

INDIGENOUS PEOPLES AND THE INTERNATIONAL ENVIRONMENTAL COMMUNITY: ACCOMMODATING CLAIMS THROUGH A COOPERATIVE LEGAL PROCESS

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For centuries, the Inuit peoples of the Arctic region have relied on whale hunting for physical sustenance, and the hunt serves as the central ritual of their culture. During the past century, however, commercial overhunting has seriously endangered whale populations, and environmentalists have taken up their cause, pushing for a moratorium on whale hunting. While the Inuits are sometimes granted a narrow exception to the regulations, their hunting rights are constantly under attack by those who fear that any hunting at all will drive the whales into extinction. In this Note, Rupa Gupta argues that the conflict between the rights of whales and of the Inuit is a false one and is based on Eurocentric notions of individual rights. She demonstrates how both the whales and the Inuit culture are endangered by commercial whaling and presents Inuit notions of social and environmental interdependence as an alternative interpretive framework to that of individual rights. Finally, she suggests that Inuits and other indigenous peoples be included in the international institutions and scientific communities that control the dialogue on environmental management.

INTRODUCTION

Whale hunting is inextricably linked to the individual sustenance¹ and the cultural existence² of the indigenous peoples³ who have in-

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¹ See Danny Westneat, *Whales Die, A Culture Lives*, *Seattle Times*, Oct. 13, 1996, at A1 ("To the Inupiat, 'Why whale?' is like asking, 'Why breathe?'").

² See Alma Soongi Beck, Comment, *The Makah's Decision to Reinstate Whaling: When Conservationists Clash with Native Americans over an Ancient Hunting Tradition*, 11 *J. Envtl. L. & Litig.* 359, 409 (1996) ("As experience has shown, cultural survival is essential to survival as a people."); Doug J. Swanson, *Barrow, Alaska: Third World at the 'Top of the World'*, *Morning News Trib. (Tacoma, Wash.)*, Dec. 11, 1994, at A20, available in 1994 WL 9796794 (confirming assertion by anthropologist Linda Ellanna that whaling is not just "nutritional or economic factor" but "central cultural underpinning" with statement by George Ahmaogak, Sr., mayor of Barrow, that "[t]he culture is centered on the whale. . . . We wouldn't have been here for thousands of years without the whale.").

³ The phrase "indigenous peoples" is used to describe the unique status of various native settlers displaced by or submerged within the majority settler nation-states. The Working Group on Indigenous Populations (Working Group), see *infra* Part III.B.2, defines "indigenous" as "having a historical continuity with pre-invasion and pre-colonial societies [which] consider themselves distinct from other sectors of the societies not pre-

habited the Circumpolar North for centuries.⁴ Overexploitation of whales by Western commercial whalers has shattered the delicate balance between the native hunter and the whale, pushing both to the edge of extinction.⁵ Already buffeted by the extreme climate of the Arctic North, these indigenous peoples now confront a challenge as obstinate as the environment itself—international environmentalists.⁶

Recent ecological attention has focused on the assault upon the many animal species being hunted to extinction or near extinction.⁷ Invoked as a metaphor for all that is sublime in nature,⁸ the whale has

vailing in those territories.” Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 *Am. J. Int’l L.* 369, 374 (1986). But consensus by indigenous groups on the definition has been elusive. See *id.* at 373-76 (pointing out various definitions of “indigenous” to illustrate lack of consensus on meaning of term); Steven C. Perkins, *Indigenous Peoples and International Organizations: Issues and Responses*, 23 *Int’l J. Legal Info.* 217, 218-21 (1995) (advancing argument that terminology of indigenous status has been manipulated to lessen arguments for self-determination or territorial independence of indigenous populations). For the purposes of this Note, the term “indigenous” refers only to the Inuit, and both are used interchangeably throughout this piece. See *infra* note 14 for a discussion of regional variance in what the Inuit are called.

⁴ This includes regions within Alaska, Greenland, Canada, and Siberia. See *infra* Part I.B.

⁵ See Storer H. Rowley, *Arctic Whalers Face Demands to Conserve*, *Chi. Trib.*, Aug. 8, 1991, at 25, available in 1991 WL 9446018 (noting that even conservation groups concerned about overhunting of beluga whales blame American and Scottish whalers for devastating whale stocks and concede that such commercial exploitation, more than Inuit’s hunting, is primarily responsible for leaving beluga stocks threatened and endangered); see also Westneat, *supra* note 1, at A1 (reporting threat to Inuit’s cultural existence if they had allowed Western influence to destroy their “epic hunt [which] keeps the community whole against the ravages of drugs and alcohol [and] staves off the seductive power of Western values on TV” in modern Inuit life).

⁶ See Rowley, *supra* note 5, at 25 (reporting that whaling communities fear “backlash” from environmentalists’ antiwhaling movement and noting that “Inuit whalers plying the Arctic inlets off the Beaufort Sea for their annual beluga [white whale] hunt are worried about falling prey themselves—to conservationists”); Elise Sereni Patkotak, *My First Fresh-Cooked Muktuk*, *S.F. Examiner*, May 28, 1991, at A17, available in Westlaw, SFEX-AMINER database (reporting that indigenous communities enjoying opening of whaling season are leery of sharing their joy too openly with outside world for fear that observers will miss point entirely and cast Inuit as “Bambi hunters” in “Walt Disney fantasy”).

⁷ See Irma S. Russell, *The Role of Public Opinion, Public Interest Groups, and Political Parties in Creating and Implementing Environmental Policy*, 23 *Env’tl. L. Rep.* 10,665, 10,666 (1993) (discussing relatively recent public consciousness of and sensitivity to environmental problems and increasing environmental protection due to interaction of three forces—public opinion, public interest groups, and political parties).

⁸ For example, according to the biblical tale of *Jonah and the Whale*, the passage into the belly of the whale is “an archetypal symbol of the hero’s journey of self-discovery” and “the power of life locked in the unconscious.” Elaine Robbins, *In the Belly of the Whale*, *E/The Env’tl. Mag.*, May/June 1997, at 34, 34 (internal quotation marks omitted). According to Buddhist legend in Japan and Vietnam, some coastal temples are “said to contain the sacred souls of whales, ‘the Angels of the Sea of the Sky.’” *Id.* (cataloguing symbolism of whale in religion, mythology, and folklore of Eastern as well as Western cultures). Robbins also describes environmentalists’ struggle on behalf of whales, the “beloved mascots of the sea” who have “captured the popular imagination.” Elaine Robbins, *Whale Watch*,

sparked the concern, energy, and dedication of conservationists more than most other endangered species.⁹

Both the indigenous Inuit peoples and the environmental community claim entitlements vis-à-vis the whale which are necessarily mutually exclusive.¹⁰ This Note focuses on two endangered groups—the indigenous Inuit peoples and the bowhead whale¹¹—in an effort to construct an international regime reconciling the interests of both with the goals of the environmental community. Part I describes the Inuit lifestyle and the effect of organized whaling by Westerners,¹² the de-

E/The Env'tl. Mag., May/June 1997, at 28, 28. Even traditionally negative Christian imagery of the whale as a symbol of evil or mystery reinforces the extent to which the whale has captivated the human imagination. See, e.g., Peter Matthiessen, *Blue Meridian* 11 (1971) ("No word conveys the eeriness of whale song . . ."); Herman Melville, *Moby Dick* (The Modern Library 1998) (1851) (narrating fictional struggle of ship's captain with great white whale, which symbolizes cunning and malice). Finally, in the folklore of Alaska's Inuit, the whale symbolizes the epitome of nature's majesty such that the spirit of the whale, among other animals, is said to inhabit the Northern Lights. See Eric Hanson, *Snow Place Like Home, Star-Trib.* (Minneapolis-St. Paul), Nov. 21, 1998, at 01E, available in 1998 WL 6377166 (reporting on exhibit based on winter heritage of city in Minnesota Children's Museum).

⁹ See Barnett M. Lawrence, Comment, *The Supreme Court: The 1985-86 Term in Review and a Look Ahead*, 16 *Env'tl. L. Rep.* 10,325, 10,377 (1986) ("The eagle and the whale have become perhaps the two best-known symbols of the wildlife conservation movement."); see also Dean M. Wilkinson, *The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective*, 17 *Denv. J. Int'l L. & Pol'y* 271, 272 (1989) (noting "startling speed" during late 1960s and 1970s with which environmental and animal welfare groups pursued "Save the Whales" movement); *International Whaling Commission Expected to Harpoon Whale Use Again*, U.S. Newswire, Oct. 13, 1997, available in Westlaw, 1997 WL 13913660 ("The anti-whaling movement started in the mid-1960s, fueled by the over-hunting of great blue whales in Antarctic waters. Animal rights campaigners and other environmental fundraising groups jumped on the issue with anti-whaling campaigns that raised hundreds of millions of dollars for their cause.").

¹⁰ The words of Canadian scientist Kerry Finley, who has studied the whales for 14 years, crystallize this point: "It makes some sense from a spiritual and cultural point of view for Inuit to hunt the whale. . . . *But my constituency here is the whale*, and from a biological point of view this is not a sustainable hunt." Brian Laghi, *Whales Caught Between Scientists, Inuit Hunters*, *Globe & Mail* (Toronto), Apr. 30, 1998, at A8 (quoting Finley) (emphasis added). Needless to say, Inuit scientists dispute research by Finley and his colleagues as underestimating actual whale population. See *id.* (quoting biologist Keith Hay of Nunavut Wildlife Management Board as saying that Finley's conclusions are not borne out by elders who live in area and have found increase in sightings of whales); see also *infra* Part III.B.3 for a discussion of the inclusion of Inuit data in the scientific community's research on whale stocks.

¹¹ For an argument that the existence of both the Inuit and the whale has been threatened by the Western hunter, see Westneat, *supra* note 1, at A1 ("In a struggle stretching over thousands of years, whales are on the same side as Eskimos in that both have been threatened only by Outsiders, namely 19th-century Yankee whalers . . .").

¹² The first recorded pursuit of whales for an organized hunt by Western countries occurred in the eleventh century. See 1 Patricia Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching* 66 (1985) (explaining origin of Western whaling); see also *infra* Part I.B.1.

velopment of commercial whaling, and the international regulation of indigenous and commercial whaling. Part II balances competing claims of indigenous subsistence¹³ and international environmental management, creating a framework of substantive principles to guide a new legal process. Part III argues for the inclusion of indigenous representatives in the international dialogue in order to optimize the efficacy of existing forums.

I

HISTORICAL BACKGROUND AND RECENT DEVELOPMENTS

Any discussion of the impact of international whaling regulations on indigenous peoples must include an understanding of the historical relationship between Inuit culture and whaling. The longevity of the relationship highlights the importance of whaling to the culture. In addition, the complexity of this relationship underscores the feasibility of various cooperative solutions that can be undertaken to maintain and expand an exemption for the Inuit from the worldwide ban on whaling.

A. Indigenous Peoples: The Inuit

The Inuit, also known as Inupriats and Eskimos,¹⁴ are an ethnic group indigenous to the Circumpolar North, which encompasses re-

¹³ "Subsistence" is defined under the Alaska National Interest Lands Conservation Act as

the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal and family consumption; and for customary trade.

¹⁶ U.S.C. § 3113 (Supp. III 1997). Generally, "subsistence involves something more than merely hunting and fishing in order to procure food. This 'something more' can be characterized as . . . a complex web of relationships that define and distinguish their traditional culture." William M. Bryner, *Toward a Group Rights Theory for Remediating Harm to the Subsistence Culture of Alaska Natives*, 12 *Alaska L. Rev.* 293, 299 (1995). However, there is considerable disagreement about the definition of subsistence and the question of who should be privileged to enjoy subsistence. See Andrew Josephson, Comment, *Katie John and Totemoff: The United States and Alaska Clash over the Reserved Water Rights Doctrine and Native Alaska Hunting and Fishing Rights—The U.S. Supreme Court Passes on an Opportunity to Resolve the Subsistence Debate*, 6 *Dick. J. Envtl. L. & Pol'y* 225, 228 n.15 (1997) (analyzing conflicts between denial of special privileges to any resource user group in Alaska Constitution on one hand and federal government's grant of subsistence privileges to Alaskan natives on other).

¹⁴ The indigenous nomad tribe known as the Inuit originally gathered into settlements around the Arctic to escape epidemic and famine. They are also known as Inupriats in Siberia, Inuvialuit in Northwestern Canada, and Polar Eskimos in Alaska. See Charles J. Hanley, *Tomorrow Slowly Encroaches on Harsh, Scenic Arctic*, *L.A. Times*, Oct. 11, 1987,

gions within Greenland, Northwestern Canada and Quebec, the Alaskan North Slope, and Eastern Siberia.¹⁵ Anthropologists refer to the Inuit as "People of the Whale"¹⁶ because Inuit culture and values are rooted in whale hunting and sharing the harvest of that hunt.¹⁷ The Inuit hunt a species of whale known as the great bowhead whale, which is found primarily in the Bering Sea.¹⁸

Archaeological evidence suggests that the Inuit and their Thule ancestors have hunted the arctic bowhead whale for at least 2500 years.¹⁹ Migratory patterns show that post-glacial Inuit settlement has tended to follow the distribution and migration of these whales around the Arctic Ocean.²⁰ The Inuit have maintained their ancient way of life, proving dynamic in their ability to achieve sustainable resource use²¹ despite extreme and varied climatic fluctuations.²² For

at 2 (documenting historic lifestyle of Arctic Inuit hunters in Greenland and encroachments on lifestyle). For the purposes of this Note, the term Inuit is used to refer collectively to the transnational tribe.

¹⁵ See Michael L. Chiropolis, Comment, *Inupiat Subsistence and the Bowhead Whale: Can Indigenous Hunting Cultures Coexist with Endangered Animal Species?*, 5 *Colo. J. Int'l Envtl. L. & Pol'y* 213, 215-16 (1994) (evaluating competing interests of Inuit hunters across transnational borders with those of international environmentalists seeking protection for endangered whale species); Frank Powley, *Greenland Faces Gilded Future*, *Tulsa Trib. & Tulsa World*, Dec. 27, 1989, at Z3, available in 1989 WL 739880 ("Today, four out of five inhabitants [of Nuuk, Greenland] are native Inuits, who are related by language and custom to the Eskimos of Alaska, Canada and Siberia.").

¹⁶ See Chiropolis, *supra* note 15, at 216.

¹⁷ See Nancy C. 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, 375 (1989) (explaining history of Inuit whaling and its contemporary significance in context of current onslaught on indigenous whale hunting based on personal experience as international environmental coordinator for Inuit Circumpolar Conference (ICC)).

¹⁸ See Chiropolis, *supra* note 15, at 215-16. The bowhead is known as the "right" whale because it is considered the right whale to hunt. As a slow swimmer, it is easy to snare; because it floats once it has been killed, it is easy to land; and due to its large yields of oil, meat, and baleen, it is highly prized. See *id.* at 215; Brian Laghi, *East Canada Inuit Taste First Whale in 20 Yrs.*, *Tundra Times* (Anchorage, Alaska), Oct. 14, 1996, at 16, available in 1996 WL 15931034.

¹⁹ See Chiropolis, *supra* note 15, at 216. See generally Jean Malauric, *The Last Kings of Thule* 123 (Adrienne Foulke trans., 1982) (exploring links between modern Inuit populations in Arctic North and their two-thousand-year-old Thule ancestors); Moreau S. Maxwell, *Prehistory of the Eastern Arctic* (1985) (detailing overview of Alaskan cultures as biological and cultural progenitors, including Thule-Punuk whale-hunting cultures, which became foundation for modern Inuit society).

²⁰ See Robert McGhee, *Canadian Arctic Prehistory* 85 (1978) (analyzing evidence indicating correlation between movement of bowhead whales and migration of Inuit ancestors across Arctic from Siberia to Greenland during warmer period around A.D. 1000); Doubleday, *supra* note 17, at 376 (noting ancestral movements across Arctic by Inuit).

²¹ "Sustainable resource use" means the ability of the Inuit to hunt the whale in such a way as to sustain its use without making it extinct, by, for example, changing their quota up or down to account for changes in the whale population.

²² See Doubleday, *supra* note 17, at 375 (describing extreme climatic conditions).

example, French ethnologist Jean Malaurie, who lived among the polar Eskimos for fourteen months, observed that the Inuit follow a complex system of internal controls depending on the abundance or shortage of game.²³ For thousands of years, the Inuit's flexibility has sustained them²⁴ in a region deemed uninhabitable by others.²⁵

The Inuit depend on the land resources of the polar Arctic, yet the mainstay of their survival has been the Arctic Ocean and its renewable resources.²⁶ Whales provide food, clothing, light, and heat²⁷ crucial for survival in the cold Arctic regions.

Moreover, the ability to obtain food from the dangerous hunt is essential to an Inuit hunter's psychological health.²⁸ The entire Inuit village depends upon the skill of the whaling captain for its survival,²⁹ and successful captains are consequently exalted.³⁰ The importance of

²³ See Malaurie, *supra* note 19, at 123 (explaining how Polar Eskimos encouraged increase or decrease in birth rate, for example, in response to abundance or scarcity of game).

²⁴ See Rowley, *supra* note 5, at 25 ("For the Inuit, the hunt is part of a history going back centuries . . ."); Henry P. Huntington, *Wildlife Management and Subsistence Hunting in Alaska* (1992) (detailing historical, archaeological, sociological, and economic study of subsistence hunting practices of Northern Alaskan Inuit people).

²⁵ In the polar winter, the sun disappears below the horizon, leaving the Inuit to pursue their demanding way of life in the darkness of the Arctic nights, at subzero temperatures, commonly between minus 40 and minus 70 degrees Fahrenheit. Seasonal winds can create dense fog, storms, and snow along the Arctic coast at any time, leaving life unpredictable and treacherous. In fact, each year, lives are lost to uncontrollable climatic hazards. See Doubleday, *supra* note 17, at 375 (describing extreme climatic conditions); see also Hanley, *supra* note 14, at 2 (calling Inuit "a model of human adaptability" because of their survival in frigid and frozen desert of Arctic regions).

²⁶ See Doubleday, *supra* note 17, at 375. The distinguishing feature of the Inuit in contrast with other Arctic natives is the Inuit's heavy reliance on marine mammals for their physical subsistence and cultural rituals. See *id.*; see also Harry Brower Jr. & Taqulik Hepa, *Subsistence Hunting Activities and the Inupiat Eskimo*, *Cultural Survival Q.*, Fall 1998, at 37, 37 ("The bowhead whale is the most culturally significant resource harvested on the North Slope.").

²⁷ See Doubleday, *supra* note 17, at 375; see also Chiropolis, *supra* note 15, at 217. The Inuit use the whale meat and skin for food, bones for building, and baleen, the horny substance attached to the upper jaws of the whale, for nets. See Doubleday, *supra* note 17, at 377.

²⁸ See Doubleday, *supra* note 17, at 375 (explaining complex relationship between whaling and Inuit life).

²⁹ See Patkotak, *supra* note 6, at A17:

After a crew lands a whale, the captain's wife, the wives of the crew members and just about anyone else who volunteers to help, spend the next 24 hours cutting and cooking so that they can serve a meal to the town. It's an awesome concept—feeding hundreds of people out of a small kitchen in your house.

³⁰ See Chiropolis, *supra* note 15, at 217 (noting that hunting is occupation with proud tradition). The "select group of men and women known as whaling captains . . . shoulder the responsibility of providing traditional food and keeping alive the most profound rite" of Inuit culture, and are the community leaders. See John Balzar, *To Catch a Whale*, *L.A. Times*, July 24, 1994, *Magazine*, at 15. Successful whaling captains are also given honors,

the hunt is evidenced by the fact that before the hunt, whaling crew members "enter a period of sexual abstinence, intensive meditation and spiritual preparation."³¹

Hunting is the Inuit way of life,³² to the extent that the social interactions³³ and cultural traditions³⁴ of the Inuit are steeped in the preparation, harvesting, and sharing of the hunt.³⁵ As articulated by Eben Hopson, former Inuit activist and native leader of the North Slope borough in Alaska:

[T]he whale is more than food to us. It is the center of our life and culture. We are the People 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.³⁶

According to tradition, the entire village participates in the complex rituals surrounding the hunt.³⁷ After a successful hunt, and once the whale is ashore, the community participates in landing, butchering, and processing every part of the whale.³⁸ There are special words

including mouth-to-jaw tattoos. See Doubleday, *supra* note 17, at 377. See generally Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission 48-72* (1985) (discussing in detail historical and contemporary economic, social, and cultural importance of whale hunting to Alaska natives).

³¹ See Nigel Bonner, *Whales of the World* 61 (1989).

³² See Brower & Hepa, *supra* note 26, at 37 ("Our continued reliance on subsistence hunting is what gives the Inupiat culture strength, confidence, and meaning. . . . Subsistence whaling is a physical, emotional, and spiritual experience which gives our people self confidence and unites our communities.")

³³ See Balzar, *supra* note 30, at 16 ("Their most important social gatherings were celebrations of the hunt.")

³⁴ See Berger, *supra* note 30, at 51. Berger notes the deeply embedded cultural values and attitudes resulting from the traditions surrounding the hunt which involve "an understanding that is both conscious and mystical of the intricate interrelationships that link humans, animals, and the environment." *Id.*

³⁵ See Westneat, *supra* note 1, at A1. "[E]ven during the 'off season,' whaling brings families together and fosters community" because of its significance to the culture. *Id.* This is why strict social conventions govern every aspect of the hunt, including pre-hunt preparation, assignment of personnel, and distribution of the proceeds within the community. See Doubleday, *supra* note 17, at 377.

³⁶ *The People of the Whale: A Fight for Survival*, *Indian Aff.*, Fall-Winter 1978-1979, at 7 (quoting Eben Hopson); see Stephen M. Hankins, Comment, *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, 509 n.119 (1990) (discussing limited, sustainable impact on whale populations of aboriginal hunting exception).

³⁷ See Westneat, *supra* note 1, at A1 ("It turns out it takes a village to kill a whale."); Brower & Hepa, *supra* note 26, at 37 (describing extensive preparations for annual hunt with women preparing traditional skin boat and initiation of children in hunting skills at early age).

³⁸ See Balzar, *supra* note 30, at 33 (reporting first-hand experience of convergence of whalers and villagers who tackle whale out of water, slice carcass in assembly-line operation, and divide up various parts of whale among everyone).

in the native language, Inuktitut, for the different parts of the whale and for the activities associated with the hunt.³⁹ After the hunt, the events of the expedition are endlessly retold, becoming part of the community's oral history.⁴⁰

For centuries, the Inuit have maintained a model management regime supporting a sustainable lifestyle for both themselves and the whale.⁴¹ Because the "focus of a hunter in a hunting society was not killing but attending to the myriad relationships he understood bound him into the world he occupied with [animals],"⁴² the Inuit's activities have never threatened the whale with extinction or polluted its habitat.⁴³ However, a number of external factors—such as commercial whaling, the emergence of international environmental regulation, and the interaction of Western industrial society with nature—have adversely affected the Inuit's centuries-old subsistence resource use.⁴⁴ From the Inuit's perspective, the disruption of this use not only raises the specter of losing the whale meat in their diet and economy, but also poses the threat of cultural, social, and spiritual starvation.⁴⁵

³⁹ See Doubleday, *supra* note 17, at 377. For example, in light of the difficulty and danger involved in towing a whale to shore or landing it, the hunters sing special songs in Inuktitut, called *aigoan*, believed to make the whale light and easy to tow. See *id.* at 376.

⁴⁰ See Patkotak, *supra* note 6, at A17. Patkotak writes:

[T]here is that part of the Inupiat that is so proud of their culture and skills that they can't help but want to share it. They so respect this giant mammal that is inextricably woven into the fabric of their being that they want others to see and feel it as they do.

Maybe this is an impossible dream, but maybe not. If they keep sharing, perhaps others will come to see this hunt as they do—a battle between worthy adversaries, a way of feeding their families, an unbroken link to their past.

Id.

⁴¹ See Chiropolis, *supra* note 15, at 213-14.

⁴² Barry Lopez, *Arctic Dreams: Imagination and Desire in a Northern Landscape* 200 (1986) (providing comprehensive history of Arctic region, including climatic shifts, marine migratory patterns, and native settlement).

⁴³ Even today, for example, the indigenous hunt for the whale under the current exemption involves the use of traditional harpoons and nets, not guns. See Balzar, *supra* note 30, at 14. Moreover, the Inuit subsist on one-fifth the catch of whales harvested by commercial whalers. See *id.*

⁴⁴ See Doubleday, *supra* note 17, at 375 (discussing variety of factors that affect Inuit whaling).

⁴⁵ See Rowley, *supra* note 5, at 25 (noting historical and contemporary importance of whaling from perspective of native whalers such as Billy Day, 60-year-old native: "This is a way of life I've been doing for almost 50 years, and I don't want it to disappear, . . . 'It's inside me, and I want to keep on doing it.'"). Some of these fears of a disappearing lifestyle already have come true for a small Indian tribe unrelated to the Inuit, the Makah Indians in Neah Bay, on the Olympic Peninsula of Washington. See Sam Howe Verhovek, *Protesters Shadow Tribe's Pursuit of Whales and Its History*, *N.Y. Times*, Oct. 2, 1998, at A12. Once renowned for their hunting prowess with the gray whale, no living Makah has ever hunted a whale due to the worldwide ban against whaling. See *id.* Supported by the Clinton Administration, the Makah won a rare exemption from the moratorium once the

B. Competition for the Inuit: Commercial Overexploitation and International Regulation

The advent of whaling by Western fishermen gradually ended the Inuit's uninterrupted pursuit of their way of life. The Western whaling industry continued to gather momentum until the mid-twentieth century, when extinction threatened many species. The resulting international regulation of whaling—created without participation of the Inuit, and, indeed, without consideration of their interests—led to increasing limitations on indigenous and commercial whaling. It culminated in a moratorium on whaling, from which the Inuit have been able to extract a narrow exemption which is itself under continual attack by conservationists.

1. Unregulated Commercial Whaling and Its Impact on the Inuit

Industrial whale-hunting began with the Basques in the Bay of Biscay in the eleventh century⁴⁶ and developed into a commercial industry for the Europeans, Americans, and the Japanese well into the twentieth century.⁴⁷ The commercial whalers, unlike the Inuit, established no internal controls to conserve whale stocks during times of depletion or scarcity. As a result, they developed a pattern of hunting a species nearly to extinction before moving on to the next species.⁴⁸

gray whale stocks recovered from the brink of extinction. See *id.* On the occasion of the tribe's first planned whale hunt in more than 50 years, Marcy Parker, the vice chairwoman of the Makah tribal council, explained the need to resurrect the traditions of the tribe's whale-hunting forefathers and echoed Inuit concerns: "The hunt is the missing link, the thing that brings us full circle to our traditions,' . . . 'We're ocean families, whaling families. So much of what we are all about comes from the ocean, and we feel deep a spiritual need to [whale]." *Id.* Despite this difference and because both tribes primarily argue for renewed whaling for cultural affirmation, it is interesting to note the vociferous protests the Makah face as a measure of popular opposition to culturally based whale hunting. See *Whale Hunt Protesters Are Arrested by Police*, N.Y. Times, Nov. 1, 1998 at A19 (detailing arrest by Makah tribal police of four antiwhaling protesters from Sea Shepherd Conservation Society who fear that Makah's hunt of five whales per year will revive commercial whaling on global scale). Further, hundreds of people across the country make threatening telephone calls and write scornful letters to the Makahs. One letter from Vermont reads: "So much for the "We love the earth, peace, harmony, etc." What garbage. You people ought to stick to welfare. Your culture—what a joke." Verhovek, *supra*, at A12.

⁴⁶ See Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 Am. J. Int'l L. 21, 28 (1991) (discussing history of whaling).

⁴⁷ See Birnie, *supra* note 12, at 68-70 (listing whaling states). Initially, the trade prospered by providing oil, baleen, and whalebones. See Doubleday, *supra* note 17, at 377. The oil was used for lamps, and the whalebone was in demand for use in fashion. See D'Amato & Chopra, *supra* note 46, at 28.

⁴⁸ The number of whales killed gives an idea of the extent and scale of commercial whaling: In 1910, over ten thousand whales were killed worldwide. By 1914 or 1915, Norway alone was responsible for killing 14,917 whales in the Antarctic waters. See Birnie, *supra* note 12, at 73. After World War I, the total increased steadily to reach a high of

Long before various national governments realized the need for regulation, this unregulated exploitation had begun to devastate the Inuit.⁴⁹ Superior technology and the sheer number of commercial whalers left the Inuit severely handicapped in the hunt. Inuit culture came under attack. In Greenland, their lifestyle collided with bands of mercenary whalers.⁵⁰ The situation was different for the Inuit in the Alaskan and Canadian Arctic, who saw the emergence of commercial whaling as a limited cash economy; many Inuit in this region adapted to the intrusion of commercial whaling by hiring themselves out as expert native harpooners on commercial ships.⁵¹ In effect, out of necessity, the Inuit entered into a symbiotic relationship with the whalers, incorporating "the technology of the commercial whalers and the whalers themselves" into their traditional way of life.⁵²

The Inuit harvest of whales dropped to one-sixth of pre-1848 levels by the end of the nineteenth century.⁵³ The devastation was so widespread that even regulation and the eventual decline of whaling⁵⁴ would not undo the harm to the Inuit. In the long term, therefore, unregulated commercial misuse handicapped the Inuit and limited their access to the marine mammal resources integral to their survival.

43,129 whales hunted in 1931. See *id.* at 74; see also Douglas M. Johnston, *The International Law of Fisheries* 398 (1965) (identifying devastation to whale stocks as precursor to international consensus on need for regulation of commercial whaling).

⁴⁹ The exponential increase in whale depletion due to commercial whaling is evident in a comparison of numbers. An estimated 18,650 bowheads, the "signature catch" of the Inuit, were killed in the almost 70-year period between 1848 and 1915 alone. See Bonner, *supra* note 31, at 60 (cataloguing history of whaling by Inuit and commercial whalers plus devastation on whale stocks as result of latter). In the same 60-year period, the Inuit would have harvested 3600 bowheads, since they averaged 60 bowheads a year before the advent of commercial whaling. See Jeremy Cherfas, *The Hunting of the Whale: A Tragedy That Must End* 154 (1988).

⁵⁰ For example, in Greenland, entire Inuit settlements left their villages and fled to the hills at the mere suggestion that another whaling ship was approaching because "entire whaling crews had descended on small groups of Inuit and terrorized them." See Doubleday, *supra* note 17, at 378.

⁵¹ See Chiropolis, *supra* note 15, at 218 (noting that this cash economy dried up with end of commercial whaling). The Inuit served as harpooners and crew, and received whale skin or *muktuk*, which they had traditionally harvested, along with trade goods and other fringe benefits. See Doubleday, *supra* note 17, at 378-79. Sometimes they would take their entire families to live on whaling ships. See *id.* at 378; An Elder Remembers the Whalers, *Vancouver Sun*, May 5, 1990, at B7 (recording memories of native elders who recall that native Inuit were allowed to be part of hunt on whaling ships and got meat, although whale fat used for fuel and baleen used for snare supports would be taken by commercial whalers).

⁵² See Doubleday, *supra* note 17, at 378-79 (noting that depletion of whale stocks, opportunity to work on ships, and technological superiority of whalers influenced Inuit to change their traditional hunt).

⁵³ See Cherfas, *supra* note 49, at 156.

⁵⁴ See *infra* Part I.B.2.

2. *International Regulation, Moratorium, and the Effect on the Inuit's Subsistence Whaling*

Independent of the harm to Inuit survival, the various whaling nations recognized that their own profits hinged on continued availability of the whale.⁵⁵ In response, they instituted regulations beginning in the 1920s.⁵⁶ This initiative culminated with the establishment, in 1946, of the International Convention for the Regulation of Whaling (ICRW)⁵⁷—a permanent international convention articulating a complex regime monitoring whaling through the International Whaling Commission (IWC).⁵⁸ Within a few decades of the institution of these regulations limiting whaling, the international community changed its course and adopted a total moratorium on hunting most species.⁵⁹ Fortunately, despite the 1977 moratorium, the Inuit were able to salvage an aboriginal subsistence whaling exception with fixed quotas for two- to three-year blocks subject to periodic renegotiation.⁶⁰ The tenuous exemption is vulnerable to conservationist attack at every renegotiation. Indeed, it is under continuous attack because conservationists fear that states will manipulate this exemption and the allowance of special whaling permits for “scientific purposes” to disguise commercial whaling by defining “aboriginal” and

⁵⁵ See D'Amato & Chopra, *supra* note 46, at 30 (noting need to maintain stocks to insure profits).

⁵⁶ The whaling nations began efforts to regulate commercial whaling by 1918. At the 1927 meeting of the Whaling Committee of the International Council for the Exploration of the Sea, the major whaling nations discussed a licensing system to limit the expansion of commercial whaling and recommended the creation of the International Bureau of Whaling Statistics, which was established in 1930. The Convention for the Regulation of Whaling followed in 1931. See *id.*

⁵⁷ See International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 62 Stat. 1716. After a conference in 1946 in Washington D.C., the ICRW came into force on November 10, 1948, with the initiative of 14 of the world's commercial whaling nations. See Chiropolis, *supra* note 15, at 220. The ICRW meant to supersede all previous international agreements and allowed annual revisions with respect to licensing, inspections, and general monitoring by member states. See, e.g., Protocol to the International Convention for the Regulation of Whaling Signed at Washington Under Date of December 2, 1946, Nov. 19, 1956, 10 U.S.T. 952, 338 U.N.T.S. 366.

⁵⁸ The ICRW established the International Whaling Commission (IWC) to achieve its goal of conserving and developing whale stocks for continued commercial whaling by eliminating the threat of extinction. The IWC specified provisions on open and closed seasons; open and closed areas, including sanctuaries; limitations on size of species taken; methods and intensity of whaling, including maximum catch; types of gear and equipment used; methods of measuring whales taken; and other statistical and biological information. The IWC oversaw the annual modification of catch quotas and the identification of species in need of protection based on scientific data. See D'Amato & Chopra, *supra* note 46, at 34.

⁵⁹ See generally *id.* at 30-34 (describing evolution of movement to ban all whaling).

⁶⁰ See Hankins, *supra* note 36, at 514 (discussing IWC's adoption of the exception).

“scientific” broadly.⁶¹ While many conservationists simply believe that it is inhuman to kill whales, they gain support from moderate conservationists by arguing that nations such as Japan and Norway will undermine the moratorium by arguing their own “cultural” and “scientific” necessity to whale.⁶²

The IWC’s insistence on a worldwide ban on whaling⁶³ unwittingly signaled a new era in the marginalization of the Inuit. While the concern for the whales was not entirely misplaced, it was given undeserved primacy due to a growing ideological divergence between the nonwhaling states and minor whaling states on the one side and the major whaling states on the other.⁶⁴ With no one to represent the

⁶¹ See Pat W. Birnie, *International Legal Issues in the Management and Protection of the Whale: A Review of Four Decades of Experience*, 29 *Nat. Resources J.* 903, 931-32 (1989) (discussing issues raised by juxtaposition of articles granting exclusive rights to member governments and power of IWC to evaluate permits itself given possibility of misuse).

⁶² See *International Whaling Commission Expected to Harpoon Whale Use Again*, supra note 9 (elaborating on Japan’s argument on behalf of four small communities for exemption from commercial whaling moratorium based on social, cultural, and economic erosion of community life after moratorium); Paul Shukovsky, *Makah Whale Hunt Bitterly Opposed, Hundreds of Groups Trying to Stop It*, *Seattle Post-Intelligencer*, Aug. 13, 1998, at A1, available in 1998 WL 4302411 (articulating argument that Norwegian and Japanese whalers have long history of whaling and can make as plausible argument as Makah tribe in Washington state for “cultural necessity” to whale, thus obliterating moratorium).

⁶³ In the decades following the establishment of the IWC, there was a growing awareness among various nations of the continued depletion and deterioration of whale stocks which culminated in the Stockholm Conference on the Human Environment convened by the United Nations General Assembly in 1972. See Birnie, supra note 12, at 364-65; D’Amato & Chopra, supra note 46, at 38. The Conference unsuccessfully proposed a 10-year moratorium on commercial whaling, ostensibly to allow time for whale stocks to recover from the brink of extinction. See *Report of the United Nations Conference on the Human Environment, Action Plan for the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (1972), reprinted in 11 *I.L.M.* 1421.

⁶⁴ While the major whaling states wanted to conserve whales in order to continue their hunting, minor whaling states began to focus on the threat of extinction of major species of whales. See *International Whaling Commission Expected to Harpoon Whale Use Again*, supra note 9.

While the IWC rejected proposed moratoriums as scientifically unjustifiable, the political contest between various member nations asserted inexorable pressure toward a moratorium. See *id.* (“Despite the IWC’s effective actions to protect over-hunted stocks, the anti-whaling movement recruited 19 countries into the IWC to vote for a moratorium on all commercial whaling in 1982.”). Activists, while claiming that a pause in whaling was necessary to assess whale stocks comprehensively, have continued to block the resumption of whaling despite the completion of this assessment by the IWC’s Scientific Committee in 1990. See *id.* When there was increased pressure on the IWC to institute a moratorium on whaling at its twenty-fifth annual meeting in 1973, the Scientific Committee pointed to the lack of scientific evidence of adverse effects on the ecosystem and “repeated and elaborated on its view that there was no biological need for a complete moratorium on commercial whaling” and that such a move would work against the objectives of the Convention. See *Report of the Scientific Committee, IWC/24th Report/1972* (cited in Cliff M. Stein, *Whales Swim for Their Lives as Captain Ahab Returns in a Norwegian Uniform: An*

interests of the Inuit at the IWC meeting in 1977,⁶⁵ the IWC instituted an outright ban on all commercial and "aboriginal whaling of the Arctic bowhead whale," identified as the most endangered species.⁶⁶ The Inuit, who had mostly adapted to sharing the hunt by working on commercial ships, were now faced with an en masse withdrawal of Western whalers,⁶⁷ the depletion of whale

Analysis of Norway's Decision to Resume Commercial Whaling, Case Comment, 8 Temp. Int'l & Comp. L.J. 155, 167 n.123 (1984)); D'Amato & Chopra, supra note 46, at 39; Birnie, supra note 12, at 422, 433-35. Once economically powerful nations such as England and the United States ceased whaling due to declining profits, they started to represent growing environmental consciousness regarding whales by calling for a cessation of all whaling through a moratorium. Small nonwhaling states, especially nation-states in the third world, united with these powerful members of the United Nations in exchange for support with their self-interested agendas. Ostensibly seizing upon the ideology of environmentalism, these states helped the United States threaten the major whaling states with their unified opposition. See Peter J. Stoett, *The International Politics of Whaling 27* (1997) (arguing that symbolic importance of both whale and moratorium may overshadow need for much more in-depth and multidimensional policy work to locate whale conservation within "ecosystem-based approach" that encompasses other environmental concerns such as marine pollution).

⁶⁵ Since only nation-states were voting on the moratorium, the Inuit peoples, who are dispersed across national boundaries and not organized into a modern nation-state, were excluded from participation. See *infra* Part III.B. Moreover, while theoretically the Inuit can vote in their respective countries and lobby against the ratification of such agreements, their numerical minority, lack of national representation, and general lack of financial resources made such an endeavor seem nearly impossible. See *infra* Part III.B.

⁶⁶ See D'Amato & Chopra, supra note 46, at 41. The Scientific Committee of the IWC stated that "from a biological point of view the only safe course is for the kill of bowhead whales from the Bering Sea stock to be zero." IWC/31st Mtg./1979, Chairman's Report, para. 12, cited in D'Amato & Chopra, supra note 46, at 41 n.134. For detailed discussion of the thirty-first meeting, see generally Birnie & Sandbrook, IWC—Increasing Complexities, 3 *Marine Pol'y* 69 (1979). Note that until 1977, Inuit had been allowed to hunt bowhead whales under an explicit aboriginal subsistence exception and that following the moratorium, the United States regained a limited quota for Alaskan Inuit without addressing the concerns of Inuit in other areas. See Beck, supra note 2, at 359, 389-90 (discussing recent outcry against expansion of whaling due to Makah tribe's successful effort to reinstate limited whaling); Birnie, supra note 61, at 929 & n.91 (noting that section 13 of IWC Schedule, as amended at annual meeting in July 1983, allows member government to contract with any of its nationals for special permit to kill, take, and treat whales for undefined "aboriginal subsistence whaling," provision used by U.S. to get limited quota for Alaskan Eskimos).

⁶⁷ The Inuit tribe that populated Canada's Barrenlands, for example, compromised its self-sufficiency by its dependence on Western goods and distribution mechanisms. See Farley Mowatt, *People of the Deer 325* (1952) (noting that related Inuit tribes, *Ihmalmuit* or "People of the Deer," never readjusted after temporary trading outpost established during the early 1930s was abandoned and they were "cast loose"). With the decline of commercial whaling, the tribe was decimated by the disruption of its traditional lifestyle inevitably following contact with the outside world. See *id.*; see also Balzar, supra note 30, at 14 ("Though contact with whites diminished along with commercial whaling on Alaska's north coast, the Inupiat culture had already been changed irrevocably. Missionaries had arrived, white diseases had taken their toll, and the natives had begun to adopt new weapons and tools.").

stocks,⁶⁸ and a complete moratorium on whaling. The whaling ban destroyed the delicate balance between the Inuit and the marine ecosystem.⁶⁹ The historical significance of whaling in indigenous culture continues to maintain modern-day relevance⁷⁰ while their contin-

⁶⁸ Even for those Inuit who had not become dependent upon Western goods or the whalers for the distribution and sale of whale products, the departure of commercial whalers left the permanent legacy of severely depleted bowhead whale stocks for the Inuit to hunt. See Doubleday, *supra* note 17, at 379.

⁶⁹ The regulations of the IWC, combined with the (1) decrease in demand for whale products, especially oil, (2) decreased population of whales around the arctic, and (3) simultaneous lobbying by animal rights activists led to the withdrawal of whaling ships from the areas surrounding the Inuit. The Inuit lost trading partners, access to goods on which they had become dependent, and the distribution system provided by commercial whalers for whale food products locally and regionally. Many whalers had taken Inuit wives, and while some stayed in the Arctic to raise their families, many disappeared back to their home ports, abandoning their Inuit families. See *id.* (describing how cessation of commercial whaling impacted on Inuit trading networks and family relationships); Chiropolls, *supra* note 15, at 217-19 (discussing Inuit return to subsistence mode of whaling after departure of commercial whaling); Mowatt, *supra* note 67, at 325 (referencing abandonment of Inuit in discussing disruption of related tribes' lifestyle after contact with Western hunters, traders, and governments). This was particularly true in the Canadian Western Arctic, where a generation of Inuit whalers who had adapted to commercial whaling lost access to the hunting equipment of the whalers and the supply of whale carcasses previously discarded by the commercial whalers. See Doubleday, *supra* note 17, at 379; see also Geoffrey York, *Lost Traditions: Few Shamans, No Tattooed Faces*, *Globe & Mail* (Toronto), Jan. 19, 1999, at A16 (reporting devastation of Russian Inuit's sea-hunting economy by arrival of "huge fleets of whaling ships" and noting that despite limited revival of traditional Inuit way of life, "it could be too late" to save it).

⁷⁰ See *A Lesson in Hunting Ethics*, *Star-Trib.* (Minneapolis-St. Paul), Nov. 5, 1988, at 4AA, available in 1988 WL 3180459 ("In the aboriginal reality, still powerful for many Eskimos, successful hunting means survival. . . . In their art, religion and customs, aboriginal peoples pay homage to those animals whose existence makes theirs possible."); Peter Gerner, *Rescue of Gray Whales Raises Questions as Well as Spirits*, *Orange County Reg.* (Cal.), Nov. 3, 1988, at A10, available in 1988 WL 4432265 ("The Inupiat still depend on hunting and fishing for most of their livelihood, and celebrate the end of the long winter by a gala bowhead whale festival in June.").

Moreover, a focus on tradition and heritage is especially important given the onslaught of modern technology and its impact on Inuit life. See Balzar, *supra* note 30, at 14 (reporting that because of dollar prosperity brought by oil fields, "[h]olding onto the hunt, [the Inuit] believe, provides the ballast that keeps them upright in the late 20th century"); Anthony DePalma, *How to Love the Sun? With Ceremony*, *N.Y. Times*, Jan. 18, 1999, at A3; Samuel Perry, *Alaska Eskimos Choose Whales over Further Oil Wealth*, *Seattle Post-Intelligencer*, July 13, 1993, at A3, available in 1993 WL 7685658 (noting that despite influx of wealth due to oil drilling and because Inuit leaders realize that they are "in the middle of two worlds here," Inuit seek to protect "[t]he synergy between the hunter and the hunted" from disruption by exploratory drilling).

ued marginalization⁷¹ necessitates a return to the whaling traditions that signify their cultural autonomy.⁷²

⁷¹ The irony of this marginalization is not lost on commentators. See *Bowhead Hunts: Alaskans' Generosity Pays Dividends but Concerns About Future Emerge*, Anchorage Daily News, Sept. 16, 1996, at B4, available in 1996 WL 11993777 ("It is ironic that the very people in Canada who first practiced sustainable bowhead hunts were denied the right by non-Natives after non-Native commercial whalers drove the bowheads to the brink of extinction."). One of the effects of this marginalization has been the complete erosion of a rich cultural heritage for the Inuit in Canada's Eastern Arctic. There, regular hunts of the bowhead stopped almost completely in the 1930s so that two generations of Inuit, whose grandfathers were renowned Inuk hunters, went unschooled in pursuing the bowhead. See Brian Laghi, *Inuit Eager for 2nd Chance at Bowhead*, *Globe & Mail* (Toronto), July 2, 1998, at A1 (reporting that despite rejoicing at long-awaited hunting license, Inuk hunters attempting first bowhead hunt in 50 years fear negative publicity due to inexperience even as they shoulder responsibility of providing pride and cultural links to community).

⁷² See Laghi, *supra* note 10, at A8 ("Milton Freeman, an anthropologist from the University of Alberta, said hunting the bowhead has become a matter of sovereignty over the North for the Inuit, and is tied to a worldwide trend of native peoples seeking their traditional ways of life."); Michael Vlessides, *Bowhead Hunt*, pt. 2, *Canadian Geographic*, Nov.-Dec. 1998, at 28, 28 [hereinafter Vlessides, *Bowhead Hunt*] ("Whale-hunting traditions, say the Inuit, are a cornerstone in their efforts to rebuild a sense of community and individual self-worth."). However, this begs the question of whether traditional practices are unequivocally worthy of resurrection. See Editorial, *When a Whale Is a Culture: Can a Hunt that Breaks Today's Rules Be Justified by Ancient Practices?*, *Globe & Mail* (Toronto), Oct. 2, 1998, at A16 ("[T]he real question is the rights of groups to reinstitute self-defining but anachronistic practices."); Editorial, *Whaling Wall*, *Times* (London), Sept. 5, 1998, at 19:

What would happen if the peoples of every nation were licensed to practice their ancestral habits? Danes would take boat trips to Scotland to rape and pillage. Londoners would create traffic havoc by driving sheep across Tower Bridge. And President Clinton would be expected to exercise *droit de seigneur* over all internees. The world would mill in a state of social tumult similar to that which will be seen in microcosm next month when . . . members of the Makah nation take to the seas for a whaling expedition amid flotillas of irate conservationists.

An extensive discussion of the philosophical ramifications of allowing "tradition" to justify revival of antiquated practices is beyond the scope of this Note. Suffice it to say, however, that most critiques of "tradition" as an insufficient justification for sidestepping international norms ignore the importance of the way in which "barbaric" traditions are exercised. In brief, almost every culture abounds with traditions that are and should be considered incompatible with modern conceptions of human rights. However, it is problematic when, as here, traditions are forcefully quelled by an extraneous majority instead of being laid to rest by an international consensus which includes dialogue with the practitioners of that traditional activity. See Stephen Corry, *Letter to Editor, Change Among Tribal Peoples*, *Independent* (London), June 26, 1996, at 11 (critiquing "common Western misunderstanding" that tribal peoples remain primitively devoid of "their own dynamic of change [to] accept or reject Western-style modernity on their own terms" and must be "dragged kicking and screaming into the 20th century"); Michael Vlessides, *License to Whale*, *Canadian Geographic*, Jan.-Feb. 1998, at 24, 29 [hereinafter Vlessides, *License to Whale*] (acknowledging that crux of dispute between traditional hunters and conservationists is fact that, despite deserved eradication of many cultural practices, "the outsider's view is irrelevant unless you support cultural imperialism—where one group dictates what another group's culture should be").

*C. Philosophical Underpinnings of a Right to Life
for Whales Through a Moratorium*

The effort to ban whaling worldwide sprung from the notion of the whale's inherent "right to life."⁷³ The institution of the ban reflected the new ideological shift away from any kind of sustainable whaling.⁷⁴ This development, culminating in a moratorium on whaling, was spearheaded by environmental scientists concerned about the extinction of the whale and the concomitant imbalance in marine ecology.⁷⁵

This nascent ideology promoting the ecological sanctity of marine mammals and their habitat began to gather momentum. Interestingly, this movement mobilized a heightened consciousness that captured not only an epistemic community⁷⁶ of wildlife conservationists but

⁷³ See Beck, *supra* note 2, at 403-04 (explaining absolute moral stance of conservationist groups that types of whaling are "morally wrong" because whales have "fundamental right to life as individuals" due to their "high intelligence and their ability to suffer and express extreme pain when dying"). Some of the groups that oppose whaling due to a deeply held belief that whales are entitled to consideration as moral entities are the Progressive Animal Welfare Society, the Animal Protection Institute, LifeForce, Fund for Animals, Friends of Animals, People for the Ethical Treatment of Animals, In Defense of Animals, Zoocheck Canada, Orenda Wildlife Trust, Friends of the Dolphin, Whale Rescue Team, Dolphin Project Interlock, and Dolphin Alliance. See *id.* at 403 n.253.

⁷⁴ In other words, the goal shifted from preserving whales for sustainable commercial hunts to creating a moratorium on all whaling as a recognition of the whales' right to live undisturbed as a species. The experience of the Makah, see *supra* note 45, provides an example of an indigenous community which faced hostile protests from animal rights activists and non-Indian community members even for a ceremonial hunt that would not endanger whale survival.

⁷⁵ At the last minute, internal lobbying by the Inuit prompted the nation-states where they reside—the former Soviet Union (Siberian Inuit), the United States (Alaskan Eskimos), Denmark (Greenland's Inuit)—to create a narrow exception for indigenous whaling based on a clause in the ICRW; Canada left the IWC to negotiate independently with Inuit in Northwestern Canada. See Birnie, *supra* note 61, at 929-30 (explaining role of nation-states in creating "aboriginal subsistence whaling" exception); Dennis Drabelle, *Arctic Ecology: A Delicate Balance*, *Washington Post*, July 12, 1987, *Book World*, at X11 (noting that by making distinction between sustainable subsistence hunting of Inuit on one hand and destructive commercial harvesting of whale species on other, environmental group Friends of the Earth helped Inuit secure exemption from IWC's moratorium on bowhead whale hunting).

⁷⁶ An epistemic community is a transnational network of experts with recognized authority, usually scientists and policymakers, around whom the consensus regarding the methodologies of and policy options for complex, global problems builds. See, e.g., Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 *Int'l Org.* 377, 384-85 (1989) [hereinafter Haas, *Do Regimes Matter*]; Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *Int'l Org.* 1, 3 (1992). In the context of the environment, the success of any global ecological cause is fairly proportional to the consensus on causes, norms, and solutions by the members of an epistemic community because it is the experts who convince the larger populations. For example, the epistemic community's consensus around chlorofluorocarbons has given bite to the regulatory enterprise, whereas the lack of scientific consensus

also the international public at large.⁷⁷

The modern conservation movement reflects developing anticruelty laws⁷⁸ that introduce and address the concept of animal rights,⁷⁹ the relation between human activity and an ecosystem, and the emerging "right to life" of forests, oceans, rivers, and mammals.⁸⁰

has created problems for the radioactive waste-dumping problem. See Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone*, 46 *Int'l Org.* 187, 188-90 (1992) (explaining how transnational actors work together to develop cognitive and normative policies to combat stratospheric ozone depletion); Stuart B. Kaye, *Legal Approaches to Polar Fisheries Regimes: A Comparative Analysis of the Convention for the Conservation of Antarctic Marine Living Resources and the Bering Sea Doughnut Hole Convention*, 26 *Cal. W. Int'l L.J.* 75, 106-07 (1995) (detailing influence of epistemic communities of scientists and environmentalists in negotiation of Antarctic fisheries regimes). For an argument that international lawyers may be an epistemic community of policymakers, see generally Jutta Brunnée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 *Am. J. Int'l L.* 26, 32-53 (1997) (discussing examples of epistemic communities of lawyers, such as International Law Association (ILA) and International Law Commission (ILC), as effective contributors to evolution of freshwater regimes).

⁷⁷ See Sanford E. Gaines & Dale R. Schmidt, *Wildlife Population Management Under the Marine Mammal Protection Act of 1972*, at 1-2 (1976) (on file with author):

In the first years of the 1970's, at the height of the national blossoming of environmental awareness, a common concern for the condition of marine mammals crystallized in the public mind. . . . The public concern over the plight of marine mammals and a complementary public interest in their unique characteristics generated a broadly based movement to grant them special legislative protection going far beyond existing wildlife management and endangered protection laws.

Central to this development was the judgment that marine mammals such as whales were intelligent, highly organized, and socially responsive and therefore "especially worthy of human care and protection." *Id.*

⁷⁸ See generally Emily Stewart Leavitt et al., *Animals and Their Legal Rights* (2d ed. 1970) (providing survey of anticruelty laws from 1641 to 1970 in various countries, including United States, and their impact on incipient animal-rights movements).

⁷⁹ See Christopher D. Stone, *Earth and Other Ethics* 216-20 (1987) (positing degrees of moral duties flowing between humans and other aspects of nature such as animals, mountains, rivers, and forests); Lance D. Wood, *Section 7 of the Endangered Species Act of 1973: A Significant Restriction for All Federal Activities*, 5 *Env'tl. L. Rep.* 50189 (1975), available in Westlaw, ELR database (locating public support of wildlife conservation in desire to preserve invaluable symbols and precise qualities expressed in endangered life forms). Wood writes:

[T]he most active "congressional lobby" on behalf of beleaguered lifeforms consists of numerous individuals who regard nonhuman living things as aesthetically valuable. . . . Those threatened natural objects may serve as paradigms of aesthetic qualities which permit us to identify and know our ideals. . . . Only deeply rooted motivations such as those described above could explain the considerable indignation of the American public over the plight of whales . . . and other endangered species.

⁸⁰ See generally Mary Anne Warren, *The Rights of the Nonhuman World*, in *Environmental Philosophy* 109, 110-11 (Robert Elliot & Arran Gare eds., 1983) (advocating move away from anthropomorphic model of environmental law to recognize that animals have "significant moral rights" but that logical foundations of such rights are different from those of human moral rights); Christopher D. Stone, *Should Trees Have Standing?*—

The notion of an animal's right to life stems from the broader question of whether animals possess legal rights independent of the human interest in safeguarding resources. While many traditional philosophers such as Immanuel Kant and John Rawls have described animals as lacking both self-consciousness and a right to life,⁸¹ modern animal rights philosophers such as Peter Singer and James Rachels explicitly recognize this right as vesting in at least some nonhuman animals.⁸² Efforts to preserve intelligent species are grounded in the work of these latter philosophers.⁸³

The protection of ecosystems, including whales, is undeniably attaining wide acceptance in international law. "International law can no longer be viewed as an artifact exclusively concerned with state and human interactions against a mere background called the environ-

Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450, 456 & n.26 (1972) (advancing new environmental theory extending legal rights to "natural objects" in environment).

⁸¹ Kant believed animals to be a means to an end, with man's duties to animals as "merely indirect duties towards humanity. . . . [F]or he who is cruel to animals becomes hard also in his dealings with men." Immanuel Kant, Lectures on Ethics 239-40 (Louis Infield trans., Peter Smith 1978) (1930). Rawls similarly disqualifies animals' right to life because animals lack the "capacity for a sense of justice," which he describes as a fundamental requirement for a creature to qualify as a direct object of justice. John Rawls, *The Sense of Justice*, 72 Phil. Rev. 281, 302-03 (1963); see also John Rawls, *A Theory of Justice* 512 (1971).

⁸² Peter Singer condemns our faulty concepts about other animals due to "speciesist" attitudes, which configure humans as less savage than other animals, and points out that "[w]e rarely stop to consider that the animal who kills with the least reason to do so is the human animal." See Peter Singer, *Animal Liberation* 222 (2d ed. 1990) (contending that while animals kill for food, humans unjustifiably kill animals "for sport, to satisfy their curiosity, to beautify their bodies, and to please their palates"). This difference alone, contends Singer, ought to qualify animals as bearing independent rights because of their ethical consciousness. See id. James Rachels supports this position, noting that certain animals have a right to life because apart from being *biologically* alive, they have a *biographical* life, which includes growing and developing relationships within social systems, acting and reacting to the environment, and experiencing emotions. See James Rachels, *Do Animals Have a Right to Life?*, in *Ethics and Animals* 275, 280-84 (Harlan B. Miller & William H. Williams eds., 1983). But see S.F. Sapontzis, *Morals, Reason, and Animals* 174 (1987) (advocating "extending to animals the same sorts of moral protection currently enjoyed only by humans" without separating more intelligent and less intelligent animals).

⁸³ This sympathy finds indirect reference in international conventions. The ICRW and the Stockholm Declaration, which came out of the Stockholm Conference on the Human Environment, see *supra* note 63, refer to the need to preserve whales for future generations. See *infra* Part I.C. Moreover, the Convention on International Trade in Endangered Species (CITES), Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature Mar. 3, 1973, 993 U.N.T.S. 243, 12 I.L.M. 1085, prohibits the destruction of certain species of animals and plants whose survival is endangered. See Joel Feinberg, *The Rights of Animals and Unborn Generations, in Responsibilities to Future Generations: Environmental Ethics* 139, 147 (Ernest Partridge ed., 1980) (detailing high priority of preserving endangered species for future generations as indication of international recognition of rights-bearing community of unborn persons).

ment. Rather, other living creatures in the environment are players in a new and expanded international legal arena."⁸⁴ Whales are significant players in this arena. Scientific evidence shows they are intelligent, self-conscious, social animals:⁸⁵ Whales are mammals that feed and care for their young; they live in groups and relate to each other as individuals; their nervous system and perception of pain are essentially similar to those of humans; they have exceptionally large brains with a well-developed area controlling emotions; and they appear capable of humor and playfulness.⁸⁶

The crusade to establish the inherent right to life of whales has exacerbated the problem faced by indigenous communities dependent upon whale hunting.⁸⁷ Since the codification of the aboriginal subsistence exception, nothing has jeopardized the fate of Inuit culture more than the impassioned calls for the elimination of the aboriginal whaling exemption.⁸⁸

⁸⁴ D'Amato & Chopra, *supra* note 46, at 50.

⁸⁵ Ironically, however, the Japanese maintain that the same arguments can be made about other animals and, indeed, are made about cows by the majority of the Hindu population of India, Nepal, Bangladesh, and Sri Lanka. Yet powerful lobbies in the United States, England, and other nation-states drown out any voices that threaten a profitable enterprise and a popular resource. See Kazuo Sumi, *The "Whale War" Between Japan and the United States: Problems and Prospects*, 17 *Denv. J. Int'l L. & Pol'y* 317, 328-29 (1989) (pointing out hypocrisy of American conservationists calling for moratorium on Japanese whaling, done for scientific purposes and without waste of byproducts, while condoning hunting and fishing of many other animals). See generally *Scientist Calls for Less Emotion in Whaling Debate*, *Japan Transp. Scan* (Tokyo), Feb. 15, 1993, available in 1993 WL 2838267 ("[Scientist and whale expert Thomas F.] Albert said people who condemn the hunting of wildlife as 'inhuman' usually ignore the 'less than humane' lifestyles to which many food animals are subjected compared to free ranging wild animals [such as whales]."). This conflict came to a head when an American conservation group unsuccessfully sought to have Japan cited as a violator of international law for its continued whaling practices. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 231-32 (1986) (holding that U.S. Secretary of Commerce has discretion under Pelly and Packwood Amendments not to certify Japan for its violations of International Whaling Commission's quotas).

⁸⁶ See Sudhir K. Chopra, *Whales: Towards a Developing Right of Survival as Part of an Ecosystem*, 17 *Denv. J. Int'l L. & Pol'y* 255, 267 (1989) (making case for right to life for whales based upon their similarity and superiority to humans).

⁸⁷ The members of the ICRW, in a ceremonial nod to the plight of the Inuit, ultimately amended the ban on commercial whaling with an exemption for "aboriginal subsistence whaling," especially of the bowhead species by the Inuit. See Birnie, *supra* note 61, at 929 (discussing history of subsistence whaling as part of Inuit culture and tradition); Doubleday, *supra* note 17, at 374 (same). However, this exemption is continually threatened because it is negotiated annually or for blocks of two to three years and has met with conservationists' opposition at every renegotiation.

⁸⁸ Today, this threat is visible in the march toward a final stage recognizing the unequivocal right to life of whales "as belonging to, or even coming from, the whales themselves" at the expense of Inuit rights. See D'Amato & Chopra, *supra* note 46, at 49.

II

DECONSTRUCTING EUROCENTRIC DEFINITIONS: AN INCLUSIVE
CONCEPT OF INDIVIDUAL AND GROUP RIGHTS

In order to address Inuit concerns effectively, the international community must accord to indigenous peoples the “dignity of [their] own conceptualization of the Earth and [their] relationship to it.”⁸⁹ A reconciliation between nation-states and the Inuit is impossible without formal recognition of the preexisting relationship that indigenous peoples have to the Earth. Thus far, environmentalists who believe in the whale’s right to life have regarded the Inuit as having only a predatory relationship with the whale, despite Inuit assertions to the contrary.⁹⁰ Fundamental to the resolution of the conflict between the Inuit and these environmentalists, therefore, is a dialogue that recognizes each position and bridges the gap between them in a principled manner.⁹¹

A. *The Eurocentric Perspective*

Western thought originates with the isolated individual separated from organized society and concentrates on the relationship of the individual to the state.⁹² In the Western tradition of natural law, individuals voluntarily enter into a social compact in which individual autonomy is exchanged for peace, security, and protection provided

⁸⁹ See International Human Rights Standards-Setting: The Case of Indigenous Peoples, 81 Am. Soc’y Int’l L. Proc. 277, 281 (1987) (remarks of Hayden F. Burgess) (discussing place of indigenous peoples in international human rights regimes).

⁹⁰ See *infra* Part I.C.; see also Balzar, *supra* note 30, at 16 (noting that for Inupiat, whale “was the stuff of survival and social structure”); Laghi, *supra* note 10, at A1 (noting conservationists’ view that killing whales is “inhumane by almost anyone’s standards” and nothing Inuit can do will make hunt of bowhead humane); Jan Wong, Self-Esteem and the Death of a Bowhead, *The Globe & Mail* (Toronto), Aug. 13, 1998, at A19 (comparing Inuit hunt of whale to ancient Chinese custom of hammering in skulls of live monkeys for fresh brains). But these views ignore the Inuit’s repeated articulations of the importance of the hunt. See Gerner, *supra* note 70, at A10; A Lesson in Hunting Ethics, *supra* note 70, at 4AA (describing how Inuit’s rescue of stranded gray whales in Point Barrow shows that it is possible to be hunter and to care about quarry); Vlessides, License to Whale, *supra* note 72, at 24 (quoting from detailed account, in Inuk hunter’s words, of reverent attitude of whalers in hunting “such beautiful and peaceful things” with skill, care, and consideration); *supra* Part I.A.

⁹¹ For an articulation of the potential positive outcome of this dialogue between Eurocentric scholars and communitarian peoples, see Robert N. Clinton, The Rights of Indigenous Peoples as Collective Group Rights, 32 Ariz. L. Rev. 739, 743 (1990) (“I submit that if western legal thinkers would listen respectfully to the claims for *group* protection of culture . . . rather than attacking such notions from their own jurisprudential perspective, a much richer conception of human rights and the relation of the individual to society might emerge.”).

⁹² See *id.* at 740.

by the sovereign.⁹³ This transition to organized society inherently rests on the perception that the Hobbesian “state of nature” is inferior to and separate from civilization.⁹⁴

Rights are conceptualized as constraints on government in favor of the individual, created from those powers not delegated to the sovereign.⁹⁵ Certainly there have been some dissenters from this interpretation.⁹⁶ Nevertheless, since Western liberal political systems treat individuals as if they all have identical relationships with the state,⁹⁷ responsibilities are conceived to run to the state, not to each other.⁹⁸ Further, rights are considered limitations on the power of the state and good government is equated with regulating the state and not strengthening group affiliations.⁹⁹

Indigenous or tribal political systems, on the other hand, are “a web of reciprocal relationships without a separately institutionalized ‘state,’” where kinship assigns roles to individuals “as if they were

⁹³ See *id.* (describing natural law tradition, in which “sovereign prerogatives and autonomy” are surrendered to state).

⁹⁴ The idea of the “state of nature,” which conceptualizes what humans are like before the molding of their minds and personalities through socialization, culture, language, indoctrination, and education, is an idea that philosophers have considered since Plato and Lucretius. See Robert C. Solomon, *A Passion for Justice: Emotions and the Origins of the Social Contract* 57 (1990). Although Thomas Hobbes characterized life in the state of nature as “solitary, poor, nasty, brutish and short” and a literal “war of all against all,” Jean-Jacques Rousseau, one hundred years later, viewed the state of nature as one where people were naturally happy and secure. See *id.* at 58.

⁹⁵ See Clinton, *supra* note 91, at 740.

⁹⁶ For example, Christopher Stone’s pioneering work posits a framework of moral pluralism where the environment implies no distinction between human animals and the rest of nature. See Richard A. Falk, Introduction: Preserving Whales in a World of Sovereign States, 17 *Denv. J. Int’l L. & Pol’y* 249, 250 (1989) (citing Christopher Stone, *Earth and Other Ethics: The Case for Moral Pluralism* (1987)). Further, environmental matters cannot be divorced from the rest of the physical world and the moral character of relations with animals, mountains, rivers, and forests implicates rights and duties in human interactions with all of nature. See generally Stone, *supra* note 80, at 456-58. Incidentally, this framework is used by environmentalists to impose complex moral duties on humans vis-à-vis whales who are “more animate than corporations, more communicative than infants and mentally enfeebled persons, more communal than the society of nations, and perhaps more intelligent than the smartest human beings.” D’Amato & Chopra, *supra* note 46, at 51.

⁹⁷ See Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 *U. Mich. J.L. Reform* 277, 297 (1993) (discussing differences between tribal and Western political systems in context of obstacles faced by indigenous communities in ending Western encroachments on indigenous autonomy).

⁹⁸ See *id.* (discussing in detail general structure of regimes that emerged in “aboriginal” North America as opposed to ones that dominate Western politics (citing Russel Lawrence Barsh, *The Nature and Spirit of North American Political Systems*, 10 *Am. Indian Q.* 181 (1986))).

⁹⁹ See *id.* (pointing to fact that tribal governments often strengthen families).

species in an ecosystem.”¹⁰⁰ Each individual plays multiple roles, and leaders are recognized as speakers for segments of the web—families, genders, generations—representing “countervailing responsibilities.”¹⁰¹ This design facilitates the inclusion of all relevant parties in decisions—even “animals and the unborn.”¹⁰² In contrast, the Western conception leaves little room for these group affiliations or collective or societal rights outside of the context of a nation-state.¹⁰³

In the context of conservationist perspectives on the Inuit, this means that indigenous peoples, perceived as nongovernmental organizations (NGOs), are outside the social compact of civilization.¹⁰⁴ Western nation-states view the Inuit as the “unempowered otherness”¹⁰⁵ rather than coequal resource managers. The Inuit neither have dominion over their ancestral lands nor rights to their traditional knowledge; they move between the two worlds of urban and tribal life.¹⁰⁶ As such, they are often unwillingly enveloped by the “larger, engulfing group[]” where a unitary social process operates, ostensibly democratically, to marginalize their concerns as indigenous subgroups.¹⁰⁷ Their claims for entitlements based on a unique cultural heritage become incoherent in the face of this dominant ideology.¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ See *id.*

¹⁰² See *id.* at 299.

¹⁰³ See Clinton, *supra* note 91, at 741 (commenting that this trend sometimes leads to “absurd results or absolute injustices”).

¹⁰⁴ See *id.* at 742 (asserting that Western thought has difficulty fitting concept of group rights, common to tribal governments, into modern nation-state).

¹⁰⁵ See Keith D. Nunes, “We Can Do . . . Better”: Rights of Singular Peoples and the United Nations Draft Declaration on the “Rights of Indigenous Peoples,” 7 *St. Thomas L. Rev.* 521, 522 (1995) (discussing relatively new perspective in international human rights law that allows nations to concentrate on people whose legacy at Western hands has been one of ignorance or oppression).

¹⁰⁶ See *id.* at 525, 532.

¹⁰⁷ See *id.* at 531-33. An example of the way in which indigenous peoples are forced into this artificial duality and then perceived as “modernized” enough to give up claims of cultural uniqueness is the following statement: “The Makah people appear willing to adapt to the modern world when it suits them. Next month, rifles and motorised boats rather than traditional techniques will be used to hunt the grey whale.” Whaling Wall, *supra* note 72, at 19. The implication of this editorial is that having adapted to modernity in one aspect of their lives, the Makah must also have adapted enough to relinquish central claims of cultural necessity, such as the need to hunt whales. See *id.*; see also Susan Lope, Comment, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims*, 23 *Sw. U. L. Rev.* 331, 334-37 (1994) (terming marginalization as “coerced dependency” in context of United States’s relationship as “self-nominated guardian” of Native American “wards”).

¹⁰⁸ For a more comprehensive discussion of the problems attendant to cultural justifications for legal policy, see Jeremy David Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 *Alaska L. Rev.* 247, 253 (1995) (noting that such justifications generate “problematic results, ranging from the dominant social group setting

Furthermore, the development of environmental law without consideration of indigenous rights limits or completely denies indigenous access to the resources on which they have depended and with which they have coexisted for centuries.¹⁰⁹ The Inuit perspective views humankind and nature as one entity¹¹⁰ and seeks minimal subsistence use that neither causes nor perpetuates the depletion of resources.¹¹¹ Without the integration of environmental conservation and indigenous rights in Western thought, the Inuit point of view cannot be accommodated.

B. An Inclusive Conception of Human Rights

Nonwesterners often have a very different view from Westerners of the nature of rights and relationships. The tribal associations and natural ecology with which they are familiar inform their view that humans are inherently social beings.¹¹² People do not, and never did, exist in a mythic, chaotic state of nature but rather are born into a "closely linked and integrated network of family, kinship, social and political relations."¹¹³ Rights and responsibilities exist only within the framework of the familial, social, and tribal networks which are integral to personal identity.¹¹⁴ Inuit claims for whaling rights are consistent with their conception of society as a whole. These rights are not merely a means of individual subsistence but are a vital part of a coherent cultural existence. While it may seem curious to outsiders that Inuit in Barrow, Alaska combine vacations to Hawaii and fancy pickups with a reverence for tradition, the Inuit regard the former only as a forced precursor to the latter:

cultural expectations for a minority to the legal institutionalization of a standard that seeks to freeze an evolving culture in defining a material entitlement" (footnote omitted)).

¹⁰⁹ See Doubleday, *supra* note 17, at 391 ("The man-nature dichotomy of urban industrial society reveals itself in an attempt to deal with environmental degradation by increasing environmental regulation . . .").

¹¹⁰ See *id.* at 391 (pointing to integral connection between Inuit hunter and nature, as exemplified by hunter's respect for animals and their spirits, which are believed to "allow themselves to be taken only by those who respect them").

¹¹¹ See *id.* at 392 (commenting on fact that "it is not generally the activities of indigenous subsistence users of a living resource which are responsible for its depletion or degradation").

¹¹² See Clinton, *supra* note 91, at 742.

¹¹³ *Id.*; see also Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 *Vt. L. Rev.* 225, 313 (1996) ("Building on the discussion of indigenous environmental ethics . . . it becomes apparent that 'conservation' for indigenous peoples is the natural result of traditional world views that stress reciprocity and kinship with other living things and counsel avoidance of waste or misuse of natural resources.").

¹¹⁴ See Clinton, *supra* note 91, at 742.

For the Inupiat . . . dollar prosperity is no substitute for whaling; it is a means to achieve it. Captains pony up thousands for the canvas tents, snowmobiles . . . food, fuel, boats, weapons and radios [for the whale hunt]. More important, in the late 1970s the Inupiat applied their new wealth to scientific studies and international lobbying, beating back angry attempts by environmentalists to eliminate the native hunt along with all other forms of whaling.¹¹⁵

The right of individual autonomy is not a right against the organized social network but a result of that membership,¹¹⁶ which is held together through “reciprocity and redistribution.”¹¹⁷ It is necessary to create a “new synthesis which is capable of conceptualizing nature as including human beings and reflecting the unity within the myriad environmental perceptions of the earth’s many cultures.”¹¹⁸

1. *Relative Rights*

The question that now emerges is best articulated by Richard Falk’s poignant query: “What shall we tell the Inuit now that both their own existence and the Bowhead whales[’] destiny hang by a slender thread over the precipice of the future?”¹¹⁹ An answer can only be formulated within a relativist framework of the basis and origin of rights and entitlements, whether on behalf of indigenous communities or marine ecosystems.

The argument that a whale’s right to life unconditionally extinguishes an indigenous community’s right to sustain its traditional lifestyle is unconvincing.¹²⁰ A process that legalizes the whale’s right to life without including indigenous dialogue is inherently suspect. Even the determination of which sentient creatures have a legal right to live without being hunted is a nonindigenous construct. However, conceding the moral validity of the rights of both the whale and the indigenous community still leaves open the question of which right should be legally recognized given their apparent mutually exclusive nature.

¹¹⁵ Balzar, *supra* note 30, at 16.

¹¹⁶ See *id.*

¹¹⁷ Barsh, *supra* note 97, at 298.

¹¹⁸ Doubleday, *supra* note 17, at 393.

¹¹⁹ Falk, *supra* note 96, at 251.

¹²⁰ See Beck, *supra* note 2, at 407 (referring to conservationists seeking moratorium as “entitlement advocates”). Given the deeply ideological nature of this particular debate, entitlement advocates will only be able to win victories if they can turn more people toward the belief that whales deserve individual rights, a process which occurs over time in the context of trusting, collaborative, long-term relationships. But if the unwillingness of entitlement advocates to honor the cultural rights of Native Americans is an indicator of a broader unwillingness to honor people’s deeply held personal beliefs, the entitlement advocates will find it extremely difficult to win the kind of support that would sustain a victorious campaign. See *id.*

Environmentalists have advocated a right to life for whales by pointing to scientific evidence of the whale's sentience, intelligence, and social propensities.¹²¹ Without disputing the merits of their argument, this is, at best, only *one* vision of the environment. A competing indigenous vision favors the hierarchy of cultural survival over physical survival. To the extent that the protection of whales promotes "a social environment congenial to the majority, it cannot amount to a right"¹²² that extinguishes an indigenous minority's equally plausible worldview.

A theory of relativism suggests that majority constructs cannot merit absolute ascendancy and minority traditions cannot merit absolute protection against every change. In this context, therefore, the environmentalists' concern for the whale is not so "dominating that it warrants imposing a whole set of duties"¹²³ on the Inuit. Instead, relativism requires only that each set of concerns be important enough "to warrant imposing *some* duties on others (or depriving them of some powers . . .)."¹²⁴

In other words, a recognition of the whale's right to life does not merit a complete moratorium on whaling. Nor does a recognition of Inuit culture require the international community to abandon its regulations or disavow the perceived rights of the whale.¹²⁵ Instead, each community, conscious of the other, must limit its powers and impose

¹²¹ See generally D'Amato & Chopra, *supra* note 46; Beck, *supra* note 2, at 404 (describing advocates who equate killing whales with killing people).

¹²² Michael Hartney, *Some Confusions Concerning Collective Rights*, in *The Rights of Minority Cultures* 202, 212 (Will Kymlicka ed., 1995). Hartney also maintains that [t]here is an important difference here between legal and moral rights. In order to determine whether a certain legal right exists, one determines first whether the law has imposed a legal duty on someone, and then whether that duty can be interpreted as owed *to* somebody; since the law can create duties for all sorts of reasons, including relatively unimportant ones, we can have a legal right to something relatively unimportant. . . . On the other hand, a moral right implies a good (or interest) sufficiently important that it warrants protection by duties on others. Thus, there are no unimportant moral duties, and an estimate of the importance of the good or interest in question is central to the determination of the existence of a moral right.

Id. at 212; see also Ronald Dworkin, *Taking Rights Seriously* xi (1978) (characterizing nature of legal rights).

¹²³ Leslie Green, *Internal Minorities and Their Rights*, in *The Rights of Minority Cultures*, *supra* note 122, at 257, 261.

¹²⁴ *Id.*

¹²⁵ See, e.g., *When a Whale Is a Culture*, *supra* note 72, at A16:

When it comes to aboriginal whaling, perhaps the only sensible principle to adhere to is one totally rooted in specifics. Sometimes, and in some places, it may make sense to allow self-defined groups to kill animals for largely ritual and symbolic purposes. Every case must be considered on its own merits.

some duties and restraints on itself in recognition of the principle that, within limits, groups have the right to define themselves.¹²⁶

2. *The Clash of Traditions*

Jeremy Waldron, the author of *Minority Cultures and the Cosmopolitan Alternative*, has stated, "To preserve a culture—to insist that it must be *secure*, come what may—is to insulate it from the very forces and tendencies that allow it to operate in a context of genuine choice."¹²⁷ The argument that no culture can survive in a vacuum is compelling. However, Inuit tradition is not threatened by abstract, independent forces of change but by the competing claims of another community—the environmentalists. The Darwinian cultural preference for change over tradition, a conclusion that preservation cripples adaptation,¹²⁸ ignores the legitimacy of the choice *not* to submit to a competing cultural force.

Conservationists claim that change prevents stasis, and that the Inuit must change their cultural heritage because of the modern understanding of whales. However, the conservationists' understanding of whales is just as much a cultural construct as is Inuit whale hunting. The Inuit may well question why the conservationists need to establish a right to life for whales. In the same way that hunting the whale preserves Inuit traditions, protecting the whale strengthens conservationist principles. It is facially unconvincing that one view deserves to be enforced over and above the other without an inclusive dialogue of negotiation and compromise.

3. *Majority Protection and Minority Duties*

International environmentalists claim that indigenous peoples are not entitled to the protection and subsidization of the international

¹²⁶ See *id.* (noting deeply conflicted conservationists' view that while they are against murder and mutilation, their liberal instincts counsel that "while ritual whale hunting may never be our way, surely there is more than one path to being human in the modern world").

¹²⁷ Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, in *The Rights of Minority Cultures*, *supra* note 122, at 93, 109. The author argues, "Either people learn about value from the dynamics of their culture and its interactions with others or their culture can operate for them at most as a museum display on which they can pride themselves." *Id.*

¹²⁸ See *id.* at 109-10:

[To] *preserve* a culture is often to take a favored 'snapshot' version of it, and insist that this version must persist at all costs, in its defined purity, irrespective of the surrounding social, economic, and political circumstances. . . . To preserve or protect it, or some favored version of it, artificially, in the face of that change, is precisely to cripple the mechanisms of adaptation and compromise . . . with which all societies confront the outside world.

community if they “sneer at and . . . disparage those whose cosmopolitan commitments make possible the lives that they are seeking to lead.”¹²⁹ In other words, the international community need not respect Inuit traditions if those traditions conflict with its norms. The flaw in this reasoning is that it assumes the dominion of one set of norms over the other. Ironically, the Inuit would not require international protection if their own traditions had been considered before the establishment of the moratorium on whaling.

Indigenous communities arguably have the greatest need for “international structures to protect and to sustain the cultural goods that they pursue.”¹³⁰ While individuals may voluntarily accede to communal structures and participate in their management, indigenous communities do not independently choose international communities with nonindigenous norms. In reality, institutional structures that universally exclude indigenous perspectives are imposed upon indigenous communities.

In demanding that the Inuit relinquish their culture to preserve whales’ rights, environmentalists put the Inuit in precisely the predicament that Professor Anne Phillips describes: “When an oppressed group is called upon to put its own partial needs aside, it is being asked to legitimate its own oppression.”¹³¹ The claim, therefore, that indigenous communities should unquestionably respect the Western perspective is unpersuasive.

4. *Physical Extinction and Cultural Survival*

The environmentalists’ counterargument is that while “[n]o one claims that the Inuit would starve to death if they were stopped from killing whales,”¹³² the great whales are threatened with physical extinction from continued hunting. It is thus not the lives of the Inuit at stake but their traditional lifestyle,¹³³ and “[t]he Inuit’s claims are at the expense of an overlooked voice—the anguished cry—of the sentient inhabitants of the deep.”¹³⁴

¹²⁹ *Id.* at 104.

¹³⁰ *Id.* at 104-05.

¹³¹ Anne Phillips, *Democracy and Difference: Some Problems for Feminist Theory*, in *The Rights of Minority Cultures*, *supra* note 122, at 288, 291; see also Green, *supra* note 123, at 257, 259:

When we speak of minority rights, whether in morality or in law, we may have in mind one of two things. The first is the rights that people have *even when* they are in the minority. . . . In contrast, the second sort of rights is one that people have only *because* they are members of a certain minority group.

¹³² D’Amato & Chopra, *supra* note 46, at 59.

¹³³ See Stone, *supra* note 80, at 220 (questioning whether threat to traditional lifestyle is sufficient to rebut *prima facie* wrong of killing whale).

¹³⁴ D’Amato & Chopra, *supra* note 46, at 59.

While it is true that the physical survival of the Inuit is not threatened,¹³⁵ their cultural survival is just as important, if not more so; existence is hardly a meaningful choice when rights, customs, and traditions are stripped away.¹³⁶ The end of whaling is an end to a way of life and an end to any sense of *ethnic* community—"a particular people sharing a heritage of custom, ritual, and way of life that is in some real or imagined sense immemorial, being referred back to a shared history and shared provenance or homeland."¹³⁷ To qualify a cultural heritage as inferior to physical survival is to discount the importance of social relationships, economic constructs, intellectual pursuits, and cultural traditions:

Among elementary human needs—as basic as those for food, shelter, security, procreation, communication—is the need to belong to a particular group, united by some common links—especially language, collective memories, continuous life upon the same soil . . . [and] race, blood, religion, a sense of common mission and the like.¹³⁸

Ironically enough, these are the very arguments that international conservationists use to distinguish whales from other nonhuman animals. In other words, it is the whale's capacity for complex social relationships which entitles it to a right to life¹³⁹ while an inferior animal's aimless existence destines it for use as a resource.¹⁴⁰

Moreover, as articulated by Professor Will Kymlicka, physical existence only has meaning to the extent that it has significance in a

¹³⁵ See Hankins, *supra* note 36, at 517 (dismissing Inuit arguments in favor of whaling in context of arguing for stronger American conservationist policies in international arena). The Nutritional Panel, part of a special committee appointed in response to U.S. requests to increase the bowhead quota at the 1978 IWC meeting, reported that increased consumption of other subsistence foods (such as walrus, seal, and beluga) combined with substitution of Western foods (donation of beef by Western governments) eradicates any nutritional risk to the survival of the Inuit in the absence of whaling. See *id.*

¹³⁶ The Cultural Anthropology Panel, another part of the special committee selected by the IWC to study the importance of whaling to Inuit culture in 1978, reported not only that whaling retained its historical importance in the contemporary organization of Inuit society but also that the hunting of other animals could not replace bowhead whaling because such ties to the past are invaluable in the face of dislocation and assimilation due to contact with the outside world. See *id.* at 518.

¹³⁷ Waldron, *supra* note 127, at 96 (footnote omitted).

¹³⁸ *Id.*

¹³⁹ See generally D'Amato & Chopra, *supra* note 46, at 27 ("[W]hales and some other sentient mammals are entitled to human rights or at least to *humanist rights* . . . not because they are 'less' than human but because they are 'different' from humans in various respects that do not affect or qualify the rights in question."); *supra* Part I.C.

¹⁴⁰ See D'Amato & Chopra, *supra* note 46, at 25 (noting that while other mammals such as dogs, cats, rabbits, and horses suffer "intense pain" and are aware of their own suffering, whales are different because their "intelligence may be superior to our own," and they "are capable of a degree of suffering that we may not be able to fathom").

particular *culture*, because it fits “into some pattern of activities which is culturally recognized as a way of leading one’s life.”¹⁴¹ If Inuit subsistence rights—which symbolize “unique hunting and fishing rights as well as the complex web of cultural practices, social relationships, and economic rewards associated with those rights”¹⁴²—are the guarantors of a community’s survival, the issue is how, not whether, they should be protected.

III

CREATING A NEW PROCESS: EXISTING INSTITUTIONS AND PROPOSED CHANGES

Rather than proposing a specific regime favoring either the Inuit’s unequivocal right to hunt or the international community’s right to establish a moratorium, this Note suggests changes to existing institutions to provide a forum to settle the dispute equitably. The existing corpus of international law regarding both the protection of endangered species and the promotion of indigenous concerns makes international organizations the appropriate dispute-resolution mechanism today:

The relationship between indigenous people and the environment, joined with a history of continuing assaults upon their land and the prospect of extinction due to global climate change, compels a resort to [international] human rights law for the protection of both people and the environment.¹⁴³

However, a fundamental problem with existing international regimes is their focus on the sovereign nation-state and the exclusion of non-state actors. The solution is the structural integration of NGOs, such as Inuit organizations, as equal, legitimate members of international organizations. Implicit in this integration is the introduction and inclusion of traditional Inuit knowledge into narrowly defined epistemic communities.¹⁴⁴

¹⁴¹ See Will Kymlicka, *Liberalism, Community, and Culture* 165 (1989) (discussing relationship of individual identity in communal as well as cultural context).

¹⁴² David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More “Effective Voice”?*, 60 U. Colo. L. Rev. 1009, 1009 (1989) (discussing policies and regimes through which Inuit goals of self-sufficiency and autonomy can be realized).

¹⁴³ William Andrew Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 Va. J. Int’l L. 479, 484-85 (1991) (advancing unique perspective that both whale conservation and Inuit survival are not contradictory but compatible).

¹⁴⁴ Sociologist Margaret Mead has articulated the importance of both the scientist-expert as an actor in critical human concerns and the need to incorporate the indigenous experience into such policymaking:

Today, the most crucial decisions in the world are not being made by those who are most involved in the intimate and perennial concerns of human beings

A. *The Efficacy of International Law in Addressing Inuit Rights and Interests*

Inuit dependence on marine resources in their struggle to survive in the Arctic has prevented them from achieving the advanced status of agricultural and industrial people.¹⁴⁵ However, with a culture as complex and rich as any,¹⁴⁶ the Inuit have survived for thousands of years in perhaps the most demanding environment ever inhabited by humans.¹⁴⁷ The mainstay of their physical survival and cultural development has been the bowhead whale,¹⁴⁸ which, until the onset of commercial whaling, was free from the threat of extinction. Indeed, the longevity of the Inuit way of life without a simultaneous threat to the survival of the whale calls for a redress of Inuit marginalization.¹⁴⁹ As Nancy Doubleday, responsible for developing the Inuit Regional Conservation Strategy, points out, “[I]f the true test of the sustainability of development is survival over time, surely Inuit passed that test at some point during their 1,000 years of bowhead hunting.”¹⁵⁰ Yet, international law has failed to address equitably the rights of indigenous societies that predate the emergence of an international order of nation-states.

For many reasons, however, international law remains the most effective arena for analyzing, assessing, and enforcing Inuit rights in the face of a potential elimination of their exemption from the moratorium on whaling. First, the transnational nature of Inuit settlements and global scope of marine conservation makes international law the best forum in which to address the concerns of Inuit resource management and environmental protection.¹⁵¹ Second, the early leaders and

but by those who are closest to the hope of technological solutions. Somehow these two must be brought together, so that we can cherish the ancient knowledge of the Asian peasant, the Portuguese fisherman, and the African camel herder, and use our common humanity to translate this older wisdom . . . into a design for the whole planet

Margaret Mead, *World Enough* 216 (1975) (advocating rethinking of legal values underlying socioeconomic development that affects minority communities).

¹⁴⁵ See *supra* Part I.A.

¹⁴⁶ See *supra* Part I.A.

¹⁴⁷ See Doubleday, *supra* note 17, at 375-76 (citation omitted).

¹⁴⁸ See *id.* at 376.

¹⁴⁹ See *id.*; see also *supra* Part I.B.

¹⁵⁰ Doubleday, *supra* note 17, at 376.

¹⁵¹ See Kal Raustiala, Note, The “Participatory Revolution” in International Environmental Law, 21 *Harv. Envtl. L. Rev.* 537, 537 (1997) (“A distinguishing characteristic of environmental problems—that they adhere to ecosystems and geographic features rather than political boundaries—often renders national and local actions ineffective and frequently necessitates international cooperation.”).

scholars of international law recognized the roots of indigenous rights within an international regime.¹⁵²

Third, a national or regional forum for Inuit participation is far from perfect, leaving the Inuit to seek codification of their interests in international conventions and treaties regulating the Arctic fisheries. While national and regional fora can be instrumental in enforcement of Inuit rights, they are ultimately ineffective without the aid of international law. A national forum is necessary yet insufficient because individual states have little incentive to share management of marine resources within their entire control through exclusive economic zones (EEZ).¹⁵³ A regional forum is likewise incomplete. There is no pervasive regime for regulation of the entire Arctic marine ecosystem that balances the interests of competing claimants with overall conservation. Neither is there an agreement regulating a single species in a uniform way across the whole region, as there is for the Antarctic.¹⁵⁴

Finally, the Inuit must be allowed, for the first time, to participate in the international discussion of the whale's potential right to life, before that right is codified as international law.¹⁵⁵ The Inuit do not seek to undermine the environmentalists' belief that whales have a right to life.¹⁵⁶ Instead, the most consistent call from the Inuit has been one for equal participation in the creation of regimes for the regulation of whale hunting.¹⁵⁷ Thus, not only must there be a dialogue that gives due consideration to the Inuit's hunting of the whale in the historical context of their right to survive, but this dialogue must occur within international organizations and legal regimes.¹⁵⁸

¹⁵² See Doubleday, *supra* note 17, at 380-81 (noting that early scholars Vitoria, Grotius, and Pufendorf all supported concept of aboriginal ownership based on occupancy).

¹⁵³ See Kaye, *supra* note 76, at 98. This is corroborated by "regime theory" in political science, which hypothesizes that "states only form regimes where they perceive that their interests would be best served by cooperative arrangements, rather than confrontation." *Id.*

¹⁵⁴ See *id.* at 97-98.

¹⁵⁵ This is especially true since the current demands of the Inuit neither jeopardize the survival of the whale nor call for an era of unlimited whale hunting. See Westneat, *supra* note 1, at A1 ("[B]iologists say the Eskimos are not harming the whale population. The Arctic stock now numbers about 8,000, up from as low as 2,000 in the 1970s, when the commission briefly tried to ban Eskimo whaling.").

¹⁵⁶ See generally *The People of the Whale*, *supra* note 36, at 8 (summarizing Inuit claims for continued subsistence whaling as encompassing solicitude of whale's survival as species).

¹⁵⁷ See *infra* Part III.B.3 on the formation of the Alaska Eskimo Whaling Commission (AEWC), the Arctic Council, and the ICC, which have systematically sought to represent the absent voice of the Inuit in the international dialogue concerning the future of whaling.

¹⁵⁸ In the face of Inuit mistrust of the ability of outsiders to understand them without contextualizing Inuit history and integrating it into a broad-based dialogue, any effective forum must include international scope and consensus. See Westneat, *supra* note 1, at A1 (agreeing with skepticism of outsiders among Alaskan Eskimos who "look at . . . visitors

B. *Changes in International Decisionmaking*

The legitimacy of international law is currently threatened by its failure to be truly international in addressing the concerns of all peoples, regardless of whether they are organized into nation-states or are indigenous communities.¹⁵⁹ An international order so circumscribed in its application cannot equitably service either the environmental community or the Inuit.¹⁶⁰ Therefore, changes in the paradigm of international environmental law are necessary.

Contemporary international environmental law is said to have originated in 1972, when nations gathered for the United Nations Stockholm Conference on the Human Environment and established the United Nations Environment Programme.¹⁶¹ Accompanied by a "dramatic growth" in the number of international environmental bodies, international environmental lawmaking thereafter became a "more prominent fixture" on the international scene.¹⁶² Given this increase in the number and scope of international environmental agencies, it is important to locate the rights of indigenous peoples within the supervisory body of international law, the United Nations.

like they've dropped in from another planet, which they have, and will never truly understand the Inupiat way, which they probably won't").

¹⁵⁹ The perceived injustice of excluding indigenous participation in the creation and management of international regimes "undermines confidence in the authority of our institutions and weakens the bonds which stabilize society." Doubleday, *supra* note 17, at 380. In fact, the UN declared 1993 as the "International Year for Indigenous People" precisely because it recognized that without a "partnership" between governments and indigenous peoples, its own legitimacy would be undermined. See Perkins, *supra* note 3, at 238. Note also that the "International Decade of the World's Indigenous Peoples" began on December 19, 1994, and will last through the end of 2004. See generally Julian Burger, *A Project for the Decade*, *Cultural Survival Q.*, Spring 1994, at 36.

¹⁶⁰ See Doubleday, *supra* note 17, at 380.

¹⁶¹ See Jeffrey L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 *Harv. Envtl. L. Rev.* 241, 243 (1995) (tracing development of dynamic international environmental law in areas of climate change, ozone depletion, and biodiversity as part of "greening" of this area of international legal system).

¹⁶² See *id.* at 244-45. Of course, this is not to suggest that international law is a uniform or monolithic entity. In fact, the somewhat fragmented nature of international law as it deals with environmental concerns is indisputable. For example, in addition to the United Nations Environment Programme, which was "designed to be the 'focal point for environmental action and co-ordination within the United Nations system,'" the following bodies exist within the UN system to address environmental issues: the Food and Agriculture Organization, the Intergovernmental Negotiating Committee, the World Health Organization, the World Meteorological Organization, the International Maritime Organization, the United Nations Educational Scientific and Cultural Organization (UNESCO), and the United Nations Development Programme. See *id.* at 245-46 (citation omitted). These global entities are in addition to the many regional entities such as the Organization for Economic Co-operation and Development and bilateral bodies such as the U.S.-Canada International Joint Commission, which have since played major roles in various environmental issues. See *id.* at 246.

Only with such a basis for indigenous rights can the enforcement of those rights be pursued within discrete regimes, such as the IWC, which regulate resource use integral to Inuit culture. In addition, because of the "prominent" use of scientific information in international environmental lawmaking,¹⁶³ it is essential that the Inuit perspective play a prominent role in planning Arctic research and designing measures for sustainable use.

1. *The International Bill of Rights*

Historically, international law has encompassed the dual notions of state sovereignty and state dominion.¹⁶⁴ Yet it seems axiomatic that international law should benefit the peoples of the world, even if they are not identified as a state.¹⁶⁵ In belated recognition of this, international human rights have evolved to encompass fundamental rights and freedoms traditionally assigned only to nation-states.¹⁶⁶

The United Nations Economic and Social Council, heading the Commission on Human Rights, has been instrumental in creating the first basic human rights document dedicated to ensuring the preservation of cultures.¹⁶⁷ The resulting Universal Declaration of Human Rights explicitly articulates a right to participate freely in cultural

¹⁶³ See *Institutions for the Earth: Sources of Effective International Environmental Protection* (Peter M. Haas et al. eds., 1993) (detailing extensive influence of scientists on international environmental lawmaking processes through formation of "epistemic communities" that cut across national boundaries); Dunoff, *supra* note 161, at 252 ("[A]uthoritative international scientific reports helped to frame the debates that led to important treaties addressing ozone depletion and climate change contexts."); Gregory Rose & Sandra Crane, *The Evolution of International Whaling Law*, in *Greening International Law* 159 (Philippe Sands ed., 1994) (advancing thesis that science can serve as underpinning for creation of and adjustments to environmental regimes).

¹⁶⁴ See Malcolm N. Shaw, *International Law* 1 (4th ed. 1997) ("[T]he principal subjects of international law are nation-states, not individual citizens."); Shutkin, *supra* note 143, at 485 ("[T]he core of international law, both procedural and substantive, has been the notion of state sovereignty.").

¹⁶⁵ See Philip Allot, *State Responsibility and the Unmaking of International Law*, 29 *Harv. Int'l L.J.* 1, 14-15 (1988) (urging reconceptualization of world, not as artificial collection of states, but as more natural and inevitable society of individual human beings).

¹⁶⁶ For example, the Universal Declaration of Human Rights (Universal Declaration) in 1948, the International Covenant on Civil and Political Rights in 1966, and the International Covenant on Economic, Social and Cultural Rights in 1966 were drafted to categorize the different classes of human rights. See generally Shutkin, *supra* note 143, at 486. These three documents comprise the International Bill of Rights. See *id.* at 486 n.34.

¹⁶⁷ See Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, in *The Rights of Peoples* 93, 94 (James Crawford ed., 1988) (defining international law's protection of culture, conceptualized as totality of knowledge and practices, intellectual and material, specific to particular groups).

life.¹⁶⁸ Presumably, the right to cultural participation implies the right to cultural survival.¹⁶⁹

However, as articulated elsewhere in the International Bill of Rights,¹⁷⁰ international law has created a hierarchy of "individual" and "group" rights: "Economic, social and cultural rights, the so-called second generation rights, purportedly emanate from the more essential civil and political rights [the so-called first generation of rights]."¹⁷¹ As an individual, first-generation right, then, individual participation in a culture is prioritized over the second-generation group right to preserve a culture.

However, it is highly unrealistic to view individual and social rights as entirely separate entitlements since human rights are, "like humans themselves, inextricably singular and social."¹⁷² The binary classification of first- and second-generation human rights, therefore, is artificial; the reality is a duality of rights, intertwined with each other and commanding equal respect and protection.¹⁷³

The 1966 International Covenant on Economic, Social and Cultural Rights declared, "In no case may a people be deprived of its own means of subsistence"¹⁷⁴—a statement, without doubt, emphasizing the inviolability of cultural norms. To argue, as authors D'Amato and Chopra do, that the loss of whale meat in the Inuit diet can be replaced with other nutritional supplements,¹⁷⁵ is to ignore the intricate spiritual and historical quality of the Inuit relationship with the ocean and its resources. As the Coordinator of the Indian Nations union explains:

The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives is where our God created us We are not idiots to believe that there is a possibility of life for us outside of where the origin of our life is.¹⁷⁶

¹⁶⁸ See Universal Declaration of Human Rights, U.N. GAOR, art. 22, plen. mtg. at 4, U.N. Doc. A/811 (1948).

¹⁶⁹ See Shutkin, *supra* note 143, at 489 ("[C]laims relating to culture entail the right to exist: cultural survival").

¹⁷⁰ See *supra* note 166.

¹⁷¹ Shutkin, *supra* note 143, at 487.

¹⁷² *Id.*

¹⁷³ See *id.* at 487-88.

¹⁷⁴ International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 1(2), 999 U.N.T.S. 171.

¹⁷⁵ See D'Amato & Chopra, *supra* note 46, at 57-59.

¹⁷⁶ World Comm'n on Env't and Dev., *Our Common Future* 115 (1987) (citation omitted) (summarizing viewpoints of both scientific community and Inuit leaders in context of balancing environmental conservation and indigenous protection).

Although these words refer specifically to the land rights of indigenous peoples in particularly endangered ecosystems,¹⁷⁷ they resonate with equal force in the current context; the only difference is a shift from land to ocean resources. International law should be expanded to protect both the whales and the Inuit through a substantive inclusion of indigenous perspectives.

In order to address the survival of both the whales and Inuit culture, the international community must steer away from partial, one-dimensional solutions. The solution should compensate the Inuit for the years when their perspective was excluded, inviting the Inuit themselves to articulate which of their cultural rights should be protected or restored. The marginalized Inuit and their native organizations must be brought in from the periphery to become central participants in the discussion of possible resolutions.

This participation should start with Inuit assertion of self-determination in national political arenas.¹⁷⁸ Since indigenous groups have not been given the opportunity to participate in national political affairs,¹⁷⁹ they lack an enforcement mechanism despite their official inclusion in international organizations. All human rights flow from the right to self-determination because "you can assure the protection of human rights and individual freedoms if you have your own government."¹⁸⁰ Without political accommodations for indigenous peoples' cultural plurality within state structures,¹⁸¹ however, indigenous groups remain unprotected. While political participation rights are separate from self-determination rights, many scholars see the former as an essential element of a long-term strategy to achieve the latter.¹⁸² This is because domestic public support is integral to educating both the state population and the international community about the Inuit's human rights problems and sustaining an international debate

¹⁷⁷ For example, the low-lying island peoples in the Caribbean, South Pacific, and Indian Oceans. See Shutkin, *supra* note 143, at 481.

¹⁷⁸ See Mary E. Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 *Cornell Int'l L.J.* 579, 582 (1992) (analyzing effect and efficacy of Inuit endeavors to achieve political sovereignty and economic self-sufficiency).

¹⁷⁹ At the time of the initial contact between the Inuit and Western explorers, indigenous peoples were viewed as "inferior" and uniformly excluded from a role in the social, political, and economic institutions of the non-native majority. As a result and despite increased integration, the Inuit and the non-native communities occupy a nonintegrated political arena to this day. See *id.* at 581.

¹⁸⁰ *Id.* at 592.

¹⁸¹ See *id.* at 582. In the context of Canadian indigenous populations, Turpel distinguishes individual enfranchisement of indigenous individuals from a creative accommodation of indigenous governments and institutions as a group within the existing political Canadian framework. See *id.*

¹⁸² See *id.* at 593.

about Inuit goals.¹⁸³ To mobilize public opinion effectively, the Inuit require enormous resources to wage lobbying efforts, media campaigns, and educational initiatives; in other words, the Inuit require direct access to state political arenas in order to get the public's attention.¹⁸⁴

Moreover, for indigenous peoples of the Arctic who wish not to become independent states but instead to retain affiliation with their respective states, opportunities of input into national policy formulation, public decisionmaking, and public-opinion formation are critical. For example, indigenous participation in the constitutional discussion process in Canada has resulted in proposed changes to the Canadian Constitution recognizing the inherent right of self-government in international law.¹⁸⁵ This illustrates the potential power of national political participation rights—to enforce the resolutions achieved by indigenous participation in the international decisionmaking process.¹⁸⁶

2. *The Working Group on Indigenous Populations*

The process of including indigenous groups in an international forum is underway, although indigenous representatives do not yet have equal access to remedies. The General Assembly's invitation to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) to study the condition of indigenous Americans in 1949 marked the first formal address of indigenous concerns by the UN.¹⁸⁷ In light of the Cold War and the prospective development of the South American interior, however, the United States objected strenuously, resulting in the termination of both the inquiry, and temporarily, the Sub-Commission itself.¹⁸⁸ A

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 593-94.

¹⁸⁶ Effective political participation will require structural changes to national political institutions because indigenous peoples may view participation in existing dominant structures with suspicion. However, these structural changes are beyond the scope of this Note, which primarily focuses on changes to international institutions. For a broader discussion of the insufficiencies of alien political systems and the changes required in party-system politics, see *id.* at 594-95. For an example of indigenous groups' successful use of domestic institutions to further collective group rights, see Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 *Yale J. Int'l L.* 127, 165 (1991) (arguing that indigenous peoples share common norm that should be recognized by states).

¹⁸⁷ Barsh, *supra* note 3, at 370. Admittedly, the hope was that "the material and cultural development of those populations would result in a more profitable utilization of the natural resources of America to the advantage of the world." *Id.* at 370 (internal quotation marks omitted) (quoting G.A. Res. 275, U.N. GAOR, 3d Sess., pt. 2, 208th plen. mtg. at 19, U.N. Doc. A/900 (1949)); see also Dworkin, *supra* note 122, at 188.

¹⁸⁸ See Barsh, *supra* note 3, at 370.

1983 report by the Sub-Commission concluded that existing human rights standards were neither "fully applied" to indigenous peoples nor "wholly adequate" to the task.¹⁸⁹

Three international conferences drew further attention to indigenous rights. The international NGO Conference on Discrimination Against Indigenous Peoples of the Americas in 1977 first attracted indigenous representatives who emphasized their right to "have authority over their own affairs."¹⁹⁰ Next, the World Conference to Combat Racism and Racial Discrimination in 1978 endorsed "the right of indigenous peoples to maintain their traditional structure of economy and culture . . . and stresse[d] that their land, land rights and natural resources should not be taken away from them."¹⁹¹ Finally, the Conference on Indigenous Peoples and the Land in 1981 called for the establishment of a working group on indigenous peoples as a forum for their demands and complaints.¹⁹²

The resulting Working Group on Indigenous Populations (Working Group) and the Universal Declaration on the Rights of Indigenous Peoples focus intensive efforts toward developing "international standards based on a continued and comprehensive review of developments . . . and of the situations and aspirations of indigenous populations throughout the world."¹⁹³ However, the Working Group is not a "complaints tribunal" which could receive, investigate, and provide relief from complaints against states.¹⁹⁴ Its role is thus limited to being "the recipient and distributor of information concerning indigenous rights."¹⁹⁵

As long as international society excludes the participation of indigenous representatives from forums where nation-states unilaterally conceive solutions, no satisfactory resolution can be achieved. The Working Group's proposal sought recognition of the fact that "[d]iscovery, conquest, and unilateral legislation are not legitimate bases for states to claim or retain the territories or natural resources of indigenous peoples."¹⁹⁶ However, this principle has not been en-

¹⁸⁹ See Study of the Problem of Discrimination Against Indigenous Populations, U.N. ESCOR, 36th Sess., pt. 3, ¶¶ 624-25, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (1983).

¹⁹⁰ See Barsh, *supra* note 3, at 371.

¹⁹¹ Report of the World Conference to Combat Racism and Racial Discrimination, U.N. GAOR, at 14, UN Doc. A/CONF.92/40 (1978).

¹⁹² See Barsh, *supra* note 3, at 372.

¹⁹³ Report of the Working Group on Indigenous Populations, E.S.C. Res. 1985/21, U.N. ESCOR, 41st Sess., Supp. No. 2., at 54, U.N. Doc. E/CN.4/1985/66 (1985).

¹⁹⁴ See Torres, *supra* note 186, at 171.

¹⁹⁵ *Id.*

¹⁹⁶ Barsh, *supra* note 3, at 380 (internal quotation marks omitted) (quoting 1984 report of the Working Group on Indigenous Populations of the United Nations Economic and

forced with regard to the unilateral nature of the whaling moratorium as adopted by the IWC, a noninclusive body. While the Working Group is unique in having opened its doors to indigenous advocacy groups, up to this point, the Working Group has not sanctioned nation-states that interfere with indigenous representatives traveling to Working Group sessions in Geneva.¹⁹⁷ The Working Group can only be an effective mechanism if its commitment to indigenous participation is enforced by “quasi-diplomatic shielding for indigenous representatives from sensitive regions.”¹⁹⁸

3. *A New Focus for Local and Regional Indigenous Organizations: Epistemic Communities*

Given the importance of information in environmental regulation,¹⁹⁹ any international regime seeking co-management of Arctic resources must integrate traditional indigenous knowledge,²⁰⁰ practices,

Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities).

¹⁹⁷ For example, three Sri Lankan “Veddahs” hoping to attend a session of the Working Group were denied passports and the Working Group declined to object to the Sri Lankan Government. See *id.* at 384.

¹⁹⁸ See Barsh, *supra* note 3, at 384; see also Report of the Working Group on Indigenous Populations on Its Sixteenth Session, U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention and Protection of Minorities, 15th Sess., Agenda Item 7, ¶ 121, U.N. Doc. E/CN.4/Sub.2/1998/16 (1998) (noting that Erica-Irene A. Daes, Chairperson-Rapporteur of the Working Group, expressed strong support for establishment of permanent forum for indigenous peoples within United Nations system); Report of the Secretary-General, Activities Undertaken and Information Received in Pursuance of Commission Resolution 1996/41 on a Permanent Forum for Indigenous People in the United Nations System, U.N. ESCOR Commission on Human Rights, 53rd Sess., Agenda Item 24, ¶ 7, U.N. Doc. E/CN.4/1997/100 (1997) (noting that “there exists no mechanism to ensure regular exchange of information between the concerned and interested parties—Governments, the UN system and indigenous people—on an ongoing basis” to accommodate effective involvement of indigenous people in work of UN).

¹⁹⁹ See generally James Cameron, *The GATT and the Environment*, in *Greening International Law*, *supra* note 163, at 100, 102-03 (stating that in environmental area, “information and the process by which it is imparted is the crucial, empowering ingredient. The information upon which the law-making and enforcing system depends is expanding rapidly, introducing new powerful actors in the non-governmental community and continuously altering power relationships.”); see also Dunoff, *supra* note 161, at 295 (“Given the importance of information, perhaps the most effective way to globalize IEL [International Environmental Law] is to . . . facilitate the involvement of non-state actors.”).

²⁰⁰ See generally Case, *supra* note 142, at 1011-12 (arguing that extent to which co-management regimes bridge gap between state and indigenous systems of wildlife management reflects whether these regimes respect native voices); *Traditional Knowledge and Renewable Resource Management in Northern Regions* (Milton M.R. Freeman & Ludwig N. Carbyn eds., 1988) (focusing on unwritten indigenous beliefs which constitute “traditional knowledge” and can inform co-management regimes in northern Arctic).

and management systems into the overall management of the IWC.²⁰¹ Local and regional Inuit organizations—the Alaska Eskimo Whaling Commission (AEWC),²⁰² the Inuit Circumpolar Conference (ICC),²⁰³ and the Arctic Council²⁰⁴—can maximize their efficacy by uniting indigenous systems of unwritten customs and beliefs with the scientific core of epistemic communities advising the IWC.

Although not a formal subgroup of the UN or its agencies, epistemic communities are integral to the institutional structures of interna-

²⁰¹ See Eric Smith, *Some Thoughts on Comanagement*, 4 *West-Northwest* 1, 1-2 (1996) (discussing key issues in co-management of Alaskan fish and wildlife populations among state, federal, and indigenous actors). See generally *Co-operative Management of Local Fisheries* (Evelyn Pinkerton ed., 1989) (same).

²⁰² Formed on September 1, 1977 by whaling captains from nine Inupiat whaling villages, the AEWC has negotiated a revocation of the Inupiat's aboriginal whaling exception. See *Chiropolis*, supra note 15, at 224-25. The AEWC also uses technology and science to improve the humanity of the hunt and to increase scientific knowledge of the bowhead. See *id.* at 227-28; see also *Inupiat Center Opens Today*, *USA Today*, Jan. 29, 1999, at D1 (announcing opening of Inupiat Heritage Center in Barrow, Alaska, under auspices of AEWC to highlight past and present of these native Alaskans with emphasis on their subsistence lifestyle based on hunting marine mammals). While it has been unsuccessful in challenging the jurisdiction of the IWC and the United States over Inuit whaling and quotas, the AEWC managed a historic Cooperative Agreement with the National Oceanic and Atmospheric Administration (NOAA) for continued Inuit whaling with oversight by the NOAA. See *Chiropolis*, supra note 15, at 225; see also *Adams v. Vance*, 570 F.2d 950, 952, 957 (D.C. Cir. 1978) (vacating district court's decision compelling Secretary of State Cyrus Vance to file objection to IWC on behalf of Inuit against proposed revocation of aboriginal whaling exception); *United States v. Nusunginya*, No. A88-063 CR, 1988 WL 142333, at *9-*11 (D. Alaska Nov. 15, 1988) (stating that legality of agreement between NOAA and AEWC is irrelevant to criminal prosecution of whaler's violation of federal statutes and regulations regarding bowhead whaling). The AEWC has also shown its ability to enforce the agreements, for despite their strong feelings that the quota is unfair, Inuit crews have adhered strictly to the IWC quota. Cf. *Brower & Hepa*, supra note 26, at 39.

²⁰³ Created in 1980, the ICC joins together Alaskan Eskimos with their transnational counterparts in Greenland, Russia, and Canada. See Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 *Nat. Resources J.* 85, 90 n.16 (1998).

²⁰⁴ A permanent intergovernmental forum inaugurated on September 19, 1996, the Arctic Council brings together eight Arctic states and three indigenous groups to address a wide range of multilateral Arctic issues common to its members. See *Canada-Denmark-Finland-Iceland-Norway-Russian Federation-Sweden-United States: Joint Communiqué and Declaration on the Establishment of the Arctic Council*, 35 *I.L.M.* 1382 (1996) (declaring inauguration of Arctic Council and its environmental enforcement agency, Arctic Environmental Protection Strategy, and establishing respective functions, members, and decisionmaking norms of each). The indigenous organizations include the ICC, the Saami Council, and the Association of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation. See *id.* at 1382-83 (noting that creation of Arctic Council should lend greater efficiency, focus, and political impetus to existing circumpolar organization and future multilateral initiatives).

tional resource management.²⁰⁵ The regulation of whaling is no exception.²⁰⁶ Without connections to these epistemic communities, the Inuit cannot foster a common understanding of issues such as extinction and catch quotas with the international community.²⁰⁷ In order for credible Inuit participation in international regimes, indigenous Arctic experts and scientists must be included²⁰⁸ in the epistemic communities administering various aspects of the IWC decisionmaking process.

The objectives of any environmental regime reflect scientists' views of how sustainable resource management should take place.²⁰⁹ International law acknowledges that experts alone understand the complex and sensitive relationships within the environment where "actions that impact upon one element affect the other elements to varying degrees."²¹⁰ For example, the IWC instituted regulation, quotas, and the final moratorium based primarily on the consensus of its Scientific and Technical Committee that the bowhead whale was in danger of extinction.²¹¹ Moreover, the Scientific Committee continues to base its decisions regarding the feasibility of "aboriginal whaling" on the findings of hand-picked scientific experts.²¹² The IWC has

²⁰⁵ See, e.g., Haas, *Do Regimes Matter*, *supra* note 76, at 388 (discussing influence of epistemic community on development of and compliance with Mediterranean Action Plan).

²⁰⁶ See generally Benjamin van Drimmelen, Comment, *The International Mismanagement of Whaling*, 10 *UCLA Pac. Basin L.J.* 240 (1991) (discussing regulatory framework of IWC with emphasis on role of Commission scientists who make numerous recommendations regarding season length, size limits, harvest decreases, research needs, area closures and sanctuaries, and total prohibition and moratoriums); see also Rose & Crane, *supra* note 163, at 159 (noting integral role of scientific community in whaling regime).

²⁰⁷ See Kaye, *supra* note 76, at 108-09 (advocating involvement of scientific community in negotiation of environmental regimes).

²⁰⁸ Although traditional international law has narrowly defined epistemic communities to mean scientific experts on focused issues, there is a growing recognition that policymakers or uniquely positioned actors form epistemic communities to the extent that their perspective adds an absent voice to the discussion of an issue. For an argument that international lawyers may be an epistemic community of policymakers, see generally Brunnée & Toope, *supra* note 76 (discussing examples of epistemic communities of lawyers, such as ILA and ILC, as effective contributors to evolution of freshwater regimes); cf. Christopher C. Joyner & George E. Little, *It's Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 *B.U. Int'l L.J.* 223, 263-64 (1996) (suggesting that feminist theory should examine whether process of developing international norms would benefit from viewing women as epistemic community to extent that women have different epistemological process than men).

²⁰⁹ See Kaye, *supra* note 76, at 109 (describing scientists' influence on Antarctic policy).

²¹⁰ *Id.*

²¹¹ See *supra* Part I.B.2.

²¹² See, e.g., Vlessides, *Bowhead Hunt*, *supra* note 72, at 30 (noting that whale biologist Kerry Finley, considered to have "more field experience with Eastern Arctic bowheads than any scientist in the world," presented his extensive field research, which shows no detectable increase in bowhead numbers, and cautioned that killing "even one bowhead

never included a critical tribal voice—either traditional Inuit knowledge²¹³ or indigenous research²¹⁴—in its powerful Scientific Committee. Only by filling this vacuum with indigenous information and perspectives can Inuit organizations establish their credibility as natural resource managers.²¹⁵

The IWC and its Scientific Committee may credibly argue that nonindigenous scientists have a minimal political agenda and therefore adequately represent environmental concerns as they pertain to all groups, including the Inuit.²¹⁶ Yet recalling the right-to-life ideology of the wildlife conservationist movement,²¹⁷ it is clear that even scientists and their methods are influenced by individual politics fo-

increases the risk of extinction due to the limited genetic pool and threats of predation from killer whales”). See generally Adrian E. Raftery & Judith E. Zeh, *Estimating Bowhead Whale Population Size and Rate of Increase from the 1993 Census*, 93 *J. Am. Stat. Ass’n* 451, 451-52 (1998) (describing various statistical methodologies used in estimating population size and rate of increase of Western Arctic stock of bowhead whales to facilitate application of quotas set by IWC).

²¹³ For example, ethnologist Jean Malaurie’s observations on the Inuit’s internal control mechanisms show that the Inuit’s sophisticated observation of bowhead populations as a result of ever-changing conditions was as subtle as the statistical analysis of scientists advising regulatory regimes:

The main problem such a micro-society had to deal with was how to adjust the activities of the group . . . to incessant fluctuations of temperature and humidity, which crucially affected the region’s flora and fauna. For example, when the climate was warmer, game was abundant. Eskimo society then encouraged an increase in the birth rate by lifting food, hunting, and sex taboos. . . . However, when ice and fog abounded . . . Eskimo society turned Malthusian and prudently balanced the size of the population against their area’s current resources.

Malaurie, *supra* note 19, at 123. For a comprehensive discussion of the implications of tribal environmental policy and traditional indigenous knowledge on the management of the global commons, see Tsosie, *supra* note 113, at 311-17.

²¹⁴ For example, under the auspices of the newly independent territory in Western Canada named Nunavut by the Inuit, the Nunavut Wildlife Management Board (NWMB) is conducting a study by interviewing local Inuit hunters and experts. See Vlessides, *Bowhead Hunt*, *supra* note 72, at 30 (quoting NWMB chairman Ben Kovic as representing Inuit wishes to discuss bowhead co-management plan through sustained dialogue between traditional knowledge sources, which report increased sightings of bowhead in Eastern Arctic, and nonindigenous scientists, who contend that bowhead population is not increasing at all). This co-management plan is endorsed by scientist Thomas F. Albert of the Tokyo-based Institute of Cetacean Research who points out discrepancies in allegations of “inhumane” whale-hunting. See *Scientist Calls for Less Emotion in Whaling Debate*, *supra* note 85.

²¹⁵ See Tsosie, *supra* note 113, at 315 (discussing occasions in which indigenous peoples have served in this capacity).

²¹⁶ After all, even Thomas F. Albert’s advocacy for the inclusion of the indigenous experience makes the distinction between an emotional debate by politicians and a technical debate between scientists, implying that science itself is objective. See *Scientist Calls for Less Emotion in Whaling Debate*, *supra* note 85.

²¹⁷ See *supra* Part I.C.

cusing solely on the concerns of one constituency.²¹⁸ It is therefore necessary for indigenous experts to establish links with scientific bodies to bring native experience to the endeavor.²¹⁹

This is especially true because political science documents the experience of many nations where "soft" scientific and cultural cooperation fosters "hard" political and economic cooperation.²²⁰ Therefore, the interpersonal interactions between indigenous experts and other members of the epistemic community may result in cooperation on substantive political, economic, and territorial issues.²²¹ In other words, the recognition by scientists of the validity of indigenous experience as a supplement to scientific technique²²² will lead to a norma-

²¹⁸ For example, Canadian scientist Kerry Finley can hardly claim objectivity after admitting that he considers whales "my constituency." Laghi, *supra* note 10, at A8 (quoting Finley). Moreover, Thomas F. Albert's statement that scientists' focus on "how the animal dies" is unfair reveals the underlying critique that methodology can be tainted by personal politics. See Scientist Calls for Less Emotion in Whaling Debate, *supra* note 85.

²¹⁹ For example, the 1985 discrepancy between Inuit whalers' estimates and the IWC's reported bowhead count could only be resolved when indigenous scientists in the North Slope Borough showed that because some bowheads migrated "too far from shore or under pack ice," they were not counted in the traditional population census of endangered species. Mark Baumgartner, Eskimo Fishermen Say Whale Count Too Low, *Seattle Times*, July 7, 1985, at E7 (reporting use of hydrophones submerged in Beaufort Sea near Barrow, Alaska, to eavesdrop on bowheads during their annual migration to Arctic waters as indicative of discrepancy between IWC's Scientific Committee and Inuit whalers).

²²⁰ See generally Ian H. Rowlands, *The Politics of Global Atmospheric Change 14-28* (1995) (detailing power-based, interest-based, and knowledge-based arguments for international cooperation on environment); Daniel Deudney, *Binding Powers, Bound States: The Logica and Geopolitics of Negarchy* (paper presented at the International Studies Ass'n, Washington, D.C. (Mar. 28-Apr. 2, 1994), on file with author) (documenting liberal international relations theory as having reclaimed lost ground, reemerging not as Wilsonian idealism but as positivist paradigm based on centrality of state-society relations whereby soft diplomacy consensus on sociocultural norms leads to successful breakthroughs in hard diplomatic concerns, such as national security and economics); Dunoff, *supra* note 161, at 251 ("[O]ver time soft law instruments tend to harden into binding norms.").

²²¹ See Deudney, *supra* note 220. Currently, negotiations on all counts are complicated by conflicting communication and cultural perspectives. See, e.g., Chase Hensel & Phyllis Morrow, *Co-Management and Co-Optation: Alaska Native Participation in Regulatory Processes*, *Cultural Survival Q.*, Fall 1998, at 69, 70 (giving examples of miscommunication in which culturally determined words are used by indigenous speakers to mean different things than native speakers of English understand). More importantly, Hensel and Morrow note that without a common cultural and academic history, indigenous and non-native participants do not recognize their miscommunication, value scientific and local knowledge differently, and perceive their responsibilities differently. See *id.*

²²² Such validity would result from years of Inuit experience with studying, hunting, and coexisting with the whale without endangering its existence. See Kevin Kidder, *Alaskan Says Concerns over Saving Whales Are Misplaced*, *Columbus Dispatch*, Oct. 11, 1998, at 4D, available in 1998 WL 16495789 ("Either the whales are reproducing like rabbits, or their estimates are wrong." (quoting Inuk hunter Ben Nageak)); Letters, *Whaling*, *Atlantic Monthly*, Jan. 1998, at 11 ("[T]he experience in Alaska shows that properly managed hunting need not drive whale populations to extinction.").

tive acceptance of the indigenous cultural experience by member states of the IWC.²²³

In order to foster this transformation, local and regional indigenous organizations, especially the AEWG and the ICC, should step in to rectify the disenfranchisement of natives and seek cooperation with international scientists and conservationists. The feasibility of such a step is evidenced by the “nearly instantaneous access to information and enhanced communications capabilities [that] provides NGOs with the ability to network and collaborate on issues of joint interest.”²²⁴ The use of global networks,²²⁵ electronic bulletin boards,²²⁶ commercial online services, and online research databases²²⁷ is especially im-

²²³ See, e.g., H. Elizabeth Dallam, Note, *The Growing Voice of Indigenous Peoples: Their Use of Storytelling and Rights Discourse to Transform Multilateral Development Bank Policies*, 8 *Ariz. J. Int'l & Comp. L.* 117, 125-39 (1991) (tracing increasing responsiveness on part of international organizations such as World Bank and General Agreement on Tariffs and Trade (GATT) to direct communications with tribal leaders from various Indian nations as evidence that narrative discourse by marginalized groups is powerful tool for transforming legal thinking). Thus, if the Inuit, as peoples who historically have been excluded, can tell their stories in the context of supplementing rigid scientific techniques, they may raise the dominant consciousness in the context of the whole arena of the international regulation of whaling. See, e.g., *id.* at 132-39 (depicting use of rights discourse and storytelling in raising consciousness and effectuating environmental policy). See generally Peter M. Haas, *Saving the Mediterranean: The Politics of International Environmental Cooperation* (1990) (positing that epistemic community with goals that transcended nation-state interests shaped successful course adopted by Mediterranean governments to address marine pollution because of scientists' willingness to conceive of “ecology” broadly enough to include economic issues of development and poverty as perceived by less developed nations).

²²⁴ Dunoff, *supra* note 161, at 298 (noting formation of Centre for Law and Social Policy, which uses computers and telecommunications to develop worldwide coalition to further nongovernmental organization (NGO) participation in Antarctic environmental matters, as one example of success story in such proposed “information arbitrage”).

²²⁵ For example, EcoNet, “an Internet network that acts as both a news source and as a conference center for environmental issues,” allows all parties of interest in a particular issue, especially the NGOs, to cooperate. See Dunoff, *supra* note 161, at 299. Another example includes the discussion list formed by the Regional Environmental Center for Central and Eastern Europe, which allows NGOs from Eastern European countries to cooperate informally for regional initiatives. See *id.*

²²⁶ For example, the creation of the Environmental Law Alliance Worldwide by public interest attorneys in Australia, Ecuador, Indonesia, Malaysia, Peru, the Philippines, Sri Lanka, and the United States, provides environmental lawyers with easy access to scientific, technical, and legal information from around the world. See Zygmunt J.B. Plater et al., *Environmental Law and Policy: Nature, Law and Society* app. II, at 27 (Supp. 1994) (providing concise summary of information available on Internet). Such an information database, perhaps consisting of Inuit experts from Canada, Alaska, Siberia, and Greenland, would ultimately help in disseminating traditional perspectives and expertise not only to other scientists but also to environmental lawyers who are integral in framing the debate around whaling and its regulation.

²²⁷ One use of such a database would be to turn research and conventions produced at the IWC into “open documents” for ongoing development through electronic networking by indigenous experts, as modeled after the procedure employed for texts produced at the

portant for the Inuit, who historically have been marginalized from traditional texts and journals, but have established themselves on newer communications technology.²²⁸

A successful dissemination of indigenous ecological information and observation could potentially lead to the scientific community's acceptance of the legitimacy of Inuit experience,²²⁹ followed by the IWC's acceptance of a co-management regulatory regime more responsive to the Inuit culture.²³⁰ Such a course will finally locate the Inuit within the international framework that regulates the marine global commons.²³¹

CONCLUSION

Only with a heightened sensitivity to the interdependence of Inuit cultural and physical survival will the international community solve the problems posed by the global commons. Historically, indigenous populations have been marginalized and viewed by the international community through a narrow lens of assimilation.²³² A member of one indigenous community expresses the danger inherent in such a perspective:

[T]he surest way to kill us is to separate us from our part of the Earth. Once separated, we will either perish in body or our minds

NGO Global Forum of the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil. See Peter H. Sand, UNCED and the Development of International Environmental Law, 8 J. Nat. Resources & Env't'l L. 209, 209, 220-21 (1992-1993) (describing technique that would make international agreements widely accessible for comment).

²²⁸ For example, the ICC has its own web page, which includes videos of annual conferences including member speeches, agreements, and resolutions. See Inuit Circumpolar Conference (visited Sept. 15, 1999) <<http://www.inusiaat.com>>.

²²⁹ See Hensel & Morrow, *supra* note 221, at 69 (recognizing that resource managers "may think that Alaska Natives may have valuable knowledge—at least in scientific terms—about the resources in question" although acknowledging non-native biologists' general skepticism of oral histories and personal experiences in favor of recorded observations and experiments). Hensel and Morrow recognize that currently, indigenous knowledge is only accepted after it has been independently confirmed, thus evidencing hesitation to value native empirical contributions. See *id.*

²³⁰ While recognizing that effective co-management must include native principles of "Traditional Environmental Knowledge" in its decisions, scholars note that "decontextualizing pieces of local knowledge and re-incorporating them as information in scientific reports seriously misrepresents indigenous perspectives." *Id.* Therefore, the incorporation by managers, anthropologists, and scientists of information like past climate data and esoteric ecological knowledge must occur through negotiations. See *id.* at 71 ("This leads us to an unsurprising conclusion. In order for co-management to work, power must *really* be shared.").

²³¹ See Nunes, *supra* note 105, at 545.

See Chiropolis, *supra* note 15, at 224.

²³² See Barsh, *supra* note 97, at 277 (describing role of UN in fight for equal access for indigenous communities as only recently turning away from its assimilationist focus).

and spirits will be altered so that we end up mimicking foreign ways, adopt foreign languages, accept foreign thoughts and buil[d] a foreign prison around our indigenous spirits which suffocates [us] Over time, we lose our identity and eventually die or are cripples as we suffer under the name of 'assimilation' into another society.²³³

The challenge that faces the international community is to articulate a conceptual framework that acknowledges the history of indigenous discrimination, discards the goal of assimilation, and constructs an inclusive regime giving dignity and control to indigenous people. This Note emphasizes the necessity of including the Inuit people in existing and future international organizations that regulate whaling. Such an integration of perspectives will transform the conceptualization of whale hunting. The international community, which currently views environmental conservation as a struggle between animal species and indigenous communities, will come to recognize that the conservation movement is a holistic continuum of the concerns of the physical world.

²³³ Shutkin, *supra* note 143, at 490-91 (quoting indigenous community member statement in 1985 World Council of Indigenous Peoples submission to United Nations Working Group on Indigenous Peoples).