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Culture Clashes: Aboriginal Subsistence Whaling and Whaling Welfare

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ABSTRACT

The convergence upon a legal recognition of the humane killing of whales as a general principle of international law implies that whaling must be prohibited, because of the cruel nature thereof and the impossibility of conducting humane whaling operations. This applies to all forms of whaling, which includes aboriginal subsistence whaling (ASW). However, the right to whaling for Indigenous peoples forms part of their cultural rights as an expression of cultural diversity. They have been the victims of colonisation and oppression, and it is important to ensure that the proposed prohibition on whaling does not perpetuate injustice and imperialism. As such, the primary issue is whether the cultural right to whaling may exempt Indigenous peoples from adhering to the general principle of animal welfare, in particular humane killing. Should cultural relativism excuse Indigenous peoples from recognising the ethical aspects of hunting whales? Thus, this article considers the implications of the proposed recognition of the humane treatment of whales as a general principle of international law on ASW. As such, the findings may not only have ramifications for the current discourse on whaling in international law but also present insights concerning the relationship between (human) cultural practices and animal welfare.

1. Introduction

In a 2017 issue of the *Journal of International Wildlife Law and Policy*, I argued for the progressive recognition of the humane treatment (manifested through humane killing) of whales as a general principle of international law.¹ I indicated that my argument would ultimately result in a prohibition against scientific and commercial whaling because of the cruel nature thereof and the impossibility of conducting humane whaling operations. What would, however,

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¹Werner Scholtz, 'Killing Them Softly: Animal Welfare and the Inhumanity of Whale Killing?' (2017) 20 *Journal of International Wildlife Law and Policy* 18.

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be the implications for aboriginal subsistence whaling (ASW)? ASW constitutes one of the exemptions to the 1982 moratorium on commercial whaling.² Paragraph 13 of the Schedule contains the exception to the prohibition on commercial whaling and allows Denmark (Greenland), Russia (Chukotka), the United States (Alaska and also potentially a resumption of whaling by the Makah tribe³ in Washington State) and St Vincent and the Grenadines (Bequia) to conduct whaling of designated whale stocks in specified years in specific geographical areas under specific conditions.⁴ For each stock, whale meat and other whale products must be used solely for local consumption, and quotas must be established to satisfy aboriginal subsistence needs.⁵

The Whaling Convention does not include a definition of ASW, but does affirm that ASW is not subject to the moratorium, as it differs from commercial whaling since it does not seek to maximise catches or profit.⁶ The International Whaling Commission (IWC) objectives for the management of ASW are to ensure that ‘hunted whale populations are maintained at (or brought back to) healthy levels, and to enable native people to hunt whales at levels that are appropriate to cultural and nutritional requirements in the long term.’⁷

²The amended para. 10(e) of the Schedule to the International Convention on the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72 (ICRW), hereinafter the Whaling Convention. For an overview of the problematic aspects of ASW: Daniel W. Dylan and Erin Chochla, ‘The Clash of Civilizations: Whaling and the IWC’s Scientific Research and Aboriginal Exceptions’ 35 *Ocean Yearbook* (1998) 572-579 2021.

³For a critical assessment of the Makah’s claim to ASW see Leesteffy Jenkins and Caro Romanzo, ‘Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium’ (1998) 9 *Colorado Journal of International Environmental Law and Policy* 71.

⁴See Anne M Creason, ‘Culture Clash: The Influence of Indigenous Cultures on the International Whaling Regime’, (2004) 35 *California Western International Law Journal* 83, 96–108. Countries such as Japan, Norway, and Iceland argue that the ASW exemption is arbitrary, as their whaling practices are part of their historical and cultural traditions and as such serve as an expression of their cultural diversity. Non-Indigenous communities with long histories and cultural traditions of whaling are excluded from the right to whaling: Lotta Viikari, ‘Rural Local Communities as Holders of Human Rights: From Aboriginal Subsistence Whaling to Small-Scale Local Community Whaling’ (2022) 40 *Nordic Journal of Human Rights* 175, 181.

⁵See Paragraph 13(b)(1)–(4) and Paragraph 13(a). The International Whaling Commission (IWC) requirements for nutritional/subsistence need for whale meat and a cultural (traditional) reliance thereupon do not support commercial aspects of whaling. However, the distinction between commercial aspects of whaling and subsistence needs is ambiguous, as is evident in the case of the aboriginal whaling in Greenland, where whale meat from aboriginal hunts is sold in shops and restaurants. For a discussion on Greenland and ASW see Chris Wold and Michael D Kearney, ‘The Legal Effect of Greenland’s Unilateral Aboriginal Subsistence Whale Hunt’ (2015) 30 *American University International Law Review* 562, 564.

⁶International Whaling Commission <<https://iwc.int/management-and-conservation/whaling/aboriginal>>. See Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge University Press 2015) 247–251.

⁷This provision makes it clear that ASW has a conservation component and that it should not result in the extinction of whale populations. The Committee receives advice from the Scientific Committee concerning the sustainability of the proposed hunts and safe catch limits, as well as information from the four national governments on cultural and subsistence needs of their Indigenous Peoples to support the process of establishing catch limits in multiple-year blocks: see Paragraph 13(a)(3) of the ICRW Schedule. The current block was established in 2024, and quotas will be decided again in 2030: International Whaling Commission <<https://iwc.int/management-and-conservation/whaling/aboriginal>>.

At first glance, a logical progression of my advocacy for a prohibition on whaling should extend to all forms of whaling, which includes ASW. It is important to keep in mind that traditional whaling methods are more inhumane than commercial whaling. The issue is more complex, as ASW has a strong cultural component since the dimension of subsistence is intertwined with the traditional livelihood of communities, which constitutes a focal element of their cultural identity.⁸

ASW constitutes a cultural right to whaling, which is part of the right to cultural diversity of Indigenous peoples who have been subjugated to colonialism and oppression. A plethora of conflicting interests exacerbate the complexity of the matter. On the one hand are the cultural rights of Indigenous peoples and the importance of not reverting to imposed injustice through a prohibition on ASW. On the other hand, at stake are the welfare interests of whales, who suffer from hunting. As such, the primary issue is whether the cultural right to whaling may exempt Indigenous peoples from adhering to the general principle of animal welfare, in particular, humane killing. Should cultural relativism excuse Indigenous peoples from recognising the ethical aspects of hunting whales? Hence, it is the main aim of this contribution to consider the implications of humane killing as a general principle of international law on the right to whaling of aborigines in terms of the international whaling regime.

This issue warrants scholarly attention. The significance of wild animal welfare in international environmental law has gained considerable traction, especially concerning whales due to their status as charismatic *megafauna*.⁹ ASW falls outside the scope of the moratorium and, therefore, perpetuates whaling. However, if welfare concerns are important, it would be important to establish whether this issue has implications for a form of whaling which is based on cultural diversity. As such, the findings may have ramifications for the current discourse on whaling in international law, as well as the relationship between (human) cultural practices and animal welfare.¹⁰

I am not aware of any legal scholar who has yet discussed the implications of the emergence of animal welfare as a general principle of

⁸Viikari (n 4) 183.

⁹W Scholtz (ed), *Animal Welfare and International Environmental Law: From Conservation to Compassion* (Edward Elgar 2019) 1–7. For a recent analysis see Veerle Platvoet, 'Growth From Common Ground: Animal Welfare in Wild Animal Law' (2024) 27 *Journal of International Wildlife Law and Policy* 303.

¹⁰Various examples exist of cultural and/or religious practices (or alleged practices) which involve killing or harming animals. Some include cultural practices of Indigenous people (Inuit seal hunting) or European examples (bullfighting). Some of the findings of this article will have relevance for these debates and vice versa but it is not my intention to engage in a broad discussion of the issue: see Alisdair Cochrane, *Animal Rights Without Liberation: Applied Ethics and Human Obligations* (Columbia University Press) 181–203.

international law on ASW.¹¹ As such, this contribution may present a timely contribution to current scholarship. Part II of this article briefly introduces and identifies ‘aborigines’ in the ASW regime and presents a brief introduction to their relevant rights in international law. I indicate in part III of the article that the poor welfare record of commercial whaling is frequently even worse in the instances of ASW due to the utilisation of traditional measures. Thus, a prohibition on commercial whaling based on the impossibility of humane killing implies that the same fate should befall ASW.

However, whaling is a cultural right and a manifestation of cultural diversity. As such, the question arises whether the right to culture might justify a deviation from humane killing as a general principle of animal welfare. I challenge recourse to cultural relativism and indicate that the suffering of whales is relevant and not relative. Based on an analysis of relativism, I argue that a strong form of relativism concerning ASW may be addressed by recourse to a qualitative measure of interpretation, which may open the possibility for non-lethal ASW in the form of whale watching. Part IV discusses the dimensions of whale watching as a form of non-lethal ASW. I argue that culture is not static and that a move towards non-lethal utilisation may be facilitated by the dynamic nature thereof. I acknowledge that my proposals for non-lethal cultural whaling may meet resistance from whale hunters, as it may be seen as a manifestation of imperialism. Thus, it is of the utmost importance to recognise the colonial history of oppression against Indigenous peoples and to ensure their meaningful participation in developing alternatives to lethal whaling. I discuss the importance of engaging in a meaningful process with Indigenous peoples based on the principle of free, prior and informed consent (FPIC). My proposals for non-lethal ASW offer an opportunity for the establishment of a relationship of ethical (welfare-centred for whales with a recognition of cultural diversity for Indigenous peoples) and ecological fairness (conservation-based) between Indigenous peoples and whales, which departs from anthropocentrism. The article concludes with final remarks.

2. Aborigines and Their Rights

The IWC does not include a definition of ‘aborigines,’ but precedent and practice indicate that the term refers to native or Indigenous peoples.¹²

¹¹Malgosia Fitzmaurice, however, alludes to the potential importance of welfare as she argues that ‘indigenous whaling should in principle conform, if not to animal rights approaches, at least to animal welfare approaches, that is to say, to ensure that pain and suffering is minimised’: Fitzmaurice (n 6) 244.

¹²Fitzmaurice (n 6) 248–251. The absence of a definition of the term ‘aborigines’ in the IWC is potentially problematic as it may be susceptible to abuse, as any form of whaling that possesses some elements of aboriginal subsistence could be approved by the IWC through a three-quarters majority.

Although the terms ‘native,’ ‘Indigenous,’ and ‘aborigine’ mean slightly different things, they are frequently used interchangeably.¹³ The term ‘Indigenous peoples’ generally denotes peoples who have been subjugated to colonial settlement; they have historical continuity with pre-colonial societies, a distinct identity, and a concern with the preservation of their culture.¹⁴ Indigenous peoples have a distinct collective spiritual relationship to their land and a dependence on their natural resources, which international law protects through a comprehensive normative framework.¹⁵ For example, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) safeguards the cultural integrity of cultural minority groups. The Human Rights Committee recognises that concerning rights protected under Article 27, ‘culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples,’ which may include ‘traditional activities as fishing or hunting.’¹⁶ Article 15(1)(a) of the International Covenant on Economic and Social Rights (ICESCR) also recognises the right of everyone to take part in cultural life.¹⁷ The United Nations Committee for Economic, Social and Cultural Rights affirmed that:

The strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of

¹³See <<https://www.oed.com>>, and Alexander Gillespie, *International Environmental Law, Policy and Ethics* (2nd ed, Oxford University Press 2014) 84.

¹⁴Jacinta Ruru, ‘Indigenous Peoples’ in Lavanja Rajamani and Jacqueline Peel (eds), *The Oxford Handbook on International Environmental Law* (2nd ed, Oxford University Press 2022) 733, 733; see also James Anaya, *Indigenous Peoples in International Law* (2nd ed, Oxford University Press 2004).

¹⁵Siegfried Wiessner, ‘Culture and the Rights of Indigenous Peoples’ in Ana Filipa Vrdoljak (ed), *The Cultural Dimensions of Human Rights* (Oxford University Press 2013) 117–156, 125. Chapter 26 of Agenda 21 affirms the historical relationship between indigenous peoples and their lands. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3 to 14 June 1992 <<https://sustainabledevelopment.un.org/outcomedocuments/agenda21>>. See Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples, A/RES 61/296 of 13 September 2007 (UNDRIP). It is not my intention to analyse the normative framework protecting indigenous peoples’ rights.

¹⁶International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). HRC, *General Comment No 23: Article 27 (Rights of Minorities)*, Adopted at the Fiftieth Session of the Human Rights Committee, on 8 April 1994, CCPR/C/21/Rev.1/Add.5, para 7. For example, Indigenous customary fishing rights based on the right to enjoy one’s culture have been affirmed through jurisprudence in Finland: see <<https://www.loc.gov/item/global-legal-monitor/2022-05-09/finland-supreme-court-rules-on-sami-indigenous-rights-to-fish>>.

¹⁷International Covenant on Economic and Social Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR). The notion of culture can be understood in an anthropological sense which includes the distinctive lifestyle, traditions and values of a community. For a discussion see Roger O’Keefe, ‘The Right to Take Part in Cultural Life’ (1998) 47 *International and Comparative Law Quarterly* 904; see also UNESCO, *Cultural Rights As Human Rights* (UNESCO 1970) 15–24.

life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.¹⁸

Article 15 of the Indigenous and Tribal Peoples Convention (ILO Convention No. 169), which is based on the principle of self-determination, safeguards the rights of Indigenous peoples concerning natural resources pertaining to their land, which includes the rights to participate in the use, management and conservation of these resources.¹⁹ Article 4 states that ‘Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.’ In 2007, the UN General Assembly adopted the non-binding UN Declaration on the Rights of Indigenous peoples, which recognises that ‘respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.’²⁰ In this vein, Article 25 recognises their right to maintain their ‘spiritual relationship’ 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.’²¹ A clear link exists between the right to use their natural resources and the cultural integrity of Indigenous peoples. Lastly, Article 11(1) affirms the right of Indigenous peoples to ‘practice and revitalise their cultural traditions and customs.’

Several other international environmental law instruments also recognise the links between Indigenous peoples, culture and their environment.²²

¹⁸Economic and Social Council, *General Comment No 21: Article 15(1)(a) (Right of Everyone to Take Part in Cultural Life)*, Adopted at the Forty-Third Session of the Committee on Economic, Social and Cultural Rights, on 21 December 2009, E/C/12/GC/21, para 36. For a discussion see Laura Pineschi, ‘Cultural Diversity as a Human Right? General Comment No. 21 of the Committee On Economic, Social And Cultural Rights’ in Silvia Borrelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Brill 2012) 29–52. See also Claire Charters, ‘Indigenous People’s Rights To Lands, Territories, and Resources in the UNDRIP’ in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press 2018) 397.

¹⁹Convention (No. 169) concerning indigenous and tribal people in independent countries, 27 June 1989, 1650 U.N.T.S. 383 (entered into force 5 September 1991); for a discussion see Anaya (n 14) 58. Collective rights of Indigenous peoples do not always enjoy universal support: see Jessika Eichler, *Reconciling Indigenous People’s Individual And Collective Rights: Participation, Prior Consultation and Self-Determination In Latin America* (Taylor & Francis, 2020).

²⁰See the preamble of UNGAR 61/295 of 2 October 2007. For an analysis of the Declaration and culture see Alexander Xanathaki, ‘Culture’ in Hohmann and Weller (n 18) 273–298.

²¹See Articles 29, 30 and 32 of the UNDRIP. For a discussion see Stefania Errico, ‘Control Over Natural Resources and Protection of the Environment of Indigenous Territories’ in Hohmann and Weller (n 18) 425–457.

²²See also Articles 13(1) and 15. Paragraph 39 of Agenda 2030 (A/CONF.2616/16), for example, includes recognition ‘that the traditional knowledge, innovations and practices of indigenous peoples ... make an important contribution to the conservation and sustainable use of biodiversity.’ Principle 22 acknowledges that Indigenous peoples ‘have a vital role in environmental management and development because of their knowledge and traditional practices.’ See A/CONF.151/26 (Vol. I).

For example, the preamble of the Convention on Biological Diversity recognises the value of Indigenous peoples' traditional knowledge, as well as their dependence on biological resources.²³ Principle 22 of the Rio Declaration also recognises that Indigenous peoples have a vital role in environmental management and affirms that 'States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.'²⁴

The rights offered to Indigenous peoples form part of the broader international law system.²⁵ The rights do not imply that they have autonomy to use natural resources in an unfettered manner, but rather as a 'common responsibility not to engage in the unsustainable exploitation of resources.'²⁶ This highlights the existing environmental responsibilities of Indigenous peoples, as outlined in conservation obligations under international environmental law. Thus, it is important to recognise that Indigenous rights are extensive, but not absolute.

3. Cultural Diversity, Cultural Relativism and the Welfare of Whales

3.1. Introduction

Although ASW refers to 'subsistence', it is based more on the right to cultural diversity and cultural identity of Indigenous peoples.²⁷ The issue now revolves around whaling as a cultural practice. The recognition of Indigenous cultural rights and the links to the respect for cultural diversity are seen as inseparable from respect for human dignity.²⁸ Culture and cultural diversity are complex to define, and it is not my intent to revisit these definitions in any detail.²⁹

²³Convention on Biological Diversity (CBD) (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79: preamble and Articles 8(j) and 15.

²⁴Dinah Shelton, 'Principle 22' in Jorge E Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 541

²⁵Articles 1 and 46 place the Declaration within the parameters of the general standards of international law.

²⁶Hendrik A Strydom, 'Environment And Indigenous People' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2022) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1761>> para. 8. See also Article 10(c) of the CBD, which requires parties to '[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.'

²⁷Fitzmaurice (n 6) 234. The reference of subsistence also has cultural dimensions and could be defined as culturally appropriate dietary intake and whaling related to subsistence may, therefore, resort under the broader ambit of culture. For a discussion see Rob van Ginkel, 'The Makah Whale Hunt and the Leviathan's Death: Reinventing Tradition and Disputing Authenticity' (2004) 17 *Etnofoor* 58.

²⁸Article 4 of the Universal Declaration on Cultural Diversity (adopted 2 November 2001, entered into force 18 March 2007) 41 ILM 57 (2002).

²⁹Francesco Francioni, 'Culture Heritage and Human Rights: An Introduction' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff 2008) 1–15.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions perceives cultural diversity as the ‘manifold ways in which the cultures of groups and societies find expression.’³⁰ It aims to protect distinctive cultural backgrounds as part of the collective identity of certain groups. Various definitions of culture exist, and it is sufficient to say for purposes of this discussion that today, culture may be viewed as values and beliefs that people use to interpret experience and generate behaviour. Shared values and beliefs result in behaviour that is acceptable to a particular society. People’s experiences and, therefore, values differ, which results in different interpretations and behaviour. Conflicts arise when different values, beliefs, and behaviours clash.³¹ In the instance of a clash between the cultural rights of aborigines and the interests of whales, several ethical tensions also arise, such as the conflict between traditional wildlife use practices and the values that others associate with wildlife, which in the instance of aboriginal whaling could translate into the cultural right to whaling versus the welfare interests of individual whales.³² It is necessary to reflect on these aspects in further detail.

3.2. Welfare and Cultural Relativism

3.2.1. Whales’ Interests Not to Suffer

Frequently, Indigenous peoples still use traditional whaling methods, which cause significantly more pain and suffering in comparison to modern whaling methods.³³ One of the oldest methods used in several ASW operations is the harpoon-line float technique, whereby harpoons are used to attach several lines and floats to a whale to impede its mobility. It is also important to acknowledge that variables concerning whaling result in a very poor welfare record, even when modern whaling techniques are used.³⁴

The adaptation of whales to diving makes it difficult to determine when they are dead; the circumstances surrounding whaling impede accuracy,

³⁰See Art 4(1).

³¹William A Haviland, *Cultural Anthropology* (Houghton Mifflin Harcourt 1993) 30.

³²For a discussion of ethical tensions: Clare Palmer et al, *Wildlife Ethics: The Ethics of Wildlife Management and Conservation* (Wiley 2023) 191. Other tensions, such as between environmental justice (which includes sustaining and valuing traditional practices) and the rectification of historical wrongs, are also present. It is evident that aboriginal whaling is a complex matter, and it is not my intent to address all of the complex issues pertaining to aboriginal subsistence whaling, but rather to focus on the tension between the welfare of whales and aboriginal hunting based on cultural rights.

³³Peter Stoett, ‘Of Whales and People: Normative Theory, Symbolism and the IWC’ (2005) 8 *Journal of International Wildlife Law and Policy* 151, 170. See for a vivid description: <<https://makah.com/makah-tribal-info/whaling>>.

³⁴See Philippa Brakes et al (eds), *Troubled Waters: A Review of the Welfare Implications of Modern Whaling Activities* (World Society for the Protection of Animals 2004) 7–10.

and killing methods are not adapted to the specific species being killed. Data indicates that the secondary killing method (rifles), deployed when the primary method (penthrite harpoons) fails, may often be inadequate. Traditional killing methods used in ASW are even less accurate, resulting in longer times to death (TTD), lower instantaneous death rates (IDRs), as well as higher 'struck and lost' rates.³⁵ Two important conclusions may be drawn from these observations: The already poor welfare record of commercial whaling is even worse in the instance of ASW, and recourse to modern whaling methods during aboriginal hunts may improve the welfare aspects of the hunt, but even the potential improvement may imply moving from a very dreadful situation to a dreadful situation. A detailed analysis of the welfare aspects of whaling activities, including commercial, ASW, and 'scientific whaling,' led Brakes et al to the overall conclusion that '[m]odern day whaling activities give rise to serious animal welfare concerns. Several factors inherent in current whaling practices render it unlikely that truly humane standards could ever be achieved. On grounds of animal welfare alone, therefore, all whaling operations should be halted.'³⁶

It is in this context that AWS raises the question of whether cultural diversity justifies whaling if one accepts the universality of humane killing, and my argument that (commercial) humane whaling is impossible and aboriginal whaling is usually crueler. Ultimately, ASW is an exemption based on a cultural (human) right. Thus, this form of cultural relativism differs from the usual human rights-relativism debate, where cultural diversity is used to justify deviation from a universal human right.³⁷ Thus,

³⁵For example, data from ASW hunts for the period 2000–2002 display an IDR of 0–17 per cent, an average TTD of 9–57 minutes and a maximum TTD of 25–300 minutes. The number of whales struck and lost varied from zero to 26: see Brakes et al (n 34) 49–58. The IWC establishes a 'strike limit' (number of whales that may be struck) for the Alaskan bowhead and the West Greenland minke whale hunt. For other hunts it sets a limit on the number of whales that may be landed, which means that hunters may strike and lose an unlimited number of whales.

³⁶Brakes et al (n 34) 10.

³⁷On cultural diversity see Yvonne Donders, *Towards a Right to Cultural Identity* (Intersentia 2002). See, for example, for one of the early authoritative articles: Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400. For a critique against cultural relativism concerning human rights see Lea Brilmayer and Tian Huang, 'The Illogic of Cultural Relativism in Global Human Rights Debate' (2004) 1 *The Global Community Yearbook of International Law and Jurisprudence* 17 and Sabine Von Schorlemer, 'Cultural Diversity' in Peters and Wolfrum (n 26) paras. 9–13 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e2032>>. Dahre, however, argues against the dichotomy of universalism and cultural relativism and proposes a holistic integration, called relative universalism of human rights, arguing for a calibration of the relationship between universal human rights and local cultural practice: Ulf Johansson Dahre, 'Searching for a Middle Ground: Anthropologists and the Debate on Universalism and Cultural Relativism of Human Rights' (2017) 21 *International Journal of Human Rights* 611. See for a critique on universal human rights Chris Brown, 'Universal Human Rights: A Critique' (1997) 1 *International Journal of Human Rights* 41. See, however, Michael Freeman, 'Universalism, Communitarianism and Human Rights' (1998) 2 *International Journal of Human Rights* 79. For an astute analysis of the cultural relativist argument claim that human rights are an imperialistic construct see Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights' (1999) 5 *Buffalo Human Rights Law Review* 211.

in this instance, the question arises whether recourse to the right to culture might be used as an exemption to the general principle of animal welfare and humane killing as a manifestation thereof in the context of whaling.

3.2.2. *Is Suffering Relative?*

Garner challenges the (moral) relativism that underlies the relationship between whale hunting and cultural diversity as an argument for ASW, as well as arguments for commercial whaling by nations such as Japan and Norway.³⁸ Relativism challenges the universality of norms, such as human rights, as the view is that some morals, such as humane killing, are not absolute but culture-specific.³⁹ Garner points to the fact that a specific culture views whaling as ethically acceptable does not make it so.⁴⁰ Whaling based on different cultural backgrounds cannot serve as a justification for cruelly killing whales. Furthermore, moral relativism underestimates the 'degree to which we can reach considered judgments on moral questions involving animals.'⁴¹

In the case of whales, significant scientific (empirical) evidence exists concerning the cruel manner of whaling, the long periods of suffering until time of death, the cognitive capacity of whales, and so on. Also, the relativist position underestimates the degree of consensus on the moral status of animals. The majority of countries in the world agree that animals matter, and they have anti-cruelty legislation to protect the interests of animals.⁴² The relativist position fails to take note of the evidence that, at the level of general principles, the moral views of the world's cultures overlap.⁴³ For example, not all Indigenous peoples share the same sentiments concerning whaling.⁴⁴ The aboriginal exemption focuses on the loss of cultural diversity and identity (which occurred due to colonisation and marginalisation) of

³⁸Robert William Garner, 'Animal Welfare, Ethics and the Work of the International Whaling Commission' (2011) 7 *Journal of Global Ethics* 279, 286. See also J Baird Callicott, 'Whaling in Sand County: A Dialectical Hunt for Land Ethical Answers to Questions About the Morality of Norwegian Minke Whale Catching' (1997) 8 *Colorado Journal of International Environmental Law and Policy* 1, 13.

³⁹As Tilley indicates, 'we must distinguish valid moral judgments from accepted ones.' A moral judgment is accepted when the most members of the culture regard it as such. However, the 'fact that a judgment is regarded as valid does not ensure that it is valid': John J Tilley, 'Cultural Relativism' (2000) 22 *Human Rights Quarterly* 501, 521.

⁴⁰Garner (n 38) 287.

⁴¹Ibid.

⁴²Bruce A Wagman and Matthew Liebman, *A Worldview of Animal Law* (Carolina Academic Press 2011).

⁴³Tilley (n 39) 532.

⁴⁴Creason (n 4) 96–108.

aboriginal people, whereas the cultural identity and diversity of some Indigenous peoples, such as the Māori, relies on a spiritual connection with whales, which is not based on the hunting of whales.⁴⁵ They revere whales and look to them for wisdom and protection. The non-lethal, spiritual reverence of the Māori for whales means that the (aboriginal) hunting of whales might harm the cultural identity of the Māori. How should one weigh the different cultural beliefs to resolve the issue?

This vexing problem indicates that the issue is not straightforward, specifically because of cultural diversity. Tension arises between the potential loss of culture (and therefore cultural diversity) of whaling cultures who are not allowed to exercise their cultural right to whaling and the loss of culture (and once again cultural diversity) of peoples who have anti-whaling practices, such as the Māori. Do one group's cultural beliefs or practices trump those of another? How is it possible to reconcile the starkly opposing beliefs in this instance, where the lethal execution of cultural practices infringes on the spiritual reverence for whales? The lethal cultural practice of whaling will have a detrimental impact on the cultural reverence for the spiritual worth of whales, as this reverence is not linked to a specific territory but rather the conscience of the Māori.⁴⁶

Furthermore, whales are migratory species, and the hunting of whales in one jurisdiction will influence the whale population in other jurisdictions. It is not only between Indigenous groups that dissident views exist concerning the importance of whale welfare, but it is even evident within tribes. Some elders of the Makah tribe, for example, supported whale-based tourism rather than hunting, and they were harassed and ostracised by the tribe.⁴⁷ Some other tribes in the area also did not support the request of the Makah to conduct whaling, as they adapted to making money through aspects of whaling tourism, such as whale watching.⁴⁸ Resuming whaling has been a very costly exercise for the Makah, as they had to

⁴⁵For a discussion: Alexander Gillespie, 'Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship Between International Law and the International Whaling Commission' (1997) 12 *Colorado Journal of International Environmental Law and Policy* 76, 116–117. However, in the early 1800s some Māori men joined European whaling fleets. The Māori people of Aotearoa, Tahiti and Cook Islands conferred legal personhood on whales in 2024. This resolution is in accordance with their view that whales are their ancestors and that they have a duty of care to protect them. See Ralph Chami et al, 'How Legal Personhood and Markets Can Partner to Help Save the Whale' (2024) 12 *Frontiers in Ocean Sustainability* 1454751.

⁴⁶For a discussion of the global nature of wild animal welfare: Werner Scholtz, 'Animals and Common Heritage and Common Concern' in Anne Peters, Kristen Stilt and Saskia Stucki (eds), *Oxford Handbook on Global Animal Law* (Oxford University Press 2026, in press).

⁴⁷For a discussion see van Ginkel (n 27) 55. Seven Makah elders presented a petition at the 1996 meeting of the IWC which expressed their dissent from the Makah pursuit of whaling. The petition states that 'we believe the hunt is only for the money' and 'Whale watching is an alternative we support': see Claire Jean Kim, *Dangerous Crossings: Race, Species and Nature in a Multicultural Age* (Cambridge University Press 2015) 239.

⁴⁸Ibid.

spend over a million dollars of their own funds between 2003 and 2012. It seems that resorting to whale watching may have been more lucrative.⁴⁹

Lastly, relativists conflate a theory of the good with a theory of the right.⁵⁰ A concept of good refers to what a group regards as an ideal way of living, which is, in this instance, the hunting of whales. Thus, relativists argue that whaling is a manifestation of the good and accuse anti-whalers of attempting to impose their conceptions of the good on them as a form of cultural imperialism.⁵¹ However, as Garner argues, the situation is more complex, as embedded in the argument of cultural relativism is the assumption either that whales cannot suffer or that their suffering is inconsequential.⁵² This assumption is unjustified as it ignores the suffering of whales. Therefore, it is not satisfactory to argue in favour of whaling and dismiss welfare concerns merely based on the existence of one manifestation of the conception of good, which is frequently the case when the argument is made that the subjective aboriginal conception of hunting differs in the sense that it is not based on the unilateral taking of whales by humans against their will.⁵³ It is important to take note that the concept of good differs from the theory of right, which individuals are owed. At the very least, this represents a right to be free of interference that causes harm. This theory of right takes precedence over the theory of good. The distinction between the theory of good and the theory of right points to the fact that cultural practices can be good or bad for whale conservation and/or welfare considerations.⁵⁴ Thus, the cultural practice of the lethal utilisation of whales cannot serve as a justification for ASW if the cruelty of whaling contravenes the universal consensus regarding the moral considerability of whales and the imperative of humaneness in dealing with them.

⁴⁹Kim (n 47) 237.

⁵⁰Garner (n 38) 287.

⁵¹Countries such as Japan accuse non-whaling countries of Western imperialism because cultural rights are sacrificed in favour of animal welfare agendas: see Milton MR Freeman, 'Culture-Based Conflict In The Whaling Commission: The Case of Japanese Small-Type Whaling' in William CG Burns and Alexander Gillespie, *The Future of Cetaceans in a Changing World* (Transnational Publishers 2003) 33, 33. See also Alexander Gillespie, 'The Ethical Question in the Whaling Debate' (1997) 9 *Georgetown International Environmental Law Review* 355, 374. For an (apologetic) analysis and defence of the Japanese position see Amy L Catalinac and Gerald Chan, 'Japan, the West, and the Whaling Issue: Understanding the Japanese Side' (2005) 17 *Japan Forum* 133, 181. They also accuse anti-whaling nations of hypocrisy as they point to the practice of slaughtering animals, such as cows and chickens, for human consumption in Western societies. It is indeed true that Western societies perpetuate significant injustices against animals on an industrial scale. However, arguing that 'nothing be prohibited unless everything comparable is prohibited' is tantamount to lifting all existing prohibitions on comparable forms of cruelty: Paula Casal, 'Is Multiculturalism Bad for Animals' (2003) 11 *Journal of Political Philosophy* 1, 17.

⁵²Garner (n 38) 287.

⁵³For example, see Andrew Brighten, 'Aboriginal Peoples and the Welfare of Animal Persons: Dissolving the Bill C-10B Conflict' (2011) 10 *Indigenous Law Journal* 39.

⁵⁴Gillespie (n 13) 88–89.

Jack Donnelly's analysis of relativism and universalism is relevant, as it indicates that both unrestricted relativism and unrestricted universalism are inappropriate, and finding an intermediate position requires a consideration of the levels and types of cultural relativism.⁵⁵ *In casu*, the reliance on culture in terms of whale hunting relies strongly on a form of strong relativism (in relation to the universal notion of humaneness) and the internal evaluations of the aboriginal society of the practice. This, in turn, rests on the moral autonomy and communal self-determination of the aboriginal community.⁵⁶ The internal evaluation, however, also needs to stand up to external scrutiny as to whether the practice presents a plausible and coherent defence in response to universalistic criticism. As such, it is not sufficient to rely on internal evaluations only, as aboriginal communities are also part of a cosmopolitan moral community.⁵⁷ Donnelly states that, as a general rule, 'the more "important" a practice ... the greater the force of internal standards, which can be overridden only by particularly strong external judgments.'⁵⁸ This crude general rule will not solve all problems and therefore requires the consideration of some qualitative measure, and Donnelly proposes a distinction between variations in substance, interpretation and form.⁵⁹ It is the qualitative measure of interpretation of whaling that may offer a potential solution for the reconciliation of the cultural right to whaling of aborigines and the general principles of animal welfare as expressed through humane killing in the ICW. The cultural right to whaling may be interpreted to allow for the non-lethal utilisation of whales through whale-watching operations led by aborigines.⁶⁰

⁵⁵Donnelly (n 37) 406.

⁵⁶*Ibid.*

⁵⁷*Ibid.* 406.

⁵⁸*Ibid.* 407.

⁵⁹*Ibid.* 410. See <<https://iwc.int/commission/commission-sub-groups/aboriginal-subsistence-whaling-sub-committee/voluntary-fund-for-aboriginal-subsistence-whaling>>.

⁶⁰For a discussion on whale watching see James Higham, Lars Bejder and Rob Williams (eds), *Whale Watching: Sustainable Tourism and Ecological Management* (Cambridge University Press 2014). The proposed non-lethal use of whales may have differential impacts on the respective Aboriginal communities. For example, the Inuit in Greenland survive in a harsh landscape with limited agricultural activity. Are they expected to starve without access to whale meat? Although Inuit communities have access to a wide variety of imported foods, as well as local game meats and fish, this issue warrants further investigation. It is not possible to address the issue in detail in this publication. See Government of Greenland, *White Paper on Management and Utilisation of Large Whales In Greenland* (Ministry of Fisheries and Hunting, 2024). Allegations of the (illegal) commercial selling of whale meat in terms of AWS quotas persist: <<https://theanimalfund.net/en/whaling-in-greenland>>. The 'Arctic Dilemma' also poses a challenge to aborigines because of the presence of contaminants, such as mercury and persistent organic pollutants, in whale meat, which could be detrimental to the health of indigenous communities. Hence, it is not unthinkable that the non-lethal use of whales in accordance with the precautionary principle could have health benefits for aborigines in the long term. This is a complex matter, which does not fall within the ambit of this publication: <<https://www.amap.no/documents/doc/the-arctic-dilemma-indigenous-peoples-of-the-arctic-diet-and-long-range-transport-of-contaminants/710>>.

Non-lethal aboriginal whaling adheres to the principles proposed by Deckha for the establishment of a postcolonial, post-humanist ethical discourse, which includes ‘no immunity for culture,’ ‘giving up the human centre’ and ‘contextualising cultural contests.’⁶¹ The application of these principles *in casu* entails arguing that ASW should be permitted because of culture and removes culture from the ethical realm. The second principle requires a more caring approach to animals and a departure from a mere instrumentalist view of the human–animal relationship. The last principle allows for the cultivation of new non-lethal cultural practices and not a reliance on lethal killing as a marker of cultural difference. This approach recognises the importance of culture for Indigenous people, but not at the cost of other vulnerable and oppressed beings. As such, the approach widens the scope of justice to include whales who have been exposed to painful slaughter over many years.

The transformation to whale watching may be made possible through existing IWC mechanisms. It is possible to repurpose the Voluntary Fund for Aboriginal Subsistence Whaling to assist aboriginal communities to transform to new non-lethal lethal practices via financial and technical support. The fund was established by the Commission at its meeting in 2012.⁶² The fund aims to assist subsistence hunters in achieving compliance with IWC measures, such as hunter safety, reporting processes and weapons improvement programmes. Funds have been donated to improve the welfare aspects of hunts, which implies that advancing the non-lethal utilisation of whales will not be alien to the nature and purpose of the initiative. Hunters could be compensated for their knowledge about whales through the fund. Tourism operations will provide outsiders with insights into the valuable cultural practices and authentic aboriginal knowledge.⁶³ These operations should not be conducted in a voyeuristic manner but in an environment of respect for the aboriginal cultures. These operations may be an important source of information concerning the relationship between humans and the environment. Indigenous peoples are the source of important indigenous knowledge concerning the environment and

⁶¹Maneesha Deckha, ‘Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals’ (2007) 2 *Journal of Animal Law and Ethics* 223.

⁶²<<https://iwc.int/commission/commission-sub-groups/aboriginal-subsistence-whaling-sub-committee/voluntary-fund-for-aboriginal-subsistence-whaling>>.

⁶³It seems that tours already cater for participating and/or observing lethal and non-lethal aspects of aboriginal subsistence whaling. One tour operator, for example, provides for the partaking in a whale hunt as well as observing whales while they are not hunted: <<https://www.arcticrussiatravel.com/tour/chukotka-whales>>. Other indigenous operators focus on whale watching and sharing their knowledge in this regard: <<https://www.indigenousofbc.com/stories/indigenous-whale-watching-british-columbia>>.

wildlife.⁶⁴ Thus, they have an important role to play as conservationists and stewards.⁶⁵

4. Moving towards Non-Lethal Aboriginal Whaling?

4.1. *The Dynamic Nature of Culture*

It is in the context of this discussion important to recognise that culture is not a static concept but may evolve.⁶⁶ The cruelty of traditional aboriginal hunting methods in comparison to (less) cruel methods resulted in a focus on the need for aboriginal subsistence whalers to reduce the suffering of whales through the employment of modern technology.⁶⁷ The IWC recognises that aboriginal whaling is usually less effective and more painful than commercial whaling techniques, and it has adopted several resolutions seeking improvements in the humaneness of whaling techniques.⁶⁸ However, the IWC still largely leaves the decision about which equipment to use to the discretion of the hunters. The insistence on humane killing concerning commercial whaling and a different approach concerning ASW presents a clear inconsistency.

The departure from more traditional hunting methods to the use of contemporary (more humane) technology is contentious, as it is seen as a departure from aboriginal authenticity and results in the questioning of subsistence whaling as an aboriginal exemption. However, as Firestone and Lilley remark in the case of the Makah tribe, to assert that they 'should either whale exactly as they did 150 years ago or not at all

⁶⁴Nancy C Doubleday, 'Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law' (1989) 17 *Denver Journal of International Law and Policy* 373, 390.

⁶⁵See also the discussion in Leena Heinämäki, 'Protecting the Rights of Indigenous Peoples—Promoting the Sustainability of the Global Environment?' (2009) 11 *International Community Law Review* 3. It has been argued that commercial consumption and exploitation of natural resources are not part of indigenous cultures: JP Kastrup, 'The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective' (1997) 32 *Texas International Law Journal* 9, 114. However, as Richardson indicates, the environmental practices of Indigenous people differ greatly and we must be wary of 'romantic generalisations of Indigenous peoples that overlook ambivalence': Benjamin J Richardson, 'Indigenous Peoples, International Law and Sustainability' (2001) 10 *Review of European Community and International Environmental Law* 1, 3. The idealisation of the 'noble savage' as an antithesis to the ideological paradigms of commercialisation and industrialisation of the Western world is not without problems and may even be considered to be paternalistic and condescending. Arne Kalland, 'Environmentalism and Images of the Other' in Helaine Selin (ed), *Nature Across Cultures: Views of Nature and the Environment in Non-Western Cultures* (Kluwer 2013) 1–17, 12.

⁶⁶Para. 11 of General Comment 21 refers to 'culture as a living process, historical, dynamic and evolving, with a past, a present and a future.' See Economic and Social Council, General Comment no. 21, Right of Everyone to Take Part in Cultural Life (Article 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), Forty-third session, 2–20 November 2009.

⁶⁷See IWC Resolution 1997-1 and IWC Resolution 1991-1.

⁶⁸Gillespie (n 51) 365.

demonstrates a lack of understanding ... of the connections between culture and development.⁶⁹ Aboriginal communities are usually adept at surviving and adapting to their environments, and their cultures evolved in a dynamic relationship with the living resources on which they depend. The Human Rights Committee affirmed that the right to enjoy culture in terms of Article 27 of the ICCPR not only protects traditional means of livelihood but also includes adaptation through modern techniques, in this instance, herding reindeer. As such, the right to culture must be viewed in context.⁷⁰

Another argument against my proposal entails that ending whaling for aborigines would destroy their cultural way of life. Doubleday, for example, argues that 'Just as food from marine mammals is important to physical health, the ability to obtain food from hunting as a livelihood is important to psychological well-being. Being a good hunter is an occupation with a proud heritage among Inuit. Hunting is the Inuit way of life.'⁷¹ I disagree with the view that changing an element of cultural life, such as the lethal hunting of whales, will disintegrate their culture, as it would be possible to change the cultural practice to non-lethal whale watching and flourish in terms of their cultural community in a new format. In the words of Nisuke Ando, the right to culture of Indigenous peoples should not be understood to mean that 'the traditional way of life must be preserved intact at all costs.'⁷² It is also important to remember that even if elements of cultural identity are lost through a prohibition on whaling, cultural diversity is not valuable at all cost because '[i]f some cultures are defined fundamentally in terms of causing serious harm to others—and whaling is a serious infliction of harm—then the loss of such cultures cannot sensibly be considered regrettable in itself.'⁷³ The proposal to move towards the non-lethal utilisation of whaling in the case of Indigenous peoples seems to be a logical legal step, as cultural relativism is not tenable in the face of the global consensus concerning the acceptance of humane killing for whaling. Thus, moving towards a non-lethal right to whaling for aborigines recognises the authentic cultural basis for the right and

⁶⁹Jeremy Firestone and Jonathan Lilley, 'Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs' (2005) 8 *Journal of International Wildlife Law and Policy* 177, 215–218.

⁷⁰*Lansman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 at para. 9.3 (1994).

⁷¹Doubleday (n 64) 377 (using the example of the Inuit).

⁷²*Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990).

⁷³See Cochrane (n 10) 192.

promotes cultural diversity through alternative (non-lethal) mechanisms, which can recognise the welfare interests of whales.

4.2. Potential Objections against Non-Lethal Aboriginal Whaling

I suspect that my argument for the (aboriginal) non-lethal utilisation of whaling may be criticised for being ‘imperialistic,’ ‘antipluralistic,’ ‘racist’ or ‘ethnocentric.’⁷⁴ Kymlicka and Donaldson point to the fact that the focus on aboriginal whaling has the potential to be racialised in the sense that Indigenous cultures may be seen as barbaric or backwards while Western cultures are civilised and humane.⁷⁵ The danger exists that the advocacy against ASW could be used for bashing the Indigenous practices of hunting whales and eating whale meat as a means to perpetuate racial hierarchies. Thus, it is important to avoid the instrumentalisation of animal welfare against Indigenous peoples on the one hand and invoking the argument of cultural imperialism as a ground for the perpetuation of injustice against whales on the other hand.

It is true that Indigenous peoples were victims of colonial oppression, genocide and cultural erasure and that they deserve special protection. However, avoiding colonial or hegemonic dynamics should not justify the toleration of cultural claims supporting the suffering of whales. Such arguments ignore the moral value and importance of sentient beings in the law and culture debate, which entrenches anthropocentrism.⁷⁶ The case of St Vincent and the Grenadines, which made claims on behalf of descendants of slaves introduced into the Caribbean, is illustrative in this regard. The response to the questioning of the claim was that the issue was off-limits as it was inappropriate to remind Caribbean countries of their history of slavery and colonialism.⁷⁷ It is difficult to conceive how whales should be vessels for the compensation of atrocities committed in the name of imperialism by members of the human species. The fact that the residents of St Vincent and Grenadines were subjugated and oppressed does not require the oppression of other vulnerable creatures but rather mandates the promotion of justice to bring equilibrium to the scales of justice. The claims of St Vincent and the Grenadines to ASW are an awkward anomaly as it is not conducted by aboriginal people, and it does

⁷⁴Examples of racism may be found in the way people expressed their opposition to Makah whaling: van Ginkel (n 27) 71–72.

⁷⁵Will Kymlicka and Sue Donaldson, ‘Animal Rights, Multiculturalism and the Left’ (2013) 45 *Journal of Social Philosophy* 116, 121.

⁷⁶Deckha (n 61) 189–229

⁷⁷Gillespie (n 13) 89–90 .

not have a long and unbroken history of subsistence hunting associated with longstanding cultural traditions.⁷⁸

Resolving the dichotomy between pro-whaling Indigenous peoples and anti-whaling exponents requires carefully navigating seemingly irreconcilable interests, whereby anti-whaling advocates should acknowledge the historical context of Indigenous peoples and their cultural traditions, whereas Indigenous peoples should not reduce all arguments to colonialism. The treaty signed between the Maa-Nulth and Canadian and British Columbia governments exemplifies a reconciliatory approach to the dilemma. The agreement pursued monetary reparations and redress while also protecting whales, as the Indigenous groups waived their rights to whaling.⁷⁹ Culture is neither absolute nor neutral, and yearning for a vision of idealism in the form of a cultural practice is contrafactual. For example, Makah whaling history depended on internal domination concerning class, status and sex. Furthermore, slavery played a role in Makah culture.⁸⁰

Resolving the opposing views concerning ASW requires an inclusive process of dialogue and cross-cultural learning. The transition to non-lethal aboriginal whaling requires a process of progressive realisation with the full participation of Indigenous peoples.⁸¹ International law recognises participatory rights, especially through the principle of free, prior and informed consent (FPIC), for Indigenous peoples to ensure the protection of their fundamental rights.⁸² FPIC as a minimum requires that states consult with Indigenous peoples in a meaningful, genuine and appropriate manner. This does not mean that Indigenous peoples have an overarching right to veto decision-making. However, decisions that affect Indigenous peoples and where they do not provide their consent will require rigorous legal justification.

In this instance, the position and role of cultural integrity within the international human rights framework offer valuable insights. For example,

⁷⁸Animal Welfare Institute, *Humpback Whaling In Bequia, St Vincent And The Grenadines. The IWC's Failed Responsibility. A Report for the International Whaling Commission* (Animal Welfare Institute 2012).

⁷⁹Kim (n 47) 251.

⁸⁰Kim (n 47) 246.

⁸¹See Articles 10, 19, 29(2) and 32(2) of the UN Declaration on the Rights of Indigenous Peoples and Articles 6 and 19 of the ILO Convention 169. For a discussion see Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, 2015). See also Mauro Barelli, 'Free, Prior, and Informed Consent in the UNDRIP' in Hohmann and Weller (n 18) 247.

⁸²See Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous People's Rights in Hohmann and Weller (n 18) 346. For example, Article 27 of the UNDRIP states that 'States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process' concerning the adjudication of their rights pertaining to land and natural resources.

the practice of female mutilation cannot be maintained as it contravenes human rights. Thus, a need exists to reform the treatment of women and girls, but with the recognition of the existence of the cultural integrity of distinct people. This can be achieved through a process of education to change attitudes concerning the morality of the practice.⁸³ Hence, it is important to ensure that the voices of Indigenous hunters are considered in the process of moving away from the lethal utilisation of whales. The ASW Sub-Committee should provide an open forum for constructive engagement with hunters in an environment which is not dominated by Western viewpoints.⁸⁴

The advocacy towards the non-lethal utilisation of whales does not need to amount to a form of imperialism or colonialism against Indigenous hunters, but can be synonymous with 'a general counter-hegemonic ethic aimed at non-violence against and compassion and justice for humans and animals both.'⁸⁵ Thus, my proposal offers an opportunity to move from suspicions of imperialism towards an ethical and ecological relationship between humans and animals where anthropocentrism does not dominate the discourse.

My view is compatible with the need to respect cultural diversity and cultural integrity, but it is also based on the premise that ethnocentrism is immoral. It does not imply that all nations have a moral requirement to be the same or hold the same moral views and/or beliefs.⁸⁶ Rather, it is difficult, or rather impossible, to view cultural diversity as a justification for aboriginal whaling in contravention of the universal acceptance of the

⁸³G Nasieku Tarayia, 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' (2004) 21 *Arizona Journal of International and Comparative Law* 183; see also S James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21 *Arizona Journal of International and Comparative Law* 13.

⁸⁴The Sub-Committee has a history of meeting with hunters. See IWC/65/ASWRep01-Rev1 Chair's Report from Ad Hoc Aboriginal Subsistence Whaling Working Group Meeting with Native Hunters. It is important to ensure that the views of Indigenous peoples are truly heard. For guidelines: Dina Lupin and Leo Townsend, 'The Right to Consultation is a Right to be Heard' in Dina Lupin (ed), *A Research Agenda for Human Rights and the Environment* (Edward Elgar 2023) 119. Participation and consultation with Indigenous peoples concerning developmental projects offer good examples of genuine partnerships with them. A 2015 publication prepared by the Secretariat of the United Nations Permanent Forum on Indigenous Issues identifies minimum criteria of good practice. See Secretariat of the United Nations Permanent Forum on Indigenous Issues, *Partnering With Indigenous Peoples: Experiences and Practices* <<https://www.un.org/esa/socdev/unpfii/documents/LibraryDocuments/partnering-with-ips.pdf>> 2. The ASW Committee recently awarded a contract to survey international indigenous and human rights instruments, which could suggest an approach in the Committee to entrench the lethal use of whales. Thus, it is important to raise counterpoints to the lethal use of whaling constructively in the context of the rights of aborigines, but with the understanding that the rights are not absolute. The embracement of the agenda of lethal use will make it difficult to move to non-lethal use. See IWC, 'Contract Awarded: Survey of Indigenous and Human Rights Instruments' <<https://iwc.int/resources/news/contract-awarded-survey-of-indigenous-and-human>>.

⁸⁵Deckha (n 61) 189, 207.

⁸⁶Tilly (n 39) 541–542.

humane killing of animals, in this instance, whales.⁸⁷ The exceptionality of cetaceans forms the basis for the view that we should think of cetaceans as the ‘people of the sea.’⁸⁸ De Grazia considers some cetaceans to be ‘borderline persons’ with a right to life.⁸⁹ Thus, Mence argues that whaling is *prima facie* unethical and points to the fact that whaling causes pain and suffering every time a whale is killed or struck and lost.⁹⁰ In the context of Dr Harry Lillie’s graphical description of whaling, he argues that whales ‘scream’ during a whale hunt, as scientists have observed that harpooned whales change their ‘characteristic whistle’ to a ‘low monotone.’⁹¹ The primary argument against all forms of whaling is, therefore, based on the cruel nature of whaling. The exceptionality of whales, in terms of cognitive capacity, culture, and as symbolic *megafauna*, forms arguments that strengthen the underlying focus on the inhumane aspect of whale hunting as a justification for an end to whaling.⁹²

My focus on ending whaling, particularly lethal ASW *in casu*, is not intended to imply that whales are the only animals that should be protected against direct and/or indirect human harm. It also does not imply that ASW constitutes the only harm against whaling. For example, whaling proponents cite current industrial agricultural practices perpetuated by Western civilisation as examples of double standards concerning animal welfare.⁹³ These animals also deserve protection and urgent attention. My arguments are not intended to distract from the need to address global

⁸⁷Alexander Gillespie, ‘Humane Killing: A Recognition of Universal Common Sense in International Law’ (2003) 7 *Journal of International Wildlife Law and Policy* 1.

⁸⁸Baird Callicott (n 38) 22.

⁸⁹David Degrazia, ‘On the Question of Personhood Beyond Homo Sapiens’ in Peter Singer (ed), *In Defense of Animals: The Second Wave* (Blackwells 2006) 40–53. On personhood see David Bilchitz, ‘Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals’ (2009) 1 *South African Journal on Human Rights* 38, and Visa Kurki, ‘Legal Personhood and Animal Rights’ (2021) 1 *Journal of Animal Ethics* 47. It is not necessary for the purposes of this article to contribute to the discourse on personhood, but to recognise that personhood is a legal fiction which could accommodate the personhood of animals.

⁹⁰David Mence, ‘The Cetacean Right to Life Revisited’ (2015) 11 *International Journal of Law in Context* 17, 25.

⁹¹Doubleday (n 64) 375.

⁹²This statement does not underwrite the notion of a ‘super whale’ which morphs all the characteristics of the different species of cetaceans into one single anthropomorphic creature: see Akamine Jun, ‘The Different Currents of Japanese Whaling: A Case Study of Beard’s Beaked Whale Foodways in the Kanto and Tohoku Regions’ in Ryan Tucker Jones and Angela Wanhalla (eds), *Across Species and Cultures: Whales, Humans, and Pacific Worlds* (University of Hawaii Press 2022) 132. The IWC coordinates its welfare actions through the Working Group on Whale Killing Methods and Welfare Issues. See <<https://iwc.int/management-and-conservation/welfare>>. For a discussion of the welfare implications of entanglement: Michael J Moore, ‘Food for Thought. How We All Kill Whales’ (2014) 71 *ICES Journal of Marine Science* 760; see also Anthony D’Amato and Sudhir K Chopra, ‘Whales: Their Emerging Right to Life’ (1991) 85 *American Journal of International Law* 21.

⁹³See section 3.2 above.

animal welfare through a global normative framework.⁹⁴ Furthermore, whaling is not the only form of harm against whales which raises welfare issues. Commercial shipping (ship strikes and noise pollution), commercial fishing (where whales are bycatch), and the negative effects of climate change on whale habitats are some of the anthropogenic, unintentional and indirect harms to whales which require attention.⁹⁵ The end of ASW as an exception to whaling should form part of a holistic strategy focused on ending the intentional and unintentional killing of whales. Thus, the exceptional nature of whales and the horrific nature of whale hunting present fertile ground for the development of a progressive normative framework that could end whaling in all its forms. This protective normative framework could ultimately take on a right of whales not to be hunted.

4.3. Non-Lethal Aboriginal Whaling and the IWC

How may the international whaling regime facilitate a change to non-lethal aboriginal whaling? The convergence of a principle of humane treatment (and killing) of whales in international law, by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, affirms that the killing methods may not be dealt with in isolation from welfare issues. An appeal to the involvement of Indigenous peoples in the killing does not negate the validity of Article 31.

Ultimately, substantive provisions dealing with the non-lethal utilisation of whales need to be dealt with through an amendment⁹⁶ (by the IWC) to the Convention Schedule, which forms an integral part of the Convention.⁹⁷ In relation to the non-lethal utilization of whales the objects of amendments may be the adoption of regulations concerning the ‘conservation and utilization of whale resources, fixing (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used.’⁹⁸ In terms of Article V(2) the aforesaid amendments ‘(a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation,

⁹⁴See Anne Peters, ‘Global Animal Law: What It Is and Why We Need It’ (2016) 5 *Transnational Environmental Law* 9.

⁹⁵<<https://iwc.int/management-and-conservation/welfare>>.

⁹⁶Article V of the Convention.

⁹⁷See Article I(1) of the Convention.

⁹⁸Article V(1).

development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.' I previously argued, based on an evolutionary interpretation of the IWC, that the non-lethal utilisation of whales accords with the objectives and purposes of the Convention and that it is possible that amendments concerning the non-lethal utilisation of whales are in line with the requirements of Article V(2).⁹⁹

5. Concluding Remarks

This article explores the impact of the emergence of humane treatment as a general principle of international law on aboriginal subsistence whaling. I argued previously that the impact of the humane treatment of whales, as expressed through deliberations on humane killing in the International Whaling Commission, is that whale hunting must conform to humane killing. However, the humane killing of whales is impossible and as such, lethal whaling practices do not accord with this converging general principle of international law.

In the context of ASW, the question arises of whether whale hunting as a cultural right may constitute a justification for an exception to the emerging principle of the humane treatment of whales. The progressive recognition of the rights of Indigenous peoples in the Whaling Convention constitutes an important response to the subjugation and oppression of these groups. It expresses and strengthens the rights of designated Indigenous groups to practice their traditions and customs, which include whale hunting. However, the comprehensive normative framework providing Indigenous peoples with rights, such as whaling, is not absolute and requires deference to conservation and sustainable use obligations in international law. It also does not provide them with a justification to conduct whaling in contravention of the proposed recognition of humane killing as a general principle of international law.

Several scholars argued for the need to reconcile conservation and welfare to break down the dichotomy between these notions. Conservation measures may not ignore the welfare interests of whales. My exposition affirms that moral relativism based on the aboriginal cultural practice of whale hunting does not stand up to rigorous scrutiny, as it does not justify an exception to the universal nature of the humane treatment of whales. Culture is a dynamic concept and lends itself to a reinterpretation of

⁹⁹Scholtz (n 1).

whaling for aborigines operating cultural whale watching for their benefit, which would be a non-lethal manifestation of cultural rights. I recognise that my proposal is potentially fraught with several pragmatic and moral issues. It may be viewed as the imperialist imposition of Western culture and sensitivities conducive to further injustice against oppressed peoples. As such, it is imperative to design non-lethal whaling in partnership with Indigenous groups and ensure that they benefit in a monetary and non-monetary manner. Whale watching should exhibit their intricate knowledge and understanding of whales and their habitat, and ensure that financial benefits accrue to these groups. The Voluntary Fund for ASW may provide financial resources for their retraining and acquisition of equipment to conduct whale watching operations.

Ultimately, the Whaling Convention would require amendments to give effect to non-lethal ASW. It is, however, doubtful that member states will support such amendments. Even in the unlikely event that a three-fourths majority of votes are indeed cast as prescribed in Article III(2), the objection procedure in Article V(3) may provide whaling nations with the opportunity to ensure that amendments do not apply to them. Thus, this may mean that Article VI may continue to be the only (current) plausible avenue for the development of non-binding recommendations concerning the proposed paradigm shift. However, the recognition that aboriginal whaling may not be justified as an exception to the converging norm of humane killing lends strength to the crystallisation of a universal norm of prohibiting whale hunting in any form. This may open the way for an emerging right or entitlement of whales to be free from being hunted by human predators, whether it is in the form of scientific, commercial or cultural whaling.

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