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Historical memory, cultural claims, and environmental ethics in the jurisprudence of whaling regulation

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Abstract

This study considers in historical perspective the ethical and juridical norms relevant to commercial and indigenous whaling activities and their regulation. An assessment is offered of the records of the International Whaling Commission from 1946 to the present, and of individual whaling nations, especially Japan and Norway. The argument is made that historic behavior should matter, when the question is raised: What nations or interests come to the table with "clean hands"? The author rejects arguments by Japan, Norway, and various scholars that coastal whaling communities in industrialized countries should be regarded as equivalent to indigenous whaling communities such as the Inuit in justifying exceptions to the IWC moratorium. In light of whale species' precarious condition and in light of past behavior by whaling fleets, only strongly based indigenous cultural claims should be permitted to trump a general rule against whaling.

1. Introduction

The quest to gain international agreement on ethical and legal norms for regulation of whaling has had a long and troubled history. The related problem of how to fashion the organization and procedures of an international agency so that it can effectively enforce any agreed norms with regard to whaling has also proven frustrating over a long period of time. In this paper, I examine the changing context and terms of the whaling debate, including the guiding norms which at various times since founding of the International Whaling Commission (IWC) in 1946 have been offered as standards of legitimacy for regulation. The analysis embraces also the question of historic behavior and responsibility, asking whether – and how – the burdens of history ought to bear on the resolution of ethical issues. In the last decade, the IWC has been challenged with rising intensity by the assertion of cultural imperatives and by other ethical claims, relevant to the more general global discourse on environmental ethics

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as well as to the continuing debates on whaling in particular. The merits of these claims will be appraised in light of their historical and contemporary contexts.

The modern phase of global concern over whaling ethics and conservationist management commenced in 1946, when the victorious Allied nations that dominated the enterprise of large-scale commercial whaling signed the International Convention on Regulation of Whaling. This agreement created the International Whaling Commission (IWC), an agency given authority to set limits (but not binding limits) upon the hunt. The IWC underwent transformation from a "whalers' club" first to a whalers club with scientific guidance, and then since 1986 to a conservationist body which at present seeks to impose an entire moratorium on high-seas whaling. The half-century history of the commission illustrates vividly both the moral and practical perplexities of defining appropriate behavior with regard to environmental resources generally and to cetaceans in particular.

2. Rival claims and claimants

The origins of modern whaling regulation actually date from two decades before the IWC's founding: in the late 1920s the League of Nations sponsored studies that attempted (entirely without success) to work out juridical principles that would provide a legal framework for the scientific management and conservation of global whale stocks. This attention to whales was itself an extension of larger concerns about the possible depletion of marine fisheries and the need for scientific management under new principles of international law – concerns that had their roots in the record of intensive competition among the distant-water fishing fleets in international waters, especially in the North Atlantic, and also reflected the experience in Northern Europe and North America with application of scientific management principles to save or restore threatened stocks [1–3].[1] A limited progress was achieved in the 1930s, when the European whaling nations concluded a series of international agreements that extended protection to selected species, most notably the right whale, and imposed certain other restrictions upon signatory states. The management regime fashioned by the 1930s agreements was a blunt instrument indeed in that there was no reliance upon systematic mobilization and application of expert scientific studies. Besides, as will be noted below, the quotas were set in a way that provided an incentive for hunting techniques that were highly damaging to the stocks. Because not all whaling nations entered into the 1930s agreements – the most important of those refusing to join was Japan, which was then aggressively expanding its industrial whaling in Pacific and Antarctic waters – the quotas were of limited value in constraining the kill. For the industry had by then – as the result of rising tonnage of the fleets and more efficient hunting techniques – become engaged in a devastating attack upon the remaining stocks of blue whale and a broadening hunt for other target species.[2] The best that can be said is that the 1931

[1] On the revival and elaboration of ecosystem concepts in fisheries oceanography, set in place conceptually in Northern Europe in the early 20th century and then applied with new vigor in the postwar period by American and other scientists, see Ref: [4].

[2] The sorry record of the assault on the blue whale is fully chronicled in Ref [5]. See also, inter alia, Ref. [6].

convention (which went into force in 1935) applied to both the high seas and coastal waters, and that in the largest sense it did accomplish (as Gambell has argued) one important jurisprudential step forward – by "establish[ing] the principle of international regulation of a common property resource in the high seas [7]".

In 1937 nine nations signed a new agreement that placed killing of right and gray whales under an entire prohibition, forbade capture of females with calves of other stocks, and established size limits for blue, fin, humpback and sperm whales. A 1938 protocol banned hunting for humpbacks in the Antarctic and adopted the then-very-advanced concept of a sanctuary for stocks in the Pacific region of Antarctic waters – the direct predecessor of today's Antarctic sanctuary agreement, though at the time of little practical importance because few whales of favored target species actually populated the area marked out [6] (p. 453), [8] (p. 127).

The 1946 agreement and the IWC endure to the present day, albeit profound changes have occurred since its founding in the political context of IWC operations and the biological realities with which it must deal, as most whale stocks have been reduced to pathetically small fractions of their original numbers. Even though a potentially competing, pro-whaling organization has been founded recently, the IWC's annual meetings continue to have a nearly universally recognized special legitimacy and thus constitute the principal forum for the international debate and decisions on whaling regulation.[3] The whaling debates have been made more complicated than ever in recent years, moreover, by the introduction into the global debate of new issues. These issues include the questions of hunting for small cetaceans and whether international controls should have sway within national offshore Exclusive Economic Zones (the 200-mile zones); and, of course, the demands from many quarters for a permanent prohibition against any and all whaling.[4]

In the debate over the ethics of whaling and its regulation since formation of the IWC, widely diverse arguments have been advanced concerning the legitimacy of the whaling enterprise and the economic, ethical, and practical aspects of international regulation if whaling is to be permitted at all. We find ourselves today at an apparent impasse with regard to whaling regulation – an impasse that underlines the perplexities that are involved in a reconciliation of widely disparate views of ecology, culture, and legitimacy as they pertain to a valued resource and its exploitation for human purposes. Analysis of the dilemma requires, I think, that we recognize the ways in which legal and ideological, scientific, and commercial imperatives have been invoked during the last fifty years by the leading actors in the policy debate. To establish a fully informed basis for an ethical judgment of the whaling nations' position and the former whaling countries' postures in the current-day debate, moreover, it is imperative that we bring back into the analysis a fully considered historical dimension – that is, that we take some accounting of the actual behavior of these nations in past eras of whaling and regulatory history. Thereby we will restore an appropriate element of historical memory that ought to be weighed in the balance with assertions of cultural and ethical claims.

[3] On the emergence of a whaling organization (NAMMCO) in the North Atlantic that is potentially a pro-whaling rival to IWC, see note 9, below.

[4] All of these factors are considered more fully in the sections of this paper that follow.

2.1. Freedom of the seas and whaling as an "ordinary fishery"

The oldest of the specific groups that advance claims has been the company of nations, diminishing in number over time, that conduct the whale hunts, i.e., that have authorized their nationals to engage in whaling on the high seas and/or in coastal waters. In recent years, this now-small group, led by Norway and Japan, has principally been concerned to sustain the killing of whales in the name of science, on the argument that effective biological and management research requires limited harvesting. As will be discussed below, this group of whaling nations also has sought to justify continued harvesting of whaling for various special purposes – to provide protein food to specified human populations, to sustain localized coastal community economies, and (in a cause the United States has officially led in the IWC) to support the continuation of traditions at the core of indigenous peoples' cultures.

For much of the IWC's fifty-year history, however, the claims of nations that engaged in large-scale killing of whales for commercial purposes scarcely needed explicit defense. This was so because these nations talked and dealt only with one another; the non-whaling nations did not participate in IWC deliberations, which were largely carried on in secret sessions. The surviving whaling industry and its national representatives continue to insist that the premises that so long legitimated this self-regulatory approach are being unfairly and irrationally challenged today.

The whaling nations' claims have rested on the conceptual foundation that the whale hunts are no less proper a use of ocean resources than any other fishery; hence the whaling enterprise represents an "ordinary" and "conventional" commercial marine activity, one in which the industrial whaling nations have invested precious capital and labor over many years and to which issues of deeply rooted cultural values are also relevant. One reservation has applied: The whaling nations have acknowledged from the beginning of regulation the ideal (though only that), embodied in the evolving policies of IWC from its first days, that the resource itself should not be exhausted by uncontrolled competition.[5]

Reinforcing this view of legitimacy – which portrayed whaling as an ordinary commercial fishery – were the accepted rules of ocean law, based on the notion of the open seas as a commons, as these rules stood in 1946 and as they remained in force, although though not unchallenged, well into the 1960s decade. It will be recalled that these legal rules provided that within three miles or some other reasonable offshore limit defining the territorial sea of a coastal state, that state enjoyed entire jurisdiction over use and management of ocean resources. Beyond the three-mile or other limit of the territorial sea, i.e., on the high seas, sovereignty belonged to no nation; *res nullis*

[5] It would seem only common sense that the whaling nations would wish to avert exhausting the resource completely. As the history shows, however, several of the industrial whaling nations (both members of IWC and non-member states) have on occasion proven quite ready to permit their fleets to decimate or destroy entire species. The attitude of Japan and the Soviet Union in more recent times, other nations earlier, in practice has revealed a willingness to exhaust local or species resources so long as other areas or species remained to be exploited. See Section 3, The Burdens of History, infra.

thus prevailed, and the living resources of the ocean were open to all to exploit. Competition for exploitation of these living resources, even when a species was being devastated, was not subject to regulation by general rules of law. Instead, the fleets that harvested fisheries and marine mammals were restrained exclusively by formal diplomatic agreements that applied only to the states that were parties to such agreements.[6]

In addition to invoking the freedom-of-the-seas doctrine, the pro-whaling nations rely upon the language in the 1946 Convention itself to support their claim that whaling was meant by the framers of the IWC to be viewed as an ordinary commercial fishery. Thus the Preamble of the Convention states that it is the desire of the signatory nations "to ensure proper and effective conservation and development of whale stocks". Although it explicitly states that the industry's history "has seen over-fishing of one area after another and of one species of whale after another … ," so that protection of all species is necessary, the Preamble asserts as a goal of the IWC the protection of whale stocks so as to "permit increases in the number of whales which may be captured without endangering these natural resources."[7]

Some distinguished scholarly commentators regard this language as a definitive indication of the purposes of the IWC; and so, in their view, any nation absolutely opposed to whaling has no legitimate place in the decision making process of the Commission – especially so when these nations form a supermajority coalition that imposes a moratorium policy (thus "completely turning upside down" the terms of the original convention [11] (p. 323)) or that presumes to establish an Antarctic sanctuary [11]. And this, of course, is also the position today of the remaining whaling nations – just as it long was the position of the Soviet Union, which for a crucial period of years was one of the leading whaling powers. It was the position, too, in earlier days of some prominent member states of IWC (e.g., the Netherlands) that were hard liners in favor of whaling but subsequently abandoned the whaling enterprise and have now adopted a "preservationist" position in IWC deliberations and in other international forums [12] (pp. 317–72).[8] The argument that supports whaling as a conventional

[6] On the freedom of the seas arguments, see, e.g., the comments by Burke, William T., Ref. [9]. "[This view] is invoked in every context to protect high seas fishing activity, including the taking of whales, catching the food of whales (krill), tuna fishing, squid harvesting, sealing, and any catch of common marine fish. Traditionally, fishing vessels on the high seas are subject to no laws and regulations other than those prescribed or accepted by the flag state. This is the ancient formula of freedom of the high seas reduced to its meaning of freedom of fishing."

See also p, 261 of Ref [9] which is a discussion of how the freedom of fishing on the high seas has been abridged in international law by the 1958 UN Convention on the High Seas (13 UST 2312) and other agreements.

[7] International Whaling Convention, 1946, quoted (and analyzed) in Ref. [8] (p. 168). The force of this language is highlighted by the fact that in pressing for Japan's entry into the IWC later, at the end of the Occupation period in 1951, the United States adverted also to the terms of the Atlantic Charter and reiterated in the Potsdam Declaration assuring all nations equal access to all the natural resources of the Earth. See Ref. [10] (pp. 23–99). This also gives a discussion of the U.S. Occupation policy and fisheries in Japan, including whaling. See also Ref. [6].

[8] On the Netherlands as an opponent of tight controls and aggressive expansion of its national quotas, see, Ref. [6] (pp. 595–96).

fishery to which no special moral concerns attach, so long as the stocks of target species are not threatened with extinction, also underlies the rationale for the establishment of the North Atlantic Marine Mammals Commission (NAAMCO), a multinational agreement that has emerged as a rival organization to IWC [13] (pp. 155–74), [14] (pp. 116–23).[9]

The determination of the whaling nations to continue the hunting is reflected in the policies of Japan and Norway, most notably, but also of other nations so diverse as Canada and the Faroe Islands, which maintain policies of supporting "scientific whaling" on a small scale, or commercial whaling, or hunting whales for subsistence or cultural purposes, or some combination of these activities.[10] These nations also continue to assert their authority to control unilaterally the rules for all types of fishing or hunting for marine mammals in their territorial seas and Exclusive Economic Zones (EEZs), the latter now extending 200 mile or slightly more offshore.[11]

As noted earlier, for nearly the entire period from the 1930s until the 1960s, the debate over IWC policies was almost completely dominated by the nations and enterprises that were engaged in the commercial whale hunt on the high seas.[12] For them, the regulatory problem was cast in terms of a need for management to assure the survival of the stocks, so that the industry could go on (profitably) into the indefinite future and not risk the entire disappearance of supply. In that sense, the terms of the discussion not only denied any special ethical standing to whales, let alone to marine mammals generally; except in extreme circumstances when extinction was imminent, even the survival of particular species or varieties or populations of whales often seemed to have little or no real influence. This commercial management orientation was reflected in the premises and specific formulas of regulation adopted during the 1930s and then made tighter and more general by the IWC during the period from 1946 to the late 1960s. The regulations were framed in terms of aggregate permissible takes, with only a few species excluded; the quotas were measured in what was defined as the Blue Whale Unit (BWU) as a standard for equivalency. This system set no limits upon any individual nation and did not restrict the number or capacity of ships or amount of gear that each signatory nation might put on the water. The regime

[9] Norway, the Faroe Islands, Greenland, and Iceland were the prime movers, organizing a predecessor conference in 1990. Canada, the Soviet Union, and Japan were involved actively, to some degree as observers and certainly to some degree behind the scenes. As Caron notes, NAAMCO poses a basic challenge to the "integrity" and legitimacy of the IWC in that the new agency plans to develop its own scientific program. Ref. [13] (p. 165).

[10] On the post-1970 background of scientific whaling issues in the IWC, see Ref. [8] (Chapter 9).

[11] Small cetaceans are hunted in the EEZ waters of Japan and other states, and even large (great) whales (e.g., the gray whale, the bowhead) have migratory patterns that bring them well within the 200 mile zones of many nations. Debate of the small cetacean regulatory issue has been prominent in the proceedings of the IWC during the last four years.

[12] Use of the term "commercial" here embraces the international market focus (whether for oil, in the earlier period, or for the food trade – in which Japan's constant demand has fueled both legal whaling under IWC regulation and other whaling efforts, many of which end up in transshipment of "pirate" whaling contraband to the Japanese consumer market); but the phrase is also meant to apply to the large-scale industrial whaling enterprise, as opposed to small-type and aboriginal whaling.

thus created compelling incentives for more and more intensive hunting efforts on the part of all – the notorious "whaling Olympics", in which each vessel sought to maximize its take as a share of the total permissible quota [15] (pp. 305–35), [16] (p. 574).[13] Only when a species was on the brink of entire obliteration did the ethical issue arise in the IWC, as happened with regard to the right whale and (many years after the prospect of imminent extinction was evident) also happened with the blue whale, finally making explicit the question: What right do humans have to extinguish altogether another species of living beings.[14]

The devastating impact of the IWC regime upon the whale stocks was virtually assured, moreover, by the procedural rules of the Commission. These rules embody an escape clause that permits any signatory nation not agreeing to the terms of a specific rule or annual quota to enter an objection; the rules that IWC adopts are binding only upon those governments that do not object.[15] Repeatedly, the annual meetings of IWC were influenced, indeed intimidated, by the certain knowledge that objections would be entered and the rules ignored by certain nations. Hence a routine of preemptive capitulation by the more conservation-minded members became a standard aspect of the Commission's record [5].[16] As a result, even manifest declines in whale stocks failed to prevent the "chaos" (as Gambell as called the long-lasting slaughter) of dangerously high annual harvest levels from going on year after year [7] (p. 99).[17] Not until 1961 did the IWC respond to rising criticism in world opinion, and to the prospect that internal tensions might cause the entire collapse of the commission's regulatory regime, by appointing a committee of independent scientific experts to provide professional assessments of stocks and recommendations for quota levels [15], [20] (p. 305). And meanwhile, the effectiveness of the IWC was also continuously attenuated by the persistence of commercial whaling, in some instances on a large scale, by Greece and Latin American nations that never entered into the IWC agreement and did not recognize its authority [6] (passim).[18]

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[13] During part of the earlier period, the whaling companies did attempt to deal with the problem by establishing national quotas through their governments on a formal but unofficial basis, outside the procedures of IWC itself.

[14] For the especially tragic record of the IWC's failure to protect the blue whale, see Ref. [5]. See also Ref. [17].

[15] This "veto" system, resulting from the escape clause, apparently was incorporated into the procedures at the insistence of the United States and over strong objections by Norway and the United Kingdom. The American position was that it was better to have a veto than to leave open as the sole alternative a complete departure from commission membership for any nation that had strong objections. (Confidential interviews with US diplomatic officials.) In addition to the structural weakness that works against conformity to quotas, there are the allowances made that have authorized whale kills for purposes allegedly of scientific research, discussed below.

[16] See Ref. [18] (pp. 483–530). Quoting Sidney Holt, a member of the IWC Scientific Committee (and later a leading proponent of the moratorium policy), from Ref. [19] (p. 132) and also citing IWC Chairman's Report of the 11th Meeting.

[17] The peak of postwar commercial whaling came in the 1961–62 season, which witnessed a harvest of 67,000 animals. See Ref. [28]. (p. 301, Fig. 1).

[18] Also of relevance was the lack of regulation exercised by the IWC in many ocean areas, most notably in the North Pacific, in which commercial activity on a rising scale was ignored until the mid-1960s, when signs of crisis for several species had become too strong to ignore any longer. See Ref. [6]. See also, Ref. [5] (p. 161).

2.2. The common-heritage concept

The introduction of scientific inquiry on a systematic basis in the 1960s was a breakthrough. Recommendations of the scientists were in fact, however, resisted so successfully by the IWC nations that not until 1972 was the Blue Whale Unit quota system finally abandoned in favor of species quotas. In addition, the commission agreed upon the deployment of on-board international observers, giving enforcement some credibility. From the standpoint of the industrial whaling interests, scientific management was a tool for assuring the availability of stocks for whaling in future years; considerations of altruism or animal rights were not at issue, other than that all acknowledged in theory (and in some instances, I would argue, *only* in theory) that entire obliteration of a species or population was an entirely unacceptable outcome.[19] In this sense, the IWC's move toward scientific management and adoption of the Maximum Sustainable Yield (MSY) principle in the 1960s, and then its endorsement in a 1974 decision of the "New Management Procedure" (regulating catches according to assessments of each identifiable population stock individually) were reflections of the emergent ethos of commercial fisheries management, both national and international, that enshrined the sustainability ideal more generally throughout the global community in that period of fisheries history.[20]

Another impetus for scientific management of whaling had a very different intellectual origin and orientation. It was based not upon commercial or entirely anthropocentric considerations, but rather upon the premise that the ecosystem must be viewed as a resource that belonged to future generations and must be treated as a common trust. In the history of whaling regulation debates, this idea had been expressed as early as 1927 in a remarkable League of Nations Committee of Experts report that called for "a new jurisprudence" in ocean resource use, proclaiming that "the riches of the sea, and especially the immense wealth of the Antarctic region, are *the patrimony of the whole human race*".[21] A direct line may be drawn in the intellectual history of modern jurisprudence – and also in the history of popular moral consciousness – about marine environmental resources, from this extraordinary statement (composed by Leon Suarez, chair of the League committee in 1927), to later expressions of ethical purpose in the history of whaling regulation. Thus when the

[19] Again, Japan's apparent willingness to hunt a population to extinction in the case of the "pygmy blue whale" controversy is the extreme case. See Ref. [5] (pp. 200–202). But if Japan became prominent because of its explicit denial of a depletion threat in this case, other nations were guilty of reckless disregard of species survival in their general resistance to timely and effective regulation and enforcement – as even commentators who are inclined to approve the revival of whaling for some species today are usually ready to admit as a matter of judgment on the past.

[20] This emerging ethos in scientific fisheries management was exemplified by the Maximum Sustained Yield principle as formulated in the 1958 UN Convention on Living Resources of the Sea. On the background of this development in both the international scientific community and, more specifically, in the diplomacy of the US Government (especially with regard to the 1953 North Pacific Fisheries convention), see Ref. [10]. On the Law of the Sea developments more generally, see, inter alia, Ref. [9]. For the details of the New Management Procedure, see Ref. [8] (pp. 453–65).

[21] Suarez, quoted and discussed in Ref. [8] (pp. 109–13).

United States convened the conference that produced the IWC agreement of 1946, Acting Secretary of State Dean Acheson referred to the responsibility of the whaling nations to treat the stocks as a "trust for mankind".[22] Similarly, international proclamations and agreements such as the convention on protection of endangered species[23] and the 1972 Stockholm Conference on the Human Environment[22] have reiterated the moral notion of obligations to future generations and to the environment itself. This ethical view is also a leading explicit premise justifying the "precautionary principle" of resources management, issued at the Rio conference.[24] Moreover, the endorsement of biodiversity protection as an objective of international regulation, endorsed in the Rio documents and later agreements such as the UN Agreement on Straddling Stocks and Highly Migratory Species, necessarily implies a legitimate place for preservationist policies; for if biodiversity is to be sustained in an ecosystem, then the systematic extinction of any species is unacceptable, and the only efficacious response to endangerment is preservationist style protection.[25] (As will be noted later, however, many of the documents and agreements embodying the new ethic of a common heritage also reasserted the sovereign rights of nation-states to control of resources within their own boundaries, including the 200-mile EEZ.)

The IWC has also operated since 1970 under the direct shadow of the UN Law of the Sea negotiations, the animating spirit of which was expressed in the famous declaration by Ambassador Pardo in the initial UN debates that the oceans constitute the "common heritage of mankind" – a declaration that reflected precisely the moral perspective expressed by Suarez in the League of Nations report more than 40 y earlier [8, 9].[26]

All these expressions of changes in moral consciousness regarding the environment changes that were also reflected in national legislation in most industrialized

[22] Acheson quoted in Ref. [8] (p. 165). For the U.S. Government's commitment to the idea of open access to resources for all nations at the end of World War II, extending not only to revival of Japanese whaling but also to rapid rebuilding of the Japanese marine fisheries generally, over protests of the other Allied nations, see Ref. [10]. (*Cf.* Ref. [6] (pp. 529–35).

[23] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Concluded March 3, 1937, 27 U.S.T. 1087, T.I.A.S. No. 8249. The treaty declares that only in "exceptional circumstances" may there be trade in any species threatened with extinction. The treaty also specifically listed the gray whale, the blue, the humpback, the bowhead, the right whale, and the Ganges susu as endangered – a list more limited than many scientists would have contended for then and have argued for later on. In subsequent meetings of the Convention signatories, the names of all cetaceans appeared on one appendix or another specifying species requiring protection. See Ref. [21] (p. 43) and, for a thorough discussion of the relatedness of CITES to the IWC Ref. [8].

[24] It must be conceded that in many respects the Rio accords certainly also embodied an explicitly utilitarian and anthropocentric (rather than ecocentric) view of management. So too, indeed even more so, did the Brundtland Commission and its report, stressing sustainability. On these and related issues, see Ref. [23] (pp. 261 – 305) which treats the complex question of the absorption and adaptation of new international norms that either reinforce, channel, or contradict the terms of existing agreements.

[25] This argument is worked out in more extended form by the author in a conference paper now in press Ref. [24].

[26] It should be noted that since 1995 the Law of the Sea developments have moved to a new phase with a protocol settling the seabed minerals issue on a new basis.

countries by the 1970s, including laws for protection of the endangered species such as the US legislation of 1973 – had a powerful bearing upon the debate over the whale hunts. Their direct relevance was brought home most immediately by the 1972 Stockholm Conference, which adopted a resolution specifically calling for a ten-year moratorium on high-seas whaling.[27] The Stockholm Conference action, which received a strong supporting vote under leadership of the United States, placed direct pressure on the IWC: Under this pressure, the commission moved then toward the adoption of its "New Management Procedure" in 1974, finally accepting the long–neglected advice of its Scientific Committee that aggregate quotas be supplanted by quotas for specific stocks according to their degree of endangerment.[28]

The Stockholm resolution inspired a group of non-whaling nations (including at least one non-maritime nation) to enter into the Convention apparently for the specific purpose of changing the balance of votes and thus to institute a moratorium policy. It was not until 1982 that the member nations critical of whaling in the IWC finally had the three-fourths majority necessary to institute the moratorium policy; and even then, as a matter of compromise and in hopes of heading off defections by the whaling nations (Iceland actually did resign from the agreement in protest), the moratorium was not made effective until 1986.[29] And of course, under terms of the original 1946 convention, member nations wishing to continue whaling can still go on "legally" with it by entering their reservations formally immediately after decisions are reached.

The 1986 moratorium remains in effect since it has been extended by the annual meetings despite recent advice of the Scientific Committee against the blanket moratorium approach. The scientific board in the last several years has contended that

[27] The Stockholm resolution also called for expansion and intensification of scientific research on whaling, and for the shoring up of the flimsy structure of the IWC organization and implementation procedures. See Ref. [22].

[28] The Revised Management Procedure differentiated (1) *Protection Stocks* (not necessarily endangered, but at less than 10 percent below the level giving their maximum sustained yield), for which no hunting is permitted, (2) *Sustained Management Stocks*, at 10 to 20 per cent of MSY level, on which limited hunting is permitted, and (3) *Initial Management Stocks*, for which commercial whaling is allowed under IWC quotas since they are abundant at levels about 20 percent over MSY level. This procedure and its virtues are analyzed in Ref. [20] (p. 308).

Dr. Knauss (U.S. Commissioner to the IWC in 1991 and 1992) has recently remarked: "For many, the RMP came too late and is [today] irrelevant since they are against whaling even if some whale stocks are sufficiently robust to allow for limited harvesting. Ref. [25] (pp. 79–87)." In subsequent sections of the present paper, it will be argued that the conclusion that the RMP came "too late", as a matter of historical judgment, is not necessarily one that depends on the premise that all whaling is evil and must be stopped. It can just as well be premised on the view that if whaling regulations have failed to contain predatory and irresponsible commercial whaling and whale-products trade in the past, at the risk of the stocks, the adoption of new scientific norms cannot be relied upon to curb such activities in the future. Indeed, the history of the IWC since adoption of the RMP gives ample reason to take such a view.

[29] In 1987 the membership of IWC consisted of 41 countries, of which only seven were engaged in whaling operations. Portugal was the only whaling nation–it harvested but 1 per cent of the kill in 1985–86–that remained at that time outside the IWC. The procedures of the commission and the history of the moratorium are provided in Ref. [26] (p. 235). See also the analysis in Ref. [8].

minke whales may be subjected to limited killing without jeopardizing the levels of sustained yield, and that probably the population dynamics of smaller whales would respond to carefully managed hunting with an increase in overall levels of the stocks. The moratorium has thus remained the central focus of global debate as well as of scientific controversy and the subject of a heated division with the IWC for the last decade.[30]

2.3. *The absolutist/preservationist view of whales' right to life*

The successive expressions of common rights of humankind, as a basis of conservation or preservation of whales, has developed even further in the direction of absolute preservation on grounds that whales must been seen as having an inviolable right to life. This is a variant of animal rights philosophy, but it is not comprehensive as to the rights of all mammals against any killing by humans.[31] Rather, the whale and other cetaceans are singled out for special consideration because of their biological character, as species whose reproduction and survival is problematic because of long gestation periods, late age at which females can reproduce, and special vulnerability of the stocks to depletion and extinction; and/or because of their characteristics of intelligence, capacity to communicate, complex social behavior, manifest suffering when hunted, and the like; and/or because of the special place of the whale (as is true also of dolphins), in the mythology, literature, art and, withal, the esthetic and moral consciousness of nearly all cultures that have come into contact with them, including both industrial societies and the traditional-type whale-hunting cultures [21].[32]

International lawyers who seek to advance the argument for a right of all whales to live use the history of changing moral consciousness and expanding use of ecocentric arguments in environmental debate to contend that an absolute preservationist policy for whales is merely the next logical step in an evolving historical movement. This movement, it is argued, represents in effect emergent principles of customary international law; it is described by D'Amato and Chopra, for example, as more than simply

[30] On the Scientific Committee's advice being rejected on this score by IWC, and the resultant intensification of divisions over the ethics of whaling and specific policies of IWC, see Ref. [27].

It should not be overlooked that Norway, Japan, and other whaling nations that have authorized minke kills (commercial or "scientific") scorned the views of the IWC scientific committee so long as that committee recommended against minke whale harvest. See Ref. [28]. Japan and Norway are quick to criticize other IWC member nations today, however, for ignoring the revised view in the scientific committee, which now is favorable to carefully managed small kills.

[31] For a work setting forth the case for animal rights generally, see Ref. [29].

[32] For an extended argument, in impressive depth, regarding the cultural construction of the relationship of ecology generally (and marine mammals in particular) to human societies, and how the problem has confounded discussion of indigenous peoples' claims versus the demands of "green" environmentalists, see, inter alia, Ref. [30]. Similarly with the argument about the realities of "subsistence"; see, e.g., Dahl, Jens Ref. [31] (p. 23) arguing that "subsistence, including hunting, has different meanings for different groups of people. Thus, when analyzing hunting in the Inuit communities of Greenland the focus should not be on subsistence as such, but on cultural, economic, and structural realities".

"a progression from self-interest to altruism", being rather "a broadening of international cultural consciousness [31] (p. 49)". In the history of "changing psychology and breadth of consciousness", they find evidence of a "trend in the component of customary international law called *opinio juris*"; general custom emerges, and "what states *do* becomes what they legally *ought* to do, by virtue of a growing sense that what they do is right, proper and natural". D'Amato and Chopra conclude that the concern for the survival of the ecosystem, together with recognition of special attributes of cetaceans, underlies the new "consensus of preservation" which justifies recognition of a right to live in whales, just as traditional morality has recognized the right of humans to life itself [31] (p. 50).[33]

Whether or not the absolutist position on preservation can correctly be thus described as a new "consensus", this deep green view has come to play an important part in the debate of whaling. The critics of the whaling moratorium and defenders of various types of whaling regard the preservationist arguments as subjective at best. At worst, these critics contend, the preservationist view is based on a hopeless romanticism that creates an imaginary super-creature where only an ordinary marine mammal exists in fact. Charges are hurled regarding "cultural arrogance" and "cultural imperialism", phrases used to describe how allegedly the anti-whaling groups in a few large advanced industrial countries are seeking to force their norms or their myths upon peoples in other cultures who do not accept the morality (or even the scientific arguments) that are adduced to favor a permanent moratorium [12].[34] Moreover, the proponents of continued whaling regularly point to what they see as the hypocrisy, or at least "historical amnesia", of many nations which now support the moratorium policy but which in earlier periods of their history were themselves guilty of the worst kind of reckless and unrestrained hunting of disappearing species. (We shall return in Section 3, below, to the question of historical memory and obligations.)

There is also widespread concern in the North Atlantic whaling nations and in Japan that the absolutist position regarding whales, which already extends to demands that killing stop in territorial waters as well the high seas, will produce a precedent that will quickly extend to demands for moratoria on any killing of small cetaceans and of seals as well.[35] The animal-welfare rights approach, critics charge, even more than the pro-moratorium position taken by the European Community and

[33] Critics of this view who defend the rights of small-type coastal whaling communities–or in some instances even champion outright the old concept of whaling as an ordinary fishery like any other, portray these ideas as either arrogant or cynical (see text at note 32), or even condemn the preservationist view as a concept that is advanced in the IWC by nations who thereby win immunity from diplomatic pressure to abate industrial pollution or other environmental malfeasance see Ref. [14] (p. 117). For an excellent analysis of the preservationist position, see Ref. [67].

[34] In a recent conference on comparative legal cultures and ocean resources, sponsored by the Ministry of Foreign Affairs, Government of Japan (Feb. 1997) papers by both Japanese government officials and academics repeatedly referred to "cultural imperialism" of the United States and other anti-whaling nations because of their attack (as it was depicted) on deeply rooted cultural values associated with whaling and whale meat consumption in Japanese society.

[35] There has already been an extended controversy, at one time a priority issue for Greenpeace, and one in which the European Community took trade-sanctions action, regarding sealing. See the full discussion in Ref. [30].

by the United States and other nations in the IWC, represents a faithless repudiation of sustainability ideas founded on human welfare, all in the name of "culture-specific values [32] (pp. 156–63), [33] (pp. 98–102)".

A wholesale attack by such critics on the preservationists as oppressive cultural absolutists is usually linked to positive arguments, however, that go beyond the simple defense of commercial whaling as an ordinary fishery under traditional freedom-of-the-seas doctrine. These additional positive arguments focus upon two aspects of contemporary whaling: first, the hunting for subsistence (variously defined) that is done by "aboriginal" or indigenous peoples who are in marginal social positions within advanced societies; and, second, hunting in the mode of what is now commonly termed "small-type coastal whaling" (STCW). The futures of both these types of whaling are fundamentally challenged by the preservationist view. We turn next, therefore, to these two special aspects as further illustration of the range and character of questions at issue in the whaling debate.

2.4. *The "aboriginal exception"*

The special status of "aboriginal whaling" has been recognized in the IWC since its inception. Even the earliest international whaling agreement in 1931 provided exemptions for aboriginal peoples. It is important to note however, that the 1931 rules conditioned the exemption from quotas on the basis of gear: the provision extended only to whaling conducted by aboriginal hunters using "canoes, pirogues or other exclusively native craft propelled by oars or sails", and it excluded use of firearms in the hunt [34] (pp. 189–216). By contrast, the aboriginal exemption under the IWC has incorporated no restrictions on gear but has required that the products of whaling be used for local consumption and not commercial trade. As Prof. Freeman notes, however, "it is evident that within the IWC a progressive broadening of the criteria under which aboriginal subsistence whaling is allowed has occurred [34A]." The liberalized rules changes are codified in a 1981 IWC report:

> Aboriginal subsistence whaling means whaling, for purposes of aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native people, who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales.
>
> Local aboriginal consumption means the traditional uses of whale products by local aboriginal, indigenous or native communities in meeting their nutritional, subsistence or cultural requirements. The term includes trade in items which are by-products of subsistence catches [35].

Since 1961 the IWC has annually granted special (exemption) quotas for communities of indigenous peoples in Arctic waters, at first for humpback kills in the Greenland coastal fishery and subsequently for bowheads hunted by Alaskan and Canadian native peoples [36] (p. 119).

Champions of the whaling moratorium, whether they speak as preservationists or instead as absolutists who argue for a right to life for whales, have focused intense

criticism on the indigenous whaling exemptions. Some scientific advice has been against bowhead hunting altogether; but in most years, the IWC has authorized larger numbers of kills than even the most generous scientific estimates would have permitted, further embittering the opponents of whaling [18]. Furthermore, the fact that the United States has taken the side of the Inuit interests in Alaska, demanding on their behalf the exemption from the moratorium, is regarded as undermining American moral leadership with respect to the preservationist cause. Indeed, a special irony inheres in the US advocacy of an Inuit bowhead exemption: for, in addition to having led the campaign for the 1982 moratorium decision and subsequent efforts to extend the moratorium, the United States has established a record of aggressively deploying unilateral economic sanctions against Japan and Norway for having conducted "scientific" whaling after exercising their rights to object to IWC decisions, as the United States has also done with respect to nations engaged in tuna-fishing with techniques that involve incidental kills of dolphins. In fact, it is a commonplace observation that US trade and fishery-access sanctions have served, in effect, as the principal enforcement mechanism for making IWC regulations effective – to the extent that they have not been evaded or rejected – against the pro-whaling states that are parties to the Convention [37] (pp. 311–54).[36]

What of the contention that "new" principles of international law, recognizing the right of whales to live, and claiming the doctrine of res communis (the bounty of the sea belonging to all humankind) have superseded the older law of free fisheries on the high seas? Defenders of indigenous whaling rights have responded to the argument that evolving moral consciousness, as the expression of customary international law, is insufficient as a rationale for regulatory actions that damage the traditional community life of those who have been harmed by the larger course of modernization. Thus, one advocate of Inuit whaling rights invokes the historical record explicitly in arguing that, though the evolution of "international legal norms" must be taken into account, nonetheless we require "a formulation of international law which [not only] is capable of recognizing … the need to be flexible in response to evolutionary forces, but is also of sufficient breadth and depth to revisit and redress the injustices perpetrated in the course of its early development [38] (pp. 371–93)."

There is, moreover, a body of dicta in the emerging international law of resources and human rights which lends support to the aboriginal-exemption policies. Most notable in this regard is the International Covenant on Economic, Social and Cultural Rights. Article 1.2, declares that "in no case may a people be deprived of its own means of subsistence [38] (pp. 387–89)." Some states have also given extensive recognition to rights of indigenous peoples to access to resources that they once controlled within the

[36] The first use of sanctions of this kind by the United States, it should be noted, was actually against Denmark for its failure to comply with international regulatory decisions regarding the Northwest Atlantic salmon fishery that was deemed to be in danger of depletion.

The recent GATT decision against the United States in a dispute with Mexico concerning U.S. unilateral application of sanctions to punish Mexican failure to control dolphin kills in connection with tuna fishing operations casts in doubt the legitimacy of effective unilateral fishery sanctions policies such as the U.S. Government has pursued in past years. For recent developments regarding unilateral sanctions, see Ref. [68].

modern states that took their territory by conquest; and in the case of Canada's compact with the Arctic peoples, such rights explicitly include whaling [39] (pp. 117–27).[37]

Building upon this jurisprudential foundation, and drawing as well from earlier formulations of indigenous rights from the history of IWC itself (especially the 1981 working group's recommendations, quoted above), the social scientists who champion the exemptions for Inuit also have argued for a broadened definition of "subsistence". Such widening of the concept of subsistence includes within it substantial cash trade on the one hand, but on the other hand also subsumes relationships that extend far beyond the exclusively economic sphere. Subsistence, in this highly extended version of the concept, is "a set of culturally established responsibilities, rights and obligations that affected every man, woman and child each day."[38] Thus Freeman argues for a definition of subsistence activities as:

> those actions that contribute to the continued functioning of various essentially non-material aspects of everyday life.
>
> A subsistence society can be understood to be a group of people whose production, use, and consumption of local resources occurs in ways that are consistent with traditional patterns maintained by kinship-based social structures.....
>
> Subsistence activities.... may also serve social and cultural ends among members of a larger, non-local, community of people who are linked through shared language, history, culture, or social bonds [34A].[39]

This elastic, revisionist concept of subsistence has been invoked as the basis of a more general argument that exemptions from the whaling moratorium should properly be extended to any coastal communities engaged in "small-scale whaling" for which the whaling activity has traditionally (however "tradition" is defined) been an important part of local culture [39].

The advocates of aboriginal exemption also portray the traditional attitudes and hunting records of indigenous peoples as being typically very favorable to the objective of sustainability of the resource. Consistently with the trend of thought among many anthropologists and sociologists regarding fishing traditions in small coastal communities almost universally, many are also contending now that the customary practices of the small coastal whaling communities are wholly consonant

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[37] In the United States, the federal courts similarly have recognized treaty rights in relation to Native American fishing; and in New Zealand, the Maori treaty rights have been extensively influential in recent cultural policies as well as resources policies. The action of Canada in relation to its northern indigenous peoples is, however, of exceptional scope and significance.

[38] Wenzel quoted in Ref. [34].

[39] For a detailed case study founded on this concept, see Ref. [40]. (pp. 144–215). It should be noted that in the green environmental movement, there are some voices that derogate the claims of even the Inuit to be "traditional" in their social organization (hence casting in question Inuit claims to legitimacy of hunting the bowhead or seals); on this campaign to "demythologize" Inuit culture, see Ref. [30] (passim). This theme is revisited in the concluding section of this paper, to ask whether, even if such demythologizing efforts vis-à-vis Inuit culture are spurious, a debunking of the claims of Japanese and Norwegian whalers is justified.

with the objective of sustainability – more so, it is often argued, than the modern "scientific" management regimes have actually achieved or probably can hope to achieve.[40] To what extent the data actually support such a view, and to what extent this contention is a naive romanticized view of customary practices and indigenous culture on the part of those who most strenuously deplore romanticization of cetacean character and uniqueness, is a matter, I think, that remains in serious dispute.

Another argument adduced in favor of coastal whaling based in small communities not composed of aboriginal peoples is that the food production through whale hunts is far less demanding of energy inputs than raising cattle or other meat animals on land, and that the pollution damage from the activity is nil compared to what land-based livestock raising causes. Hence, not only does whale meat supply cultural needs as well as meet the dietary preferences of substantial populations, it also helps to reduce the net cost of protein consumption in a world facing the possibility of chronic aggregate food shortfalls [34].

2.5. Whaling in the fourth world

Deploying arguments such as the foregoing, the critics of the whaling moratorium and the enemies of animal-rights claims have sought to gain sympathy not only for the claims of the indigenous peoples, such as the Inuit of the Arctic, but also for all who engage in coastal whaling in even such highly advanced industrial countries as Japan and Norway. Although these pro-whaling advocates assert that such whaling activity is consistent with environmentalist ethical concerns for sustainability of resources and for the support of world food supply, their main appeal is in a different direction: they appeal to the sentiment that the indigenous peoples must not suffer further loss of their cultural identities. This is, of course, a sentiment that is widely shared among environmental activists and the officers of governmental agencies in the nations that are otherwise sympathetic to the moratorium and in most cases absolutely opposed to commercial whaling.

The interests of aboriginal or indigenous peoples has been a concern embedded in IWC policies almost from the beginning. What is new in these current-day debates is the way in which all the arguments regarding cultural survival are now put forward with equal fervor in the cause of coastal communities in Japan and Norway – communities in which there has been a high dependency on whaling for cultural as well as economic purposes, but whose populations are indistinguishable ethnically from the workers in factories, on farms, in computing firms, and in banks and other service

[40] There is now a copious literature on the alleged virtues of "co-management" (regimes drawing on the traditional wisdom and techniques of small coastal communities and especially indigenous peoples) and also on the record of whaling and sustainability among the Inuits and other groups that come under the exemption or seek to do so. See, for example, the argument in Ref. [39] (pp. 120–21). (contending that in shore-based small-scale whaling communities in which "historical, social, cultural, and dietary considerations" all give evidence of the central importance of whaling to the culture, "practices … are generally sustainable in the sense that in themselves they do not lead to the depletion of the resource base)".

industries throughout the country. With their emphasis on coastal whaling, conducted in relatively small vessels and in waters generally well within the 200-mile zone offshore, the critics of the moratorium thus subsume in one large category–a category that they wish to qualify for exemption from any bans on whaling – both indigenous and non-indigenous coastal communities. The latter are now termed "small-type coastal whaling" communities (STCW); and it is contended that they too have special cultures in which whaling and whale products play a major part, that "subsistence" should not be regarded as a narrow concept that can serve to differentiate them from more isolated indigenous communities, and, finally, that even the type of technology they employ in whaling should be disregarded as a factor irrelevant to the issue of defining their essential cultural character and their claims to special consideration vis-à-vis the moratorium.[41] If such communities on the coast of Norway "are to have any future", the Norwegian government declared, "they are dependent on acceptance [by world opinion] of their time-honored right to exploit the living, renewable resources of the sea" [41]. Similarly, spokesmen for the interests of Japanese coastal whaling communities argue that the social fabric of communal life is torn asunder by the whaling moratorium, with devastating effects on an established craft, on family relationships, and on the self-identity of the people involved.[42]

When the argument first emerged in IWC debates that the Norwegian and Japanese coastal communities were in the same category, with respect to culture and tradition, as the Inuit, the idea was dismissed by one prominent conservationist writer as "solipsistic nonsense"[28] (p. 166). Whether or not, on reflection, so harsh a characterization is fair to the many scholars who have taken sides with Norway and Japan in this pro-whaling cause, it seems evident to the present writer that the effort to equate indigenous peoples of the North with whalers in coastal communities of industrialized countries can only be plausible if one gives zero weight to a set of critically important qualitative distinctions. We return to this issue in the Conclusion, below.

2.6. Intersecting claims: A summary view

The history of the IWC – and also of the more comprehensive whaling debate since 1946 – may thus be regarded as having gone through four distinctive phases.[43] In the first phase, from the founding until the mid-1970s, the "whalers' club" structure and absence of representation by any groups concerned with ecological claims meant that a crude commercial ethic clearly prevailed. This had tragic consequences, so far as the condition of whaling stocks was concerned. Such restraints as *were* exercised tended to come late, to be accepted reluctantly, and to be attenuated in their effectiveness by the procedures of the Commission and also by the underlying willingness of the parties to deplete whale stocks (and even species) for industrial profit.

[41] Young et al. of Ref. [39] are the most widely noticed champions of this view.

[42] The fullest argument for Japanese claims (though I think not a convincing argument) is in Ref. [42].

[43] For an alternative periodization, see Ref. [21].

In the second phase, from 1974 until the early 1980s, the crude commercial ethic was displaced by the scientific concept of Maximum Sustainable Yield. By the 1970s, MSY had become widely accepted as an ideal in fisheries management in most nations of the world for oversight of activities in their own coastal waters, and since 1958 it had been an acknowledged standard in international law embodied in the Convention on Living Resources of the Sea.[44] Thus the MSY standard became the intellectual fulcrum of debate in IWC decision-making, most notably in the adoption of the New Management Procedure that was more refined than the crude aggregate standard and that differentiated stocks by their condition.[45] But at a more comprehensive level, MSY represented a moral position, based on the idea that survival of the whales was compatible with uses for human consumption and commercial profit.[46]

This ethical standard was displaced by the preservationist standard with the success in 1986, fourteen years after the Stockholm Conference declaration, of the moratorium policy. During the period 1986 to the present the moratorium policy has prevailed in the IWC. The scientific basis of the arguments for moratorium is a compelling one for many participants in the debate, and must be given careful attention in any analysis of today's controversies. Scientific data that are cited include, first, the uncertainties as to how stable or safe current levels of whale stocks are for most, if not all, species. Second, there is the question of how renewed killing might interact with other factors dangerous to the survival of stocks (particularly marine pollution, shipping, and uses of dangerous gear such as driftnets in other fisheries) to precipitate an irreversible decline in stocks. Third, there is the unique biology of whales, especially as to reproductive patterns and the relationship of health and life span to losses from hunting.[47]

The scientific debate is by no means the entire story, however, for there is also the well-known disagreement, already mentioned here, on the matter of whether whales have "a right to live", with special standing in the animal world by dint of their intrinsic qualities but also as symbols, variously interpreted, in so many of the diverse cultures of humankind. (This symbolic function is evident in the special place of

[44] On the 1958 convention, see Ref. [8] (pp. 290–99).

[45] See note 20.

[46] MSY had special standing with scientists who even in the 1960s recognized how difficult it would be to translate the ideal into effective management, and against emerging alternative ideas such as privatization of fishing rights, because they believed that MSY management could win the support of the industrial fishing interests and was an idea that had won public support. See discussion in Ref. [43] (pp. 381–534).

[47] For a summary view of many of the scientific arguments, and how they cut for or against the moratorium, see Ref. [44] (pp. 42–45). When the United States made an unsuccessful effort in 1978 to obtain revision of the basic charter of the IWC, including a proposal that the objective of a strengthened independent scientific research effort should be to "maintain or restore the functional role of the stocks in the marine ecosystem", it rested its case in part on the premise that the special character of whales required looking beyond merely human consumptive objectives. For a discussion of this issue, see Ref. [8].

Two insightful analyses of the IWC's record are: Refs. [45 (pp. 105–115); 46 (p. 31–88)].

whales in the imagination and cultural life of whaling communities, and in the literature and cultural consciousness of societies which today are in the forefront of the preservationist movement.) Not to be forgotten, either, is the evidence of the unique status of whales in the ecology of the oceans, so manifest at this point in the history of their exploitation that very few of even the most ardent pro-whaling champions pretend any longer that this is another "ordinary fishery".[48]

Throughout the history of the debates over whaling regulation and the role of the IWC, in these three distinct phases, there has been a continuous process of intersection and counterpoint between the focused concerns regarding the ethics, goals, and varying paradigms of management of whaling itself, on the one hand; and, on the other, the assertion of ethical standards from other quarters in the larger process by which the norms of international law have been articulated. Some of the latter have been mentioned already at various points in the text, but a brief reiteration will suggest how they have added to the perplexities of the whaling debate. An encapsulated view would include the following:

1. The provisions of the Atlantic Charter, the Potsdam Agreement and other wartime and postwar Allied commitments to open access to resources by all nations and peoples.
2. The concept of freedom of the seas and unrestricted fishing on ocean waters beyond the territorial seas, yielding in 1958 to the MSY ideal embraced by signatories to the UN Convention on Living Resources of the Sea and stating an obligation of nations to manage fisheries on a sustainable basis.
3. The expression of indigenous rights, as a unique aspect of universal human rights, in the International Covenant on Economic, Social, and Cultural Rights, Article 1 (quoted earlier), asserting:

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

This clause was incorporated into the International Covenant on Civil and Political Rights (Part I, Article I.2.).[49]

4. The 1972 Stockholm Convention resolution, calling for a ten-year moratorium on whaling, expressed more generally "the concept of a global commons" [38] (p. 385).

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[48] On symbolism and cultural importance, see Refs. [47, (pp. 112–20); [48] and (pp. 124–33)] condemning "totemization" of whales as a symbol mobilized by environmentalists. See also, inter alia, Ref. [21].

One prominent advocate of whale-hunting is the Greenlander, now an official in the European Union bureaucracy, Finn Lynge, who argues that there is nothing more natural in life on this planet than to kill animals for food and hides. Lynge contends that the moratorium movement (like the animal rights position more generally) is an effete expression of modern urban life and evidence of how detached we have become from the "real" terms of existence in the natural order. See Ref. [49].

Indeed, at a the 1997 International Wildlife Law Conference at Georgetown Law Center, Mr. Lynge opened his presentation with a reminder that to indigenous people living in his country, the fact that their horses are "delicious to eat" is at least as important as the work these horses do or as their beauty. (Tape of proceedings, Washington, D.C., March 30, 1997, in author's files.)

[49] Discussed in Ref. [38] (pp. 383–4).

and as such gave legitimacy to the participation as parties in the IWC of non-whaling nations – including some that were dedicated to preservationist absolutism from almost the start of their membership – quickly outnumbering the pro-whaling nations as voting members of that body.

5. The comprehensive UN Convention on the Law of the Sea as finally adopted also gave formal expression to the global commons concept, although the extent to which its premises concerning sustainability and use of resources run against a moratorium on whaling is a matter of debate.
6. The two major documents that resulted from the 1992 Rio meetings on the world environment, the Rio Declaration and the Biodiversity Treaty, revealed the robustness of a continuing tension in international environmental debate as between the concept of "sustainability" as a utilitarian and anthropocentric ethic geared to maximization of consumptive use, and the ideal of common heritage and intergenerational commitments that also express "rights" of the ecosystem itself and the species it harbors [23] (Rf passim). In Resolution 19.63 of the International Union for the Conservation of Nature and Natural Resources (IUCN), this tension was addressed in terms that (as Friedheim has indicated) seems to lend legitimacy to the anti-whaling IWC majority with respect to the moratorium and the Antarctic sanctuary; for this resolution stressed that "nothing in Agenda 21 restricts the right of a State, or competent international organization, to prohibit, limit or regulate the use of marine mammals more strictly than is required for sustainable use, within areas under its jurisdiction or control [50]".[50]
7. The emerging claims of the indigenous peoples and small coastal communities engaged in whaling – claims that are premised on the arguments for cultural pluralism and against the imposition of industrialized countries' environmentalist ideals that threaten the survival of distinctive community or indigenous cultures – have further complicated the debate. (The IWC itself has sought to work out a fully developed, formal position on definitions of "subsistence" and other problems in definition of groups that should qualify for exemptions from taking whales). This intersection of whale-hunting issues with the more general question of cultural-survival rights has had three distinctive effects in the whaling debate. First, as we have already noted, it has intensified the level of controversy between states and the confrontation of ethical norms as to the continuation or terms of the whaling moratorium. Second, it has become an issue with regard to the legitimacy of NAAMCO, the rival organization in the North Atlantic, whose undoubted core purpose is to revive commercial whaling though the rationale typically advanced by its members is concern for the survival for alleged "subsistence" or "traditional" coastal settlements. And third, at the most practical level of international diplomacy, it has complicated the already-perplexing ethical dilemma of the United States Government in its championing

[50] Ref. [50] as quoted in Ref. [51] (pp. 349–78) on p. 378 n. 119.

of indigenous-exemption quotas for the Alaska Inuit (and now also for the Makah).[51]

Such expressions of universal ethical principles are asserted from forums outside the whaling controversy, but they intersect with the claims in the whaling debate and deeply affect its terms of reference. Moreover, they have had a powerful practical impact upon the question that parties to the IWC confront, as to how the commission can possibly survive today's fracturing tendencies. Indeed, critics of the anti-whaling parties in the IWC denounce as unethical the successful use of the Commission as a vehicle to advance their "absolutist" approach, embodied in the moratorium and in the Antarctic sanctuary. These critics, who include the eminent legal scholar William T. Burke as well as some well respected scholars in the social sciences, declare that the moratorium and Antarctic sanctuary policies represent a cynical manipulation of an international agency in violation of the original intention of the nations that came together in the 1946 agreement. Moreover, Burke has argued, the accepted rules of construction for international agreements render illegitimate a 180-degree reversal of the IWC's original purpose. If the anti-whaling nations want to stop the hunts entirely, according to this view, then respect for the principle that promises must be kept dictates that they should withdraw from the IWC and seek to effect their reforms through other types of activity and in other forums [11]. The IWC should continue to be a whaler's club after all! (However, these same critics of the preservationist position seem to be perfectly comfortable with radical modifications of original terms when they advance the idea of transforming the "aboriginal exception" into a much broader and more inclusive concept that would advance their own agenda as to expansion of the volume of permitted whaling.)[52]

Alongside the ethical argument, in this last aspect of the whaling debate, is the instrumental issue regarding institutional survival of the IWC. If a coalition of anti-whaling member states continues to impose policies found unacceptable by Japan, Norway, and other whaling nations, then there is a strong chance that all of the pro-whaling states will withdraw from the agreement; and the result (the argument continues) will be the collapse of the only effective regulatory regime that has global support. If all the whaling states withdraw from the IWC, as Iceland and Canada have already done, then the likely risk to the survival of the remaining whale stocks will be far greater than it would be under an IWC regime of regulated whaling employing the Revised Management Procedure that the Commission's scientific committee has

[51] With removal of the gray whale from the U.S. Endangered Species Act endangered list, the Makah people in the Northwest U.S. coastal region obtained in 1996–97 the support of the United States Government for resumption of what was rationalized as ritualistic, traditional whaling (demanded by the Makah for ceremonial and cultural purposes, but with no promise by Makah leaders that commercial whaling in the future will not be demanded also). A treaty with the United States had given the Makah whaling rights. Evidence of a serious division within the Makah political leadership–with some of the elders coming out in opposition to renewed whaling-led the United States to withdraw its proposal in the 1996 IWC meeting for a Makah gray whale quota under the aboriginal exemption. See text at note 71.

[52] A summary of the anti-whaling IWC majority view regarding legitimacy of fundamentally changing the Commission's policy, to support a moratorium and an Antarctic sanctuary, is provided in Ref. [51] (p. 366). See also, inter alia, Ref. [52] (pp. 439–83).

proposed [25], [53] (pp. 61–89).[53] The failure of the IWC, if Japan were to withdraw and the Commission were to be rendered completely ineffective, in this view would be a terrible blow to the instrumental cause of multilateralism in the international community. Since probably the only way to save the commission, it is argued, is for the anti-whaling nations to accept compromise, the moral burden for support of rule of law through multilateral agreements falls upon them [25].

Those who oppose resumption of commercial whaling, or who take an absolutist view on the preservation issue, reject this claim that the moral burden is theirs. Indeed, I think one can make a reasonable case that the effort to place that moral burden upon the IWC majority, in the manner described here, is not much different from the tactic by which whaling nations' threats to resign as parties to the Convention were used in earlier periods of IWC history to obtain decisions on quotas and other matters that made a mockery of the MSY ideal, openly rejected the advice of the scientific committee, and betrayed the promise implicit in the original agreement that the whale stocks and individual species would be protected.

This entire situation is further complicated by the reiteration, in counterpoint with the emerging "new" morality of the common-heritage and ecosystem environmentalist view, of the traditional prerogatives of the sovereign nation-state. Thus not only in the Law of the Sea Convention provisions for EEZ control but in other agreements as well, the notion of sovereignty is prominently acknowledged; and just as the IWC has a procedure by which nations objecting to a specific policy can opt out from complying with it, other agreements have left room for sovereign authority of the nation-state to trump multilateral policy decisions.[54]

3. The burdens of history

The actors in these controversies of such high importance to ecology of the oceans – and, as the recent debates have made clear, also of importance to the terms on which the world's peoples will support the survival of human cultural diversities and traditional ways of life – are not creatures of a playwright's imagination, as it were, written into the script of the debate. Quite to the contrary, all the nation-states as leading actors come to the drama with definable histories of their behavior and action

[53] On the adoption of the RMP and for an incisive critical analysis of its terms and reliability, see Ref. [46] (pp. 56–73).

[54] E.g., CITES has provision for reservations being entered by member states who object to the listing of any species as banned in trade, with results comparable to the debilitating results of the objection/reservation provision of the treaty under which IWC operates.

A highly interesting aspect of the Straddling Stocks/Highly Migratory Species agreement is a set of enforcement provisions that require nations party to the convention to enter into regional fishery management organizations (and to comply with their regulations); and that seem to move in the direction of authorizing collective sanctions against nations, whether parties to the agreement or not, that are in violation of the rule requiring adherence to the regional regimes. There is also the intriguing question (beyond the scope of the present study) that is opened up by the convention as to whether the authority of the IWC might actually be significantly expanded under the new agreement's terms. See, Ref. [25].

as matters of record. Any assessment of the merits of their respective claims today ought to take account of those records. And in light of the great damage that has been done to whale stocks and species as the result of the modern hunts, it seems reasonable to give specific moral focus to the inquiry by asking: *Who in fact comes to this, today, with clean hands*?

Such a normatively focused question would not be put forward were there general agreement, as in an earlier day, that no indictment lay in a process by which whalers might drive any or all species to extinction. Nor need the question of historic performance be put forward, as a practical matter bearing on policy, if there were willingness on all sides to accept the "whales' right to life" argument, bringing the hunt to an end everywhere, absolutely and for all time. It does seem, however, a fair enough inquiry given how things now stand – that is, in a situation in which there is powerful support in world opinion and national policies of the IWC majority for the continuing moratorium, but in which the nature of exemptions is at issue. What moral baggage is brought to the table by different parties to the debate can, and I think ought to, influence an assessment of moral standards and priorities in the exemptions controversy.[55]

That history ought to matter to analysis of this problem in contemporary environmental ethics is nothing new in the literature on whaling. For that literature is replete with historical lore and lessons. Thus it is a common observation, for example, that the history of the IWC stands as an irrefutable "indictment" of the industrial whaling countries. Some strident defenders of Japanese whaling charge American supporters of the moratorium with being victim of "historical amnesia" [33] (p. 102). because of the United States' own record in whaling. Contrariwise, it has been a source of astonishment and chagrin expressed in diplomatic correspondence since IWC was founded that the major commercial whaling nations that have been most aggressively opposed to effective IWC regulation have appeared to be completely insensitive to the implications of their records of exploiting whale stocks, including some in danger of imminent extinction – oblivious, as it were, to the idea that past irresponsible of predatory behavior in whale-killing can be seen by others as implicating a moral burden, or (at a minimum) as an indicator of prediction for future behavior.[56] At

[55] I believe that the question of historic behavior is relevant if exemptions are at issue–and that this is so whether it be the question of exemptions to a comprehensive moratorium on all whaling (including small cetaceans), as the IWC now supports; or instead it be exemptions to quotas established on some scientific basis that rejects the right of all whales to live.

Interestingly, Prof. Burkeargues that we must understand the original purpose of the International Convention under which IWC operates by studying *the behavior of the parties* in the years after 1946; for, because they engaged in whale hunting and adopted regulations concerned with sustainability, we can (in his view) discount as spurious the notion that the original convention contemplated a complete moratorium or an Antarctic sanctuary. Ref. [54].

What I am arguing here is that, just as Burke invokes the empirical record of historic behavior for purposes of textual interpretation of a treaty, we can (and ought to) look at historic behavior of the parties to ascertain the ethical merits and burdens that are brought to the table in the present debates of whaling policy.

[56] The author has in progress a study of historic behavior, culpability, and fishery diplomacy (including whaling diplomacy) from 1935 to the present. The statement in the text, above, is based on archival research in the post-World War II diplomatic records of five member states of the IWC. See also specific citations in note 64.

a minimum, in the controversy over Small-type Coastal Whaling (STCW) considerations of history necessarily infuse the entire complex debate over what is "subsistence" and whose is a "traditional" local culture – since tradition is itself a matter of history and how its relationship to present-day life is perceived.

Against this background of concern to mobilize history as a measure of ethical standing and a tool for prediction of future behavior, then, let us seek to reconsider what is the gravamen of the historical record made by the actors here.

3.1. Collective responsibility

The entire community of former industrial whaling nations must stand responsible collectively for the devastation of the stocks in the modern era. To be sure, even with much more primitive ship and hunting technologies, in earlier eras of western European and North American history, the sail-powered whaling fleets did manage to virtually wipe out sizable local stocks or species. (Indeed, the devastation that was wrought in the pre-modern whaling era – with fragile craft, hunting techniques highly dangerous to human life, and weapons of small scale and reliability – gives one pause as to what the potential effects might be of unleashing even the STCW effort on the rising scale that would probably be the result if Norway, Japan and their allies have their way today with a small start.)

No former industrial whaling nation can point to a record that gives it any moral authority in pleading for exemptions for itself or persons in the mainstream of its economy and society ("mainstream" admittedly being an important question for definition – to which we return below). Within the IWC, moreover, these nations collectively failed entirely to halt or ameliorate the slaughter even when it was obvious to all that some of the stocks were going to crash and species be endangered with possible extinction. Their failure was not for lack of scientific advice as to what must be done; in fact, they perpetuated procedures which virtually assured that even moderately conservationist proposals from the scientific committee of their own creation would be routinely ignored – even at the height of the "war on the whales" in the 1960s and down to the last months before the moratorium.[57]

The specifics of this indictment of the IWC are well known, but a few are worth brief mention here. A startling recent examples derives from recent disclosures by the Russian government that under the Soviet regime there was extensive falsification of catch data, under-reporting kills by the Soviet fleets [55]. This systematic deception was particularly devastating, because its confirmation now casts in doubt the validity of years of scientific data collection and analysis, throwing into turmoil the entire enterprise of estimating the size and vigor of stocks.[58]

[57] Even writers such as Gambell, Gulland, and Milton Freeman, who are to varying degrees critical of preservationism as a policy, seem to have no substantial disagreement with the strongest critics of the IWC that prior to 1974 an unrestrained commercialism dictated the course of the IWC, with disastrous effects on whale populations.

[58] The range of implications of Soviet dissembling with the statistics is explored in Ref. [13] (pp. 171–2) (also quoting Ray Gambell, president of the IWC, as saying that "the enormity of the deception is staggering"). See also Ref. [46] (p. 63).

Another aspect of the IWC record that provides strong material for an indictment of some member states is their record of looking the other way when flags of convenience were used by their nationals, and when illicit trade was tolerated, in complicity with the commerce of whale meat to Japan's rich consumer market from the harvest of "pirate" fleets that undermined even the modest protection that IWC would have provided for the stocks. Japan's policies not only on the whaling question but also other environmental and resource issues have undermined Japanese credibility on the whaling issue, and thus stiffened the opposition to termination or further qualification of the IWC moratorium. This aspect of Japan's international relations is acknowledged even by commentators who are highly sympathetic to the Japanese government's position on the IWC moratorium and other regulatory issues.[59]

Ironically, in light of its leading role in environmental causes in global politics, and in its domestic policies, Norway has in the recent past authorized its fleet to hunt minke whales for allegedly scientific purposes against the clear recommendations of IWC's scientific committee. By mid-1997, moreover, Norway was making its case with a new candid emphasis on commercial purposes, contending that the local economies of its coastal communities depend on whale revenues; and in the last year, Norway's determination to resume commercial whaling has been made fully explicit.[60] To take another particularly grievous case, Japan and the Soviet Union long refused to recognize the seriousness of the threat to the blue whale; and by their resistance to scientific findings and advice, in the quest for quick profits, they may be held directly responsible for an environmental outrage by any reasonable definition of the term, covering the purposeful and uncaring destruction of a species.[61]

These and other examples of resistance to one aspect or another of regulation have added cumulatively, over the course of time, to the attenuation of efforts to establish through the IWC effective rules of law (whether for obtaining sustainable yield or for purposes of the moratorium). In sum, it is hard to quarrel with the judgment of two Norwegian historians – men who certainly do not represent an animal rights position – that that IWC's work by 1982 had been rendered "a fiasco" by the behavior of the

[59] Ref. [56] (p. 29, passim) provides a summary of discussion at a conference sponsored by the Japanese whaling interests themselves in 1991 and Ref. [42] (pp. 15–6, n. 15) acknowledges that Japan's general record on environment and resources, especially with respect to fisheries and logging, has undermined the credibility of both the Japanese government and industrial voices. Cf. Ref. [13] (p. 172). Also playing into distrust of Japan has been the fact that DNA testing evidence from the Tokyo markets demonstrated that whale meat from operators outside IWC control or from alleged scientific whaling elsewhere were easily finding their way into the Japanese consumer channels. This evidence merely compounds the long-debated issue of whether Japan's formation of a quasi-governmental organization to conduct its "scientific" whaling, with sales of meat from the animals taken authorized for the consumer market, is not just an elaborate cover for simply commercial activity [46] but for a view stressing that Japan attempted sincerely to eliminate commercialism from marketing of the small-type coastal hunting, see Ref. [51] (p. 361).

[60] Ref. [41] gives the economic arguments; Ref. [57] gives scientific argument. On earlier episodes in which Norway, the Netherlands, and other western states used a variety of diplomatic tactics to resist the reduction of quotas, see Ref. [6] (pp. 595–96, 609–37, passim); Ref. [5] (pp. 199–203).

[61] See note 19, on the pygmy blue whale issue.

member states.[62] Tragically, this left many species radically depleted; and overall numbers (especially if figured in a ratio to human population, which has been expanding with such rapidity in the last half century) are vastly reduced from original stocks. The fiasco of the IWC regime in earlier years also weighs heavily today, casting the shadow of doubt over credibility of those who contend that the commission is the global community's best hope for assuring "survival of all the various species of these magnificent animals [25] (p. 84)."

3.2. An ambivalent history: Japan and the United States

What history says of Japan and of the United States – and of their relationship to one another – is a subject with its own special dimensions and moral burdens. Although history does not readily disclose its hypothetical alternatives, there is strong evidence that the very presence of Japan as a major participant in the postwar industrial whaling industry is entirely owing to US policy during the Occupation and in global diplomacy of the peace settlement.[63] Japan had established a reputation before 1941 as a ruthless exploiter of fishery resources in colonial possessions, especially Korean coastal waters, and Australian mother-of-pearl beds, and, of course, had also declined to join in the international agreements to establish controls over whaling. Quite typical, therefore, of the position assumed by governments in the British Commonwealth was the view taken by New Zealand government ministries in 1947, that in light of "the history of Japanese depredations in Antarctic waters … [and] unrestricted slaughter[ing] of all types and sizes of whales," Japan should be debarred from pelagic whaling for a minimum of twenty years [58].[64] Even within the

[62] Tønnesen and Johnsen, [6] (p. 511) refers to the first three decades. The same judgment holds, even more so, today.

[63] The record that is summarized in the following section of the text is analyzed in Ref. [10], where detailed documentation is provided. There is also a valuable discussion of the postwar situation and Japan's whaling revival as the ward of the Occupation authorities, in Ref. [6].

[64] Similar responses had come earlier from the press and from political leaders in Australia. Thus the Melbourne correspondent of a New Zealand newspaper reported, Aug. 26, 1946, that the Australians reacted angrily to the prospect of renewed whaling by Japan, recalling that "Japan had savagely ransacked the Antarctic for whalebone and whale oil and... helped to slaughter indiscriminately" whale herds that were biologically endangered [59]. Later that year, Australia formally protested the Occupation decision to authorize Japan's whaling fleets to resume hunting in the Antarctic, stating: "The Government is strongly of the opinion that the Japanese should be prohibited from whaling in the Antarctic in future in view of their past record in that industry … [60]".

In the Far Eastern Commission, the Allied agency which nominally had authority over basic Occupation policy–though in fact MacArthur and the U.S. Government regularly ignored its positions–the Australian Government proposed that the Japanese fleets be kept north of the equator for pelagic fishing of any kind, that there be no pelagic whaling of any kind, and that pearl fishing (which Japanese operators had conducted intensively in offshore Australian waters before the war, depleting many of the richest pearl beds) also be confined to north of the equator [61].

In June 1944, the working party of the British Cabinet on the question of a postwar peace treaty, mindful of the interests of Commonwealth members and of the Allied nations and Norway with respect to whaling, took it as a working premise that Japan should be debarred more or less permanently from Antarctic whaling. The author treats in the aforementioned book, forthcoming, this episode of Allied planning for ocean resources after World War II.

US Department of State, there was great apprehension that favoring resumption of Japanese whaling would sent a signal to the Allies that amounted to abandonment of a US commitment to conservation principles in management.[65]

Thus widely viewed already as virtually an outlaw fishing nation – whether out of authentic outrage or as a tactical cover for the self-interest of Japan's rivals–Japan carried after 1945 the additional burden of guilt for its aggression and war crimes in Asia. This war record which led to demands by Australia, New Zealand, the Philippines, China, and other governments that Japanese marine fishing should be severely constrained and that Japan's whaling fleets should be entirely dismantled. Indeed, many of the Allied governments hopefully came together on a proposal to force Japan, in the peace treaty, to accept permanent limitations on the scope of its fishing and forced to accept either entire exclusion or severe limits on any return to pelagic whaling. General Douglas MacArthur's occupation administration, however, first defied the other Allies by unilaterally deciding to re-admit Japan to Antarctic whaling, a decision that probably saved the shipyards of Japan from the dismantling and use as war reparations that other Allied governments regarded as their right.[66]

To the consternation of the Allies, the United States Government also insisted upon the admission of Japan in 1951 to the IWC, formalizing irreversibly the re-entry of Japanese vessels on a permanent basis into the whale hunt – and, by extension, Japan's participation in the subsequent dynamics of the destruction of whale stocks; it also assured Japan its unique place in the international politics of the whale question. A special irony inheres in the fact that the Occupation authorities promoted the distribution of whale meat for school lunch programs, thereby establishing the basis for a broadly based food market. Over time, and continuing to the present, this market has become the richest incentive to the perpetuation of whaling globally, and also an incentive for pirate whaling, illicit trade, and the masking of commercial whaling under the banner of "scientific research".

Some Japanese commentators have suggested that the US restoration of Japan's whaling industry during 1946–51 makes it hypocritical for Americans to support the moratorium now, against the policies of the Japanese government and demands of its whaling industry. A different view would suggest that Japanese criticism of the United States for "lack of respect" for Japanese cultural norms is misplaced, in light of the great "respect" that was shown by the Occupation policy which deployed American

[65] Bryton Barron (Chief, Treaty Branch) to IR (Mr. Van Sant), Memorandum re: Antarctic Whaling Operations by Japanese, Aug. 16, 1946, manuscript in international resources diplomatic files, Department of State Records, U.S. National Archives, Washington, D. C., reading in part: "In view of the uncooperative record of the Japanese in their prewar refusal or neglect to become a party to any of the international agreements on the regulation of whaling, it is difficult to understand how the Japanese can be expected to faithfully observe the provisions of those agreements … ." Hence the State Department insisted that when the General MacArthur's Occupation command authorized additional Japanese whaling expeditions to the Antarctic, it should require that Allied observers be on board the mother ships so as to oversee the operations. This condition for approval of further Japanese whaling expeditions was accepted by MacArthur and put into effect [62].

[66] On the way in which resumption of whaling and fishery expansion had spinoff effects on shipyards and other industry, see Ref. [63] (pp. 100–9).

diplomatic power in the postwar years to restore Japan's economy and to insist upon the reintroduction of Japan into the whaling hunts and admission of the Japanese into IWC.[67]

It appears, withal, that a good case can be made that the American people are, if anything, in a particularly strong moral position to ask Japan to accept preservation of the whales. Japanese society in the large in 1945–46 was in mortal danger of being kept to a near-subsistence economic level, having its industrial plant dismantled, carrying a burden of heavy long-term financial reparations payments to the Allies, and suffering an extended period of threatened exclusion from multilateral agencies of all kinds. The Japanese people were spared from such policies only because the United States Government and the Occupation authority under MacArthur used American power, in a unique period of extraordinary US hegemony in international affairs, to champion the cause of restoring Japan to full membership in the community of nations – while at the same time US taxpayers were supporting fiscal aid (in magnitudes close to the Marshall Plan program's expenditures for Europe) to underwrite Japan's postwar recovery. To frame an analogy between a defeated Japanese nation in mortal danger in 1945–46 with the plight of the whales as an animal community in mortal danger today does not seem to me strained or perverse, nor would I accept the validity of a charge of "Japan-bashing", which seems to come forward reflexively when such ideas, invoking historic relationships, are ventured.

In light of the postwar historical background recalled here (though apparently little known even to the younger generation of Japanese diplomatic officials and scholars), and in light of the enormous share of modern whale exploitation that accrued to the profit of the Japanese fleets, it may be argued that Japan bears a special responsibility now to hold its hand on the whaling question and look to other activities to advance its cultural and economic interests.[68]

To obtain a realistic understanding of why the Japanese government's posture in defense of its "scientific" whaling kills and its coastal whaling claims is apparently so deeply resented by many of Japan's critics, we are required to consider in addition the broader historic context of Japanese ocean diplomacy. The record since World War II and the conclusion of the Peace Treaty has been one of persistent diplomatic resistance from Tokyo to the effective application and enforcement of constraints on the Japanese fishing fleets outside their own coastal waters. This diplomatic posture, often based on denial of claims from scientific evidence on the condition of fish stocks that other parties have seen as compelling, has had its practical counterpart on the

[67] The charge of "lack of respect" for Japan's culture is a variant of the "cultural imperialism" charge. These phrases were used, for example, in comments on a section of the present article that were made from the floor by a Japanese Embassy attaché, at the International Wildlife Law Conference, Georgetown University, April 1997. For comment on similar criticism in another recent forum, see note 34. For a different view from that presented here, see Ref. [51].

[68] For a completely different view, arguing that if anything the Japanese Government has been excessively timid in pressing its case on whaling, see Ref. [51] (pp. 349–78).

fishing grounds in the ways that Japanese fishing vessels have often sought to evade national or international management regulations.[69]

The burden of the record thus made by Japan has been made all the greater in recent years by the way in which Japan long resisted efforts to institute effective regulation of drift-net fishing methods on the high seas that were wreaking havoc with sea-bird life as well as fish and marine mammal species. The Japanese fleets are by no means unique in this regard – witness, for example, the difficulties in enforcing against Taiwanese and Southeast Asian fishing vessels the rules of their fishery regimes as encountered by the South Pacific Forum nations; and certainly the universal failure of the coastal fishing nations to conserve their fish stocks under unilateral management in their EEZs raises questions with regard to ethical posture of all parties in the more general debate of ocean resources management. And yet Japan's posture is of special significance owing to its record of tolerance of re-flagging for whaling and illegal trade in whale products, and owing also to its towering role in global diplomacy, not least with regard to its record in the issues that have troubled the councils of the IWC. The reputation that Japan has thereby won has contributed toward undermining its credibility with many other nations, in its efforts to advance the cause of its STCW industry in the quest to be categorized legally and sociologically as the equivalent of indigenous societies [42], (pp. 14, 15), [33] (p. 102).

As to the United States, a nation which in the sailing era sent its whaling fleets widely through the ocean seas, and which as late as the 1960s maintained an interest in commercial whale killing, there are further ambivalences and perplexities in current whaling diplomacy and ethical debates. Above all, it is difficult to square the steadfast championing by the United States (against the advice of the IWC scientific board) of the Inuit exemption for taking bowhead whales, a severely decimated species, with the leadership that US diplomats and American environmentalist pressure groups (NGOs) have given for the last quarter century in the cause of the whaling moratorium and extended protection for marine mammals more generally.[70] The moral difficulties of forging a consistent policy on exemptions have become even more intense as the United States has announced its willingness to support claims of the Makah Tribe on the Pacific coast of Washington State, as some of its leaders now insist upon being included in the aboriginal exemption from the IWC for purposes of hunting a limited number of gray whales. The Makah are a cultural community of

[69] In the archives of fishery diplomacy in several countries, reference was routine and commonplace, from 1946 to the 1970s, to Japan's aggressive "predatory" practices on the fishing grounds, its determination to undermine and evade effective regulation, and its willingness to exploit resources on the open seas or in the waters just beyond the territorial seas of coastal states. Although many Japanese officials and academic commentators see this as evidence of racial prejudice, "cultural imperialism", or "Japan-bashing", the notion that Japanese marine fishing interests push the envelope as far as they can within the constraints of the realities of global diplomacy is one that is expressed as virtually axiomatic even in the foreign ministries of countries that have been closely allied with Japan in other vital realms of diplomatic relations. Again, *contra*, see Ref. [51].

[70] This has taken the form of American sanctions policy, through application of Pelly Amendment and Packwood Amendment trade and fishery prohibitions. See, inter alia, Ref. [37].

1700 that gave up whaling more than three quarters of a century ago. At present, the Makah are building a large marina for recreational boats and are planning a major effort to build up tourism to the 44-mile-square coastal site of their reservation. An emotionally charged division of opinion within factions of the Makah's traditional leadership of elders and a younger group that is pushing for the exemption stalled the question temporarily. To what degree claims of "tradition" ought to be honored in such a situation, and with what practical implications for the future of the gray whale – which came near to extinction early in this century – when other coastal communities of Makah ancestry in Canada's British Columbia province might well come forward to make similar demands for hunting rights, lends urgency to the matter. Meanwhile, the willingness of the US Government to support a whale hunt by the Makah clearly has contributed to a sense that this country is backing off from its commitment to enforcement of the moratorium and might become more receptive to other breaches in the moratorium justified under the banner of indigenous rights and cultural claims.[71] And in the last analysis, American willingness to support the Makah claim serves to undermine its ethical position on the moratorium issue.

4. Conclusion: a modest proposal

There is no concise and ready answer to the moral and practical difficulties that the current impasse over the whaling moratorium presents. Still, difficult environmental issues are better confronted than abandoned in despair. Hence the following modest proposal.

At the outset, it is important to build on the broad agreement that in the body of our scientific knowledge of whale biology and population dynamics, there remain profound gaps in both data and interpretation. This has been the most telling argument for the moratorium, especially if one accepts the seemingly incontrovertible evidence that whale stocks are especially vulnerable to contingencies in the ocean environment that are capable of reducing their numbers swiftly and often radically, long before an effective protective response can be devised and mounted to stem the damage – particularly if they are under pressure from hunting, for whatever purpose.[72]

[71] In one of the earliest reports of the move by the Tribe (Ref. [65]) it was stated that American diplomats were concerned that the Makah–who have a treaty with the United States that guarantees their whaling rights–will seek to expand the claim in future years to include whaling for commercial profit (either covertly or overtly defined and pursued). Apparently the Clinton Administration has put aside any concern it may have had on this score, at least until the issue arises concretely in the future [66] (p. 4).

[72] Caron [13] examines the importance of a shift from emphasis on the rights of whales to a more utilitarian argument asserting "that, regardless of population size, the notion that a common resource such as whales can be sustainably managed is illusory"—not only because of difficulties of attaining scientific certainty, but also because the historical record indicates that "some of the users may act in bad faith and the capacity of the resource manager to police such users is insubstantial (p. 171)".

This give powerful support, I think, to the conclusion reached by preservationists, that the whales have suffered enough (their numbers depleted, both absolutely and in ratio to human population), so that "it is now time that we gave whales the benefit of the doubt [28] (p. 235)".

There remains, nonetheless, the problem of whether exemptions to hunt rightfully belong to any peoples whatsoever. The survival of a whale species whose status as "not endangered" cannot be clearly established by scientific research – whose status, that is, is presumed to be endangered under the application of the precautionary principle – must trump the claims of any cultural group, however persuasive are that group's claims to a tradition involving the whale hunt as essential to its economic viability and cultural identity. If nothing else, this priority for the endangered species is wholly consistent with the notion that traditional hunting societies have a special degree of respect for their prey – their authentic totemization, as it were, by contrast with the contrived form that critics see in the anti-whaling campaigns mounted by preservationists in the industrial countries; for, after all, to put at risk the very survival of a species is the highest form of disrespect.

It is also important, however, to recognize that the burdens of history are not borne equally by all parties to the issue. The aboriginal, or indigenous, peoples are in large part the victims, and not the perpetrators, in this tragic story; and the destruction of the whale stocks once central to their sustenance (and vital to their cultures) is part and parcel of the broader impact of industrialization and modernization that has led to the destruction of vast numbers of traditional local or even national cultures, both of indigenous people and, indeed, of many cultural and ethnic subgroups within the dominant modern peoples.[73]

We cannot restore every traditional culture, and in fact we typically do not attempt to do so – especially in today's world of officially sanctioned "downsizing" and global competitiveness – within the mainstream or dominant societies. Nor is there wide acceptance of any moral compulsion to do so, because the people displaced by the modernization of economies and growth of industrial and post-industrial societies have assumed new economic and social roles. Moreover, in the industrial democracies they are given a voice in direction of policies affecting their fates, and withal they share (at least aggregatively) in the material growth that is generated by these societies.

The Inuit communities, and their counterparts among indigenous peoples elsewhere in the sub-Arctic regions, have a very different history. They are ethnically separate from the dominant society, and in large measure geographically separated. Their territorial lands and waters have been taken by conquest; their resource has been depleted essentially by the conquerors, not themselves, even where their labor has been bought. The traditions of their cultures are in danger of disappearance, as is broadly agreed even by critics of the aboriginal exemption: a way of life is threatened

[73] And this is so, I think, whether or not they participated (as the North American Inuit did) as workers on the ships of the industrial whaling countries when the great fleets arrived to harvest the stocks on which their traditions had been built and their lives sustained.

with extinction. In this situation, the Inuit and others truly qualified for aboriginal exemption are differentiated from coastal communities that are populated by people who are ethnically indistinguishable from the dominant society's population and – no matter how intensely they may claim to value whaling as a part of their local traditions – who have shared in the benefits of modernization and social change.

On this basis, the indigenous exemption would be denied to the Norwegian and Japanese coastal whaling communities. They are not unlike communities in other primary industries that have seen ways of life undermined or virtually eliminated, their cultural traditions made impossible to sustain with any vitality, by the march of industrial change. Indeed, the landscapes of virtually every industrial country covers today the remains of once thriving mining camps and towns, fishing villages, sheep and cattle herding communities, and forests where a pre-modern or early-industrial way of life once prevailed. The process has gone forward inexorably, perhaps, but also with its tradeoffs for the dominant populations. Alternative opportunities have offered for employment, education, adoption of new technologies, and mobility (including out-migration to other modernized countries). It would be difficult, one reckons, to demonstrate that the people in the quaint, or once-quaint, Japanese coastal whaling towns did not benefit in a major way (direct or indirect) from Japanese industrialization. They shared in the fruits of Japanese military expansion and colonial exploitation in the 1930s and World War II; and they have benefited from recent-day expansion of the modern Japanese economy. This is so because these people – in no way ethnically distinct from the dominant population in Japan, and with full access to the educational institutions, governmental largess, infrastructure, and welfare programs of the country – are fully integrated into the national economy, and have been so for a long time.

Champions of the Japanese coastal towns' claim to status as "indigenous equivalents" invoke economic as well as cultural reasons for a whaling exemption, pointing to the sad fact that high-pollution activities such as oil refineries and potentially dangerous facilities such as nuclear power plants are the only kinds of investment that are attracted to such remote areas. Also invoked to justify renewed whaling is the fact that the local governments have had difficulty funding local schools and other public facilities [42] (pp. 180–6). Given the wealth of Japan and the fiscal capacity of its government to provide regional programs that could go far toward correcting such inequities, and given the way in which Japan has made a high art of government-guided investment and growth, it hardly seems a necessity that the remaining whale stocks of the southern oceans should be the answer to a common type of regional problem for "the people left behind" as modern industrial change has progressed.[74] If the residents of the coastal towns were ethnically distinctive and the subjects of conquest by the dominant group in the society, their local economies truly remote and disconnected from the modern sector – all of which can be said of the Inuit peoples –

[74]The phrase "The people left behind" was the title given to a famous government study in the United States in the 1960s of the population in agricultural, mining, and forest areas where rural poverty had taken hold as industrial change left their localities as islands of misery in a landscape of affluence.

warranting exempt status for them as the equivalent of indigenous whalers might be justified. As the realities stand, it seems not so.

If we accept, then, the concept of an accepted international rule of law by which the whales are left alone except for an exemption to be granted to the "authentic" indigenous peoples that engage in subsistence whaling, there will still be three definitional issues left wholly unresolved: (1) May the claims of "traditional culture" be invoked to warrant *revival* of whaling by groups (such as the Makah) that meet the criteria for inclusion in the exemption, if there has been serious discontinuity in the tradition – and if so, after how many years' time does the legitimacy of the claim expire? (2) How flexibly should the concept of "subsistence whaling" be interpreted, especially if the groups that are to enjoy exemptions from the moratorium regard their whaling as a matter essential to their economic viability (and by dint of that, to their cultural survival)? and can the definition be constraining enough that the enormously profitable sale of whale meat through commercial channels can be eliminated? and, finally, (3) To what degree should indigenous peoples deemed qualified for exempt whaling be restricted in terms of the scale and type of equipment, on the grounds that a qualitative leap in technology constitutes a departure from tradition and its meaning for a local culture?

Hence if – in light of the precariousness of the whales' existence in the modern ocean and global environment – we want to extend exemptions to the policy (based on the precautionary approach) that would extend the moratorium indefinitely, there still remains before us the task of working out a jurisprudence that systematically justifies whale-hunting by those few groups in our global civilization of whom it may unequivocally be said: they do not carry the burden of historical blame for the predicament of these creatures.

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