority groups have had a chance to participate in the decision-making process.[149] As the Inter-American Court of Human Rights has explained, "consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement."[150]

It is clear the right to lands, territories, and resources is customary international law and the right is not absolute. Nonetheless, it is not clear precisely what the test is for interfering with the right. As described in this Section, the Inter-American Court of Human Rights has a well-developed jurisprudence in

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[143] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 126.

[144] *Id.* ¶ 127.

[145] Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 145 (June 17, 2005).

[146] *Id.*

[147] *Id.*

[148] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 128.

[149] *See id.* ¶ 130; UNDRIP, *supra* note 43, art. 32(2) ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.").

[150] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 133.

this area. Because the ICCPR does not have a right to property or a right to land, the Human Rights Committee has not developed a test specifically addressing this issue. Nonetheless, in the context of the right to cultural integrity, which the Committee has stated does encompass a right to land for indigenous peoples, the Committee has stated that restrictions must be subject to "reasonable and objective justification."[151] Moreover, there is widespread support for requiring the participation of indigenous peoples in decisions that affect their right to land, territory, and resources even if the precise terms for participation are not universally agreed upon.[152]

D. The Right to Cultural Integrity

The right to cultural integrity has achieved international customary law status.[153] The right to cultural integrity is found in many important international documents, including Article 27 of the ICCPR.[154] ILO Convention 169 and UNDRIP also include provisions relating to cultural integrity and the protection of indigenous culture more generally.[155] Principle 22 of the Rio Declaration,[156] Article 8(j) of the Convention on Biological Diversity,[157] and Articles 18(l) and 16(g) of the Desertification Convention[158] all refer to the idea of cultural integrity.[159]

1. The Scope of the Right to Cultural Integrity

Human rights commissions and courts have concluded that the right to cultural integrity is not only customary international law but an essential aspect of protecting indigenous rights. For example, the Inter-American Commission

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[151] Lovelace v. Canada, Human Rights Committee, Comm. No. R.6/24, ¶¶ 16–17, U.N. Doc. A/36/40 (1981).

[152] For a discussion of effective participation, see Pentassuglia, *supra* note 140, at 169, 176, 178, and Errico, *supra* note 141, at 357–63 (discussing different perspectives on whether a state must obtain consent or engage in consultation).

[153] *See* ANAYA, *supra* note 72, at 98.

[154] *See* ICCPR, *supra* note 59, art. 27.

[155] *See* ILO Convention 169, *supra* note 42, art. 23; UNDRIP, *supra* note 43, art. 11; *see also* Anaya, *The Move Toward the Multicultural State*, *supra* note 73, at 23 (discussing the rights the ILO Convention 169 grants indigenous peoples).

[156] *See* U.N Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I, princ. 22 (Aug. 12, 1992).

[157] *See* Convention on Biological Diversity art. 8(j), June 5, 1992, 1760 U.N.T.S 79 (entered into force Dec. 29, 1993).

[158] *See* United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, *adopted* June 17, 1994, 1954 U.N.T.S. 3 (entered into force Dec. 26, 1996).

[159] *See generally* Cherie Metcalf, *Indigenous Rights and the Environment: Evolving International Law*, 35 OTTAWA L. REV. 101, 107–11 (2003) (discussing how each of these international conventions and declarations imply the international customary law of cultural integrity).

on Human Rights (Commission) held in *Coulter v. Brazil* (the *Yanomami* case) that Brazil violated Article 27 of the ICCPR, which grants "special protection on [indigenous people's] use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity," even though Brazil was not a signatory at the time of the decision.[160] In reviewing the facts, the Commission found that after Brazil approved a highway through Yanomami territory, geologists, mining prospectors, and farm workers settled in Yanomami territory, resulting in the Yanomami losing lands; they also introduced measles, tuberculosis, and influenza, among other threats to the Yanomami.[161] In addition, many Yanomami who lived near the highway abandoned their villages and became beggars or prostitutes.[162] While taking into account ICCPR Article 27, the Commission concluded that Brazil violated a number of rights included in the American Declaration of the Rights and Duties of Man[163] closely associated with the right to cultural integrity: the right to life, liberty, and personal security; the right to residence and movement; and the right to the preservation of health and well-being.[164]

Other cases show how the right to cultural integrity relates to the right to lands and resources. For example, in *Ominayak v. Canada*, the Human Rights Committee interpreted ICCPR Article 27 as applicable to those "economic and social activities" relied on by the Lubicon Lake Band of Cree Indians as a group.[165] Chief Ominayak of the Lubicon Lake Band claimed that Canada violated ICCPR Article 27 by leasing virtually all of the traditional Lubicon land for oil and gas exploration, a pulp mill, and associated timber harvesting, thus precluding fishing and hunting that the Lubicon people relied on for their livelihood.[166] In an opaque conclusion, the Committee stated that "[h]istorical inequities . . . and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue."[167] The Committee never stated, however, what constituted "historical inequities." Whether these inequities related to the failure to designate a reserve for the Lubicon Lake Band, the allowance of oil and gas

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[160] Coulter v. Brazil (*Yanomami Case*), No. 7615, Inter-Am. Comm'n H.R., Resolution. No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1, "Considering," ¶ 7 (1985).

[161] *Id.* ¶¶ 10(a)–(b).

[162] *Id.* ¶ 10(c).

[163] American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.22, doc. 21, rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1, at 17.

[164] *See Yanomami Case*, No. 7615, Inter-Am. Comm'n H.R. ¶¶ 1, 7.

[165] Ominayak v. Canada, Human Rights Committee, Comm. No. 167/1984, ¶ 32.2, U.N. Doc. No. CCPR/C/38/D/167/1984 (1990).

[166] *Id.* ¶ 27.4.

[167] *Id.* ¶ 33.

exploration, or the operation of the pulp mill with its associated timber harvesting is simply left unsaid.[168] Nonetheless, the Committee tied these inequities and developments to threats to the band's way of life, which included fishing and hunting.

The Human Rights Committee subsequently interpreted "culture" in the context of ICCPR Article 27 consistently with its view of the *Ominayak* case, that culture and land are entwined:

> [C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, [e]specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[169]

In *Länsman v. Finland*, the Human Rights Committee applied the right to cultural integrity and balanced the Sami's traditional and modernized access to resources with Finland's right to economic growth.[170] Finland allowed quarrying of stone and transportation of that stone through reindeer herding territory.[171] In keeping with the broad interpretation of "culture" articulated above, the Human Rights Committee concluded that Article 27 "does not only protect *traditional* means of livelihood of national minorities;" it also covers traditional activities modified with modern technology.[172]

2. Limits to the Right to Cultural Integrity

As with the right to self-determination and the right to lands, territories, and resources, the right to culture is not absolute. In *Lovelace v. Canada*, the Committee concluded that Canada's rationale for excluding an individual from

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[168] *See* Dominic McGoldrick, *Canadian Indians, Cultural Rights, and the Human Rights Committee*, 40 INT'L & COMP. L.Q. 658, 666 (1991) (stating that "[p]resumably the inequity lay in" not granting the band a reservation consistent with Canadian law, and that "'more recent developments'" likely referred to the issuance of leases for oil and gas exploration but that it is unclear whether it relates to the pulp mill and timber harvesting).

[169] Human Rights Comm., *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994) (footnote omitted). Paragraph 7, from which this quotation derives, specifically references *Ominayak* in a footnote. *See id.* ¶ 7 n.5.

[170] Länsman v. Finland, Human Rights Committee, Comm. No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994).

[171] *See id.* ¶ 3.1.

[172] *Id.* ¶ 9.3.

her indigenous group violated ICCPR Article 27.[173] Sandra Lovelace married a non-Indian and lost her status as a member of the Tobique band; consequently, the Indian Act of Canada prevented her from living on the Tobique Reserve.[174] The Human Rights Committee found that Lovelace's right to access her native culture and language "in community with the other members" of her group had been interfered with because the community of Indians belonging to the Tobique Reserve did not exist elsewhere.[175] Nonetheless, the Committee declared that "not every interference can be regarded as a denial of rights within the meaning of article 27."[176] Restrictions based on "reasonable and objective justification" may be consistent with Article 27's right to cultural integrity.[177] The Committee concluded that the Indian Act, which prevented Lovelace from belonging to and residing with the band, was not reasonable or necessary to preserve the identity of the tribe as a whole; it was "an unjustifiable denial of her rights."[178] Thus, Canada violated Article 27.[179]

The Human Rights Committee came to a similar conclusion in *Länsman*. In *Länsman*, the Committee stated that an activity or measure that denies a minority group its right to culture violates the right; however, "measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27."[180] The Committee agreed that the Sami represented a minority group within the scope of Article 27 and that reindeer husbandry constituted an essential element of Sami culture.[181] The Committee then asked whether the impact of the quarry was "so substantial" that it effectively denied the Sami the right to their culture[182] and concluded that the quarrying that had taken place did not deny the Sami their rights.[183] The Committee noted that the quarrying "does not appear to have . . . adversely affected" reindeer herding.[184] The Committee also noted that the Sami reindeer husbandry association had been consulted and helped frame restrictions on the quarrying activities.[185]

[173] *See Lovelace v. Canada*, Comm. No. R.6/24, ¶¶ 16–17.
[174] *Id.* ¶¶ 9.6, 15.
[175] *Id.* ¶ 15 (internal quotation marks omitted).
[176] *Id.*
[177] *Id.* ¶ 16.
[178] *Id.* ¶ 17.
[179] *Id.* ¶¶ 17, 19.
[180] *Länsman v. Finland*, Comm. No. 511/1992, ¶ 9.4.
[181] *Id.* ¶ 9.2.
[182] *Id.* ¶ 9.5.
[183] *Id.* ¶ 9.6.
[184] *Id.*
[185] *Id.* ¶¶ 9.5–.6.

The Committee came to its conclusion by balancing the "essential" nature of the cultural activity against the impacts of the state's economic activity.[186] The Committee did not explain how important the state's interest needed to be, but rather focused on the economic activity's impact on the cultural activity.[187] However, the Committee did caution that future quarrying or other "economic activities must . . . be carried out in a way that the [Sami people] continue to benefit from reindeer husbandry" and a larger scale operation could violate Article 27.[188] *Länsman* illustrates that the principle of cultural integrity is not absolute and can be balanced with the interests of society and the state.[189] A state may interfere with the exercise of the right up to a certain point as long as it is justified in doing so.

The Committee in *Kitok v. Sweden* was also asked to investigate the impact of restrictions on the right to culture.[190] In this case, Kitok claimed he was denied membership to the Sami village and re-entry into reindeer husbandry, and therefore denied the right to enjoy his culture in Sweden because Swedish legislation subjected re-entry into reindeer husbandry to a vote by the village.[191] The Human Rights Committee concluded that Kitok's right to enjoy his culture was not violated because the legislation was designed to protect and sustain the Sami's cultural practice of reindeer herding as a whole by limiting the number of individuals engaged in the practice.[192] The Committee, relying on *Lovelace*, stated that "a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority *as a whole*."[193] Because the legislation limiting the number of reindeer herders was necessary "to ensure the future of reindeer breeding and the livelihood of those for whom reindeer farming is the primary source of income,"[194] and because

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[186] *See id.* at ¶¶ 9.4–.6. The Committee stated that "[a] state may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27." *Id.* ¶ 9.4.

[187] *See id.* ¶ 9.4 (stating that "measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27").

[188] *Id.* ¶ 9.8.

[189] *See* Anaya, *The Move Toward the Multicultural State*, *supra* note 73, at 30 (stating that the Human Rights Committee in *Länsman* "instructed that rights of cultural integrity are not absolute when confronted with the interests of society as a whole").

[190] Kitok v. Sweden, Human Rights Committee, Comm. No. 197/1985, ¶ 4.2, U.N. Doc. CCPR/C/33/D/197/1985 (July 27, 1988).

[191] *Id.* ¶¶ 2.1–.2, 4.1.

[192] *Id.* ¶ 4.2.

[193] *Id.* ¶ 9.8 (emphasis added).

[194] *Id.* ¶ 9.5. The Committee stated in full:

> According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective

Kitok could graze his reindeer, although not as of right, the Committee found no violation of ICCPR Article 27.[195]

As with the right to self-determination and the right to lands, territories, and resources, participation and consultation in the decision-making process is an important element for determining whether a state is upholding the right to culture. In *Mahuika v. New Zealand*,[196] New Zealand enacted the Treaty of Waitangi (Fisheries Claims) Settlement Act that limited the rights of the Maori tribe "to enjoy their own culture."[197] The act affected the various ways the Maori could engage in commercial and non-commercial fishing, a fundamental feature of Maori culture and religion.[198] The Human Rights Committee ruled that although the act affected the rights of the Maori tribe, New Zealand's actions were compatible with ICCPR Article 27 because New Zealand engaged in a consultation process that included the Maori and paid special attention to their cultural and religious relationship to fishing.[199] This case illustrates that when indigenous people are included in the consultation and legislation process, a state can avoid violating Article 27 despite limiting the indigenous group's rights.[200]

The cases above demonstrate that the Human Rights Committee and courts use some sort of balancing test or impact analysis to decide whether the right to cultural integrity has been upheld. Although they do not explicitly state that they are employing a balancing test or impact analysis, each case refer-

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> measures are required to ensure the future of reindeer breeding and the livelihood of those for whom reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

Id. The Committee had "grave doubts" as to the criteria for determining whether an individual could be a member of the Sami community, stating that criteria "may have been disproportionate to the legitimate ends sought by the legislation." *Id.* ¶¶ 9.6–.7. Nonetheless, the Committee found no violation of Article 27. *Id.* ¶¶ 9.6–.8.

[195] *Id.* ¶ 9.8.

[196] Mahuika v. New Zealand, Human Rights Committee, Comm. No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 16, 2000).

[197] *Id.* ¶¶ 6.1, 9.5.

[198] *Id.* ¶¶ 8.2, 9.4.

[199] *Id.* ¶ 9.8.

[200] *See id.* Although here some of the Maori did participate in the settlement and consultation process, the Committee concluded that because the state simply engaged

> itself in the process of broad consultation before proceeding to legislate, and [paid] specific attention to the sustainability of Maori fishing activities, [the state had] taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, [were] compatible with article 27.

Id. This engagement in the consultation process was enough to ensure compliance with Article 27 ICCPR. *Id.*

ences the essential nature of the indigenous peoples' interest, the state's legislative purpose, and the extent of the adverse impact on the rights of indigenous peoples. When an individual's essential cultural interest is at stake, the test assesses whether the restrictions on that person's right "have a reasonable and objective justification and [are] necessary for the continued viability and welfare of the minority as a whole."[201] However, the test varies when the entire group's interests are at stake. When a state consults with indigenous people and pays close attention to an indigenous group's activities, the balance may tip in favor of the state.[202] The state's actions perhaps look more reasonable if undertaken with the participation of the affected indigenous community. Also, when the state presents a reasonable and objective justification to limit indigenous access to resources, the state's actions do not violate the right to cultural integrity under ICCPR Article 27.[203] For example, when the state has an interest in economic development and the restriction on the indigenous group's access to resources is minimal, the state does not violate Article 27.[204] However, if the economic development continues and escalates, the restriction might violate ICCPR Article 27.[205]

III. The Implementation of Human Rights by International Organizations

As described in the previous Section, the rights to lands, territories, and resources, and to cultural identity are all customary international law, and the right to self-determination as it relates to indigenous peoples may already be customary international law. Yet, questions remain as to whether these rights must be embodied in the rules of international organizations such as the IWC. As noted, the right to lands, territories, and resources does not clearly apply to the marine environment and to marine resources. Even assuming it does, a separate question is whether an international organization such as the IWC has a responsibility to implement these rights.

The law on this subject is far from clear. The first issue is whether an international organization such as the IWC has a *direct* responsibility to implement human rights and other relevant international law because it has international legal personality, or whether it has an *indirect* responsibility to do so because the state parties in their individual capacities have the duty to act con-

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[201] *Kitok v. Sweden*, Comm. No. 197/1985, ¶ 9.8; *see also Lovelace v. Canada*, Comm. No. R.6/24, ¶ 16.

[202] *See Mahuika v. New Zealand*, Comm. No. 547/1993, ¶ 9.8. Here, the state's actions maintained the viability and welfare of the minority group as a whole because it still granted them some fishing rights. *See id.*

[203] *See Länsman v. Finland*, Comm. No. 511/1992, ¶¶ 9.1–.8.

[204] *See id.* ¶ 9.5.

[205] *See id.* ¶¶ 9.7–.8.

sistently with human rights and other international law when participating in an international organization. For the purpose of establishing whether a duty to implement these human rights exists, the distinction between a direct and indirect duty is irrelevant. If the international organization has a direct duty, then states acting collectively must ensure the behavior of the international organization conforms to relevant international law. If the duty is indirect, then the individual states must ensure that their decisions and actions taken within an international organization conform to relevant law. In either case, a state must ensure it acts consistently with international law. Whether the duty falls on the international organization directly or indirectly is relevant only to the extent that a remedy is sought for noncompliance; if the duty belongs to the state, then another state may challenge noncompliance at the International Court of Justice (ICJ) or in other fora.[206] If the duty belongs directly to the IWC as an international organization, then a remedy may not exist since the IWC and other international organizations are not subject to the jurisdiction of the ICJ and other international adjudicatory or compliance fora.

The second issue relates to which international law an international organization must implement. Scholars have used several different theories to claim that treaty law and customary international law may or may not apply directly or indirectly to international organizations. Scholars and the International Law Commission mostly agree, with some exceptions, that treaty law does *not* apply directly or indirectly to international organizations.[207] On the question of whether customary international law and general principles of law bind international organizations, answers vary from "yes, maybe, sometimes, and always."[208]

As to the first issue, this Section concludes that an international organization, either directly or indirectly, has a duty to implement customary international law. As to the second issue, this Section concludes that international organizations must always implement jus cogens norms as these obligations are nonderogable. They must also implement relevant customary international law; however, states may opt out of non-jus cogens norms when establishing the international organization or through the decision-making processes of an international organization.

[206] For example, the compulsory dispute settlement provisions of the U.N. Convention on the Law of the Sea. United Nations Convention on the Law of the Sea arts. 279–99, Dec. 10, 1982, 1833 U.N.T.S 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS], http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm [https://perma.cc/SA2C-3WGL].

[207] *See infra* Section III(A).

[208] Kristina Daugirdas, *How and Why International Law Binds International Organizations* 13 (Jean Monnet Ctr. for Int'l & Reg'l Econ. Law & Justice, Working Paper No. 16/15, 2015).

A. The Applicability of Customary International Law to International Organizations Such as the IWC

Most international scholars as well as important international law commissions believe that customary international law is binding on international organizations like the IWC.[209] One international law treatise posits that "international custom will apply as much to international organizations as it does to states."[210] The idea appears to have taken root in dicta of the ICJ. In an Advisory Opinion, the ICJ said that "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreement to which they are parties."[211]

Yet, the ICJ did not explain the legal basis for this statement, define "general rules of international law," or describe when such rules are "incumbent" upon international organizations.[212] As one scholar noted, the ICJ's "one sentence hardly settles the matter. Not only is the ICJ's opinion devoid of reasoning and unsupported by state practice, but the ICJ's precise legal conclusion is unclear."[213] Consequently, "significant disagreement and uncertainty persists about which international law rules bind [international organizations] and which they are legally free to ignore."[214]

Nonetheless, two legal theories explain how, at least with respect to customary international law, international organizations are bound, directly or indi-

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[209] *See, e.g.*, Günther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 AM. J. INT'L L. 642, 657–58 (1998); August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 37, 82 (Philip Alston ed., 2005) (stating that "the basic idea that [international organizations] may be directly obliged under international law to respect human rights no longer meets major objections as a matter of principle").

[210] HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW § 1579 (5th rev. ed. 2011).

[211] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, ¶ 37 (Dec. 20).

[212] *See id.*

[213] Daugirdas, *supra* note 208, at 4 (footnote omitted). Another scholar opined: "[T]he discipline may claim, following the ICJ in 1980, that international organizations are subjects of international law, and thus also subject to international law, but it remains unclear which international law, and why: there is no plausible theory of obligation." Jan Klabbers, *The Paradox of International Institutional Law*, 5 INT'L ORG. L. REV. 1, 15 (2008) (footnote omitted).

[214] Daugirdas, *supra* note 208, at 4. Despite stating that customary international law binds international organizations, Schermers and Blokker also acknowledge the following questions:

> What is the legal basis for applying customary law to international organizations? Are specific rules of customary law—which have generally been developed on the basis of the practice and *opinio juris* of states—suitable to be applied to international organizations? To what extent is it relevant that international organizations so far have been rather reticent in accepting obligations under customary law?

SCHERMERS & BLOKKER, *supra* note 210, § 1579.

rectly, by international law. First, Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that treaties should be interpreted in light of "[a]ny relevant rules of international law applicable in the relations between the parties."[215] As noted by Sir Ian Sinclair, a negotiator of the Vienna Convention, "[i]t would seem logical to take into account, in interpreting a treaty, the state of international law at the time of its conclusion."[216] The ICJ has supported this view, noting that the court's interpretation of a treaty "cannot remain unaffected by subsequent development of law, through the Charter of the United Nations and by way of customary law."[217] Consequently, if a treaty must be interpreted in light of subsequent customary international law, then a treaty like the ICRW would need to be interpreted in light of that law. Individual countries, either acting as a member of an international organization or in their individual capacities, must interpret their treaty obligations consistently with these norms.

Second, scholars have more or less agreed that states should not be allowed to undertake actions through international organizations that they are not allowed to take within their own territories.[218] This basic premise has widespread support. As the International Law Commission has said, "[t]he essential principle is that a State should not be able to do through another what it could not do itself."[219]

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[215] Vienna Convention, *supra* note 35, art. 31(3)(c).

[216] IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 139 (2d ed. 1984).

[217] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21); *see also* Case Concerning the Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 112 ("By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.").

[218] This theory differs significantly from Mennecke's. Whereas Mennecke wants the ICRW and its terms, such as "local consumption" and "subsistence," to be interpreted in light of human rights law, the reasoning of most scholars makes human rights norms that have attained the status of customary international law binding on the IWC directly or through its member states. Mennecke, *supra* note 14.

[219] Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 17 cmt. 8, U.N. Doc. A/56/10 (2001); s*ee also* Chris Wold et al., *Bringing Southern Bluefin Tuna Back from the Brink: Enhancing Understanding of the Scientific Process in the Western and Central Pacific Fisheries Commission*, 42 B.C. ENVTL. AFF. L. REV. 347 (2015) (stating that members of the Western and Central Pacific Fisheries Commission have a responsibility to undertake obligations directed at "contracting parties" when acting as a member of the commission). In the specific context of human rights, two scholars have written that "States cannot simply avoid international human rights law by bringing to life an international organization and charging it with tasks that would violate human rights standards if undertaken by the members of that organization themselves." Daniel Halberstam & Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13, 21 (2009); *see also* August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOBAL GOVERNANCE 131, 143 (2001) ("Stated less politely, one could say that states should not be allowed to escape their human rights obligations by forming an international or-

Because of these two legal theories, this report does not need to determine whether customary international law binds international organizations directly or indirectly. Both theories support the view that customary international law binds the actions of states participating in an international organization.

B. The Customary International Law that Binds International Organizations

Two general forms of customary international law exist: jus cogens and non-jus cogens customary international law. Jus cogens customary international law binds international organizations (directly or indirectly) all the time because jus cogens norms are nonderogable. As the International Law Commission has said, jus cogens norms, also known as peremptory norms, must bind international organizations because "it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organization."[220] In fact, the Vienna Convention on the Law of Treaties declares that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[221] It also states that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[222] In light of these provisions, the International Law Commission has stated that "[i]f United Nations Member States are unable to draw up valid agreements in dissonance with jus cogens, they must also be unable to vest an international organization with the power to go against peremptory norms."[223]

Non-jus cogens customary international law, however, may or may not bind international organizations. The default rule is that these norms bind international organizations.[224] However, states are allowed to create treaties, including treaties that establish international organizations, that contain provi-

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ganization to do the 'dirty work.'"); Gabriele Porretto & Sylvain Vité, *The Application of International Humanitarian Law and Human Rights Law to International Organisations* 7 (Centre Universitaire de Droit International Humanitaire Research Paper Series, Paper No. 1, 2006) (stating that "[c]oncluding that these [humanitarian and humans rights] regimes are inapplicable to the activities of international organizations would equate to creating a legal void manifesting itself in the absence of any protection for the population concerned").

[220] *Report of the International Law Commission on the Work of its 34th Session*, [1982] 2 Y.B. Int'l L. Comm'n, art. 53 cmt. 2, U.N. Doc. A/CN.4/SER.A/1982/Add.1.

[221] Vienna Convention, *supra* note 35, art. 53.

[222] *Id.* art. 64.

[223] Martti Koskenniemi, Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 346, UN Doc. A/CN.4/L.682 (Apr. 13, 2006) (emphasis omitted); *see also* Daugirdas, *supra* note 208, at 27 (stating that "it is perfectly clear that states cannot enter into treaties that violate jus cogens norms. Jus cogens norms bind [international organizations] because states cannot, by treaty, establish [international organizations] that are authorized to violate jus cogens norms") (emphasis omitted) (footnote omitted).

[224] Daugirdas, *supra* note 208, at 5.

sions that differ from non-jus cogens customary international law. The ICJ has concluded, for example, that "it is well understood that . . . rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties."[225] Others note that "a rule established by agreement supersedes for them a prior inconsistent rule of customary international law."[226] In fact, "[m]odification of customary law by agreement is not uncommon."[227] The U.N. Convention on the Law of the Sea, for example, allows coastal states the right to designate an exclusive economic zone in which the coastal state has sovereign rights to natural resources up to 200 nautical miles from the coast.[228] These provisions superseded customary international law that made resources beyond twelve nautical miles from a coast part of the global commons and not subject to sovereign rights.[229]

Thus, international organizations normally will be bound by non-jus cogens customary international law. However, they may "opt out" or, stated differently, "contract around" such law.[230] This could occur when a treaty is drafted or when an international organization creates rules for itself. In the case of an international organization like the IWC, the establishment of binding regulations would be the strongest way to opt out of non-jus cogens customary law, if so desired.

C. The Non-Applicability of Treaty Law to International Organizations

For at least two reasons, obligations found in human rights treaties (or other treaties) that have not become customary international law do not bind international organizations.[231] First, such treaty law does not apply directly to international organizations because they have not consented to be bound by those treaties. Second, such treaty law does not apply indirectly to international organizations through the obligations of the member states because this would create de facto obligations on those states that have joined the international organization but have not consented to be bound by the human rights treaty;

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[225] North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 72 (Feb. 20). Similarly, the International Law Commission has stated the following: "That treaty rules enjoy priority over custom is merely an incident of the fact that most of general international law is *jus dispositivum* so that parties are entitled to derogate from it by establishing specific rights or obligations to govern their behaviour." Koskenniemi, *supra* note 223, ¶ 79.

[226] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. j (AM. LAW INST. 1987).

[227] *Id.* § 102 n.4.

[228] UNCLOS, *supra* note 206, arts. 56–57.

[229] *See* R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 8–10 (2nd ed. 1988) (noting that, prior to the recognition of 200-mile exclusive economic zones, the customary international law norm allowed only a three-mile or twelve-mile territorial sea).

[230] Daugirdas, *supra* note 208, at 5, 41.

[231] Much more can be said about why treaty obligations do not apply to international organizations. For a more detailed discussion, see Daugirdas, *supra* note 208, at 30–40, 53–58.

such an outcome is inconsistent with the Vienna Convention on the Law of Treaties.

International organizations are not bound directly by treaties as a matter of treaty law because treaties are binding only on those that have given their consent to be bound by the treaty. The Vienna Convention on the Law of Treaties provides that "[a] treaty does not create either obligations or rights for a third State without its consent."[232] Similarly, the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, although not in force, provides that "[a] treaty does not create either obligations or rights for a third . . . organization without the consent of that . . . organization."[233] Because international organizations such as the IWC are not typically parties to treaties, including human rights treaties, they are not bound by those treaties.[234]

Nonetheless, some scholars have written that treaty-based obligations can bind international organizations because the organizations are bound indirectly by their member states' treaty obligations.[235] Under this theory, a member state may not transfer to an international organization "more powers than those which it possesses."[236] Thus, if states are bound by certain treaty obligations, they may not create organizations that have the capacity to violate those obligations.[237]

This theory, however, violates the principle established in the Vienna Convention on the Law of Treaties that a state must consent to be bound by a treaty. Consider the situation of a state that has joined an international organization but has not consented to be bound by a treaty that other members of the international organization have ratified. If treaty obligations follow a state into the international organizations that it joins, then those treaty obligations also

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[232] Vienna Convention, *supra* note 35, art. 34.

[233] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations art. 34, *opened for signature* Mar. 21, 1986, 25 I.L.M. 543 (not yet in force).

[234] *See* Handl, *supra* note 209, at 659 (stating that, in the context of international organizations like multilateral development banks (MDBs) such as the World Bank, "any attempt at extending the reach of treaty provisions to MDBs raises the issue of 'third organizations': in respect of the banks, these [multilateral environmental agreements] represent *res inter alios acta* or, put differently, are not capable of binding the organization concerned without its consent").

[235] *See* Frédéric Mégret & Florian Hoffmann, *The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 318 (2003) (describing the position that the United Nations is bound by international human rights standards "as a result and to the extent that its members are bound").

[236] Olivier de Schutter, *Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility*, *in* ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANIZATIONS 51, 62 (Jan Wouters et al. eds., 2010).

[237] *Id.* at 62–63. At least one scholar has developed a new theory of international law development in an attempt to make certain principles of treaty law applicable to international organizations. *See, e.g.*, Handl, *supra* note 209, at 660–61.

implicitly bind other member states of the organization that have not consented to be bound by the treaty.[238]

Even if all the states to a new international organization are also party to a treaty, say Treaty Q, nothing prevents the member states from establishing rules inconsistent with those in Treaty Q. The Vienna Convention on the Law of Treaties states that "[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."[239] The International Law Commission has succinctly stated that "the parties to the earlier treaty are always competent to abrogate it, whether in whole or in part, by concluding another treaty with that object."[240]

IV. Implementation of Human Rights in the Context of Aboriginal Subsistence Whaling

The right to cultural integrity and the right to lands, territories, and resources are customary international law, and this Section assumes that the right to self-determination in the context of indigenous peoples is also customary international law. However, these rights are not jus cogens norms of customary international law.[241] As such, these rights bind the IWC unless the IWC members opt out of them through a regulation included in the schedule. Moreover, even if the IWC does not opt out of them, it can interfere with those rights without infringing them. As described below, the Human Rights Committee has allowed restrictions on the right to cultural integrity that are subject to a

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[238] In its commentary to draft article 24, the International Law Commission stated that "[t]he principle which the Vienna Convention lays down is only the expression of one of the fundamental consequences of consensuality. It has been adapted without difficulty to treaties to which one or more international organizations are parties." *Report of the International Law Commission on the Work of its 34th Session*, *supra* note 220, art. 24 cmt.

[239] Vienna Convention, *supra* note 35, art. 30(3). This provision assumes an irreconcilable conflict. In many cases, treaties can be reconciled. For example, Article XI of the General Agreement on Tariffs and Trade prohibits restrictions on the importation of goods. General Agreement on Tariffs and Trade art. XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. CITES prohibits trade for primarily commercial purposes in specimens of species included in Appendix I. CITES, *supra* note 7, art. 3(3)(c). While these provisions appear to conflict, they can be reconciled through the GATT's exception for measures "necessary to protect human, animal or plant life or health." *See* General Agreement on Tariffs and Trade, *supra* note, art. XX(b).

[240] Humphrey Waldock, *Third Report on the Law of Treaties*, [1964] 2 Y.B. Int'l L. Comm'n 38, art. 65 cmt. 14, U.N. Doc. No. A/CN.4/SER.A/1964/ADD.1.

[241] In two reports, the International Law Association never suggested that these rights are jus cogens norms. It did, however, state that the prohibition against genocide was a jus cogens norm and that a treaty is to be considered as extinguished only when a later incompatible norm is of jus cogens character. *See* Int'l Law Ass'n, The Hague Conference, *supra* note 74, at 51; Int'l Law Ass'n, Sofia Conference, *supra* note 65, at 17. Thus, it can be assumed the association's failure to identify any indigenous rights as jus cogens norms was not an oversight.

reasonable and objective justification. The Inter-American Human Rights Commission has allowed restrictions on the right to lands that are necessary, legitimate, and proportional.

The ICRW itself does not expressly or implicitly opt out of human rights norms or other customary international law norms. Neither does paragraph 13 of the schedule, which includes the basic framework for ASW, nor any other provision of the schedule.[242] The question, then, is whether the IWC's current approach to ASW is consistent with these human rights norms.

A. The IWC's ASW Decision-Making Process

The IWC manages ASW using a multi-step process incorporated in resolutions and the terms of reference for various committees. First, the Scientific Committee's Standing Working Group on Aboriginal Subsistence Whaling develops a strike limit algorithm[243] for a specific stock; using the specific algorithm, it evaluates proposed ASW strike limits based on the best scientific information available to determine whether the proposed strike limit will harm the stock.[244] Second, the Scientific Committee reviews the information provided by the Standing Working Group and advises the Commission on the proposed strike limits and, for Greenland, which seeks a tonnage of whale meat rather than a specific number of whales, determines how many tons of edible products can be obtained from an individual whale of a specific species.[245] Third, the IWC's Aboriginal Substance Whaling Sub-committee considers the Scientific Committee's report and reviews information on subsistence need provided by proponent governments.[246] Fourth, the ASW Sub-committee then makes its recommendation to the Commission in plenary session, which either accepts the proposed schedule amendment by consensus or moves to a vote.[247]

While the first two steps assess scientific factors only, the third and fourth steps take into account aboriginal subsistence need and other non-scientific factors. The terms of reference for the ASW Sub-committee direct it to:

> [C]onsider relevant information and documentation from the Scientific Committee, and to consider nutritional, subsistence and cultural needs relating to aboriginal subsistence whaling and the use of whales taken for such purposes, and to provide advice on the dependence of aboriginal

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[242] *See* ICRW, *supra* note 5; Schedule, *supra* note 5, ¶ 13.

[243] A Strike Limit Algorithm (SLA) represents a conservative approach to setting strike limits for each hunt and species. It assumes that all struck whales die, even though this might not be the case. *Scientific Advice on Aboriginal Subsistence Whaling*, INT'L WHALING COMMISSION, https://iwc.int/scientific-advice-on-aboriginal-subsistence-whalin [https://perma.cc/KJ2C-NKQN].

[244] Donovan, *supra* note 9, at 1–3.

[245] *Id.* at 2.

[246] *Id.* at 2 fig.1b.

[247] *Id.* at 4.

> communities on specific whale stocks to the Commission for its consideration and determination of appropriate management measures.[248]

While the terms of reference direct the ASW Sub-committee to consider need, no documents establish criteria for documenting need, except in the case of bowhead whales for indigenous groups in the United States. The 1979 Resolution on Bering Sea Bowhead Whales provides the following:

> The Commission intends that the needs of the aboriginals of the United States shall be determined by the Government of the United States of America. This need shall be documented annually to the Technical Committee, and shall be based upon the following factors:
> 1. importance of the bowhead in the traditional diet,
> 2. possible adverse effects of shifts to non-native foods,
> 3. availability and acceptability of other food sources,
> 4. historical take,
> 5. the integrative functions of the bowhead hunt in contemporary Eskimo society, and the risk to the community identity from an imposed restriction on native harvesting of the bowhead; and
> 6. to the extent possible, ecological considerations.[249]

In addition, the 1980 IWC Resolution on the Documentation of Aboriginal Need directed relevant IWC members to "document annually for the information of the Commission: the utilisation of the meat and products of any whales taken for aboriginal/subsistence purposes."[250] Although this 1980 resolution does not establish criteria for a need statement, either in terms of what a need statement should include or how it should be evaluated, the resolution does appear designed to require a justification of need.[251]

Since the adoption of these two resolutions, IWC members have developed a consistent practice of submitting a "need statement" on behalf of their relevant indigenous groups at least sixty days prior to an annual meeting of the

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[248] Int'l Whaling Comm'n, *Chairman's Report of the Forty-Ninth Annual Meeting*, 48 REP. INT'L WHALING COMMISSION 17, 31 (1998) (emphasis omitted).

[249] Int'l Whaling Comm'n, *Resolution of the International Whaling Commission 31st Annual Meeting, July 1979*, 30 ANN. REP. INT'L WHALING COMMISSION app. 4, at 35 (1980).

[250] Int'l Whaling Comm'n, *Resolution on the Documentation of Aboriginal Need*, *Chairman's Report of the Thirty-Second Annual Meeting*, 31 ANN. REP. INT'L WHALING COMMISSION app. 3, at 29 (1981).

[251] Greg Donovan, the Secretariat's Head of Science, has written that "this wording appears to relate more to the nature of use rather than a justification of need, despite the accompanying text in the Chairman's report." Donovan, *supra* note 9, at 3 n.2. That may be so, but the report specifically states that relevant governments "should document the needs," which indicates that the resolution was designed to require a justification of need. Int'l Whaling Comm'n, *Chairman's Report of the Thirty-Second Annual Meeting*, *supra* note 250, at 18.

IWC.[252] Without a need statement or some other mechanism to assess need, the IWC may not be able to take a decision concerning an ASW quota because paragraph 13 of the schedule allows an ASW quota "to satisfy aboriginal subsistence need."[253]

When ASW quotas are introduced in plenary sessions of the IWC for discussion and decision, an indigenous representative frequently introduces the issue formally by describing the cultural and subsistence needs of the group.[254] Representatives of indigenous groups may also take the floor as observers to comment on proposals.[255] After discussion, the members take a decision to approve an ASW quota, which requires a three-fourths majority vote.[256] ASW quotas are approved in six-year blocks.[257]

B. The IWC's Process Is Likely Sufficient to Implement the Human Rights Obligations of the IWC or Its Members

The IWC's decision-making process for ASW quotas is likely sufficient to implement the human rights obligations of the IWC or its member states. They either have "a reasonable and objective justification,"[258] as required by

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[252] *See* Int'l Whaling Comm'n, *Rules of Procedure and Financial Regulations as Amended by the Commission at the 66th Meeting*, § J(1) (2016), https://archive.iwc.int/pages/view.php?ref=3605&k= [https://perma.cc/F3XE-SD4M] [hereinafter Int'l Whaling Comm'n, *Rules of Procedure*]. The Rules of Procedure provide that:

> No item of business which involves amendment of the Schedule to the Convention, recommendations under Article VI of the Convention, or Resolutions of the Commission, shall be the subject of decisive action by the Commission unless the full draft text has been circulated to the Commissioners at least 60 days in advance of the meeting at which the matter is to be discussed.

Id.

[253] Schedule, *supra* note 5, ¶ 13(a).

[254] *See* Int'l Whaling Comm'n, *Chair's Report of the 65th Meeting*, *supra* note 30, at 8 & n.6 (noting that the term "Denmark (Greenland)" was used in the report when a Greenlandic representative on the Danish delegation intervened and reporting that the many comments made by a Greenlandic representative); Int'l Whaling Comm'n, *Chair's Report of the 64th Annual Meeting*, *supra* note 29, at 17 (reporting that Ane Hansen, Greenland's Minister of Fisheries, Hunting and Agriculture presented the background to Greenland's request for an ASW quota, which was followed by a statement from Leif Fontaine, Chairman of the Organisation of Fishermen and Hunters of Greenland) & 22 (reporting that Greenland's Minister of Fisheries, Hunting and Agriculture and the chairman of the Organisation of Fishermen and Hunters of Greenland introduced various aspects of Greenland's request for an ASW quota); Int'l Whaling Comm'n, *Chair's Report of the 62nd Annual Meeting*, *supra* note 26, at 17 (reporting that Greenland presented its request for an ASW quota to the IWC).

[255] *See, e.g.*, Int'l Whaling Comm'n, *Chair's Report of the 65th Meeting*, *supra* note 30, at 7, 11 (reporting the comments of the Alaska Eskimo Whaling Commission).

[256] ICRW, *supra* note 5, art. III(2) (requiring a three-fourths majority of those members voting to adopt amendments to the schedule).

[257] *See* Schedule, *supra* note 5, ¶ 13(b); *see also* Donovan, *supra* note 9, at 1.

[258] Lovelace v. Canada, Human Rights Committee, Comm. No. R.6/24, ¶ 16, U.N. Doc. A/36/40 (1981).

the Human Rights Committee, or are necessary, legitimate, and proportional, as required by the Inter-American Court of Human Rights.

1. IWC Management of ASW Generally and the Review of Strike Limits

The IWC is responsible for regulating whaling "to ensure proper and effective conservation and development of whale stocks"[259] and it may authorize regulations that "are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources."[260] The IWC has this responsibility and authority throughout "all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers."[261]

The importance of a single body to manage whale resources is apparent when the geographic range of whale species is considered. For example, the stock of bowhead whales hunted off West Greenland is shared with Canada, where some individuals are killed.[262] The North Pacific stock of gray whales hunted by Russian Chukotkans is found in Mexico, Russia, and the United States.[263] The Bering-Chukchi-Beaufort Seas stock of bowhead whale is shared between Russia and the United States.[264] Given the range of potential mortality vectors, such as chemical and noise pollution, entanglement, vessel strikes, disease, strandings, climate change, marine debris, and direct mortality from hunting, the conservation and management of whale stocks is best served by a single entity like the IWC.

From this perspective, management by the IWC and the review of strike limits by the Scientific Committee have both a reasonable and objective justification. Without such management and review, the IWC would have great difficulty meeting its duty to conserve and develop whale stocks. Moreover, these requirements do not deny indigenous peoples their means of survival. In fact, they can be viewed as means to ensure that indigenous peoples have a long-term means of survival because the IWC is managing shared stocks for their sustainability in perpetuity.

Management by the IWC and the review of strike limits by the Scientific Committee is also necessary, legitimate, and proportional. These rules are necessary to ensure that utilization of whale resources is sustainable; the history of

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[259] ICRW, *supra* note 5, pmbl.

[260] *Id.* art. V(2)(a).

[261] *Id.* art. I(2).

[262] Int'l Whaling Comm'n Sixty-Sixth Meeting, *Report of the Scientific Committee*, §§ 9.1, 9.3, IWC/66/Rep01 (2015), https://archive.iwc.int/pages/view.php?ref=5429&search=%21collection73&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=1&restypes= [https://perma.cc/E3U7-JFXR].

[263] *Id.* §§ 9.2, 10.7.2.

[264] *Id.* § 9.3.

whaling shows the conservation problems associated with inadequate regulation and management.[265] The conservation and management of important resources such as whales is clearly legitimate. Moreover, the measures are proportional—that is, they are closely adjusted to the attainment of a legitimate objective. In fact, ASW management and strike limits are specifically designed to ensure the long-term sustainability of ASW.

2. The Requirement to Submit a Need Statement

The IWC's requirement that an IWC member submit a need statement on behalf of one of its aboriginal groups can be traced to the ICRW's inception in 1946, when negotiators agreed that the ICRW would allow whaling "for local consumption by aborigines."[266] This requirement is expressly incorporated into paragraph 13 of the schedule. As a means to demonstrate that the meat is needed for local consumption, paragraph 13 of the schedule allows ASW "to satisfy aboriginal subsistence need."[267]

In the context of shared whale populations and rules for ASW that are more permissive than for commercial whaling, the need-statement requirement can be seen as having both a reasonable and objective justification. This is especially true because the right to culture—together with the right to traditional land, territories, and resources—includes the right to subsistence. Thus, a requirement to submit a need statement can be reasonably and objectively justified in relation to the nature of the right. Moreover, the requirement does not deny indigenous peoples of their means of survival. The need statement is designed to ensure that there are links between the killing of whales, the cultural identity of the indigenous peoples, and subsistence needs.

The need-statement requirement is also necessary, legitimate, and proportional. It is necessary as a means to demonstrate that the ASW quota "satisf[ies] aboriginal subsistence need."[268] The objective of ensuring that ASW actually fulfills need is surely legitimate in light of paragraph 13's requirement to allow ASW only to satisfy need.[269] Moreover, the requirement is proportional because the need statement directly relates to the legitimate goal of ensuring that an ASW hunt fulfills subsistence need.

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[265] A large number of articles describe the decimation of whale populations due to inadequate management. *See, e.g.*, Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1990).

[266] Schedule, *supra* note 5, ¶ 13(b)(1); *see also supra* Section II (describing the history of ASW in more detail).

[267] Schedule, *supra* note 5, ¶ 13(a).

[268] *Id.*

[269] *See id.*

3. Rejection of an ASW Quota

In some years, the IWC has rejected ASW quotas. In some of these cases, the concern of some IWC members was the scientific basis for, and thus the sustainability of, the hunt. At other times, members questioned aspects of the need statement of the indigenous peoples seeking the ASW quota.

For example, in 1977 the IWC rejected a U.S. request for an ASW quota for bowhead whales due to concerns about the size of the hunt, the hunt's impact on populations, and inadequate surveillance and enforcement measures to ensure that ASW hunts on bowheads complied with the ICRW.[270] The IWC rejected Greenland's request for an ASW quota starting with the 2013 season[271] due to concerns of some IWC members over the size of the quota, Greenland's conversion factors, and evidence of the commercial sale of whale meat, including in restaurants.[272] The IWC also rejected Greenland's request for a new humpback whale ASW quota in 2008 because some members thought Greenland's need statement "needed to be updated and reassessed,"[273] while others had questions about Greenland's conversion factors.[274]

The IWC's rejection of ASW hunts due to concerns about the sustainability of the hunt provides both a reasonable and objective justification for restricting the rights to culture and resources. Consistent with the IWC's task of conserving and developing whale resources, the IWC must determine whether a hunt of a certain size is sustainable. If the IWC, using the relevant strike limit algorithm to determine the total allowable catch, rejects an ASW quota as unsustainable, that decision would be supported by a reasonable and objective justification. For similar reasons, rejection of an ASW quota can also be viewed as necessary, legitimate, and proportional.

The IWC's rejection of ASW hunts due to concerns as to the extent of need are more questionable because one could argue that, without criteria for preparing and evaluating need statements, those decisions do not contain a "reasonable and objective justification." Nonetheless, IWC discussions in re-

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[270] Int'l Whaling Comm'n, *Chairman's Report of the Twenty-Ninth Meeting*, 28 ANN. REP. INT'L WHALING COMMISSION 18, 22 (1978) (noting that five recognized stocks should retain their protection stock status).

[271] *See* Press Release, Int'l Whaling Comm'n, *supra* note 10 (discussing the impasse within the IWC over Greenland with a vote of twenty-five to thirty-four with three abstentions).

[272] *See* Int'l Whaling Comm'n, *Chair's Report of the 64th Annual Meeting*, *supra* note 29, at 22 (describing concern from Brazil, Ecuador, and Argentina over Greenland's ASW whaling practices).

[273] Int'l Whaling Comm'n, *Chair's Report of the 60th Annual Meeting*, 2008 ANN. REP. INT'L WHALING COMMISSION 22 (statement of Slovenia speaking on behalf of the European Union). The Buenos Aires Group of Latin American IWC members also had concerns about Greenland's need statement. *Id.* at 20.

[274] *Id.* at 23 (statement of Argentina). The proposed amendment to add ten humpback whales to Greenland's ASW quota failed by a vote of twenty-nine votes in favor, thirty-six against, and two abstentions. *Id.*

cent years concerning need have focused on the issues of conversion factors,[275] the total size of the proposed ASW quota relevant to need,[276] and certain commercial elements of the hunt.[277] In other words, the main issues are well known. These issues also derive from the 1979 Resolution on Bering Sea Bowhead Whales and the 1980 Resolution on the Documentation of Aboriginal Need. Thus, even though consideration of these issues is not formally described as a requirement for a need statement, IWC members and indigenous groups are on notice of the expectations for preparing a need statement. Still, this part of the ASW decision-making process could be strengthened.

4. Participation

As noted in Section III, participation is a crucial element of implementing indigenous rights.[278] As stated elsewhere in this article, UNDRIP requires states to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[279] However, free, prior informed consent has not become customary international law.[280] Nonetheless, UNDRIP requires states, and by extension, international organizations, to es-

[275] Conversion factors have been discussed in 2008, 2012, and 2014. *See* Int'l Whaling Comm'n, *Chair's Report of the 64th Annual Meeting*, *supra* note 29, at 22 (statements of Dominican Republic and Brazil); Int'l Whaling Comm'n, *Chair's Report of the 62nd Annual Meeting*, *supra* note 26, at 19; Int'l Whaling Comm'n, *Chair's Report of the 60th Annual Meeting*, *supra* note 273, at 23 (statements of Argentina and Mexico).

[276] The EU noted in 2008 that it had examined the need statement of Greenland but could not support Greenland's request for an ASW quota of ten humpback whales, stating that information about Greenland's subsistence needs must be "updated and reassessed." Int'l Whaling Comm'n, *Chair's Report of the 60th Annual Meeting*, *supra* note 273, at 20, 22. At the same meeting, Germany asked to "receive more information relating to the real subsistence needs of the people of Greenland." *Id.* at 22. In 2012, India commented that Greenland's ASW proposal "for increasing the quota is not supported by adequate studies on the assessment of the increased need for meat by the aboriginal communities." Int'l Whaling Comm'n, *Chair's Report of the 64th Annual Meeting*, *supra* note 29, at 23. In 2014, Monaco commented that "it was not clear how many large whales were needed to meet their cultural needs." Int'l Whaling Comm'n, *Chair's Report of the 65th Meeting*, *supra* note 30, at 11.

[277] *See* Int'l Whaling Comm'n, *Chair's Report of the 65th Meeting*, *supra* note 30, at 11 (noting the comments on commerciality of Argentina on behalf of the "Buenos Aires Group," which comprises Argentina, Brazil, Chile, Columbia, Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, Peru and Uruguay); Int'l Whaling Comm'n, *Chair's Report of the 64th Annual Meeting*, *supra* note 29, at 22–24 (describing concern from Brazil, Ecuador, Chile, Mexico, and Monaco over the sale of whale meat to tourists and the commercial aspects of the hunt).

[278] *See* discussion *supra* Section III.

[279] UNDRIP, *supra* note 43, art. 19.

[280] *See supra* notes 97–102 and accompanying text.

tablish "[w]ays and means of ensuring participation of indigenous peoples on issues affecting them."[281]

This article concludes that the participation of indigenous peoples in the ASW process is sufficient. Indigenous people have the ability to participate in the decisions of the IWC, with representatives of indigenous groups either formally presenting a proposal for an ASW quota[282] or making interventions to support and justify an ASW quota.[283]

The situation in the IWC is very similar to *Mahuika v. New Zealand*[284] and *Länsman v. Finland*.[285] In those two cases, the participation of indigenous peoples in the process leading to restrictions on their rights helped the Human Rights Committee reach the conclusion that no violation of human rights occurred. Because indigenous peoples have a voice in the ASW decisionmaking process, the IWC may be shielded from a finding of violation.

C. Options for Strengthening the Implementation of Human Rights at the IWC

Although the IWC's current approach to ASW does not violate indigenous rights, options may exist to strengthen the implementation of these rights in the IWC's decision-making. This Article concludes by describing four of these options.

First, the decisions of the IWC relating to need would be more defensible—that is, subject to "reasonable and objective justification"—if a resolution or schedule amendment defined the criteria by which need is judged. The 1979 and 1980 resolutions provide the basis for those criteria. Questions remain as to how specific those criteria should be. As the workshop presenters noted, the needs of various indigenous groups differ.[286] Establishing criteria that are both general enough to accommodate the different needs of indigenous groups and

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[281] UNDRIP, *supra* note 43, art. 41.

[282] *See supra* note 254.

[283] *See, e.g.*, Int'l Whaling Comm'n, *Chair's Report of the 65th Meeting*, *supra* note 30, at 10 (reporting the comments of the Alaska Eskimo Whaling Commission).

[284] *See* Mahuika v. New Zealand, Human Rights Committee, Comm. No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 16, 2000); *supra* notes 196–200 and accompanying text.

[285] *See* Länsman v. Finland, Human Rights Committee, Comm. No. 511/1992, ¶ 3.1, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994); *supra* note 185 and accompanying text.

[286] *See* Int'l Whaling Comm'n, Report of the IWC Expert Workshop on Aboriginal Subsistence Whaling (ASW), *supra* note 6, § 5.2.2. The workshop agreed that:

> [t]he extent and nature of the different components of such [cultural and societal] needs varies amongst the different hunts. Quantifying such needs is complex and it is important to recognise that changes over time are natural and inevitable . . . and do not alter their status as ASW hunts.

Id. Consequently, the Workshop recommended that guidance on need statements "must be sufficiently flexible to account for the different circumstances for each hunt." *Id.* § 8 para. (c).

specific enough to limit IWC discretion will be challenging. In preparing such criteria, a working group that includes IWC members, relevant indigenous groups, and members of observer organizations would be beneficial, as these different stakeholders would bring unique expertise to the task. One task of the ASW workshop was to "develop a proposal or options for addressing those [ASW] issues including a broad consideration of the issue of 'standardised need statements,'" but it did not happen.[287] Nonetheless, including indigenous groups in the working group would also satisfy the consultation provisions of UNDRIP to the extent that current participation is considered inadequate. Their inclusion would also implement one of the recommendations of the ASW Workshop.[288]

Second, a process for reconsideration of rejected ASW proposals should be included in the IWC's Rules of Procedure or Rules of Debate.[289] The Rules of Procedure and Rules of Debate neither expressly allow nor preclude reconsideration of a vote. The IWC should amend its rules to clarify that under certain circumstances it may reconsider a decision. Take, for example, the rejection of Greenland's quota in 2012. If the IWC had included a process for reconsidering decisions, then, after the IWC rejected Greenland's ASW quota, Greenland (and Denmark on its behalf) could have amended its proposal to take into account the concerns of some members and requested another vote.

This process has been invaluable within the context of CITES, and similar rules for "reopening debate" also exist in the Convention on Migratory Species of Wild Animals (CMS). Rule 11 of the CMS Rules of Procedure provides as follows:

> (3) Whenever the Conference considers a recommendation originating in plenary session, where the discussion of the recommendation has been conducted with interpretation in the three working languages, it may be reconsidered during the meeting only under the following circumstances.
> (4) Any Representative, if seconded by a Representative of another Party, may present a motion for the reopening of debate. Permission to speak on the motion shall be granted only to the Representative presenting it and the seconder, and to a Representative of each of two Parties wishing to speak against the motion, after which the motion shall immediately be put to a vote. A motion to reopen the debate shall be granted if two-thirds of the Representatives present and

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[287] Int'l Whaling Comm'n, *Chair's Report of the 65th Meeting*, *supra* note 30, at 9.

[288] *See* Int'l Whaling Comm'n, Report of the IWC Expert Workshop on Aboriginal Subsistence Whaling (ASW), *supra* note 6, § 5.1 (recommending that "an Indigenous rights perspective should be introduced into its discussions on developing guidance for future ASW 'need statements' and their review").

[289] Int'l Whaling Comm'n, *Rules of Procedure*, *supra* note 252.

> voting support the motion. While speaking on a motion to reopen the debate, a Representative may not speak on the substance of the decision itself.[290]

If such a rule existed within the IWC Rules of Procedure or Rules of Debate, the rejection of a quota could be reconsidered. An IWC member would reopen debate in accordance with the new rule and, if successful in reopening debate, the members would take another vote. If it were clear that the original proposal would not be accepted, the proponent could reopen debate and then amend its proposal consistent with Rule E of the Rules of Debate. Such a rule would apply to all decisions of the members, not just votes on ASW quotas, unless so limited. However, ASW quotas provide the most relevant context for considering such an amendment to the Rules of Debate because it would provide an avenue for safeguarding the rights of indigenous peoples. To further safeguard these rights, the rule should specify that only the proponent can propose an amendment to its proposal for an ASW catch limit.

Third, the ASW workshop report recommended that need statements be submitted only when needed to account for new information rather than every six years.[291] On the one hand, this would be consistent with a right to subsistence and reduce the burden on indigenous communities. On the other hand, it would be inconsistent with the IWC's treatment of ASW whaling as an exception. It might also be a way to avoid reporting on changes in consumption patterns. While it is clear that indigenous communities may evolve and that such evolution does not change their status as indigenous peoples, such evolution could lead to greater consumption of whale products just as easily as less consumption. To accommodate both the rights of indigenous peoples and the duty of the IWC to manage whale stocks, a hybrid approach could be established that requires a new need statement only when there is new information to consider but, if there is no new information to consider, requires an affirmative statement that no changes have occurred since the last need statement was submitted.

Fourth, the ASW workshop report also suggested that discussions related to need begin two years before a quota renewal year to prevent surprises.[292] A

[290] Convention on Migratory Species of Wild Animals, *Rules of Procedure for Meetings of the Conference of the Parties (COP)*, Proceedings of the 11th Meeting of the Conference of the Parties, annex II, 87, 92, UNEP/CMS/COP11/REPORT (2015), http://www.cms.int/en/publication/conference-parties-proceedings-11th-meeting [https://perma.cc/VQ68-BJJP]; *see also* Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora, Rules of Procedure of the Conference of the Parties (as amended at the 16th meeting, Bangkok, 2013), at 7 (2013), https://cites.org/sites/default/files/eng/cop/E16-Rules.pdf [https://perma.cc/GR7G-VC5F].

[291] Int'l Whaling Comm'n, Report of the IWC Expert Workshop on Aboriginal Subsistence Whaling (ASW), *supra* note 6, § 5.1.

[292] *Id.*

two-year period seems overly long given how rarely ASW quotas are rejected. The IWC could consider a requirement that relevant member states, on behalf of their indigenous groups, submit a need statement (or an affirmative statement that need has not changed, if the previous recommendation is adopted), 150 days prior to the beginning of an annual meeting rather than the current requirement of sixty days. IWC members would then be required to submit any comments and concerns on the proposal at least sixty days before the meeting to give the indigenous group, as well as all IWC members, the opportunity to reflect on those concerns.

Conclusion

The question of whether international organizations have a duty to implement human rights norms has only recently received attention with that attention focused on ASW in the IWC. In 2015, Greenland hosted a workshop at which presenters posited that the IWC had a duty to interpret the ICRW in light of those human rights norms that have become customary international law, specifically, the rights to self-determination, cultural identity, and lands, territories, and resources. The basic claim made at the workshop—that these rights have become customary international law—is essentially correct, although it is not yet clear that the right to self-determination in the context of indigenous peoples has become customary international law.

This article moves the discussion forward by providing a legal theory that explains why international organizations have an obligation to implement customary international human rights law. It concludes that customary international law binds international organizations such as the IWC either directly or indirectly because the member states composing the international organization have individual responsibilities to implement them or because the Vienna Convention on the Law of Treaties requires that treaties be interpreted in light of evolving customary international law. More specifically, jus cogens norms of customary international law bind international organizations all the time because these norms cannot be derogated from; however, none of the human rights norms discussed in this report have attained the status of jus cogens. In contrast, non-jus cogens norms of customary international law—such as those embodied in the rights to self-determination, cultural identity, and lands, territories, and resources—bind international organizations unless they decide otherwise. International law is clear that states and international organizations may adopt treaties or otherwise establish rules inconsistent with customary international law. The IWC may do so through binding regulations or otherwise agreeing to adopt rules inconsistent with customary international law.

The article also addresses two important limitations in relation to these rights. First, the content of these rights is not clear. For example, it is not clear

that indigenous peoples have the right to use resources, including marine resources, that they do not currently possess. Second, these rights are not absolute. Actions may interfere with human rights provided that those actions are subject to reasonable and objective justification, as the U.N. Human Rights Committee has concluded, or are necessary, legitimate, and proportional, as the Inter-American Court of Human Rights has stated.

The non-absolute nature of these rights is critical in the case of ASW because, although the IWC's current management regime for ASW does affect certain customary international human rights, the regime can be reasonably and objectively justified or would be considered necessary, legitimate, and proportional. This is because the conservation and management of whale resources, particularly those that are shared stocks, requires a single entity like the IWC to develop rules for their conservation and management. The requirement for a need statement would seem a reasonable and objective way (or a necessary, legitimate, and proportional way) to implement the requirement of paragraph 13 of the schedule, which allows ASW "to satisfy aboriginal subsistence need." Consequently, the IWC's ASW does not need to be changed. Nonetheless, the IWC could take steps to strengthen implementation of human rights by, for example, clearly articulating criteria for preparing and evaluating need statements.