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Environmental Law, Indigenous Peoples, International Law: History, Human Rights Law, Indian Law

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I. ABSTRACT

Inuit are the indigenous peoples of arctic Canada, Alaska, Greenland and Siberia. Inuit culture and values are rooted in sharing the harvest of the hunt, particularly of marine mammal species which are important for food throughout the Inuit regions. Archaeological evidence suggests a strong correlation between the post-glacial distribution of bowhead whales and Inuit settlement. The period of intense commercial whaling in the arctic drastically depleted stocks of bowhead and other whales, and also affected Inuit subsistence whaling.

The rights of Inuit and other indigenous peoples are slowly being recognized in international law. The right to hunt for food is a fundamental indigenous right of Inuit and other hunting peoples. Inuit have traditionally exercised that right subject to internal controls aimed at maintaining an equilibrium between prey and hunter, so that the resource itself is perpetuated.

The impacts of the commercial whaling era are still being felt in the arctic as a consequence of international efforts to conserve and rebuild whale stocks. Current efforts to redress the imbalances caused by commercial whaling too often come into conflict both cultural and nutritional needs.

Efforts to develop a new paradigm for areas on international environmental law, such as international whaling law, are only beginning to recognize the need to address the issue of indigenous rights. Indeed the approach of many environmentalists to the advancement of international whaling law begins with a simple dichotomy: whales are good and must be saved; and humans who hunt whales are bad and must be stopped. Unfortunately, this approach further separates mankind from nature, perpetuating alienation and reductionism. It also denies the qualitative differences in relationship to and perceptions of nature of urban industrial societies and those of indigenous societies, by denying indigenous rights.

Continued failure to address the issue of indigenous rights to hunt

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whales would result in perpetuation of injustices caused by the commercial whaling era and the creation of new hardships among indigenous peoples who have already borne so much of the cost of the growth of colonial empires. Such failure would also deprive the process of the progressive development of international environmental law of some approaches to sustainable development which have proven themselves during thousands of years of evolution of social and environmental equilibrium.

Inuit themselves are committed to the principle of sustainable development and to the conservation of the living resources of the arctic. If a real paradigm shift is to occur in the evolution of international environmental law, it may very well occur as a result of the conflict both indigenous rights. If we cannot conceive of a vision of nature in international law which comprehends indigenous peoples and their relationship to the animals on which they depend, where can we find a niche for the rest of humankind?

II. INTRODUCTION

The subject of aboriginal subsistence whaling is complex. It has many dimensions, but can most simply be characterized as the connection between environmental opportunities and human survival which is created by long-standing traditions of use of renewable resources, specifically whales. This discussion focuses exclusively on the aboriginal subsistence whaling of Inuit, the indigenous peoples of the arctic regions of Greenland, Canada, Alaska and Siberia. "Inuit" is the word for "the people" in the Inuit language, Inuktitut. Regional variations of the word, "Inuit" are found, including for example "Inupiat" in Alaska and "Inuvialuit" in the western arctic of Canada. The English name "Eskimo" is derived through French from an Indian name for Inuit and is also used in some contexts.

In order to come to an understanding of the right of Inuit to take whales for subsistence purposes, it is necessary to have some awareness of Inuit culture and traditions, as well as the day to day conditions of life in the arctic. To understand Inuit tradition, it is necessary to have an appreciation of the social and environmental context within which the culture has evolved. Indigenous rights are, in a sense of rights to identity and survival which have a powerful environmental component.

The environmental context of aboriginal subsistence whaling includes a time dimension which introduces an element of variability: environment is subject to climatic control, and the time period with which we must deal is sufficiently lengthy that climatic fluctuations have occurred. This means that traditions of resource use must be adaptive in nature; and that the relationship between human survival and environmental opportunities is flexible and dynamic, rather than fixed and static. This is important from the point of view of understanding the qualities of indigenous rights and some of the difficulties in codification of these rights.

The social context is neither homogeneous nor fixed in time. Human populations change in numbers and in distribution. Malaurie believes

that variations of these kinds among Inuit of the Thule district of Greenland could be directly attributed to Inuit adaptation to fluctuation in climate and environment. Also there is great variability in some respects within Inuit culture, some of which extend to Inuit subsistence whaling. Therefore, where illustrative examples given include temporal and geographic references, they should not be taken out of context.

A number of external factors, such as commercial whaling, the emergence of international law of human rights, environment and development, and the relationship between western industrial society and nature, also influence the present situation of Inuit subsistence whaling.

III. THE INUIT, THE WHALE, AND THE COMMERCIAL WHALERS

For thousands of years Inuit have survived in a region of the world that few other cultures thought was habitable. Climatic conditions are extreme: in winter the sun disappears below the horizon, leaving Inuit to pursue their way of life in the darkness of the arctic night at temperatures commonly between minus 40 degrees and minus 70 degrees Fahrenheit. The length of the winter darkness varies with latitude. In the high arctic, where the sun goes below the horizon in October and reappears in January, Inuit must hunt in the cold and dark. In summer, the sun stays above the horizon, creating prolonged daylight periods. The tundra blooms and migratory birds seem to be everywhere. Life for the Inuit is easier for a time. This is not to say that it is without risk. Changing winds can generate fog, storms and even snow along the coast of the Arctic Ocean at anytime. Modern technology has improved search and rescue possibilities, but the risks themselves are unchanged, and each year some lives are lost.

Inuit depends on the resources of land and sea, but the well-spring of Inuit culture is the Arctic Ocean, and the renewable resources which it provides. The Inuit subsistence economy is complex: many species are hunted or fished. However, Inuit rely heavily on marine mammals for their subsistence and it is this reliance that distinguishes the Inuit way of life from that of other arctic peoples. Inuit culture and values are rooted in sharing the harvest of the hunt, especially of marine mammals. Marine mammals provide food, clothing, light and heat. They are also important to the maintenance of health and well-being, as they provide vitamins and calories essential in the cold climate of the arctic. Just as food from marine mammals is important to physical health, the ability to obtain food from hunting as a livelihood is important to psychological well-being. Being a good hunter is an occupation with a proud heritage among Inuit. Hunting is the Inuit way of life.

When looking at archaeological data, it is important to remember that climate is not static. Around 10,000 years ago, the Canadian city of Toronto was under a glacial ice sheet some two kilometers thick and the arctic regions were at the heart of the last major glaciation to affect the Northern Hemisphere. Since that glacial maximum, the climate has

warmed significantly in the Northern Hemisphere. About 3,000 to 6,000 years ago, the climate was slightly warmer than it is now, a period which is known as the Hypsithermal in geological time. Following the Hypsithermal, the climate of the Northern Hemisphere underwent a relatively cooler interval, culminating in what is called "The Little Ice Age," about 1600 to 1850. Since then, the climate has warmed again, approaching the conditions prevalent during the Hypsithermal. Many scientists believe the warming trend will continue as a consequence of natural and man-induced changes in the atmosphere.

During this post-glacial period, a number of waves of human migration across the arctic appear to have taken place, as discussed in great detail by McGhee.¹ The "Old Whaling Culture" of the Bering Sea has been dated to about 1,000 B.C. Archaeological and climatic evidence indicates a correlation between the migration of Inuit forebears across the arctic from Siberia to Greenland and the movement of bowhead whales, during a warmer period around 1,000 A.D.

It is clear that Inuit whaling traditions have roots deep in the past. To put these archaeologically derived dates in context, it is helpful to draw chronological connections: a whale-based subsistence culture in the arctic had been in existence for some 2,500 years and the Inuit of the Thule period had been harvesting bowheads for some 1,000 years at the time when European nation-states were building colonial empires and scholars like Grotius and Pufendorf proposed the concept of an "international law."

The fact that Inuit culture pre-dates European colonial expansion as well as the emergence of international law is at the root of the debate over indigenous rights in international law, a point which will be revisited *infra*. In the interim it should be noted that if the true test of the sustainability of development is survival over time, surely Inuit passed that test at some point in their 1,000 years of bowhead hunting.

During the course of their history of bowhead whaling, Inuit developed a sophisticated system of harpoon heads, lines, drags and floats which they used, in conjunction with boats, to take whales. The basic unit of the Inuit hunt for large whales was the umiak, a boat crewed by four or five men under the leadership of a whaling captain. Several boats would co-operate in the hunt. A thorough understanding of whale morphology and physiology was demonstrated in the taking of the whale, as one technique required only one blow to paralyze the whale and a second to dispatch it. Towing the whale to shore was difficult and potentially dangerous work: it could take a whole day, and if a wind came up, the Inuit might have to lose the whale in order to get safely to shore. Special songs called aigoan were sung to make the whale light and easy to tow. Once on shore, the processing of the whale became a community responsibility and everyone would be involved in landing and butchering the whale.

1. R. MCGHEE, CANADIAN ARCTIC PREHISTORY (1978).

Every part of the whale had a use in Inuit culture, from the skin, meat, blubber, organs and blood which were used for food, to bones which were used for building, to baleen which was used for nets. There are special words in Inuktitut for the parts of the whale and for the activities associated with the whale. Hunting for whales required high levels of social organization, skill, discipline, and strength. Strict social conventions governed every aspect of the whale hunt from preparation to personnel to distribution of the proceeds within the community. Successful captains had additional responsibilities, as well as honors which included mouth to jaw tatoos. The events of the whale hunt would then be endlessly retold as part of the oral history of the Inuit.

Taking issue with the view that the "Inuit of arctic Canada" were "very 'primitive' people," McGhee states:

Living in perhaps the most demanding environment ever occupied by the human race, they are seen as the survival of an ancient way of life that was prevented by its harsh environment from achieving the social and cultural complexes that characterize "advanced" societies Archaeology shows this view to be false. The (immediate) ancestors of the Inuit moved to arctic Canada within only the last thousand years, bringing with them a culture as rich and complex as that of any other nonagricultural or nonindustrial people.²

In the case of the Inuit, their culture evolved in a dynamic relationship with the living resources on which they depended for a very long time. As Malaurie observed of the "Polar Eskimos":

The main problem such a micro-society had to deal with was how to adjust the activities of the group . . . (including population growth) 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.³

The issue of "primitivism" is relevant to subsequent discussions of indigenous rights at international law and will be examined further in that context.

When European explorers encountered Inuit, the warmer climate of the preceding 3,000 years had cooled and the Northern Hemisphere was in the grip of what is known as "The Little Ice Age," a period which lasted from about 1600 to 1850. As a result, the polar ice pack extended farther south, influencing the distribution of animals, including marine mammals, and consequently Inuit settlement patterns also shifted southward. The contraction of environmental opportunities due to the climate shift, coupled with the stress of introduced diseases decimated Inuit populations, but ultimately the most devastating change was the advent

2. *Id.* at 118.

3. J. MALAURIE, *THE LAST KINGS OF THULE* 123 (1982).

of the commercial whalers because of the long-term impact of their activities on Inuit marine mammal resources.

The commercial whaling fleets came to the arctic from many different countries at the close of a global rampage which saw gross over-exploitation of these living resources. At the beginning of the commercial whaling era, the great whales were sought for their oil, baleen, and other by-products. The crews sometimes ate the whale meat themselves, but often the carcasses were quickly discarded so that the whaling ship could pursue more whales.

The Canadian western arctic was virtually the last of the world's whaling grounds to be opened to commercial exploitation. Whaling ended relatively recently, as the last whaling ship withdrew in 1934. Consequently it is still possible to talk to Inuit who experienced this period first-hand, which is extremely valuable when trying to come to an understanding of values and attitudes, as well as of knowledge and events. Anecdotal evidence often conveys subtle nuances which are particularly helpful in cross-cultural circumstances.

In Greenland, whaling ships arrived much earlier. Here, Rasmussen, (cited by Malaurie 1982:434) reports that the situation was so bad that entire Inuit settlements fled to the hills at the mere suggestion that another whaling ship was approaching. There it appears, entire whaling crews had descended on small groups of Inuit and terrorized them.

In the Canadian western arctic, the experience of the Inuvialuit was happier: Inuit would frequently be hired to work as harpooners because of their knowledge of whales, their skill with the harpoon and their strength. Sometimes they would take their entire families to live on the whaling ships. Agnes Goose of Holman Island is a living witness. As a child she with her father, Billy Banksland and the rest of her family lived on a whaling ship in the western arctic. Billy Banksland worked as a harpooner and Agnes Goose has powerful memories of him. One of the stories that she tells reveals something of the differences between Inuit and the commercial whalers. Her father harpooned a bowhead and the crew secured it to the side of the ship, but a sudden storm came up and they were only able to take the head on board. The rest of the whale had to be abandoned for fear of losing the ship. Agnes Goose remembers her father would not starve because of this wastefulness.

From discussions with Inuit elders like Agnes Goose, and from historical and contemporary sources, it appears that Inuit experience with whaling ships and their crews was mixed. This may have been due in part to the differing nationalities of the whalers themselves. At any rate, it is clear that there were a range of relationships between Inuit and the commercial whalers.

Inuit observed the technological superiority of the commercial whale hunt, which coupled with the depletion of the whale stocks and the opportunity to work on the ships led to replacement of the traditional form of Inuit hunt in the Canadian western arctic for example, in favor of a

symbiotic relationship with the whalers. The Inuit served as harpooners and crew, and received whale meat and muktuk which they had traditionally harvested, plus trade goods and other benefits. In essence, Inuit continued their traditional way of life while incorporating the technology of the commercial whalers and the whalers themselves, in it.

When commercial whaling ceased, Inuit felt the impact in many ways. Commercial whalers had also been merchant-traders, and when they disappeared Inuit lost trading partners as well as access to goods. The commercial whalers also provided a distribution system for whale food products locally and regionally to some extent, which was lost when commercial whaling ended. Many of the whalers took Inuit wives. When the whaling ended, some stayed in the arctic to raise their children; while others disappeared back to their home ports leaving their Inuit families behind.

The departure of the commercial whalers was also felt with regard to access to whales and to the foods traditionally prepared from them. Not only were whale stocks severely depleted, leaving few whales for Inuit to hunt; but those Inuit who had adapted to commercial whaling also lost access to the hunting equipment of the whalers which they had used for a generation or more. This was particularly true in the Canadian western arctic. In Alaska however, the Inupiat retained the use of their traditional boats and equipment, and in fact still use the umiaq.

Inuit also lost the supply of whale carcasses previously discarded by the whalers. Silo, or drift bowhead carcasses, are the subject of many stories. There is an account of starvation from Vitoria Island which credits one of these bowhead carcasses abandoned by the whalers with saving the lives of those people by providing food for a long time. Drift carcasses were also important to other species, particularly polar bears and arctic foxes.

Inuit have a long history of subsistence whaling. They have been affected in many ways by the commercial whale fishery in the arctic and also by its closure. They continue to be affected by measures intended to alleviate the impacts of commercial whaling on whales which infringe on Inuit subsistence rights.

IV. WHAT OF THE RIGHT OF INUIT TO HUNT WHALES?

Just what constitutes international law and what does not has been the subject of debate ever since Grotius and Pufendorf argued for its existence. The assertion that international law is what states do, leaves international law exposed to the legitimate criticism that it is merely the sanctioned use of force by the powerful usually against the powerless. Such a narrow description of international law not only does violence to international law itself, but also promotes an almost Hobbesian world view, without hope or aspiration. Not only does such a positivist view betray those who are most in need of the protection of international law, but it is contrary to international experience which shows that states do not always

comply with international law, and are therefore capable of illegal acts.

Change is the natural order: we see it even in that fundamental unit of international law, the nation-state, as common markets and other supranational entities form and geopolitical lines are redrawn. Not all of the challenges to our concepts of international law come from new situations. The failure of international law to deal equitably with the rights of indigenous peoples whose societies pre-date the emergence of international law has long been a source of concern to the people affected. Until very recently, this failure could be attributed to sins of omission. However this generosity of interpretation can no longer be given. Indigenous peoples are claiming their rights and those who have the capacity to recognize them can no longer plead ignorance.

McWhinney and other have recognized that international legal norms are evolving.⁴ It is very clear that the body of international law is growing. If the goal of international law is international order or peaceful co-existence, that goal cannot be achieved by shutting those who seek justice outside the gates of international law. To do so leaves them only unpalatable choices: abandoning their quest for redress, assuming the role of beggar, or conducting "illegal" activities. They will not go away, nor in our own interest do we want them to. We are all poorer in the end because of injustices which are not addressed, because injustice undermines confidence in the authority of our institutions and weakens the bonds which stabilize society. It is hypocritical at best to support international law as a means of promoting order, if the application of that international law is so circumscribed that it can only contribute to greater disorder. What is required is a formulation of international law which is capable of recognizing not only the need to be flexible in response to evolutionary forces, but is also of sufficient breadth and depth to revisit and redress the injustices perpetrated in the course of its early development.

From the point of view of identifying possible roots of indigenous rights at international law, three early scholars are of particular significance: Francisus de Vitoria (1492-1546), Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-1694). All three are subsequently cited as authorities in various important legal decisions affecting indigenous rights, as well as contributing to the nascence of international law. Vitoria was an ecclesiastical legal authority whose works *De Indis* and *De Jure Belli* addressed the questions of aboriginal ownership and dominion. Vitoria found no fault in either civil or divine law, stating that: "[T]he aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners."⁵ Vitoria also disputed the application of the title of discovery to Co-

4. E. McWHINNEY, *CONFLICT AND COMPROMISE: INTERNATIONAL LAW AND ORDER IN A REVOLUTIONARY AGE* (1981).

5. F. DE VITORIA, *DE INDIS ET DE JURE BELLI RELECTIONES* 128 (1964).

lumbus' encounter with the Americas, because the barbarians were the true owners.⁶ This did not deter the European nations which were busily engaged in dividing up North America and sending cargos of plunder home for much the same reason as states today do not always observe the fine and not so fine points of international legal thought.

In 1625, Grotius published *De Jure Belli ac Pacis Libri Tres*, the first treatise on international law, in which he makes the following comment on earlier works in international law, including that of Vitoria:

All of these, however, have said next to nothing upon a most fertile subject; most of them have done their work without system, and in such a way as to intermingle and utterly confuse what belongs to the law of nature, to divine law, to the law of nations, to the civil law, and to the body of law which is found in the canons.⁷

For Grotius, the environmental and historical context of international law and aboriginal rights was Biblical, rather than evolutionary and archaeological. He believed that after the "Deluge" all things were undivided and common to all. Grotius held that Indians represented the "primitive condition," unlike that of his own advanced society.

Significantly, Grotius is called the father of modern international law. Careful reading of Grotius show that his views, both respect to indigenous rights, are basically in accord with the findings of Vitoria. Both conclude that discovery as a root of title cannot be applied to the lands of North American indigenous peoples who through occupancy have ownership, as well as dominion as understood by Vitoria and sovereignty in the sense of Grotius' usage of the term.

Pufendorf published *De Jure Naturae et Gentium Libri Octo* in 1688. This work is the first to provide a framework in international law for the expression of collective rights as enjoyed by indigenous peoples. Pufendorf cites Ambrose: "Nature has produced a common right for all, but greed has made it a right for a few."⁸ It is then through reason that mankind must come to an equitable application of that right. Without reason and convention, there can be no dominion, even with occupancy.

Inuit traditions with respect to land-use, such as hunting areas, are clearly significant in this regard. Pufendorf conceptualized the vesting rights though occupation and convention, as taking two forms: proprietorship meaning individual ownership, and positive community. Positive community, means that several share rights, to the exclusion of those not of the group. Termination of the interest of the group requires the consent of each member.

Pufendorf draws an important distinction between the occupation by an individual, which requires cultivation or boundary marking, and occu-

6. *Id.* at 139.

7. H. GROTIUS, *THE LAW OF WAR AND PEACE* 22 (1925).

8. S. PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 536 (1934).

pation by a group, which may be in whole or in sections. Occupancy as a whole establishes a universal dominion over all things moveable and immoveable, including animals, within that tract for the group as a whole.⁹

Pufendorf's formulation provides a firm foundation for the progressive development of the international law of indigenous rights. Unfortunately, except for the Marshall Court in the United States, Pufendorf's works have received little attention. Given that recognition and codification of collective rights to lands and resources pose major stumbling blocks to current efforts to progressively develop the law of indigenous rights internationally in the process of the revision of Convention 107 of the International Labor Organization, and in the development of a Declaration on the Rights of Indigenous Peoples under the UN Working Group on Indigenous Populations, perhaps the works of Puffendorf should be given new attention.¹⁰

Since the time of Vitoria's *De Indis*, the question of the rights of aboriginal peoples to their lands and resources, relative to the rights of European nations with aspirations of colonization has been pursued. Given the novelty of the situation and the newness of the concept of international law itself, it is not surprising that these attempts resulted in considerable confusion rather than clarity. The influence of the Christian Church and its claims of divine law, the classical interpretations of natural law, and the rise of civil law within sovereign states all contributed to the tumult surrounding discussions of international law and the rights of indigenous peoples. Modern discussions of international law are not necessarily less conflict-ridden, nor more coherent.

The difficulty stems in part from the fact that international law is an evolving entity. There is a sense of certainty as to what is and is not international law in the past, but this certainty decreases the closer one comes to areas of rapid development in international law. Most of these rapidly evolving areas result from innovations in the present; but some such as the international law of indigenous rights are areas where for various political or economic reasons international law has not evolved when it might have been expected to in the past. This asynchronicity in the development of international law creates its own set of problems. For a long time it was assumed that international law was something that could be codified. It is only in the contemporary era of United Nations law that the concept of progressive development of international law has been accepted. The idea of the progressive development of international law occurring contemporaneously with its codification could have saved earlier scholars a great deal of agonizing. In modern times there is still a great deal of reliance on the codified international law, a great temptation to

9. *Id.* at 570.

10. For a previous discussion, see N.C. Weeks, *The International Law of Aboriginal Rights: An Evolutionary Approach*, 1982 (research paper on file at Osgoode Hall Law School, York University).

look to authorities, and a strong inclination to seize on historical interpretations of international law, no matter how poorly they fit. This is particularly true of the international law of indigenous rights because there is a presumption that since the issue has been addressed in some way historically, it is part of the dead wood of international law, rather than part of the living tissue of the tree. In fact, in real trees, to pursue the metaphor a little farther, living tissue runs the length of the tree, from the buried roots of the ancient past to the growing tips on the threshold of becoming.

In modern international law, when indigenous rights are addressed expressly, it is most often within the framework of international human rights law. For example in the United Nations system, the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities under the Commission on Human Rights is developing a draft declaration on the rights of indigenous people. At present, the only major international agreement dealing expressly with the rights of indigenous peoples is the Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries of the International Labor Organization (ILO 107). This convention is generally viewed as of limited value due to its paternalistic approach and narrowness of focus, and is currently under revision.

Other international human rights instruments do exist, however which are relevant to the discussion of Inuit rights to take whales for food. The International Covenant on Economic, Social and Cultural Rights addresses subsistence rights in Article 1.2:

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

In a sense, Pufendorf's concept of universal dominion resulting from occupation by a group of a whole, is reflected in this clause.

The International Covenant on Civil and Political Rights contains the same clause in Part I, Article 1.2. This Covenant has an Optional Protocol which provides a complaint procedure which can be invoked against parties when domestic remedies have been exhausted. These Covenants and the Optional Protocol are important to the development of indigenous rights at international law, even though they do not expressly address indigenous peoples, because they deal with rights held by all peoples, including indigenous peoples. With respect to Inuit rights, hunting whales is clearly a means of subsistence, and as such Inuit cannot be deprived of it under the Covenants. While some governments have tried to advance the argument that indigenous peoples are not "peoples", but rather "populations"; this self-serving position is clearly unacceptable. From the point of view of the rights of Inuit, it is difficult to think of a

people whose identity is more clearly defined in the imagination of the world.¹¹

It seems that the necessary elements exist to develop indigenous rights fully at international law. Early publicists provide authority and theoretical roots. Existing international agreements provide materials for revision and for inclusion. Processes like that of the Working Group on Indigenous Populations and the ILO 107 revision provide opportunities. What is required, it seems, are stronger incentives and vision of progressive development of the international law of indigenous rights.

The international law concerning whales and whaling has a different heritage, and the consideration of aboriginal subsistence whaling within it follows a somewhat different course than that of the evolution of indigenous rights. The collapse of commercial whaling due to depletion of the resource was followed by attempts to regulate the whale fishery under the Convention for the Regulation of Whaling in 1931. This agreement was superceded by the International Convention for the Regulation of Whaling (the "International Whaling Convention") in 1946.

The International Whaling Convention of 1946 was an international agreement to regulate what was then primarily a commercial activity. It continued the prohibition on taking of all right whales, "except when the meat and products would be used exclusively for local consumption by aborigines," that was adopted in 1931. In the view of the International Whaling Commission (IWC), it is this exemption which permits the Alaskan bowhead hunt. (Gambell in IWC Reports Special Issue 4:1982:1). While the jurisdiction of the IWC with respect to aboriginal subsistence whaling has been challenged legally, the issue has not been determined judicially. As those affected now operate on the basis of an agreement on co-operative management, this challenge seems unlikely to be resumed.

The original intention of the 1931 Convention and the International Whaling Convention of 1946 was to regulate the commercial whale hunt. With the ascendancy of the environmental movement in western democracies and the increase in numbers of non-whaling nations which became parties to the Convention. Concern for the depletion of whale stocks coupled with the emergence of an international whale protection movement led to redirection of much of the activity under the Whaling Convention to anti-whaling efforts.

External developments were skillfully orchestrated to strengthen this trend. In 1970, the General Assembly of the United Nations declared the principle of "the common heritage of mankind" in Resolution 2749

11. It is interesting to note that the Canadian constitution provides, in Section 35 of The Constitution Act that:

(1) The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed.

(2) In this act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

(XXV) with respect to the sea-bed and ocean floor. The United Nations Conference on the Human Environment in 1972 (The Stockholm Conference) espoused the concept of a global commons, and addressed marine mammal issues in particular, passing a resolution which called, inter alia, for a ten-year moratorium on commercial whaling. This had the effect of accelerating "the more conservative policies instituted by the IWC from 1965 on."¹²

The 1982 United Nations Convention on the Law of the Sea gave effect to the principles of "common heritage" and "benefit of mankind as a whole." It also made a number of specific references to the protection, conservation and utilization of living marine resources, including establishing the principle of co-operation "with a view to the conservation of marine mammals and in the case of cetaceans shall work through the appropriate international organizations for their conservation, management and study" under article 65. This in particular is regarded as an important development with regard to the possible expansion of IWC jurisdiction.¹³ In 1982, this mobilization of public opinion outside the arctic in support of a global ten-year moratorium on commercial whaling was successful and the moratorium was adopted by the IWC. Although the International Whaling Commission does not have express jurisdiction over subsistence whaling, it has acted to impose quotas on aboriginal hunts with respect to species that are of concern due to depletion by commercial whaling, such as grey whales and bowhead whales.

During the period leading up to the moratorium on commercial whaling, the aboriginal subsistence hunt of Alaskan Inupiat for bowhead whales became a highly contentious issue for environmentalists. In 1977, presented with new estimates as to the size of the original population, and of the then current stock, coupled with the harvest levels and struck and lost rates, the IWC confirmed "the protection status of the bowhead stock and decided to delete the exemption clause whereby the aboriginal catch had been allowed."¹⁴ The disagreement between the Inupiat hunters and scientists over whale numbers that occurred has been documented by Freeman (in press) and the resultant "politicization" of the IWC and of the United States delegation has been dealt with from an environmentalist standpoint by M'Gonigle.¹⁵ The response of the Inupiat to loss of access to their subsistence resource was to assert their subsistence rights.

Within the IWC itself, this situation held to the serious study of aboriginal subsistence whaling, and a number of measures were taken to come to terms with it as a consequence. In 1978 a working group of the

12. Ray Gambell, *Aboriginal/Subsistence Whaling*, Int'l Whaling Comm'n Rep., Special Issue 4, at 1 (1982).

13. M'Gonigle, *The "Economizing" of Ecology: Why Big, Rare Whales Still Die*, 9 *ECOLOGY L. Q.* 119 (1980).

14. *Id.* at 2.

15. *Id.*

IWC Technical Committee was established to "examine the entire aboriginal whaling problem"¹⁶ and a meeting of a panel of experts was convened in 1979, resulting in the publication of an IWC report on Aboriginal/Subsistence Whaling in 1982. In 1979, the IWC adopted a resolution on management of the Alaskan bowhead whale hunt. The following year, the IWC agreed to establish an ad hoc Working Group of the Technical Committee for the "development of management principles and guidelines for subsistence catches of whales by indigenous (aboriginal) peoples." More activity occurred when the IWC with respect to aboriginal subsistence whaling in the period following the crisis over the Alaskan bowhead hunt than in the preceding period from 1977 to 1980, the IWC moved from the 19th century colonial terminology of "aborigines" to the international legal language of "indigenous" peoples.

As a result of the 1981 meeting of the ad hoc Working Group, definitions of "aboriginal subsistence whaling", "local aboriginal consumption" and "subsistence catches" were agreed upon. The Working Group also agreed that:

[T]he full participation and involvement of the indigenous peoples are essential for effective whale management; and that it is in the best interests of all three parties involved (the IWC, the national governments and the indigenous people) to involve the indigenous people in the decision-making process.¹⁷

The Working Group also discussed possible management principles which could be applied in whale stocks utilized by aboriginal subsistence whaling. While some members of the group resisted the drawing of distinctions between commercial and subsistence whaling, it was considered that the management objectives of the two were different: management procedures oriented to commercial whaling were directed to maximizing yields, while the lower level of demand on stocks harvested for subsistence purposes would not demand maximization. The Working Group then acknowledged that the IWC had recognized a qualitative difference between commercial and aboriginal subsistence whaling and proceeded to agree on the following "Objectives for Management of Whale Stocks Subjected to Aboriginal Subsistence Whaling":

- TO ENSURE that the risks of extinction to individual stocks are not seriously increased by subsistence whaling;

- TO ENABLE aboriginal people, to harvest whales in perpetuity at levels appropriate to their cultural and nutritional requirements, subject to other objectives;

- TO MAINTAIN the status of whale stocks at or above the level giving the highest net recruitment and to ensure that stocks below that level are moved towards it, so far as the environment permits.

16. Int'l Whaling Comm'n, 33rd Mtg., para. 14 (1982).

17. *Id.*

Other matters of concern to Inuit whalers were also discussed, including: recognition that indigenous subsistence use includes trade and barter on a limited scale; that whaling has substantial cultural importance for the indigenous peoples concerned and plays an important role in maintaining social structure, and spiritual and cultural traditions of their communities.

The report of this meeting of the ad hoc Working Group is very positive, in comparison with the IWC meeting of 1977. In the 1977 IWC report the right of Inupiat to hunt whales became a major issue. Notwithstanding the unsympathetic view of some members with respect to aboriginal subsistence whaling, it was acknowledged that a very real distinction exists and that this distinction should be taken into consideration in determining management goals and principles for stocks which indigenous peoples hunt. It was also recognized that "important subsistence needs should not be jeopardized by commercial operations, including incidental catches."

With regard to the functioning of the IWC Scientific Committee, it was agreed that it should make recommendations with respect to stocks subject to aboriginal subsistence whaling, but should confine itself to biological advice on stocks, and should not address cultural, socio-economic or nutritional aspects of subsistence whaling.

Ostensibly the guidelines contained in the report of the ad hoc Working Group directed IWC activity with respect to aboriginal subsistence whaling. However in actual practice, a coalition of anti-whaling nations operating in a clandestine fashion has circumvented the letter and the spirit of the Working Group recommendation that full participation and involvement of the indigenous peoples are essential for effective whale management; and that it is in the best interests of all three parties involved (the IWC, the national governments and the indigenous people) to involve the indigenous people in the decision-making process. Calling itself the "Like-minded Group", this coalition of anti-whaling nations which hold the majority in the IWC meet in private to make the deals that ultimately become the "decisions" of the IWC in subsequent sessions of the Commission. Indigenous peoples are not welcome at these "Like-minded Sessions". In this way, the advances made by indigenous peoples in the IWC itself are undermined by the anti-whaling interests. The IWC can thus appear to honor the right of indigenous peoples to be involved in decisions affecting their welfare, but in fact the majority of its members are operating what is tantamount to a discriminatory secret society virtually under the nose of the Commission itself. Further doubt of the sincerity of the IWC with respect to its past dealings with indigenous people is cast by the fact that in 1988 the Working Group and the Commission displayed collective amnesia, calling for the consideration of definitions, obviously overlooking the work done in 1981. Some proposals were in fact submitted, but were withdrawn when the existing definitions were drawn to the attention of the Working Group by one of its members.

Despite the positive aspects of the activities of the Working Group,

indigenous peoples must still carry the burden of defining aboriginal subsistence whaling rights. While the language of the Working Group is positive, its application is not necessarily so. Some of the anti-whaling lobbies have been reluctant to accept aboriginal subsistence rights to whale at all, and they continue to promote their views. Each year those aboriginal peoples who whale are subjected to the inquisitorial review of their past actions, their present needs and their probable future. This, coupled with the cabal of "like-minded" nations, prejudices Inuit interests.

The onus remains on the Inuit and other subsistence whalers to justify their activities through the governments which represent them at the IWC. Given that a positive duty exists to recognize subsistence rights under international human rights law, it appears that some members of the IWC are shirking their responsibilities.

In general, the Working Group contribution with respect to aboriginal subsistence and the report of the panel held in 1979 demonstrates a more progressive approach to Inuit subsistence than the 1931 Convention reference to the exemption for aborigines. The importance of the co-operation and participation of indigenous peoples in decision-making affecting them and the resources on which they depend is given recognition. The importance of traditional values and the spiritual aspect of indigenous cultures are also acknowledged. While this is not the autonomy or dominion envisioned by any of the early scholars of international law discussed, it does appear to reflect in principle, recognition of cultural and social rights and needs.

The real challenge is the implementation of these principles and guidelines. Are indigenous peoples to be satisfied with platitudes while neo-colonial attitudes and practices exclude them from real involvement in the negotiations determining the fate of their subsistence hunting and of the people themselves?

The opponents and detractors of indigenous peoples remain. Some of them are environmentalists. According to M'Gonigal:

Environmentalists and Eskimos have been antagonists over the bowhead for three years. Yet the interests shared by native peoples and environmentalists are at the heart of the environmental movement, and resolution of this destructive issue is a top priority for the immediate future. The recent efforts of both of these groups in challenging the proposed oil and gas leases in the Beaufort Sea provides a basis for mutual accommodation and cooperation, but substantial differences remain. Ultimately, the two groups must agree on a balanced scheme providing for aboriginal subsistence and cultural survival in conjunction with a sound program of whale conservation.¹⁸

Sharing of common concerns for the environment has not been enough to bring the two together. If environmentalists truly want to come to consensus, they must be prepared to recognize both Inuit subsistence rights

18. *Id.* at 181.

and Inuit commitment to conservation as part of Inuit culture. To demand that Inuit be other than who they are is just more cultural imperialism from the same culture that was responsible for the commercial exploitation of the great whales in the first place.

The final section discusses this division between indigenous peoples and environmentalists, and between nature and man; with a view to a paradigm shift within international environmental and human rights law.

V. FROM CONFLICT TO PARADIGM SHIFT: INTERNATIONAL ENVIRONMENTAL LAW AND INDIGENOUS RIGHTS

Environmentalists have tended to assume that the paradigm shift which they believe is necessary with respect to economics and ecology is to come from within their own ranks.¹⁹ However, this analysis creates a simple dichotomy between whales as a subject of ecology and of economics. Humans are then either on the side of protection or economic exploitation. This scheme provides no place for indigenous peoples who depend on whales for food. This failure is at the root of the conflict between Inuit and environmentalists with respect to whales.

Recognition of indigenous rights is an area of progressive development in international human rights law. It poses a challenge to current assumptions about the formulation of conservation measures within international environmental law.

The problem of endangered peoples is like that of endangered species. With continued neglect it will solve itself, the people will die, or the species will become extinct. But the loss to humanity will be incalculable. If you believe, as some of us do, that the future depends on our ability to restore, at a higher technological level, the old man/nature continuum, the loss of those who can guide us would be tragic.²⁰

If the test of sustainability is persistence over time, then the current sustainable development debate has much to gain from cooperation with societies and cultures such as Inuit society and culture. Yet, indigenous peoples continue to be relegated to the periphery in policy development and decision making which affect them and the living resources on which they depend.²¹ Despite these exclusions, Inuit formed the Inuit Circumpolar Conference ("ICC") to work for the survival of Inuit culture and the recognition of Inuit rights. Through the ICC, Inuit initiated the Inuit Regional Conservation Strategy to protect the arctic environment by promoting sustainable development and conservation.

The international dialogue regarding global change and the climatic impact of human activities suggests that the reintegration of humankind

19. *Id.* at 120-121.

20. R. Dasman, IUCN Bulletin.

21. No Inuit are invited to the "informal" discussions of the "Likeminded Group" at the IWC meetings where policy and decision making actually take place.

into nature is deferred at our collective peril. In the arctic environment, the Inuit experience stands in contrast to the perspectives and beliefs of western industrial society. The Inuit experience indicates that it is not human activities that control animals, but rather climatic conditions. The successful adaptation of the Inuit to their environment is a unique contribution to make to the global change debate.

Indigenous peoples like the Inuit are "ecosystem peoples" in contrast "biosphere" people who depend on the international market economy.²² "The economy of ecosystem peoples is in balance with the dynamic functioning of natural ecosystems. The economy of biosphere peoples tends to be destructive of such ecosystems, and special measures must be taken if even samples (of those ecosystems) are to be preserved."²³ The challenge for other societies is to adapt to their environments and function harmoniously within them.

Inuit subsistence whaling should not be treated as an isolated concern. The current debates over global change and sustainable development challenge assumptions as to what is and what is not relevant to the future of humankind and this planet. The failure of existing models with respect to development and conservation demands the development of new ones. The re-evaluation of subsistence economies, such as the Inuit, is a contribution which can be made to the discussions of global change and sustainable development. It may also finally lay to rest the social Darwinism of Haeckle and others who pronounced indigenous peoples like the Inuit "primitive" and used the pronouncement as justification for violation of their rights, ranging from the right to life as in the case of the Beothuks, to the right to liberty as in the case of Sami in the Berlin zoo, to the right to culture, language and religious freedom as in the case of so many indigenous peoples throughout the Americas.

The use of labels like "primitive" is indicative of intellectual colonialism. As archaeologists like McGhee pointed out, Inuit culture is rich and complex. The fact that Europeans historically failed to understand Inuit and their culture provides no justification for the violation of Inuit rights. Even the early publicists were unsympathetic to European claims on indigenous lands, including the supposed title of discovery. It is clear that indigenous peoples like Inuit occupied their lands, and through the positive community of Pufendorf, can be said to have dominion over all things in those lands, moveable or immovable, including wildlife. The dominion which Inuit had was not hierarchical in the way that the dominion as conveyed by the Bible was understood to be. Inuit hunted then as now for food in order to survive, not for sport or pleasure. They also hunted on an equal footing with their prey within the environment. When climatic conditions were unfavorable and animals became scarce, Inuit employed mechanisms of social control such as taboos to regulate their

22. R. Dasman, *supra* note 20.

23. *Id.*

society. In this way, Inuit responded to their environment, adjusting their levels of demand to what the environment could provide. As Malaurie noted, the Inuit of Thule had a complicated system of forecasting future abundance and scarcity, based on the acute observations by hunters of all forms of natural phenomena over long periods of time. By his calculations, Malaurie observes that necessary adjustments were made to social customs approximately 22 months in advance.

Western urban industrial society takes the opposite approach, promoting unending growth at the expense of nature, changing only the mode of exploitation, never decreasing the level of the demand. This is due in part to the separation of urban industrial man from nature. For him, nature becomes an object to be exploited, whereas nature for a hunter attuned to the spiritual connections among living things, is an extension of self. This fundamental philosophical difference has many consequences. It is at the root of the conflict between environmentalists and indigenous peoples because the environmentalist response to environmental deterioration has been a backlash against this perception of the over-exploitation of nature. Nature is sanctified, but man remains outcast under this regime, and environmentalists adopt the role of speaking for animals. Those who depend on wildlife are lumped together with all exploiters, regardless of values or traditions or spiritual dimensions. In the environmentalist struggle for protection of nature through control of other humans, nature remains an object. The environmentalist cannot enter into a dialogue with nature as the hunter can, because the environmentalist will not accept nature on her own terms. The environmentalist communes with nature on his own terms, in a monologue. The environmentalist is still carrying the burden of the hierarchical concept of dominion.

The man-nature dichotomy of urban industrial society, reveals itself in an attempt to deal with environmental degradation by increasing environmental regulation, whether as an end in itself, or aimed at species preservation or habitat protection. Another response to the apparent failure of the stewardship of human beings with respect to other species on the planet has been the emergence of the animal rights movement, which attempts to bridge the gulf between urban industrial societies and nature by extending concepts that originated in human rights to animals. From the point of view of Inuit and other indigenous cultures, animals and their spirits are respected and shown honor according to tradition, but it is a dialogue, as the animals allow themselves to be taken only by those who respect them. A hunter who abuses or who fails to show respect to the animals he takes will not be successful in the hunt. Failure in the hunt is failure in life.

The consequence of the separation of development of indigenous rights in international law from the development of international law concerning environment and living resources is perpetuation of the gulf between humankind and nature which exists in western industrial society and in western thought in general. The objectification of nature (which

results in part from this separation of humankind from nature) gives rise to many environmental problems when put into common practice. For example, rivers become sewers and impair living organisms rather than nourishing them.

The domination of urban industrial society internationally promotes the objectification of nature globally. The consequences for indigenous peoples of this imposed separation of humankind from nature are frequently severe. They find themselves barred from or limited in their access to the living resources on which they have depended and co-existed with, in some cases for thousands of years. The reasons for the denial of access are varied: perhaps corporate and commercial interests have acquired some "legal" interest through the political process, notwithstanding the prior claim of the indigenous group affected, as in the case of the Indians of the Brazilian rain forests; or depredation of exploitative colonial agents have seriously depleted the resource, as in the case of the Inuit and the great whales of the arctic; or the resource which people depend on is threatened because its habitat is degraded due to improper environmental practices, as in the case of the whitefish used by the Indians of the English-Wabigoon River system affected by mercury pollution from the wood products industry.

The point is that it is not the indigenous perspective which separated humankind from nature and it is not generally the activities of indigenous subsistence users of a lining resource which are responsible for its depletion or degradation. Yet they have frequently been the ones most burdened by attempts to rectify the situation.

Indeed as our understandings of the environment are refined we become more aware of the poverty of our values and of the limitations of our legal models, both domestic and international. This unhappy awareness is in reality an opportunity to redefine our models and close the gap between the real and the ideal, of the ecological and the legal. In effect we face the challenge of a paradigm shift.

Some would say that the necessary paradigm shift has already occurred with the Stockholm Conference and the development of the concept of "the common heritage of mankind." However to take whales and to declare that they are the "common heritage of mankind" and therefore would not be hunted by people who have depended on them and whose culture is based on that hunt, is a kind of intellectual imperialism closely related to the historical imperialism to which indigenous peoples have already lost so much. Fortunately, the International Whaling Commission has opened the door to a more pragmatic approach, recognizing at least in principle the legitimate interests of indigenous peoples with respect to whales and their management. It remains to be seen how effectively principles can be transformed into practice. This is not to deny or ignore the necessity of whale conservation. Conservation is part of the relationship between indigenous cultures and the environment of which they are a part. This is what makes indigenous cultures sustainable. Rather it is a plea for an equitable distribution of costs and benefits. Without such an

equitable approach to conservation, the heaviest burden of conserving the common heritage will fall on those who have already been marginalized by colonial and industrial exploitation.

It is not good enough to attempt to globalize the environmental perceptions of western industrialist societies and call it a paradigm shift. What is necessary is 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. Too often the environmentalist looks to indigenous cultures for support on environmental issues that he defines in his cultural context, rather than in the context of indigenous culture. M'Gonigal has correctly identified the need for cooperation. The recognition of indigenous rights is a first step. A paradigm shift within international environmental law is a next step.

If the old man/nature continuum is to be restored, the harmonization of international environmental law with respect to the rights of indigenous peoples is urgently needed. The discussion of Inuit subsistence whaling presented in this paper is intended to respond to what Inuit view as an urgent matter of cultural survival: the right to take whales for food. At the same time this issue offers useful insights into the larger concern of reconciling human rights and environmental law in the international community in a way that truly is for the benefit of mankind as a whole. The situation with respect to the International Whaling Commission will remain tense, but the recognition of the Working Group on Aboriginal Subsistence Whaling that indigenous peoples must be a party to any discussions affecting their aboriginal subsistence rights, is a necessary first step. Real progress will depend on the "informal" discussions of the "Like-minded Group" who are basically opposed to whaling, and whether or not they can envision a paradigm within which indigenous peoples, governments, and the IWC can begin to reconcile the cone conservation requirements that are the legacy of the commercial whaling era with indigenous needs and rights.

