

The Legal Status of Whales: capabilities, entitlements and culture*

O Estatuto Jurídico das Baleias: capacidades, direitos e cultura

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Abstract: Whales, among our planet's most majestic, mysterious, powerful, and intelligent beings, are profoundly endangered. International law has for some time attempted to protect them from extinction. Our paper addresses the legal status of whales and argues that they should be regarded as creatures with rights, not simply as commodities. Currently, international law does not recognize whales as creatures with rights. International organizations, particularly the International Whaling Commission (IWC) and its founding document, the International Convention for the Regulation of Whaling (ICRW), have focused on the issue of overfishing and have allowed exceptions to usual standards based both on the alleged needs of scientific research (in the case of Japan) and on the alleged claims of culture (in the case of aboriginal groups in the Arctic).

Keywords: Animal Rights. International Law. Legal Status of Whales.

Resumo: Baleias, apesar de estarem entre os seres mais majestosos, misteriosos, poderosos e inteligentes do nosso planeta, são profundamente ameaçadas. O direito internacional já há algum tempo tenta protegê-las da extinção. Este trabalho aborda o estatuto jurídico das baleias e argumenta que elas devem ser consideradas criaturas com direitos e não simplesmente *commodities*. Atualmente, o direito internacional não reconhece as baleias como criaturas com direitos. Organizações internacionais, particularmente a Comissão Baleeira Internacional (CIB) e seu documento de fundação, a Convenção Internacional para a Regulação da Atividade Baleeira (CIRB), estão centradas na questão da caça excessiva e permitiram exceções a padrões habituais, baseados tanto nas supostas necessidades de pesquisa científica (no caso do Japão) como na reivindicação de práticas culturais (no caso dos grupos indígenas do Ártico).

Palavras-chave: Direitos Animais. Direito Internacional. Estatuto Jurídico das Baleias.

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They say the sea is cold, but the sea contains
the hottest blood of all, and the wildest, the most urgent.
All the whales in the wider deeps, hot are they, as they urge
on and on, and dive beneath the icebergs.
The right whales, the sperm-whales, the hammer-heads, the killers
there they blow, there they blow, hot wild white breath out of
the sea!
(D. H. Lawrence, “Whales Weep Not,” 1909)

1 Marine Mammals: moral and legal status

In a related paper, we have explored the moral basis of animal entitlements, in the context of evolving legal debates about whether animals can be granted “standing” to approach a court of law (through an advocate, as is now the case with human with severe disabilities)¹. Many animal rights activists have urged that the best basis for legal (and moral) standing for animals is suffering, an approach that can be traced to Jeremy Bentham, the founder of Utilitarianism. While we support Bentham’s radical extension of moral concern to all sentient beings, we argue that suffering is not the only relevant notion. Intelligence and the ability to be social are qualities that are at least as important. Indeed, there is a strong case for considering cetaceans “non-human persons” and according them legal rights, most importantly standing to sue in their own right. Whales cannot be said to be “like” humans in terms of DNA, but they have their own form of intelligence and deserve protection under the law.

On the other hand, we reject as misguidedly anthropocentric the form of this argument that exalts intelligence above physical suffering. Each animal species has its own form of life, and each deserves

¹ Rachel Nussbaum Wichert and Martha C. Nussbaum, “The Legal Status of Whales and Dolphins: From Bentham to the Capabilities Approach,” presented at the Human Development and Capability Association annual meeting, September 2015, and forthcoming in *Agency, Democracy, and Participation in Global Development*, ed. Lori Keleher and Stacy J. Kosko (Cambridge: Cambridge University Press)

opportunities to flourish in its own way. We argue that ultimately the best philosophical approach to these issues is an analysis of animal lives in terms of a range of distinct but related capabilities, intertwined into a form of life. This approach, however, has never been accepted in either domestic or international law, despite years of argument by environmental groups urging courts to treat marine mammals as creatures with moral and legal rights.

2 Whaling: the cultural exception

One prominent line of defense for whaling is the claim that whaling is necessary for scientific research. This argument holds that we cannot learn a great deal that we want to learn about marine mammals without examining cadavers. The IWC has given Japan an exception permitting whaling for such purposes, but the scientific-whaling exception has remained controversial up to the present day. The evidence of a serious research purpose is very thin, and meanwhile the whales so killed are permitted to be used commercially in a variety of ways. In other related work we examine this controversy, focusing on a 2014 ruling of the International Court of Justice that held Japan's program of scientific whaling in the Antarctic to be unjustifiable under international law². There we also consider the case of *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, decided in 2013 by the Ninth Circuit³.

The most influential defense of whaling, however, involves the notion of culture. We now turn to the issue of aboriginal subsistence whaling, typically defended both by appeal to subsistence and by appeal to culture. The two appeals are often put together by arguing that subsistence whaling is necessary for the survival of a cultural group.

The issue of aboriginal subsistence whaling has a long history, ever since the International Whaling Commission made an exception for it in the original draft of the International Convention for the Regulation of Whaling (1946). In this section we discuss the history of the ASW exception and some of the reasons why it endures in IWC regulations.

² Rachel Nussbaum Wichert, "Are Whales Special? The Scientific Research Exception and the Future of the International Whaling Commission," paper on file with author.

However, we also argue that ASW is being abused to the point that international organizations should reconsider the issue, for several reasons. First, it is not clear whether actual subsistence is really the problem. Cultural arguments are mingled with subsistence arguments in a confusing way, and the cultural arguments themselves are open to a variety of objections, which we discuss in this and the following sections. In addition, some recent incidents have indicated that commercial whaling nations are using the ASW loophole to their own advantage, as they seek to legitimize their practice of taking cetaceans in the face of an international community that increasingly objects to the practice. A significant split between pro-whaling and anti-whaling nations has caused the former to be extremely creative in the way they read the rules and to shape their behavior accordingly.

A problem at the outset, is that the ICRW never defines what an aboriginal group actually is³. This is still the case, as the international community has been unable to reach a definition of what constitutes “aboriginal” or “indigenous”⁴. Some definitions used in international environmental law rely primarily on colonization, something that seems questionable and arbitrary⁵. “Broadly speaking,” argues Alexander Gillespie, “the question that may be raised is one of whether it is desirable that people, because of the fact that they were earlier colonized, should be given different rights from those who were colonized at a later date or not colonized at all – or, alternatively, whether all peoples should be treated the same”⁶.

Philosophical considerations did not play a large role in the whaling debate initially. Indeed, many of the original concerns of the ICRW were economic, as one might expect from a convention concluded shortly after the Second World War. As Peter Stoett writes, “It would have been

³ International Convention on the Regulation of Whaling, December 2, 1946, available at <http://iwc.int/iwcmain>

⁴ Alexander Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Interrelationship Between International Law and the International Whaling Commission*, 12 *Colo.J. Int’l Env’tl. L & Poly* 77, 89 (2001)

⁵ *Id.* at 94.

⁶ Alexander Gillespie, *Whaling Diplomacy* 204 (Edward Elgar, 2005)

fanciful to expect anything other than the continuation of large-scale whaling following the creation of the IWC. It was, after all, set up in a postwar context of widespread scarcity with the mandate ‘to provide for the proper conservation of whale stocks and the orderly development of the whaling industry’⁷.

The ASW exception arose in the context of the 1931 Convention on the Regulation of Whaling, one of the predecessors of the 1946 treaty. Efforts to address international whale stocks were first given priority during this era. The exceptions for indigenous peoples appeared in Article 3, which states that the convention would not apply: “to aborigines dwelling on the coasts of the territories of the High Contracting Parties” provided that they used traditional fishing vessels, did not carry firearms, and intended to whale for local consumption only. Aboriginal whalers were not intended to be “under contract to deliver the products of their whaling to any third person”⁸. A similar text was written into the ICRW, with the same focus on local consumption⁹. The ICRW does not allocate ASW quotas to specific aboriginal groups. It sets quotas on stocks from which indigenous groups may take whales. Recently there has been an initiative to develop an Aboriginal Whaling Scheme that will regulate the “scientific and logistical” aspects of aboriginal fisheries¹⁰.

Environmental concerns as such did not appear in the original treaty. In fact, before it enacted a 1982 moratorium on commercial whaling, the IWC’s mission had little to do with environmentalism. The parties that concluded the convention did so principally in order to address the effects of the commercial practice. Representatives noted that “[...] whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers [...]”¹¹ Thus, the original concern was

⁷ Peter Stoett, *The International Politics of Whaling* 63 (University of British Columbia Press, 1997)

⁸ *Id.* at 194.

⁹ *Id.* at 195.

¹⁰ <http://archive.iwcoffice.org/conservation/aboriginal.htm>,

¹¹ ICRW, *supra* note 1

the depletion of whale stocks and the danger of over-fishing. However, increasingly the ICRW has become important for environmental groups who object to the practice of commercial whaling. Accordingly, many nations not involved in whaling at all have become part of the IWC, established by the Convention¹². But instead of clarifying and sharpening their focus in a shared agreement about purposes, the parties simply add one concern on top of another, in effect using the already unclear text of the ICRW as terrain on which each can try to impose its own meaning.

Whale subsistence hunting has long played a role in the daily lives of people in the Arctic. Many Native groups argue that it is essential to their way of life and that current regulations do not accommodate their cultural practices. But what is subsistence? At the meeting of the Aboriginal Subsistence Whaling Committee in 2012, Greenland made a statement on behalf of all ASW countries reaffirming decisions reached at earlier meetings and declaring that “subsistence hunting is for food to meet cultural and nutritional needs”¹³.

The committee also discussed the sale of whale meat in Greenland, a matter that has been the subject of considerable controversy in recent years¹⁴. While the United States noted that it believed the use of whale products in Greenland was consistent with the IWC’s definition of ASW, other nations disagreed¹⁵. It would certainly appear that the meat sold is meat that is not needed to meet daily nutritional needs. (There are further issues of biodiversity involved, as well as possible health risks associated with eating whale meat.) Greenland responded as follows: “With respect to restaurants it [Greenland] noted that it did not control who could eat particular products within Greenland and saw no problem with tourists eating whale meat in restaurants. The advice from the Nutritional Council

¹² Howard S. Schiffman, *The International Whaling Commission: Challenges From Within and Without*, 10 ILSA J.Int’l and Comp. L 367 (2004).

¹³ IWC/64/Rep3, Agenda Item 7.

¹⁴ “Going to Greenland? Don’t Eat Whale Meat” available at <http://us.whales.org/wdc-in-action/going-to-greenland-dont-eat-whale-meat>. Norway has also sold whale meat at international trade fairs in violation of the law in most EU countries; see “Whale Meat Snacks Seized at German Trade Fair”, *The Guardian*, January 24, 2014.

¹⁵ ICRW, *supra* note 1.

on marine mammals is well publicized within Greenland and is available in the Council's website....The nutritional value of local foods is better and more environmentally sound than flying in imported foods from the west along with the associated health problems this can bring"¹⁶.

These arguments show that the concept of subsistence, at least in some countries, is not limited to a native population consuming whale products taken by individual natives. It also concerns sales to non-natives such as tourists and therefore is limited neither to nutrition nor to the internal health of aboriginal peoples. At the 2012 meeting, in response to reports by environmental groups, the IWC denied Greenland any increase in its quota of whales¹⁷. The response was unequivocal: "Claims by Denmark on behalf of Greenland that they would not stop selling whale meat to tourists and that Greenland's whalers could use baseball bats to kill whales if they wanted to did little to endear Greenland to the rest of the IWC"¹⁸.

Most countries who sought ASW exceptions were not so straightforward. However, in addition to a focus on subsistence, they did stress culture. The "needs" statements of the various countries all emphasize cultural values in various ways. Perhaps the most remarkable is the needs statement of the United States, based on a survey conducted in 2011. The statement reads in part that Natives "characteriz[ed] the primary benefits in terms of cultural maintenance, tribal unity, and an improved quality of life. A clean and sober lifestyle was independently related to whaling by half of the survey respondents"¹⁹. The cultural aspects of ASW have been the subject of considerable debate. Some authors have argued that anti-whaling advocates should be more respectful of what are considered cultural rights. However, there are considerable debates about what culture actually is, or whether cultural rights support the practice of ASW.

¹⁶ *Id.*

¹⁷ "Greenland refused permission to increase 'subsistence whaling'". Available in: <<http://www.wildlifeextra.com/go/news/whaling-greenland.html>>. Access: 9 Mar. 2016.

¹⁸ *Id.*

¹⁹ IWC, *supra* note 1.

Adam Wesolowski, casting doubt on the cultural argument in ways that we shall support in the next section, suggests that taking the cultural defense off the table will allow “whale preservationists [to] argue for continued recognition of the aboriginal subsistence exception on the basis of environmental justice towards traditionally marginalized groups without appearing hypocritical”²⁰. The accusations of hypocrisy are not without foundation. Peter Stoett questions whether most developed nations have much credibility on the issue of whales: “Nations without an interest in whaling have an easy time pontificating about whales, while their citizens eat hamburgers and drive polluting vehicles to work in their resource-consuming modern cities, no doubt with ‘Save the Whales’ bumper stickers above the exhaust pipe”²¹. In other words, rich Americans have a culture too, and not one that is particularly animal-friendly. Stoett believes that sidelining the cultural argument would allow debate to focus on the issue of subsistence, where common ground might be found.

However, in some ways this critique is incomplete. It is one thing to look at isolated rural Alaskans and conclude that, of course, they ought to be able to continue their subsistence traditions. However, the debate about whaling in the Arctic also includes citizens of highly developed nations such as Norway, Iceland and Denmark. Greenlanders, for example have historically been heavily subsidized by the central government in Denmark. Greenland has been granted an increasing amount of independence in recent years. In the course of Copenhagen’s devolution of authority, Greenlanders now have control of the oil and mineral resources present in their country²². In this situation, it is difficult to make the case that the residents “must” whale for subsistence purposes.

One useful comparison is the debate surrounding tuna and dolphins in the eastern tropical Pacific region. This has also been framed as an example of prosperous Westerners trying to impose their moral values on the rest of the world. “From the point of view of the developing world,”

²⁰ Adam Wesolowski, *Taking It Off the Table: A Critical View of Culture in the Whaling Debate*, 20 *Geo.Int’l Env’tl.L.Rev.* 99, 100 (2013).

²¹ Stoett, *supra* note 5, at 113.

²² “Greenland Is Getting Ready to Stand Alone”, *The Guardian*, June 15, 2010

argues Daniel Esty, “why should Mexico forgo fishing tuna with efficient purse seine nets, which produce a valuable source of low-cost protein for poor Mexicans and modest export earnings on US sales, just because America has a dolphin fetish?”²³ To this one might reply: who decides what counts as a fetish? Environmental and animal rights activists have their own set of values that must be weighed against the “subsistence” consideration. The situation is particularly grave because many of the whale species that are the subject of debate at the IWC are severely depleted, unlike the dolphins.

Indeed, it appears that some indigenous groups do not automatically equate either their subsistence or their cultural needs with killing whales. At the annual meeting of the IWC in Adelaide in 2000, Sandra Lee, the leader of the New Zealand delegation, stated that: “Maori people had benign contact with whales for more than a thousand years of coastal and ocean-going travel before European colonization. All whales, but especially sperm whales were regarded as chiefly figures of the ocean realm. High-ranking Maori were often praised and revered by being likened to whales [...]”²⁴. Thus, it appears that indigenous peoples are themselves not unanimous on the issues addressed here. The question about subsistence remains unclear, even in a climate as unforgiving as that of the Arctic. Is it about subsistence in a narrowly defined sense, or is it really about group identity?

3 The case of Bowhead Whales in Alaska

A useful example of the difficulties generated by both subsistence and cultural arguments is the controversy surrounding bowhead whales in Alaska. In 1982, the IWC stated that, “Aboriginal/subsistence whaling, for purposes of local aboriginal consumption, carried out by or on behalf of aboriginals, indigenous or native peoples who share strong community, social and cultural ties related to a continuing traditional dependence on

²³ Daniel Esty, *Greening the GATT: Trade, Environment and the Future* 188 (Institute for International Economics, 1994).

²⁴ Quoted in Gillespie, *supra* note 4, at 218-19.

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 and cultural requirements. The term includes trade in items that are by-products of subsistence catches.²⁵

This statement illustrates the typical confusion between appeals to subsistence and appeals to other aspects of culture. Both international organizations and Native groups need to clarify the distinction between nutritional need for whale meat and whale products and their use for other purposes. It is also imperative to ensure that ASW does not deplete critically endangered whale stocks. Environmental groups have long opposed bowhead hunting in Alaska, pointing out that bowheads may become extinct if the hunting is allowed to continue. This issue is one that directly pits environmental groups against indigenous groups, since indigenous peoples, despite often being regarded as models of sustainability and environmental sensitivity, have not shown much sensitivity to the plight of endangered animals. When the controversy over bowheads first arose in the 1970s, environmentalists were distressed to find “[...] that some of the people who were supposed to be leading by example liked to eat the animal that symbolized a planet in peril”²⁶. Other activists questioned the cultural claims of those who insisted on hunting the bowhead. Environmentalist Tom Garrett stated in 1977 that “Eskimo culture would appear to be, by the definition supplied by representatives of the Interior Department, anything that Eskimos happen to be doing at the present time”²⁷.

Indeed, the views of defenders of the “subsistence” theory seem to support this assessment, showing that subsistence concerns take a distant second place to symbolic cultural issues. Michael Chiropoulos quotes a hunter from the Inupiat of Alaska’s North Slope: “The whale is more than food to us. It is the center of our life and culture. We are the People

²⁵ Cited at <http://us.whales.org/issues/aboriginal-subsistence-whaling>

²⁶ Kirkpatrick Dorsey, *Whales and Nations: Environmental Diplomacy on the High Seas* 244 (University of Washington Press, 2013).

²⁷ Quoted in *Id.* at 247.

of the Whale. The taking and sharing of the whale is our Eucharist and Passover. The whaling festival is our Easter and Christmas, the Arctic celebrations of the mysteries of life”²⁸. This makes clear that the debate is about more than subsistence: “From the Inupiat’s perspective, losing the right to hunt the bowhead raises the specter of cultural starvation, a threat more serious than the simple physical loss of whale meat in their diet”²⁹.

The proposed ban on taking bowheads, first proposed in 1977, therefore posed a problem for the US. On the one hand, conservationist interests within the IWC were gaining ground. On the other hand, the US had legal and ethical obligations to the Inupiat³⁰. Several cases filed in U.S. courts also addressed the issue. In *Adams v. Vance*, for example, plaintiffs challenged the IWC’s ban on hunting the bowhead³¹. The District of Columbia circuit ruled that compelling the Secretary of State to object formally to the IWC’s actions would “[...] intrude into the core concerns of the executive branch, and therefore required an exceptionally strong showing on the relevant factors to justify it [...]”³². Plaintiffs did not make this showing, and therefore the danger to the bowheads would outweigh any injury to the Inupiat³³. Because the whaling season was almost over, any IWC action would have little effect. The U.S. would also have to consider its international position: “The United States has been active in persuading other countries to abide by the restrictions of the whaling agreement, notwithstanding severe impact on their domestic concerns. No other nation has entered an objection to an IWC action since 1973, and the symbolic impact of the United States being the first nation to break that pattern was assessed by cognizant U.S. officials and others as likely to be quite grave”³⁴.

²⁸ Michael Chiripulos, *Inupiat Subsistence and the Bowhead Whale: Can Indigenous Hunting Cultures Coexist with Endangered Animal Species?* in 5 *Clrd.J. Int’l L.& Pl’y* 213, 216 (1994).

²⁹ *Id.* at 213.

³⁰ *Id.* at 222.

³¹ 570 F. 2d 950 (1978).

³² *Id.*

³³ *Id.* at 957.

³⁴ *Id.*

At a special IWC meeting held in December 1977, the US urged the committee to allow for a “modest take” of bowheads. Subsequently, in June 1978, three panels convened to study the issue³⁵. Notably, the panel on nutrition found that Native Alaskans are not dependent on whale meat and that their dietary needs could be fulfilled in many other ways³⁶. At a later meeting in 1994, the nutrition panel commented that “Arctic Eskimos have no unusual nutritional requirements as a result of their long-time occupancy of the Arctic environment... Any risk to the survival of the bowhead whale [that] may be posed by the continuance of aboriginal whaling cannot be justified on nutritional grounds”³⁷. The only panel that defended the continued taking of whales was the cultural anthropology panel. However, even this panel defines subsistence whaling as involving personal consumption. It should be both non-commercial and local³⁸. The meaning of “local” has, however, expanded to include local networks, as whale meat has allegedly been transported from small local communities to Anchorage³⁹.

One major problem with this situation is that the whole notion of ASW was originally premised on the idea that whale hunting would have a minimal effect on existing whale stocks, certainly in comparison to the effect of commercial whaling⁴⁰. The Inupiat want to retain significant aspects of their culture, but it appears that this is not possible without significant damage to the interests of the whales. The US insistence on an ASW exception is therefore contrary to the mission of the IWC. There is little evidence that the drafters of the original convention would have condoned takings that deplete whale stocks to the point of extinction⁴¹.

³⁵ *Id.* at 223.

³⁶ Gillespie, *supra* note 2, at 103.

³⁷ *Id.*

³⁸ *Id.* at 105.

³⁹ *Id.* at 110.

⁴⁰ Stephen M. Hankins, *The United States' Abuse of the Aboriginal Whaling Exception: A Contradiction in United States Policy and a Dangerous Precedent for the Whale*, 24 U.C. Davis L.Rev. 489, 508 (1990).

⁴¹ *Id.* at 522.

Another related problem is that a US insistence on ASW exceptions for Alaskan natives (and non-Arctic groups such as the Makah) encourages other nations to demand similar exceptions for whaling practices that are best described not as ASW, but as “[...] small-scale whaling.” The major example is Japan. Japan has claimed since 1986 that inhabitants of some of its coastal villages should be allowed an exception similar to that allowed Alaskan natives⁴². The IWC has consistently refused to grant such an exception, but this is clearly inconsistent in light of its treatment of Alaskan natives. As one author has stated, “[...] the application of the aboriginal whaling exception in Alaska is inconsistent with virtually every conservationist policy proposal advocated by the United States and approved by the IWC. It directly contradicts the conservative approach to whale conservation which characterizes United States and IWC policy for the past twenty years”⁴³.

Canada, which has left the IWC, faces similar issues. The Tapirisat is a group of Inuit who oppose the IWC and its preservationist stance⁴⁴. They have been known to kill bowheads in opposition to official government policy. One spokesman for the group stated that he wanted to taste bowhead meat once more before he died⁴⁵. Any Canadian take of bowheads confuses the situation “[...] because of possible attempts to subtract Canadian takes from the aboriginal subsistence quota granted to Alaska Eskimos”⁴⁶.

US policy on this issue thus is clearly muddled. Matthew Scully’s book *Dominion* does not pretend to be an objective study, but he does point to some problems with the notion of culture used to mean whatever a particular group wants it to mean. Since we are focusing on the Arctic, we do not address his claims about the Makah, who, according to his account, were inspired by Japanese pro-whaling forces to embrace a

⁴² *Id.* at 523.

⁴³ *Id.* at 528.

⁴⁴ Stoett, *supra* note 5, at 118-19.

⁴⁵ *Id.*

⁴⁶ *Id.* at 118.

tradition they had not pursued for many years⁴⁷. Scully admits that the Inuit hunters have a more serious claim to be “real-life” aboriginal whalers: “Their argument is that they have been whaling in bays for at least four or five thousand years, and who is anyone to come along and tell them it’s time to stop?”⁴⁸. Their right to whale would appear to be supported by international law. However, Scully asks, does Inuit whaling really amount to a sacred tradition? “[...] most Eskimos who hunt whales today are not primitives struggling to subsist in the harsh fringes of civilization. They are young men for whom whaling is a passion as, as we are told, an act of cultural self-affirmation. They whale, not because they must, but because they want to, otherwise living quite civilized lives [...]”⁴⁹. Scully concludes that the practice is not all that different from trophy hunting, especially since the lifestyles of Alaskan natives are today largely reliant on the petroleum industry. Their alleged respect for “custom” is also selective, since the methods used to remove the whales from the waters are usually far from traditional⁵⁰.

4 What’s Wrong with the Appeal to Culture?

Appeals to culture are ubiquitous in our pluralistic world. They are often used to contest international human rights norms. Frequently the appeal to culture is coupled with a charge of “Western imperialism”: human rights norms are charged with being a tacit imposition of values that are themselves those of a particular local culture, namely the culture (that of Europe and North America) that happen to dominate at the present time. The same sort of objection is typically brought against those who seek to defend the rights of non-human animals: they are charged with imposing local and dominant values on powerless minorities.

⁴⁷ Matthew Scully, *Dominion: The Power of Man, The Suffering of Animals, and the Call to Mercy* 175-76 (St. Martin’s, 2002).

⁴⁸ *Id.* at 176.

⁴⁹ *Id.*

⁵⁰ *Id.*

The first thing we must say about this type of argument is that if it's a question of defending the powerless from the abuse of power, surely there is no group more dominated and less respected in today's world than are non-human animals. Voiceless in international politics and lacking standing in law, they are defended, to the extent that they are, only by the very norms that are charged with being an abuse of power! So there would seem to be something seriously wrong with this way of making the case for culture: far from empowering the powerless, it further disempowers the entirely powerless.

But there is much more to say. Appeals to culture have two virtually insuperable problems of logic and definition. The first of these we may call the "who's in, who's out" problem. Typically the values of a cultural group are defined in ways that leave many delicate issues of boundary-drawing for later resolution. Who are "the Inuit people"? All who live anywhere in the world? Only a particular geographically bounded group (those in Greenland, for example)? Combined with this problem is the "whose voices count" problem. Most appeals to the values of a culture attend to the voices of the powerful leaders of that group, usually male. They ignore women, critical voices, alienated voices, and so forth. In this case, the young male hunters are being heard, and all sorts of other people with Inuit credentials are not being heard: women, those who moved away out of dissatisfaction with tradition, those who criticize tradition, and so forth. Cultures are neither monolithic nor static: they are scenes of debate and contestation, and they are in motion. To grant supremacy to a narrow subgroup who defend archaic practices, rejecting other dissonant voices, is to make a decision. But what could the normative basis for that decision possibly be?

This brings us to the truly insuperable problem with appeals to culture: they parade as if they had normative force, but they never tell us where that force is coming from. All sorts of bad practices are highly traditional: for example, domestic violence, child sexual abuse, and, of course, the torture of animals. The fact that these practices have been around for a long time is not a point in their favor. If tradition has a normative force, its defenders have to try harder to say what that force is.

The argument cannot simply be that cultures collapse if they reject some prominent value that they once held. Even though it is likely that the values involved in Nazism were deeply woven into German cultural traditions, German culture of a recognizable sort has survived the utter rejection of Nazism. All cultures have begun to reject gender discrimination, with struggle but without utter cultural collapse. Christian cultures were once profoundly hostile to Jews, Muslims, and Hindus; now they are far less so, and they have reinvented their culture in order to show respect for the religious commitments of non-Christians. And although Lord Devlin predicted in 1958 that British culture would not survive without discrimination against gays and lesbians, history has show him wrong⁵¹. Britain celebrates the contributions of LGBT people to British life, recognizes same-sex marriage, and continues on. If there were a culture or subculture that had to engage in a form of profound evil in order to survive, would we be unhappy about its demise?

A plausible normative claim in the special case of indigenous peoples is that people whose culture is already gravely threatened need to cling to the core elements of their way of life, or else they will succumb to despair in the face of dislocation. That claim about indigenous peoples has been movingly explored by Jonathan Lear in his book about the Crow Indians, *Radical Hope*. But as Lear shows, the Crow are able to move into the future through a creative reinvention of their traditions. The possibility of radical hope does not require keeping absolutely all elements of the way of life the same as they were before⁵².

Another plausible claim, pertinent to the charge of “Western imperialism,” is that local groups should be permitted, within limits, to define their own goals, and that paternalistic imposition of goals by Western nations is likely to prove both condescending and obtuse. Anyone who supports the idea that constitutional democracy is the best form of government has to believe something like this. The U. S. should

⁵¹ Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1959). 1958 is the date of the lecture from which the book’s title derives.

⁵² Jonathan Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (Cambridge, MA: Harvard University Press, 2008).

not go running around the world writing constitutions for all the nations that exist. But notice that we say, “within limits”. International human rights laws and other aspects of international law are best understood as limits, not as paternalistic cooptions. Increasingly, whether nations are considering the rights of women, the rights of children, or the rights of people with disabilities, they rightly attend to the limits put forward in international agreements.

Reasonable claims on behalf of culture, then, require a sensitivity to harm and rights. When an element of a way of life is relatively harmless, there is still a question about whether keeping it going is worth the cost. This question is asked all the time when governments debate how much money to spend on propping up a fading language, whether Irish Gaelic or Welsh, when the same money might be put to other uses. But when a practice does evident harm, the debate takes a different shape, since we must consider the costs to the people whose rights may be violated by the practice in question. Indeed here the charge of imperialism often runs the other way: the nostalgic imperialist defends a tradition without considering its human costs. Tourists love to purchase hand-made lace, and they think it is great if women in rural India wear out their eyes, shoulders, and hands in the process, or rather they simply don’t think. Some even think it is lovely if children are given away by their families to become child temple prostitutes: they preserve beautiful traditions of Indian dance⁵³. Sometimes there is a non-harmful way of preserving the core of a tradition (better conditions for the lace-makers), sometimes not.

5 The Right of Whales to Life

Finally, one might argue that the cultural debate is misconceived because whale preservationists have their own equally valid arguments. We defended this position in section II, and it is well represented in the international law arena. Several authors argue that whales have an inherent right to life and that this should be the focus of the debate. Some

⁵³ See the argument to that effect in Frédérique Appfel Marglin, *Wives of the God-King: The Rituals of the Devadasis of Puri* (New York: Oxford University Press, 1985).

features of whales that might justify their continued preservation from both commercial and non-commercial whaling include their intelligence and their ability to communicate. If one takes this view, then a mere temporary moratorium on whaling, for whatever reason, does not solve any important moral or ethical problems⁵⁴. It also means that the cultural claims of aboriginal groups to hunt whales must be limited because of the inherent right of whales to life.

Anthony D'Amato and Sudhir Chopra quote scholar Nancy Doubleday as defending traditional Inuit hunting practices because they show respect for the whale⁵⁵. Doubleday focuses on a notion of culture and environmental law that does not “perpetuat[e] alienation and reductionism” by separating mankind from nature⁵⁶. Her arguments in favor of the value of whaling for Inuit culture are, however, undermined when she acknowledges that “there were a range of relationships between Inuit and the commercial whalers”⁵⁷. And the notion of respect she uses is a very odd one, since it countenances using whales as things for human purposes. As D'Amato and Chopra rightly comment, “[...] no one asked the bowhead whether the gangs of men clubbing and harpooning them were demonstrating respect...No one claims that the Inuit would starve to death if they were stopped from killing whales”⁵⁸.

International law, however, has not gone very far in the direction of recognizing whales' right to life. Proposed redefinitions of international law, such as Doubleday's, must still deal with the fact that “subsistence” under the ICRW is such an ill-defined concept. This is also true for other sources of international law dealing with marine mammals, such as the United Nations Convention on the Law of the Sea. The LOS Convention makes reference to the principles of “common heritage” and “benefit of

⁵⁴ See Anthony D' Amato and Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 Am.J. Int'l. L 21, 48 (1991).

⁵⁵ *Id.* at 58.

⁵⁶ Nancy Doubleday, *Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law*, 17 Denv.J. Int'l L & Pol'y 373 (1989).

⁵⁷ *Id.* at 378-79.

⁵⁸ D'Amato and Chopra, *supra* note 36, at 59.

mankind as a whole” and to protection of marine mammals “[...] with a view to the conservation of marine mammals and in the case of cetaceans [the Convention] shall work through the appropriate international organizations for their conservation, management and study”⁵⁹. Again, these notions are too vague and ill-defined to offer whales secure protection.

The advocate of rights for whales has something of a dilemma here: for Western nations do tend to center their attention on those species that can be called “charismatic megafauna.” The Save the Whales campaigns started by environmental groups in the 1970s seemed to imply that whales are special and that hunting and consuming them is unusually abhorrent. As we indicated above, this focus is not exactly immune to criticism, given that affluent residents of developed countries often engage in behavior that damages animals. Popular concern about whaling is linked to perceptions of whales’ intelligence and social behavior. While these concerns did not really play a role when the IWC was originally founded, today they are central to those who are concerned with the environment and conservation. Philosophically we reject this approach: each form of animal life deserves protection and a chance to flourish. But in terms of political strategy, it may be the best we can do at present to focus on species that already attract considerable public sympathy. This means an uncomfortably anthropocentric focus on intelligence, communicative ability, and, in the case of dogs, cats, and horses, symbiotic living with humans. It is an unfortunate fact of today’s world that we are far more likely to see protection for whales, great apes, dog and cats, than for pigs, chickens, and calves. (As we write, the banning of puppy mills has just been upheld in Chicago, even though young pigs and chickens are still tortured in the factory farming industry)⁶⁰. However, progress on one issue of urgent human importance should not wait for principled consistency on the part of the public.

⁵⁹ LOS Convention, Article 65 (look up!!).

⁶⁰ See “Judge dismisses suit challenging Cook County ‘puppy mill’ ban,” Chicago Tribune August 12, 2015. Available in: <<http://www.chicagotribune.com/news/local/breaking/ct-puppy-mill-ban-met-20150810-story.html>>. Access: 9 Mar. 2016.

If environmentalism and conservation are an important part of the IWC's mission, it is well placed to take action on the specific question of whale protection. It is the major organization specifically focused on whales. In the process, it should also consider the threat posed by climate change. If significant portions of the Arctic open up for commercial oil and gas drilling in the future, this will pose further dangers for the marine mammals who live there and for their entire ecosystem.

The issue, then, ultimately comes back to the moral and legal question of standing. By now most of the international community agrees that the harms done by cultural traditions must be limited in the name of human rights. But they don't reach the same conclusion about marine mammals, because they do not grant them legal or moral standing. The international community must decide: are whales person-like beings with legal entitlements, or are they not? At present, they are not, under customary international law. But customary international law is at odds, here, with moral reasoning grounded on empirical fact, and at odds with the moral judgments of a growing proportion of the international community. The romanticization of traditional whaling is no more morally defensible than the romanticization of domestic violence and child prostitution. Whales are person-like beings with intelligence, social interactions, and the capacity for not just suffering but a wide range of experiences and activities. The time has come for international law in general, and the IWC in particular, to recognize this.

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