CONFLICTING INTEREST: STATE'S OBLIGATION IN RESPECTING THE CULTURE OF INDIGENOUS PEOPLE AND PROTECTING WHALES

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Marsha

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Chapter I

1. Introduction

1.1. Whales: Conservation Status and Indigenous Peoples

Whale is one of the largest mammals in the world which play a significant role in the nutrient cycling of the marine environment. According to Australian researchers, its feces may help the oceans to absorb the carbon dioxide from the air as it releases approximately 50 tons of iron every year. The phytoplankton (tiny marine plants) are then, stimulated by the iron, grow and absorb the CO2 on its photosynthesis process.[1] Therefore, the scientists believe that the giant whales such as the sperm whale could act as the ecosystem engineer in the global ocean as it maintains the stabilization of life in the oceans[2] which affecting the greenhouse gas levels. The whales thus help to "fix" the climate change.

The international community has generally accepted that whaling activity is indisputably unsustainable and subsequently banned by both international and domestic law. For example, the sperm whale is categorized as *vulnerable* (VU) by *International Union for Conservation of Nature and Natural Resources* (IUCN)[3] and listed on Appendix I in the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)[4]. Moreover, the whales are also specifically protected in the Appendices I and II of the *Convention on the Conservation of Migratory Species of Wild Animals* (CMS)[5]. As for the regional law works in practice (e.g. Indonesia and America), at least two traditional communities hunt the big whales such as sperm and gray whales in the national territory. This practice contributes to the population decline of marine mammals in the area. As an illustration, the population of the sperm whale itself has drastically declined between 1950 until 1970 due to large scale of commercial whaling in several areas such as North Pacific and Antarctica, and the current population trend is still decreasing

[1] BBC News. (2010). *Sperm Whale Faeces 'helps oceans absorb CO2'*. Retrieved from: https://www.bbc.com/news/10323987

[2] Tech Times. (2014). *Baleen and Sperm whales are ocean's 'ecosystem engineers,' new study says*. Retrieved from: https://www.techtimes.com/articles/9815/20140706/baleen-sperm-whales-oceans-ecosystem-engineers.htm

[3] IUCN Red List. (2008). *Sperm Whale* (Physeter macrocephalus). Retrieved from: https://www.iucnredlist.org/species/41755/10554884

[4] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). (1973). *Appendices I, II, and III.* Retrieved from: https://www.cites.org/eng/app/appendices.php

[5] Convention on the Conservation of Migratory Species of Wild Animals (CMS). (1979). *Appendix I & II of CMS.* Retrieved from: https://www.cms.int/en/species

based on the data from IUCN.[6] The problem is, the reproduction of female whales are relatively slow with only gave birth to one calf every few years and result in the impediment to recover their population. Therefore, the declining number of whales by whaling activity will severely impact their ecological role in the marine environment.[7]

However, the state's obligation to protect the wildlife constitutes a delicate balancing act with the rights of indigenous people. On one side of the spectrum, the prosperity of indigenous people is assured in the Preamble of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which delineates the recognition of the traditional practice of indigenous people while respecting the distinction of the tradition between regions around the world.[8] On the other hand, in particular regions, these respected traditional practices involve some activities that also supposed to be protected under the legal instruments. These overlapping interests then led us to an assumption: whether a certain custom of indigenous people is supposedly qualified as a lawless act.

As a case illustration, the Lamalera tribe who dwell in East Nusa Tenggara Province of Indonesia, have been hunting the whales for centuries including dolphins and mantas in the Savu Sea. Important to realize, the Savu Sea is a critical migratory route for the whale and dolphin species thus needs to be strictly preserved. The fishermen in this village argue that their whaling activity is for their own consumption since it has been their tradition from their ancestors since 1643.[9] According to the categorization by the *International Whaling Commission* (IWC), the Lamalera's hunting as *subsistence whaling* since it is intended to 'meet immediate nutritional and cultural needs' and not for commercial purposes.[10] However, this practice is started to be questioned by the conservationists and animal activists due to the changes in their hunting capabilities by using

[6] IUCN Red List, *Sperm Whale*.
[7] Australian Government (Department of the Environment, Water, Heritage and the Arts). (2010). Marine Publications and Resources: *Whale Protection*. Retrieved from: https://www.environment.gov.au/system/files/resources/0bc1c82b-0a06-4113-9704-2cce2b13af83/files/fs-whale-protection.pdf
[8] United Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP). (2007). Preamble.
[9] Barnes, R.H. (1996). *Sea hunters of Indonesia: fishers and weavers of Lamalera.* Oxford (GB): Clarendon Press, 399.
[10] Donovan, G.P. (1982). *The International Whaling Commission and Aboriginal/Subsistence Whaling (with special reference to the Alaska and Greenland fisheries): Report of the International Whaling Commission Special Issue 4*. Cambridge, 89.

modern boats rather than the traditional ones. This action leads to prejudice that the Lamalera fishermen were involved in the trafficking of wildlife parts.[11]

Concerning to the issue mentioned above, this research will argue the lawfulness of the indigenous peoples' activity to harvest the whale under the human rights law, nature conservation law, and other related legal instruments perspectives. Two samplings of cases in a developed and developing country will be taken as the core of this research in order to offer recommendations to balance both interest in the future. The next chapter will draw a clear line and strict definition regarding to the criteria about community that considered as "indigenous" and defining the whale that protected under the law. Subsequently, the discussion will continue on the obligation that needs to be implemented by the states as a compliance to both international and regional law. Chapter 3 devotes to the case law in order to underline the measures that have been taken by national governments to address the issue. Chapter 4 continues with a "neck-to-neck" choice between the protection of whales and the culture of the people by referring to existing legal frameworks while offering other possible legal measures to maintain both interests. Chapter 5 will lastly set out the conclusion.

1.2. Research Questions

This research is going to highlight the unresolved gaps in the existing legal frameworks by examining how the conflicting interest between the rights of indigenous people and the state's obligation on the conservation of biodiversity can be addressed by international and domestic law. The study will then focus on the custom of certain tribes that kill the protected marine mammals, especially whales, for their tradition purposes in order to show the interplay between the culture and environmental protection under the existing legal instruments. Two relevant case studies in two different parts of the world will be analyzed and compared in order to answer the research question. The first case is the whaling activity from the indigenous American peoples known as "Makah tribe", while the second whaling is taking place in Indonesia which known as "Lamalera tribe". These two samplings are deliberately taken to compare the contrasting practice of the dispute settlement in the developing country (Indonesia) and the developed country (United States).

[11] The Asean Post. (2018). *Developing an appetite for whale conservation.* Retrieved from: https://theaseanpost.com/article/developing-appetite-whale-conservation

This issue is critical to discuss in order to preserve the conservation status of the marine mammals, particularly the whales. The declining number of whale population will contribute to the ocean imbalance and the indirect effect in the effort to slow the climate change. While the conservation effort needs to be improved, respecting the rights of the indigenous people also need to be taken into account as it is also guaranteed by the law.

The overarching research question is as follows:

'*What is the role of international and domestic law in addressing the conflicting interest between respecting the culture of indigenous peoples and protecting whales?'*

In order to answer the main question, the following sub-questions are going to be discussed:

1) What is the relationship between the conservation of marine mammals and the protection of cultural interests in international law?

   This sub-question will reveal the relationship between the conservation of marine mammals and the protection of the cultural value of indigenous people in order to conclude how the existing law dealing with the relationship between both issues. The chapter will utilize related documents of international and regional legal frameworks to give an overview of the definition of both terms in the current legislation and then identify the correlation by looking at the problem background.

2) How have possible conflicts of interests been dealt with in practice?

   This part is going to present the discussion on two cases in separate sub-chapters in order to give a real example of the law implementation and dispute settlement of the conflict between the indigenous people and the protection of marine mammals. The first part discusses the role of whale in the cultural life of Makah tribe, the recent status of the whaling permission for the Makah, and a reference of measures that have been taken by the international and US national court to address the conflicting interest of the indigenous people and the whale, while the second part provides the data of the social constructions of whale hunting by the Lamalera tribe and the status of subsistence whaling of the Lamalera tribe based on the applicable national and international legal instruments.

3) What are the implications of current practice for the future of whale conservation law?

   This part is going to be an analysis chapter in which the conclusion will be drawn from both cases, and the law will be re-examined: is there anything to be changed in order to balance the interest in the future? The first part presents the discussion about the possibility

of joint implementation of legal instruments in order to reduce the regulation gap in the current legal practice and the second part delineates the possibility of collaborative natural resource management partnerships in the protected natural areas between indigenous communities and the government agencies.

1.3. Case Study & Methodological Approach

This research will primarily use the desk study approach by doing the legal analysis of the literature, treaties and the case law on the issue of marine mammal conservation and conflicting cultural interests. The first sub-question will be elaborated from the legal documents and books. Subsequently, two case studies will be utilized as the representatives of broader issue: Makah tribe and Lamalera tribe. The first one is from the indigenous American peoples who live in the Pacific Northwest of the continental of United States which several times being involved as a party in the court for their tradition of hunting the gray whales that also protected before the law and requesting the authorization of treaty on whaling right under the 1855 Treaty of Neah Bay to the United States authority. Meanwhile, the latter whaling is the tribe that has been hunting the sperm whales for centuries in Indonesia and currently under suspect whether they are associated with commercial whaling. Lastly, the normative research will be used in order to evaluate the outcomes of the research as well as proposing some recommendations to the current system and legislation.

Chapter II

2. The Relationship of Indigenous Peoples' Rights and Nature Conservation

There are several rights of indigenous peoples that recognized in the principle of human rights to harvest the marine mammals as a part of cultural tradition. However, there should be a clear line in which conditions the terms apply in order to identify the legality of their practice. The failure to distinguish the legal context of both terms may lead to the illegal trade of commercial whaling which will contribute in increasing the incentive for whaling activity for economic purpose as well as significantly decline the whales' population in the marine ecosystem. Therefore, in addressing the link between the rights of the indigenous people and the nature conservation especially whale protection, this chapter aims to evaluate the definition and roles of both issues in international and national level (United States and Indonesia) in order to contrast the practice in both countries in Chapter 3.

2.1. Indigenous Peoples

Defining the indigenous people is not as easy as it seems since the term is still facing conceptual problems both in the national and international system. For example, if indigenous people understood as people who reside in a certain area as their homeland, what about the population that migrates in the process of becoming 'indigenous'? Alternatively, in another case, how about the people who reside in a country as a part of their nationality? Do all of them can be recognized as indigenous people? Moreover, this the term is also closely related to 'minorities' group as they are similar people who have been in non-dominant position whose characters generally different compared to the majority in the societies they live in[12] and also compared to 'non-self-governing territories' as the 'distinctiveness' factor is also present in both terms.[13] Even though the 'indigenous people' term is broadly acknowledged in the international community, certain countries are denying that they have any indigenous people in the territory. It is also problematic to draw precise boundaries to distinguish indigenous and non-indigenous people[14] since there is

[12] Moeckli, D., Shah, S., & Sivkumaran, S. (2010). *International Human Rights Law.* Oxford: Oxford University Press, 351.
[13] UN Working Group on Indigenous Populations. Evolution of Standards Concerning the Rights of Indigenous People: Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of 'indigenous people', E/CN.4/Sub.2/AC.4/1996/2. (10 June 1996).
[14] Ross, A., Sherman, K.P., & Snodgrass, J. G. (2016). *Indigenous Peoples and the Collaborative Stewardship of nature: Knowledge binds and institutional conflicts*, 24. Retrieved from: http://ebookcentral.proquest.com. Created from uvtilburg-ebooks on 2019-04-23 07:14:16.

no formal definition that unanimously accepted in any international treaty excepts the recognition on its characteristics and distinct identities.[15] Therefore, the outcome of this chapter will then help to understand the definition of indigenous people in the international and national context in order to assess the legality of indigenous peoples' right in harvesting the whales under nature conservation law and human rights law.

2.1.1. Indigenous Peoples in International Law

Since most of the legal regimes are designed to protect the individuals' rights, it is still questionable whether the law also particularly guarantees the rights of indigenous people. The indigenous people need a specific instrument which they can rely on to fulfill their fundamental rights and a foundation to address the challenges that they may encounter in the future.[16] Despite the absence of a formal definition of indigenous people as mentioned above, the protection and preservation on their traditional value have actually been highlighted in the UN Working Group on Indigenous Populations which listed at least four characteristics that need to take into account to determine whether a certain group is classified as indigenous people, as quoted:

> "(a) priority in time, with respect to the occupation and use of a specific territory; (b) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; (c) self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and (d) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist."[17]

These characteristics, although still not reach a universal definition, have been considered as appropriate understanding on the concept of the indigenous people by the legal experts (including indigenous experts) and international organizations.[18] In the UN Development Group Guidelines on Indigenous People Issue, other several characteristics of indigenous people from various sources are also mentioned, for example, the ILO's Indigenous and Tribal Peoples Convention 1989, The Study on the discrimination against indigenous peoples by Martinez Cobo Study, and

[15] Moeckli, D., Shah, S., & Sivkumaran, S. (2010). *International Human Rights Law.* Oxford: Oxford University Press, 351.
[16] UN Development Group Guidelines on Indigenous Peoples' Issues. (February 2008).
[17] UN Working Group on Indigenous Populations. Evolution of Standards Concerning the Rights of Indigenous People: Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of 'indigenous people', E/CN.4/Sub.2/AC.4/1996/2. (10 June 1996).
[18] Ibid.

the UN Declaration on the Rights of Indigenous (UNDRIP) Article 33. However, the only international binding instruments that explicitly defines the states' obligation to respect the rights of indigenous people is the ILO Convention No. 169 as a modified result of the preceding conduct, No. 107. This convention sticks to specific elements to describe the indigenous people, *inter alia*, those who dwell in the area as the pre-conquest or colonization societies, having territorial connection with their ancestor whom inhabitant in a region at the time the state was created, and those who retain their own social, economic, cultural, and political institutions.[19] Thus, on the basis of this recognition, this convention ensures the duty of the government to respect the integrity of the indigenous people as well as the fundamental freedoms and full measure of human rights in relation to their identity, territory, culture, physical welfare, autonomy, and the participation in the political and social national life.[20] Working in harmony with the ILO Convention, the UN Declaration on the Rights of Indigenous Peoples has comprehensively set provisions that mainly reflected on its Article 1 (rights of fundamental freedom as recognized in international human rights law instruments, UDHR, and the Charter of the United Nations), Article 3 (right to self-determination), and Article 4 (right to autonomy or self-government). These provisions have been influential as a universal framework and national laws, albeit the lack of legally binding character and the absence of monitor mechanism to ensure its implementation.[21] This declaration is basically covered quite a range of indigenous peoples' issue while strongly propose the States to recognize, guarantee, and implement standard-setting instrument for the protection of the indigenous people which also include the recognition of the indigenous women, children, and youth as those who have specific needs.[22] Other international legal instruments on human rights law such as International Covenant in Civil and Political Rights (Article 27), Committee on the Elimination of Racial Discrimination (General Recommendation No.23, Annex V, Para. 4), and other soft law such as the 2001 Universal Declaration on Cultural Diversity and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions also imply the obligation of the state to respect and support the indigenous way of living.[23]

[19] ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries N0. 169. (1989). Article 1.
[20] Moeckli, D., Shah, S., & Sivkumaran, S. (2010). *International Human Rights Law.* Oxford: Oxford University Press, 352.
[21] Ibid.
[22] UN Development Group Guidelines on Indigenous Peoples' Issues. (February 2008).
[23] Bowman, M., Davies, P., & Goodwin, E. (2016). *Research Handbook on Biodiversity Law.* Cheltenham (UK): Edward Elgar Publishing Limited, 310.

Accordance to brief discussion above, the Governments are providing measures in order to remove and prevent discrimination while promoting social and political inclusion for indigenous people which are reflected in several elements *inter alia*, equality, gender equality, self-determination, collective rights, the right to development. Continuing the discussion on their rights to harvest the marine mammals, especially whales, we will take a closer look to the 'right to self-determination' and 'right to development' elements since both are closely related to their whaling activity as a cultural tradition. However, the definition of indigenous people in the countries where the whaling activity occurs need to be examined first to identify whether it also accordance with the international recognition on the rights of indigenous people discussed above.

2.1.2. Indigenous Peoples in National Law (United States and Republic of Indonesia)

The modernization of the world leads to the difficulties for the indigenous groups to be recognized and identified in their homeland. Therefore, the definition of indigenous people in the countries where this research disembogues is crucial to be highlighted in order to give a foundation in analyzing the lawfulness of whaling activity in the next chapters.

2.1.2.1. United States

In the United States of America, it is safe to say that the U.S. government has a well-established foundational principle about the status and rights of the Indian tribes. In order to obtain the specific recognition that allows the tribe members to exercise their powers on sovereignty or self-government, they need to be validated by the U.S. legal system. The unrecognized groups, in this matter, are in a disadvantaged position due to the absence of federal recognition.[24]

The identification of the member of the tribes is not determined from a single federal or tribal criterion since the standard would differ from tribe to tribe. Similarly, the eligibility of the tribes' member to obtain federal services also depends on which program they are applying to. As a major difference, the term "American Indian" in ethnological and the legal/political sense cannot be equated. This is because the rights, protections, and services guaranteed by the U.S. government to the tribes' member is only when she or he is a member of a federally recognized tribe, not merely based on ethnological sense.[25] In order to be federally recognized as Indian group, Congress

[24] UN Human Rights Council. (August 30, 2012). *Report of the Special Rapporteur on the rights of indigenous peoples: The situation of indigenous peoples in the United States of America, James Anaya,* A/HRC/21/47/Add.1. Retrieved from: https://turtletalk.files.wordpress.com/2012/09/8-30-12-spec-rapporteur-report-us-indigenous.pdf

[25] Bureau of Indian Affairs. (Acc. June 10, 2019). *Frequently Asked Questions.* Retrieved from*:* https://www.bia.gov/frequently-asked-questions

enacted Public Law 103-454 which is known as the Federally Recognized Indian Tribe List Act (108 Stat. 4791, 4792) to regulate three ways that can be taken to obtain the federal recognition: by Act of Congress, by the administrative procedures under 25 C.F.R. Part 83, or by decision of a U.S. court.[26]

Regarding to the laws and policies, the recognition of the status of indigenous minorities has been accepted from the beginning. The U.S. government itself has a legal obligation to respect the relationship with Indian tribes in almost 600 treaties and other contracts, including the tribes' rights as a nation as well as their property rights.[27] The U.S. Constitution has recognized three levels of governments, including federal, state, and tribal. This acknowledgment is reflected on Indian tribes that have their own sovereignty on its members and tribal lands through the inherent rights. There are particularly 573 federally recognized American Indian and Alaska Native tribes with around 154 tribally operated investigative/police programs.[28] Even though United States is one of the four countries that voted against the adoption of UNDRIP in 2007, they eventually reversed their position in 2010 by officially announced their endorsement on UNDRIP and would pursue the implementation of it.

The act of the U.S. government to fulfill the rights of the indigenous people in the term of rights to self-determination was established in the early phase when the government was started to recognize the Native tribes as sovereign nations and began treaties with them. These rights are strengthened by two significant pieces of legislation that highlight the tribal self-determination and self-governance: The Indian Self-determination and Education Assistance Act of 1975 and the Tribal-Self-Governance Act of 1994. Therefore, in this case, the federal recognition shall be used as a benchmark whether the Indians are able to exercise their right of self-determination effectively. The federal recognition will allow the Indians to have a government-to-government relationship in order to be involved in the federal decisions concerning their affairs, including the monetary and environmental resources. The collaboration and cooperation with tribes and the

[26] Ibid.
[27] Spirling, Arthur. (Septermber 13, 2011). *US Treaty-making with American Indians: Institutional Change and Relative Power*, 1784-1911. Retrieved from: https://www.nyu.edu/projects/spirling/documents/indianbargain.pdf
[28] Lithopoulus, Savvas. (2007). *International Comparison of Indigenous Policing Models.* Canada: Department of Public Safety. Retrieved from: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/cmprsn-ndgns-plcng/cmprsn-ndgns-plcng-eng.pdf

states are conducted through compacts or agreements on mutual concern issue such as law enforcement and environmental protection.[29]

2.1.2.2. Republic of Indonesia

According to the Indigenous Peoples Alliance of the Archipelago (AMAN), Republic of Indonesia is a home for approximately 75-80 million population of Indigenous people. The foundation of the recognition of indigenous people in Indonesia is recognized on the third amendment of Indonesian Constitution Article 18B (2). Moreover, in the recent government Acts and Decrees, Indonesia is using the term of *'masyarakat adat'* (customary communities) or '*masyarakat hukum adat'* (customary law societies) to identify the indigenous people. This term can be found in recent national legislation that implicitly mention the rights of peoples considered as customary law societies, such as Act No. 39/1999 on Human Rights, Act No. 5/1960 on Basic Agrarian Law, Act No. 5/1967 on Basic Forestry Law, Act No.7/2004 on Water Resources, Act No. 27/2007 on Coastal Areas and Small Islands, and Decree No. IX/MPR-RI/2001 on Agrarian and Natural Resource Management Reform.[30]

However, in response to the review during the 2012 Universal Periodic Review at the Human Rights Council, Indonesia denied the existence of indigenous people in the area. Explicitly, Indonesia stated that although the Government of Indonesia supports the promotion and protection of indigenous people worldwide, the application of the concept of indigenous people as defined in the UN Declaration on the Rights of Indigenous People is not recognized in the country.[31] This response was in contrary with the Indonesian government act on Constitutional Court decision No. 35/PUU-X/2012 which emphasizes the constitutional rights of indigenous groups over lands and territories, as well as collective rights for customary forests. In this constitution, Indonesia uses the reference based on UNDRIP and ILO Convention No. 169 on Indigenous and Tribal Peoples, which previously turned down by Indonesia to be ratified.[32] Indonesia also using the term

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[29] Bureau of Indian Affairs. (Acc. June 10, 2019). *Frequently Asked Questions.* Retrieved from*:* https://www.bia.gov/frequently-asked-questions

[30] Chrisitina, Marina. (January 2012). *Recognition of Indigenous Peoples in Indonesia: An International Human Rights Law Approach (*Master's thesis). Retrieved from: http://arno.uvt.nl/show.cgi?fid=128392

[31] UN Human Rights Council. (September 5, 2012). *Report of the Working Group on the Universal Periodic Review: Indonesia.* Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/21/7/Add.1. Response to Recommendation 109.7 and 109.36.

[32] Indigenous Peoples Alliance of the Archipelago (AMAN) and Asia Indigenous Peoples Pact (AIPP). (Acc. June 10, 2019). *Joint Stakeholders' Submission on the Situation of Human Rights of Indigenous Peoples in Indonesia.* Submission Prepared for 3rd Cycle of Universal Periodic Review of Indonesia, 27th Session of the Human Rights

'indigenous peoples' in numbers of official documents and reports such as on the 5th National Report to the Convention on Biological Diversity in 2015.[33]

The inconsistencies of the Indonesian government in defining and regulating the rights of indigenous people were forming many conflicts between indigenous groups and the government. Despite the recognition of customary law societies as mentioned in its national law and the adoption of UNDRIP in 2007, Indonesia has merely acknowledged the existence of indigenous people in a symbolic manner. For example, the Indonesian government claimed that all the lands and forests in Indonesia are under the control of the government under Article 5 (1) of Act No. 5/1967. It means that the land owned by indigenous people in Indonesia is not originally inherited from their ancestor, but from the authority of the Indonesian government as the controller. Unlike the rights of indigenous people guaranteed in the international legal instruments such as UNDRIP and Convention 169 that fully recognizes land rights as the inheritance rights of indigenous people through ancestry even before the modern development taking place, Indonesia recognition to its indigenous people is more likely to limit their rights by having control over all lands and forests.[34] Therefore, the legal instrument concerning the definition and rights of indigenous people in Indonesia is still unclear due to the inconsistencies of the Indonesian government in regulating this matter.

2.2. Whales Protection under International Law

Talking about the preservation of whale under international law, there are three major international legal instruments concerning the protection of the whales. Firstly, the main supervising actor for whaling industry is the International Whaling Commission (IWC) that was established in 1946 in order to enforce the provisions of the ICRW (International Convention for the Regulation of Whaling). The ICRW originally initiated to provide protection to 'all species of whales from further over-fishing' and aim to 'ensure proper and effective conservation and development of whale stocks' as stated in its Preamble. [35] The goal is basically to gain maximum benefit on the sustainable usage of whaling activity by set restrictions and limits the quotas on whale harvesting, called a Schedule. Therefore, the countries that opposed the whaling activity were able to place

Council (Apr-May 2017). Retrieved from: http://www.aman.or.id/wp-content/uploads/2016/09/INDONESIA_AMAN_AIPP_UPR_3rdCycle.pdf

[33] Report available at https://www.cbd.int/doc/world/id/id-nr-05-en.pdf

[34] Chrisitina, Marina. (January 2012). *Recognition of Indigenous Peoples in Indonesia: An International Human Rights Law Approach (*Master's thesis). Retrieved from: http://arno.uvt.nl/show.cgi?fid=128392

[35] International Convention for the Regulation of Whaling (ICRW). (1946). Preamble.

moratorium or technically known as 'zero quota' under this convention. This option was actually available because the countries that in favor of whaling were outnumbered by the opponent which led to the transformation of IWC into a complete body aimed at conservation effort and leave its initial economic-purpose.[36] This shifting role was also incentivized due to the depletion of several major whale populations in 1960. The 10-year moratorium in commercial whaling was then imposed in 1986 in order to conduct a proper research on the status of the whale populations along with the effort to recover and increase the size of the populations. In this matter, the whaling countries such as Russia, Norway, and Japan were given three-year period to gradually bring the whaling practices come to an end. This moratorium only allowed for exception under subsistence and scientific whaling as proposed by the US earlier at IWC 25—10 years before it was actually adopted—and reflected in the amendment to the Schedule, para. 10(e).[37] Specifically, the special permit whaling or known as scientific whaling is exempted from the moratorium under Article VIII of the ICRW which responsibility to regulate is given to individual governments instead of IWC. The application of this permit in practice can be seen in the case *Australia v. Japan: New Zealand Intervening* in 2010 when the Court decided that Japan had breached some provisions invoked by Australia regarding to Japan's whaling activity.[38] Meanwhile, the subsistence whaling consists the IWC recognition on the indigenous or aboriginal subsistence whaling that does not seek to earn any profit from the practice but rather to fulfil the traditional culture and nutritional requirement of the indigenous people. The management for aboriginal subsistence whaling was adopted by the IWC in 1981 consisting three objectives: (1) ensuring the subsistence whaling that does not contribute to the increasing risks of extinction to individual stocks; (2) enabling the harvesting of whale by aboriginal people to their cultural and nutritional requirements are at appropriate levels and subject to the other objectives; and (3) maintaining the status of whale stocks at or above the level of highest net recruitment as well as ensuring the stocks below that level are moved towards it so far as the environment permits.[39] The responsibility to prove the cultural and subsistence 'needs' of the aborigines to the Commission is handing over to the national

[36] Couzens, Ed. (2014). *Whales and Elephants in International Conservation Law and Politics: A Comparative Study*. Oxon: Routledge, 21.
[37] Ibid.
[38] International Court of Justice. (Acc. June 12, 2019). *Whaling in Antarctic (Australia v. Japan: New Zealand Intervening).* Retrieved from: https://www.icj-cij.org/en/case/148
[39] International Whaling Commission. (Acc. June 12, 2019). *Aboriginal Subsistence Whaling.* Retrieved from: https://iwc.int/aboriginal

governments, while the Scientific Committee provides the scientific advice on safe catch limits.[40] Recently in 2012, the Ad Hoc Aboriginal Subsistence Whaling Working Group (ASWWG) was formed which then result on the endorsement of a range of proposals concerning to the management of aboriginal subsistence whaling by the Commission in 2018.[41]

Secondly, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is specifically provides protection of flora and fauna in international trade. The main purpose of this convention is promoting the conservation of endangered species while also allowing the trade of certain wildlife and preventing the over-exploitation through international trade.[42] Therefore, the list of species in this convention are divided into three categories: Appendix I for all species threatened with extinction, Appendix II for all species that not necessarily threatened but may become so unless strict regulation on the trade of specimens applied, and Appendix III for all species which any Party identifies within its jurisdiction as being subject to regulation.[43] In these listings, all the great whales are strictly regulated under Appendix I which make it impossible for any commercial purpose to be used as a reason for import or export of the specimen.[44] The CITES and ICRW can be seen as inherently linked considering its similar purpose on the conservation of stocks. The discussion of collaborating the IWC and CITES has been brought up at IWC 29 in 1977 which mainly propose the IWC as the adviser of CITES on cetaceans (IWC 29, Chair's Report).[45] But since there are a lot of contentions coming from the Parties, the cooperation between both instruments could only produce a slight progress. The increased interest was appeared again at IWC 51 in 1999 where the US introduced the resolution on cooperation between IWC and CITES. In the proposed resolution, the US commissioner was stated that the IWC and CITES are both interested in whales while provide different aspects on the conservation effort. Regarding to that matter, the conservation and management of whale stocks on IWC and regulation on international trade on CITES are 'imperative that they cooperate as closely as possible' since it regulates the same species.[46]

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[40] Bowman, M., Davies, P., & Goodwin, E. (2016). *Research Handbook on Biodiversity Law.* Cheltenham (UK): Edward Elgar Publishing Limited, 305.
[41] Ibid.
[42] CITES. (1973). Preamble.
[43] Ibid., Article 2.
[44] Ibid., Article 3.
[45] Couzens, Ed. (2014). *Whales and Elephants in International Conservation Law and Politics: A Comparative Study*. Oxon: Routledge, 30.
[46] Ibid., 65.

Lastly, in the United Nations Convention on the Law of the Sea (UNCLOS), the signed Parties are obliged to conserve the marine mammals as well as follow the International Whaling Convention's guidelines. The provisions in UNCLOS has been echoed as a tool that can provide the power to compel nations in enforcing the IWC using its dispute settlement procedure.[47] Even though the provisions are not specifically point out the regulation of whaling, the Article 65 and 120 of UNCLOS are highlighting the obligation of the State Parties in the conservation and management of marine mammals which will impact the IWC. The discussion on the relationship between these legal instruments will be further examined in the Chapter 4.

2.3. The Relationship

As indicated in the previous sub-chapters, the international and national legal instruments concerning the conservation of the whale populations have been quite sufficiently established. Although there are several deficiencies on the implementation of those laws which will be discussed in the next chapters, the foundation has at least been set to prevent over-exploitation and to maintain the size of whale populations. In order to move further and connect the dots in each part of this thesis, a question arose: what is the relationship between the indigenous people and the legal instruments on whale protection? This chapter is therefore designed to answer that point.

Looking closely to above discussions, it can be seen that the life of certain indigenous groups is closely linked with the marine mammals in order to fulfill their cultural traditions and nutritional requirements. However, in conducting this practice, the indigenous people are somehow subjected to law infringement. This is occurred because the interest of laws might be overlapped to each other, which make it difficult to determine which subject of law that should be put as a priority when it encounters to each other. The most relevant example of this case is reflected in the aboriginal subsistence whaling. This exemption exists because the whaling activity that supposed to be strictly regulated—if not banned—under international and national legal instruments need to be bent considering the protection of rights and traditional values of certain groups. When whaling practice is carried out by an indigenous group that legally recognized in its nation, the home state needs to balance the effort in protecting both subjects so one protective action does not impact to the disadvantages of the other. However, there are numbers of elements that need to be satisfied

[47] Zemantauski, Jared. (2012). *Has the Law of the Sea Convention Strengthened the Conservation Ability of the International Whaling Commisson?*. 43 U. Miami Inter-Am. L. Rev. 325. Retrieved from: http://repository.law.miami.edu/umialr/vol43/iss2/5

in order to determine whether a whaling act by an indigenous group is considered lawful and can be categorized as aboriginal subsistence whaling. The entitlement as "indigenous people" is not merely giving a person legal permission to breach the law on whale conservation because not every tribe has interconnectivity with whaling practice. Moreover, national law also plays a massive role in legalizing this act. In this case, there are four possibilities: (1) whether a state recognizes the rights of indigenous people in their jurisdiction and implement the law on whales conservation; (2) whether a state did not recognize the rights of indigenous people but implement the law on whales conservation; (3) whether a state recognizes the rights of indigenous people in their jurisdiction but did not implement the law on whales conservation; or (4) whether a state did not implement both. In the last three points, another question arose: is there something that international law can do to impose its provisions concerning both fields? Moreover, who got to decide the priority between hunting cultures and animal preservation? These points will be addressed in the next chapters.

Regarding to the aboriginal subsistence whaling exception, the exact definition on this term was proposed on the Working Group of the Technical Committee, involving the Scientific Committee and the indigenous people who conduct the subsistence whaling practice (IWC, 1981). This meeting resulted on the concept as quoted: "aboriginal subsistence whaling means purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous, or native peoples who share strong community, familial, social, and cultural ties related to a continuing traditional dependence on whaling and on the use of whales."[48] Moreover in the same report, the stipulation on "local aboriginal consumption" on whale product is basically defined as long as it is intended to meet the nutritional, subsistence, and cultural requirements of indigenous or native communities.[49] This concept is notably pointed out the features of aborigines that eligible to undertake the whaling exception. In order to ensure the practice is sustainable and did not adversely impact the populations of whale stocks, the IWC sets a catch limits for each type of whales considering the advice from the IWC's Scientific Committee which then attached to the Schedule.

[48] Gambell, Ray. (1993). *International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling.* Arctic 46, No 2. Retrieved from: https://journalhosting.ucalgary.ca/index.php/arctic

[49] Donovan, G.P. (1982). *The International Whaling Commission and Aboriginal/Subsistence Whaling (with special reference to the Alaska and Greenland fisheries): Report of the International Whaling Commission Special Issue 4*. Cambridge, 89.

The listings on the Schedule can be amended from time to time depending on the conservation, development, and optimum utilization of the whale resources as stated in Article 5 of ICRW.

Highlighting the nutrition, subsistence, and culture as the three elements that can be used to justify the indigenous whaling, it would be problematic if everyone is able to interpret this in their own understanding. Therefore, on the IWC report 1981 in the part of the nutrition element, it was proposed that: firstly, the factual information on nutritional requirement is needed in order to measure the nutritional needs and how the substitution of whales to other animals would impact the particular indigenous group. This proposed information includes the percentages on the diet fulfilled by whale meats and products, by subsistence foods, by cash economy and foods, and additional percentage of the diet that possibly fulfilled by better utilization of subsistence food.[50] Secondly, the subsistence use of whale products defined in the Appendix I of the report as the consumption for: (1) the food, fuel shelter, clothing, tools, or transportation by participants in the whale harvest; (2) the barter, trade, or sharing whale products in the harvested form with the relatives of whaling participants, local communities, or non-local persons in the locations who shares familial, social, cultural, or economic ties with the local residents while the predominant portion from each whale is ordinarily directly utilized or consumed in its harvested form; (3) the making and selling of handicraft articles from whale products obtained from the whaling which purposes stated in (1) and (2).[51] Meanwhile for the cultural anthropology, the same report proposed the information of whale harvest in the cultural activities and cultural identity of the concerning aborigines as well as the relationship of whaling practice to their well-being. The proof of the relationship itself needs to be examined in various historical period until the present situation.[52]The information obtained from points above should then be developed and documented in order to support IWC in measuring the importance of the whale harvest to the culture and determine whether the hunt is considered as aboriginal subsistence whaling that subjects to the ICRW provisions.

Despite the justification of whaling practice, the limitations to aboriginal subsistence whaling are similarly essential to be highlighted. In the ICRW, it is pretty clear that the limitations on the catch quota and the type of whales have been the outline of the Schedule. The Schedule includes the list

[50] Ibid., 3.
[51] Ibid., 49.
[52] Ibid., 3.

of the whale species that allowed to be taken in order to fulfill the primary duty of the Convention on the conservation and preservation of the whale stocks, particularly to the endangered ones. Moreover, the Schedule also forbids the taking or killing of suckling calves or female whales accompanied by calves.[53] By setting such limitations on the specific quota and species, the Schedule generally implies that the whaling activity should be "consistent with effective conservation of whale stocks" referring to aboriginal subsistence whaling, commercial whaling, or scientific whaling.[54]

A key point to remember, the most imperative thing above all is people who seek for an exception on whaling activity is first needs to be legally recognized as "indigenous people" in national and international level. This recognition will enable the group to fully exercise their rights, which protected and guaranteed under both national and international legal instruments.

2.4. Concluding Remarks

In general, this chapter explores the relationship of the indigenous people's rights and the nature conservation on the whale populations. Since there are doubts and uncertainty in the international community regarding the definition of indigenous people, the subchapters in this section are designed to discuss each point of the definition of indigenous people, specifically in international law and in the national law of two countries where this thesis is focused: the United States and the Republic of Indonesia. The particular understanding of the international and national law where the case study is conducted will then be utilized in Chapter 3 to support the analysis on the lawfulness of whaling activity in both states. From the discussion, the researcher found that the United States and the Republic of Indonesia have a contrast law system in fulfilling the rights of indigenous people in their jurisdiction. The U.S. government has a special body and national policy that specifically designed for the aborigines to be federally recognized. Meanwhile, Indonesia still relies on the general provisions included in various national laws, which makes the rights of indigenous people in the area remains unclear.

From the above discussion, it can also be concluded that even though the whaling activity has been governed in several international statutes, IWC along with the ICRW provisions is holding a crucial role in the whaling conservation. However, in the application of ICRW, the indigenous people have heavily relied on their national authorities in order to gain access to aboriginal

[53] Convention for the Regulation of Whaling. (1931). Schedule.
[54] International Whaling Commission. (1983). *Report of the Thirty-Fourth Meeting: Chair's Report.* Appendix 3.

subsistence whaling. By recognized in their home State, an indigenous group can request the national authority to make a formal proposal on their behalf to the IWC. The IWC will then assess whether their act can be subjected as aboriginal subsistence whaling and subsequently determine the catch limits and allowed whales species for the concerning group.[55]

Overall, it can be seen that the interrelation of the indigenous people and the whale conservation are mainly placed within the aboriginal subsistence whaling. The whaling activity is classified as unlawful in most of the international legal instruments concerning the protection of marine mammals with endangered status. Unfortunately, some whale species that harvested by indigenous people to fulfill the cultural and nutritional needs are included in the list which makes their act considered as a contravention to law. The only way to legalize this act is by obtaining the recognition of a whaling practice as aboriginal subsistence whaling in the eye of the international community and national government. This chapter is thus answered the first sub-question of this research.

[55] Hossain, Kamrul. (2008). *Hunting by Indigenous Peoples of Charismatic Mega-Fauna: Does Human Rights Approach Challenge the Way Hunting by Indigenous Peoples is Regulated?.* International Community Law Review 10, 306.

Chapter III

3. Case Study

The conflicting interest between ensuring the rights of indigenous people while at the same time fulfilling the duty for the conservation of whale has put a State *between a rock and a hard place*. The whaling activity by indigenous people requires a balancing act from the State in order to protect both interests. While the previous chapter has explained the relationship of both field by using applicable legal instruments in international and national law, this chapter will bring up the real whaling practice by indigenous groups in two different countries. The first one is Makah Tribe who lives in the northwestern tip of Washington State of United States, while the second one is Lamalera Tribe who lives in the Lembata Island of Republic of Indonesia. These two cases are taken as the research object of this thesis in order to compare the whaling practice that occurred in developed and developing countries. The expected outcome of this chapter will be made by answering three questions: (1) what is the difference between the developed and developing countries' government in handling the whaling practice by indigenous people?; and (2) what is the legal outcome of the whaling practice in the IWC member state (U.S.) and non-member of IWC (Indonesia)? These points are made in order to address how the conflict been dealt in practice, which is the second sub-question of this thesis. The result will contribute to the identification of the role of international and domestic law in solving such problem in real practice.

3.1. Makah Whale Hunting (United States)

The Makah Indian Tribe has been located for thousands of years on the northwestern tip of Washington State at Cape Flattery in its reservation. The Pacific Ocean borders the reservation to the west, and to the north by the Strait of Juan de Fuca, which separates the United States from Canada.[56] The culture, religion, economy, and the way of life of the Makah tribe on the whaling activity is cannot be overstated. The social order of the Makah is determined by the Makah whale hunt which used to govern the wealth, status, marriage preferences, and ceremonial displays. Being a successful whaler is the pride of the tribes since they could achieve the highest social status and prestige position in the community. The history of Makah whaling itself has been going on for

[56] Miller, J. R. (2002). *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling.* American Indian Law Review, Vol. 25, No.2, 170. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161284

over 1500 years, based on the acceptance from Non-Indian authorities. However, the natives in the Pacific Northwest have hunted the California gray whales for over nine thousand years.[57]

The relationship of the culture and subsistence between Makah people with the whales is very well-established. They view the whaling practice as "an integral part of the world view, heritage, and identity of the Makah."[58] The headmen of Makah are chosen among the whalers, equipped with rigorous physical and spiritual preparations necessary to successfully hunt and land the whales. The preparations are going to be conducted months before the whaling, where the tribes will perform a specific ritual to purify the heart of the whalers. This is based on the idea that humans are too insignificant to be able to capture the whale without the cooperation and willingness of the whale itself; thus this ritual is considered as necessary as the whaling method and equipment they used.[59] In the society, the whalers will be placed at the top of the social order since they are seen as the trusted men who could offer prestige, protection, and resources to kin and non-kin members of the tribe. Aside from the role of the headmen, the community-at-large also contributed in processing, preserving and preparing whale product for the consumption of the community.[60] As the whaling practice shared a strong bond with the Makah, the whaling families will pass down the hunting skills and traditions to their children. The songs and dances specific to whaling are taught since the children are still infants by the parents, grandparents, and other relatives in order to tell histories and stories of family connection with the whales. Moreover, in middle school and high school, Makah students also learn about the right to hunt the whales in the treaty as well as IWC and domestic legal process in the rules of whaling.[61]

3.1.1. The Legal Perspective

On 31 January 1855, the United States and Makah Tribe entered into the Treaty of Neah Bay in which the tribe claimed its inherent sovereign rights to natural resources as the exchange of 469 m^2 of Makah territory to the United States.[62] The treaty is the "supreme law of the land" under Article 6 of U.S. Constitution and based on the U.S. law recognition on the centrality of tribal sovereignty. Thus, the "measured separatism" was obtained by the Makah from the U.S.

[57] Ibid.
[58] Ibid., 180.
[59] Ibid., 184.
[60] International Whaling Commission. (Acc. June 16, 2019). *Description of the USA Aboriginal Subsistence Hunt: Makah Tribe.* Retrieved from: https://iwc.int/makah-tribe
[61] Ibid.
[62] Ibid.

government and the states.[63] Aside from the ceded ancestral lands to the United States, the Makah reserved their right to whaling which specifically mentioned in the Article 4 of the treaty, "the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured [to the Makah]… in common with all citizens of the United States."[64] However, despite the specific right to whaling that explicitly secured in the Treaty of Neah Bay, the Makah was demanded to cease the whale hunting from the 1920s until 1990s due to the significant depletion of gray whales caused by non-Native commercial whaling.[65]

In the United States, the marine mammals that considered threatened or endangered to extinction are specifically protected under two legal instruments: The Endangered Species Act of 1973, as amended (ESA), and the Marine Mammal Protection Act (MMPA). Therefore in 1970, the Eastern North Pacific (ENP) gray whale population was listed as an endangered species by the federal government under the predecessor to the ESA.[66] Later in 1994, the National Marine Fisheries Service (NMFS) found that the population of the ENP gray whales had recovered sufficiently and decided to remove the whale from the ESA list. In order to prove the stock's viability, NMFS subsequently conducted a 5-year monitoring program where they finally confirmed that the population of the gray whale had reached the "environmental carrying capacity" supported by 28 large-whale biology experts in the Status Review 1999.[67] In response to this status, the Makah tribe was immediately sought their right to whale by approaching the United States government—the Department of Commerce (DOC); the National Oceanic and Atmospheric Administration (NOAA); and NMFS—and request the government cooperation to obtain IWC approval on aboriginal subsistence whaling quota on ENP gray whales. Finally, under the joint requests submitted by the United States (on behalf of Makah tribe) and the Russian Federation (on behalf of Chukotka Natives), the Makah received four catch limit on the gray whale in the period of 1998-2018 as they successfully shown the cultural and subsistence need of the whaling to the Makah.[68]

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[63] Wilkinson, C.F. (1987). *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*. Yale University Press, 14.
[64] Treaty of Neah Bay. (1855). Article 4.
[65] Firestone, Jeremy. (2005). *Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs*. Journal of International Wildlife Law and Policy, 189.
[66] Ibid., 197.
[67] *National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants: 90-Day Finding for a Petition to List Eastern North Pacific Gray Whales as Threatened or Endangered Under the Endangered Species Act (ESA).* (June 14, 2001*),* as cited in Firestone (2005).
[68] Firestone, Jeremy. (2005). *Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs*. Journal of International Wildlife Law and Policy, 200.

Celebrating the approval of the IWC and leaving the hiatus era of whaling, the Makah conducted its first successful whaling in seventy years on 17 May 1999, where the Makah community was joining the welcoming celebration of the whale products back to their homes, communal ceremonies, and daily lives in Neah Bay.[69] However, following the 1999 hunt, the U.S. federal courts brought up the United States Marine Mammal Protection Act (MMPA) which ruled that the Makah must apply for a waiver on the moratorium on taking marine mammals, notwithstanding the right of whaling they obtained in the Treaty of Neah Bay.[70]

As the MMPA issue arose, the Makah was forced once again to cease their whaling practice. The moratorium of the MMPA could be exempted if the taking of the marine mammals is "expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before the effective date of this sub-chapter or by any statute implementing any such treaty, convention, or agreement […]."[71] In a big picture, the Makah tribe circumstance might be exempted under this provision since they have a treaty with the U.S. government in which their right to whaling was included. However, the court decided that this article cannot be derogated for the Makah considering three reasons: (a) the quota for the gray whale sets by the IWC 1997 was conducted 24 years after the enactment of the MMPA and effectively amended the ICRW; (b) the Schedule in ICRW fails to explicitly mention Makah tribe for the whaling quota; and (c) the Whaling Convention Act (WCA) which implement the ICRW domestically fails to address aboriginal subsistence whaling quotas or the Makah.[72]

As a result of this issue, the tribe needs to satisfy the requirement of this highly protective domestic legal instrument before they are allowed to continue exercising their right to hunt. The Makah hunt must be authorized by Secretary of Commerce which acting through the NOAA in order to obtain the moratorium waiver in the MMPA. In the first issued decision in 2002 and finalized in 2004, the United States appellate court stated that the Environmental Impact Statement (EIS)—the highest level of environmental review under American law—must be prepared by the NOAA

[69] International Whaling Commission. (Acc. June 16, 2019). *Description of the USA Aboriginal Subsistence Hunt: Makah Tribe.* Retrieved from: https://iwc.int/makah-tribe
[70] Ibid.
[71] Marine Mammal Protection Act. (1972). *As Amended Through P.L. 115-329, Enacted December 18, 2018*. Sec. 102 [16 U.S.C 1372] (2).
[72] Firestone, Jeremy. (2005). *Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs*. Journal of International Wildlife Law and Policy, 204.

before granting authorization in Makah whale hunting.[73] This is because, in *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004) challenged the environmental assessment issued by NOAA and accused it has infringed the National Environmental Policy Act by not conducting a complete environmental assessment when entered an agreement with the Makah.[74] Therefore, the court stated that it is not holding the right to whaling of the Makah that assured in the Treaty of Neah Bay. Instead, the right would be on a "suspend implementation" until the requirements in MMPA is fulfilled. The NOAA required to follow the procedure on MMPA waiver and permit process through a thorough scientific review and analysis before the Makah before the whaling practice of the Makah allowed to take place again. The waiver process includes an on-the-record hearing before an administrative law judge in where the opponents of the Makah would also be allowed to participate and present their testimony and other evidence that could support the judgment.[75]

Even though the Makah Tribe was in a strong contradiction with the court decision, the Makah ceased the whale hunting to comply with the court ruling and began the administrative process in aim to obtain the MMPA waiver by submitting the application to NOAA. However, even until the most recent draft in March 2015, the EIS process for the Makah hunt is so far only resulted on two drafts EISs that consist the evaluation of the potential impacts of the Makah whale hunt to local populations of gray whales, the ENP stock, whales migration between the western and eastern Pacific Ocean, and the environment as a whole. Until this discussion is written, the waiver MMPA application of the Makah is currently still being processed by the NOAA.[76]

3.2. Lamalera Whale Hunting (Republic of Indonesia)

Lamalera Tribe lives in the Lembata Island which located approximately 190 km north of Kupang, the capital of East Nusa Tenggara Province in West Timor, Indonesia. However, the dwellers that engaged in whaling in Lembata Island do not formerly come from there. Instead, their ancestors were mostly coming from the Kingdom of Luwuk (now Province of South Sulawesi) which makes

[73] International Whaling Commission. (Acc. June 17, 2019). *Description of the USA Aboriginal Subsistence Hunt: Makah Tribe.* Retrieved from: https://iwc.int/makah-tribe
[74] Makah Tribal Council. (February 11, 2005). *Marine Mammal Protection Act Take Moratorium to Exercise Gray Whale Hunting Rights Secured in the Treaty of Neah Bay,* 11. Retrieved from: https://www.westcoast.fisheries.noaa.gov/publications/protected_species/marine_mammals/cetaceans/gray_whales/application.pdf
[75] International Whaling Commission. (Acc. June 17, 2019). *Description of the USA Aboriginal Subsistence Hunt: Makah Tribe.* Retrieved from: https://iwc.int/makah-tribe
[76] Ibid.

them not the indigenous to Lembata Regency.[77] The ancestors were sustaining their lives as the fishermen who hunted sharks, turtles, manta rays, or other edible sea creatures by using traditional harpoons. These people have then entered a contractual agreement with the indigenous in the Lamalera village by offering the sea catch as an exchange of the land use rights.[78] As the Savu Sea is the critical migratory route and feeding grounds for cetaceans, the hunting area around Lamalerans was favorable for whaling and assumed to be the impetus of more western Indonesian and mountains region of Lembata Island to move to Lamalera.[79]

The first documented Lamalera whale hunting by European was recorded on a Portuguese text 1643 which can be the evidence that the whaling practice in Lamalera has been going on for at least 460 years.[80] From the documents and references collected by the researcher, there is no sufficient indicator that could be used to measure the dependency of the Lamalerans to the whale. Therefore, the information is gathered from the villagers of the Lamalera through an empirical finding by an Indonesian researcher, Putu Mustika (2006) who asked the fishermen about their preference to catch the whale rather than the usual fishing target. The interviewees opined that one big whale catch could feed the entire village for more than a month, while the usual fishes would only satisfy their family in one day. The Lamalerans also prefer to go whaling once in a month and sell it to the market to increase their income compared to fishing daily.[81] The distribution of whale products is regulated through a strict customary law where everyone who takes part in the whaling would be put as priorities, and the rest would be shared with the local community. The whale products majorly served as an important barter item, making it as the leading economy source of the locals and often used as a form of currency in agricultural products.[82] Even though the

[77] Barnes, R.H. (1996). *Sea hunters of Indonesia: fishers and weavers of Lamalera.* Oxford (GB): Clarendon Press, 56.
[78] Egami, T & Kojima, K. (August 30, 2013). *Traditional Whaling Culture and Social Change in Lamalera, Indonesia: An Analysis of the Catch Record of Whaling 1994-2010.* Senri Ethnological Studies, Vol. 84, 158. Retrieved from: http://doi.org/10.15021/00002442
[79] Kahn, B. (2002). *Visual and Acoustic Cetacean Surveys and Evalutation of Traditional Whaling Practices, Fisheries Interactions and Nature-Based Tourism Potential.* WWF Indonesia Wallaca Program, Alor and Solor.
[80] Barnes, R.H. (1996). *Sea hunters of Indonesia: fishers and weavers of Lamalera.* Oxford (GB): Clarendon Press, 326.
[81] Mustika, P.L.K. (2006). *Marine Mammals in the Savu Sea (Indonesia): Indigenous Knowledge, Threat Analysis and Management Options* (Master Dissertation), 38. Retrieved from: https://researchonline.jcu.edu.au/2064/
[82] Egami, T & Kojima, K. (August 30, 2013). *Traditional Whaling Culture and Social Change in Lamalera, Indonesia: An Analysis of the Catch Record of Whaling 1994-2010.* Senri Ethnological Studies, Vol. 84, 159. Retrieved from: http://doi.org/10.15021/00002442

interdependency of the Lamalerans culture is not directly linked with the whale, the daily supplies obtained through the barter system can be valued as a significant tie-in with the community.

Despite the economic dependency, the modernization era hits the Lamalera village with the improvement of local infrastructure by local government in the 2000s. The construction of roads has majorly triggered the changes in Lamalera's traditional culture and symbolize the collapse of traditional whale hunting. The presence of the modern roads, public transportation, electrical power, and communication services along with 14 new motorboats to assist the traditional harpoon hunting marked the degradation of the traditional value of the Lamalerans. Thanks to the motorboats, the productivity in the whaling and fishing industry increased significantly, which make the barter of whale products for economic prosperity are not really necessary anymore. Instead, the barter system is more likely to maintain the relationship between Lamalera villagers and its surrounding area.[83] The Lamalerans also argued that their whaling culture still needs to be continued and preserved because even though their subsistence does not necessarily rely on the whales, the villagers of Lamalera are born from the whale with the sea as their mother. Hence, the restriction access to the sea means killing their mother.[84]

On the other findings obtained through the news platform, however, the Lamalerans are often offended the law by exceeding the number of whales that allowed to be slaughtered per year. This might be the impact of the introduction of the motorboats as the impetus of the commercial whaling. From the field research of Putu Mustika (2006), she found the indication of commercial whaling during her visit to Lamalera in May 2004. She stated that a Korean offered to buy the whale meat for export purposes.[85] Another news in July 2017 also reveals the interception of whale bones shipping between Lamalera and Poland by Indonesia's police.[86] Moreover, it is also found that the Lamalera village is started to build its new economy as a tourism place. They offered the visitors a chance to interact with the dead whales such as taking selfies or renting a boat to see the whale hunting process.[87] Regarding these indications, therefore, the dependency of the Lamalerans

[83] Ibid., 161.
[84] Emont, Jon. (August 3, 2017). *Lamalera Journal: A Whaling Way of Life Under Threat.* The New York Times. Retrieved from: https://www.nytimes.com/2017/08/03/world/asia/whaling-lamalera-indonesia.html
[85] Mustika, P.L.K. (2006). *Marine Mammals in the Savu Sea (Indonesia): Indigenous Knowledge, Threat Analysis and Management Options* (Master Dissertation), 50. Retrieved from: https://researchonline.jcu.edu.au/2064/
[86] Emont, Jon. (August 3, 2017). *Lamalera Journal: A Whaling Way of Life Under Threat.* The New York Times. Retrieved from: https://www.nytimes.com/2017/08/03/world/asia/whaling-lamalera-indonesia.html
[87] Haas, D.F. (January 7, 2019). *Indonesia's Illegal Dolphin Slaugther to End.* The Dolphin Project. Retrieved from: https://www.dolphinproject.com/blog/indonesias-illegal-dolphin-slaughter-to-end/

to the whaling practice as the traditional culture of the villagers is still questionable due to suspicion of another intention in disguise, such as commercial purpose.

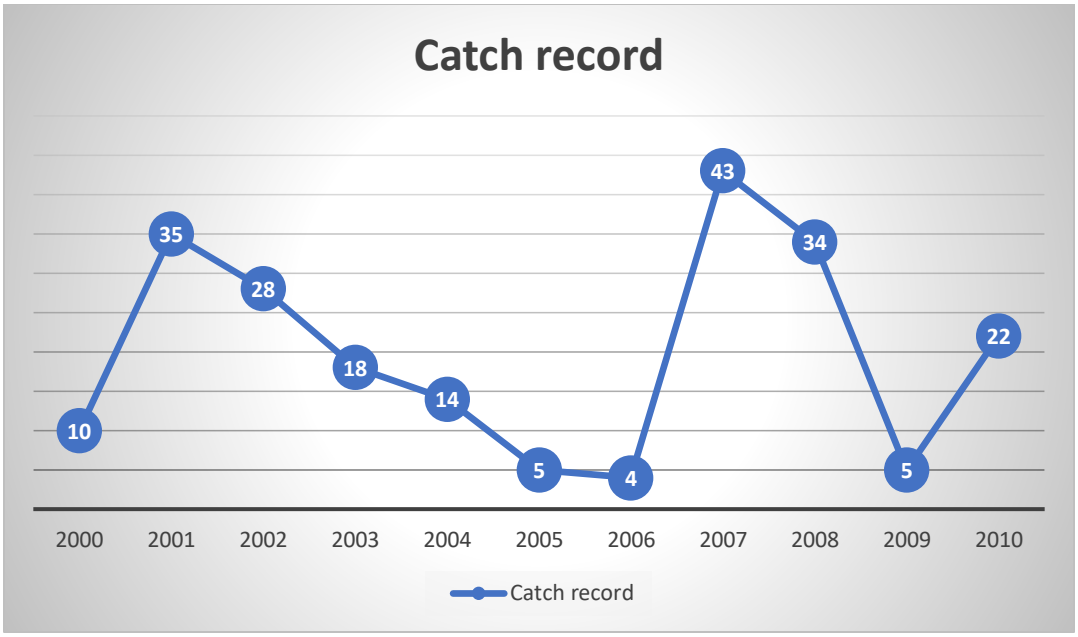
3.2.1. The Legal Perspective

In order to determine whether the whaling practice by Lamalera tribe is considered as a legitimized aboriginal subsistence whaling, the position of the Lamalerans as a recognized indigenous people in Indonesia needs to be clarified first. As discussed in the previous chapter (see Chapter 2 Section 2.1.2), the definition of indigenous people in Indonesia is still debatable since there is no specific regulation to address this issue. However, stated in the Article 61 of Act No. 27/2007 on Coastal Areas and Small Islands, Indonesian government recognize, respect, and protect the rights of customary communities, traditional communities, and local wisdom (*kearifan lokal* in Indonesia) on Coastal Areas and Small Islands which has been utilized and passed down for generations.[88] This law is the most relevant regulation that could be used by the Lamalerans to defend their rights on traditional whaling for subsistence and cultural purpose even though it does not explicitly mention the requirements of a community to be included under this act. Another regulation that could be set as a foundation for Lamalera hunting is the Fisheries Law No. 31/2004 Article 6 Para 2 that mentioned the customary laws and/or traditional knowledge should be taken into account in fisheries management for capture and aquaculture with regards to community participation and should not contradict the national laws.[89] As of July 2019, the definition of traditional whaling has yet to be established by the Indonesian government, which makes the right of Lamalerans for whale hunting remains unclear.

Despite the cultural life of the Lamalerans and its dependency on the whale meat, the researcher found that the amount of whale caught by the Lamalerans is not consistent each year. This data is essential to present in order to measure whether the Lamalera whaling can be considered as sustainable or not.

Figure 1. Catch record of sperm whales for the period 2000-2010[90]

[88] Law of the Republic of Indonesia No. 27/2007 on the Management of Coastal Areas and Small Islands. Article 61.
[89] Law of the Republic of Indonesia No. 31/2004 on Fisheries. Article 6.
[90] Egami, T & Kojima, K. (August 30, 2013). *Traditional Whaling Culture and Social Change in Lamalera, Indonesia: An Analysis of the Catch Record of Whaling 1994-2010.* Senri Ethnological Studies, Vol. 84, 159. Retrieved from: http://doi.org/10.15021/00002442



From the figure above, it can be seen that the number of whales landed by the Lamalerans fluctuated each year. Even though the latest whaling record from 2011-2019 still cannot be found, this ten-years record of the landed whales can extrapolate the average of 21.8 whales were harvested annually. This is not sustainable at all considering the status of the sperm whale as Appendix I in most of the international legal instruments that ratified by the Indonesian government (e.g., CITES). In the Government Regulation of the Republic of Indonesia No. 60/2007 on the Fisheries Resource Conservation, Article 2 Para 2 requires the conservation of fisheries resources needs to be done in the principle of precautionary approach. In this case, the precautionary principle seems to be ignored in maintaining the stability of the marine ecosystem in the Savu Sea, which could adversely impact the fisheries population in the area.

Since the law concerning to the rights of whaling for the Lamalerans is unregulated, the analysis of the lawfulness of the traditional whale hunting will be discussed from the perspective of the protection to the marine mammals in Indonesia, especially the whale as the object of the aboriginal hunting. In the national legislation, the protection of whale is generally stated in the Government Regulation No. 7/1999 on Preserving Flora and Fauna Species. The cetacean family is listed on the number 13 of the Appendix as a protected marine mammal which is written in its Indonesian name as '*paus*'. This law regulates explicitly the obligation of the state to preserve the species included in the list in order to prevent the species from the threat of extinction, preserve the pure-

bred and biodiversity, as well as to maintain the equilibrium of the existing ecosystem in a sustainable manner and in the interest of human welfare.[91] In the recent legislation, the sperm whale that hunted by the Lamalerans is explicitly listed as the protected animal species under the Regulation of Minister of Environment and Forestry No. P.20/MENLHK/SETJEN/KUM.1/6/2018 on the Protected Animal and Plant Species and as amended on Ministerial Decree No. P.92/MENLHK/SETJEN/KUM.1/8/2018. In this list, the sperm whale is appended as protected mammal number 106 with its scientific name '*physeter macrocephalus'* and Indonesian name '*paus sperma'* along with the other species of whales such as blue whale and sei whale.[92] These legislations are work in tandem with the Law No. 5/1990 on the Conservation of Living Natural Resources and Its Ecosystem, which set the implication of the enforcement of the related instruments. Specifically, Law No.15/1990 imposes the legal sanction such as imprisonment and/or fine on the infringement of its provisions, inter alia, as stated in its Article 21 regarding the prohibition to: (a) catch, injure, kill, store, possess, nurture, transport, and trade-in protected animals in alive condition; (b) store, possess, nurture, transport, and trade-in protected animals in dead condition; (c) take out any protected animals from a place in Indonesia to other places inside or outside Indonesia; (d) trade-in, store, or possess leather, body, or other parts of protected animals or goods made of parts of the animals or take out from a place in Indonesia to other places inside or outside Indonesia; and (d) take, damage, abolish, trade-in, store or possess eggs and/or nests of protected animals.[93] This article is *juncto* to Article 40 Para 2 regarding the criminal sanction imposed to the offenders of Article 21.

Furthermore, from the perspective of the hunting ground, the Savu Sea, the whale hunting of the Lamalerans can be considered unlawful. This is because the Savu Sea has been designated as conservation area as enacted by the Minister of Marine and Fisheries on Ministerial Decree No. 5/KEPMEN-KP/2014 on the Savu Sea National Marine Conservation Area and Its Surroundings in East Nusa Tenggara Province. This establishment generates another requirement that needs to be fulfilled in order to lawfully fishing (or whaling) in the marine conservation area. The

[91] Government Regulation of the Republic of Indonesia No. 7/1999 on Preserving Flora and Fauna Species. Article 2.

[92] Appendix of the Regulation of Minister of Environment and Forestry No. P.106/MENLHK/SETJEN/KUM.1/12/2018 regarding to the Second Amendment of Ministerial Decree No. P.20/MENLHK/SETJEN/KUM.1/6/2018 on the Protected Animal and Plant Species.

[93] Law of the Republic of Indonesia No. 15/1990 on the Conservation of Living Natural Resources and Its Ecosystem. Article 21.

Government Regulation No. 60/2007 supports the latter decree by imposing a strict obligation for everyone to obtain a permit concerning the allowance of fishing in the sustainable fisheries zone.[94] However, the problem is the official permittance of the Lamalerans to hunt the whale in the Savu Sea as the conservation area is still questionable. In some articles found by the researcher, the villagers of Lamalera has obtained permission from the Indonesian government to whaling as long as it is for the consumption of the locals and not for commercial sale (The New York Times, 2017). Another news also implies that two whales are allowed to be landed per year in a traditional manner, and as long as it is for the subsistence of the villagers (Dolphin Project, 2009). On the other hand, the representative of the Lamalerans emphasized that they need to hunt three sperm whales a year to maintain the livelihood of the villagers (Daily Mail, 2018). However, despite the news and articles, the researcher has not found the official document between the Indonesian government and the villagers of Lamalera concerning to the whaling quota that allowed under national legal instruments. Also, reflecting the Figure 1 provided above, the number of harvested whales by the Lamalerans were far beyond two or three whale per-year as initially claimed by the villagers who make this practice clearly unsustainable. Instead, the researcher found that the on the Draft/Bill of the Republic of Indonesia on the Conservation of Biodiversity and Ecosystem in 2016, the Indonesian government is started to consider the customary communities that live inside the conservation area. On Article 146 of this Bill, the specimen of plants or wild animals from the natural habitat can be utilized for the subsistence or traditional customary purposes, taking into account the principle of sustainability.[95] As this law is still under discussion by the Legislative Assembly, it does not have any legal implications thus make the whaling quota of the Lamalerans as claimed in the spreading articles remain unreliable.

In the point of view of international legal instruments, the parameter set by the IWC to determine whether a whaling practice of certain indigenous people is an aboriginal subsistence whaling in purpose to fulfill the subsistence, cultural and nutritional requirement of an indigenous group still cannot be precisely measured in Indonesia due to scattered data and the absence of official documents regarding to the Lamalera whale hunting.[96] Moreover, the alleged involvement of

[94] Government Regulation of the Republic of Indonesia No. 60/2007 on the Fisheries Resource Conservation. Article 31 Para 2.

[95] Legal Draft of the Republic of Indonesia on the Conservation of Biodiversity and Ecosystem. (Jakarta, May 2016). Article 146. Retrieved from: http://berkas.dpr.go.id/pusatpuu/draft-ruu/public-file/draft-ruu-public-4.pdf

[96] The official government reports published by the Ministry of Marine and Fisheries of Republic of Indonesia have been examined by the researcher and no data can be found regarding to the whale catching by Lamalera tribe or any

commercial whaling as described in the previous sub-chapter will automatically remove Lamalera whale hunting as an exemption in the IWRC provisions. Nevertheless, Indonesia is not a party of the IWC. Hence, any legal obligation arises from the IWC does not apply to Indonesia. Until now, the IWC itself is never formally objecting the traditional whaling practice of the Lamalera which make their whaling practice is superficially regulated both from national and international perspectives.

Apart from the IWC, other applicable international legal instruments that not explicitly regulate about whaling but still related to the conservation of the marine mammals would be briefly discussed here. Firstly, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) is listing the sperm whale in Appendix I which prohibit any commercial purpose for export and import of specimen of the related fauna. Unfortunately, CITES only regulate international commercial trade rather than subsistence whaling, though Indonesia has ratified it. However, if the Lamalera tribe has been proven as a part of commercial trade on the whale products, the legal implications arose from CITES could be enforced to the Indonesian government and the tribe. Secondly, the Convention on Migratory Species (CMS) cannot be fully implemented in Indonesia since Indonesia is not a full party of this convention. Even though this convention applies to the whale in the Savu Sea as a critical migratory route for the cetaceans in the area, the CMS does not address the traditional hunting on the marine mammals either. Not to mention the involvement of Indonesia in this convention which only acts as a MoU signatory of the Indian Ocean and South-East Asia (IOSEA) Marine Turtles.[97] Thirdly, the Convention on Biological Diversity (CBD) acknowledged in its Article 8 about in-situ conservation, 'the practice of indigenous people and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity'.[98] This provision implies the recognition of the CBD to traditional indigenous practice, and thus Indonesia should manage this whaling practice sustainably. Lastly, the UNCLOS that also ratified by Indonesia encourages the international cooperation on the conservation of the marine mammals in the Article 65, however again, the

other parties. (*See. Annual Performance Report of Ministry of Marine and Fisheries 2013 to 2019.* Retrieved from: https://kkp.go.id). The scattered data are collected through news and online articles.

[97] Convention on the Conservation of Migratory Species of Wild Animals. (Last updated: June 1, 2019). *Parties and Range States.* Retrieved from: https://www.cms.int/en/parties-range-states

[98] Convention on Biological Diversity. (1992). Article 8 (j).

traditional hunting is not specifically mentioned in this instrument which makes it difficult to see the legal outcome of the whaling practice of the Lamalerans.

3.3. Concluding Remarks

In general, this chapter examined the real whaling practice that occurred in two different countries in order to compare the legal implications that arise from the conflicting interest of the state in respecting the rights and culture of the indigenous people and the obligation on the whale conservation. The case studies were taken from the developed country and developing country to avoid count heavily on one practice and in aim to see the issue on a broader perspective. From the discussion, the initial questions asked in the introduction of this chapter has finally been answered. Regarding the difference between developed and developing countries' government in handling such case, it is found that the United States and Indonesia have a completely different system in addressing the aboriginal subsistence whaling. In practice, it can be concluded that the US government has a well-established regulation both for the recognized aborigines and whale conservation. Even though the Makah tribe were facing several problems regarding their right to whaling due to the overlapping regulations between the international law (IWC) and national law (MMPA), at least the legal certainty of measuring the lawfulness of the act is there. The U.S. government also provide a collaboration work with the Makah to request the whaling quota under the ICRW as well as the moratorium waiver under its national legislation. Despite the whaling permission that still being contended, the Makah shows a respectful attitude by ceasing their whaling practice for more than a decade until the official permit of whaling issued. This practice has shown a quite impressive balancing act from the United States in protecting and maintaining the population of the whale in its waters while at the same time respecting the cultural life of the Makah by providing a waiver on such a strict conservation effort. Moreover, the Makah community is also having sufficient knowledge about whaling and the law that lies with it as it is taught to the Makah students in high school. This kind of knowledge is very crucial to maintain the subsistence and sustainable whaling for generations along with the tribe's harmonic relationship with the state.

On the other hand, however, whaling practice in Indonesia did not show a satisfying result. From the start, the definition of indigenous people itself is still vague, which makes the rights of the Lamalera to whaling is complicated—if not impossible—to be identified. The absence of sufficient foundation in its national legal instrument to regulate the traditional hunting on whale makes the

whaling practice in Lamalera tends to be unsustainable. Although some provisions in its national legislations list the sperm whale as a protected species is exist and could be enforced if collaborated with another legal instrument (e.g., Law No. 15/1990), the shortfall would be in defining the traditional whaling. If the Lamalera tribe is not receiving any official recognition concerning the right to whale, their practice will automatically be considered as illegal whaling. Moreover, the number of harvested whales by the Lamalerans tend to fluctuate each year and does not according to the original needs of the villagers. Referring to Figure 1, the Lamalerans has no certain threshold in determining how many whales that they are going to land annually. Taking into account the precautionary principle, the migration cycle and the maternity period of the sperm whale needs to be observed as well. The sperm whale tends to give birth to one calf every five years, and the data shows that between 2006 to 2007 itself, the Lamalera whale catching was equal to approximately 108. Comparing this allowance with the Makah tribe who previously has obtained whaling quota from the IWC, the Makah tribe only allowed to catch maximum five whales in the period between 1999 – 2018 which was a very long period before it was ceased. The role of international legal instruments, especially the IWC is not fully applicable in Indonesia since Indonesia is not a party, and the other instruments are not quite enforceable. Hence, the Indonesian government is holding full control in regulating the right of whaling of its indigenous group as well as conserving the whale in the jurisdiction. The lack of knowledge of the Lamalera villagers concerning to the whale conservation could also be one of the reasons behind the overhunting. Therefore, the Indonesian government still has a lot of things to do in order to create sustainable whaling for the welfare of both the indigenous people and marine mammals in the area.

Chapter IV

4. The Rights of Indigenous Peoples for Whaling Activity

The impact of anthropogenic activities has indeed become a major concern in the world nowadays due to the current extinction rate of species for about 1,000 times higher than the natural background, following the estimation of future extinction rate to be 10,000 times higher.[99] The issue of biodiversity loss has also been recognized in the 'planetary boundaries' concept as one of the four boundaries that have been crossed as a result of human activity. This concept is highlighting the global priorities related to the resilience of the earth system to the current and future anthropogenic threat. The change in biosphere integrity, which includes biodiversity loss and species extinction is listed as the second global risks after climate change. According to National Geographic, many scientists indicate that the sixth mass extinction is now approaching. The pollution, land clearing, and overfishing derived from human mismanagement of the Earth's natural resources would lead to the extinction of more than half of the world's marine and land species by the year of 2100.[100] Despite this disastrous event, however, the long-standing cultural practices of indigenous people who have been dwelling in a certain area for hundreds of years also need to be respected. The protection of cultural integrity and the desire to pursue tolerant pluralistic societies are essential to create a balanced and harmonious relationship between human and animals. The role of human rights law is also pertinent to uphold the cultural values of aboriginal and/or traditional peoples. As expressed in the 1972 World Heritage Convention, 'the deterioration or disappearance of any item of cultural or natural heritage constitutes a harmful impoverishment to all nations in the world'.[101] Therefore, in accordance with the topic of this thesis, the balancing act of the state to preserve both the cultural practice of indigenous people and the conservation of biodiversity in the area are critically required. The risk of overlapping regulation might be present, and one interest might demand prioritization upon one another in this balancing effort. When such issue occurs, the state is required to take action to resolve the tension that arises from this issue.

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[99] This estimation is based on the evidences obtained from fossils, the separation of speciation and extinction rates from molecular phylogenies, and from overall diversification rates. *See:* De Vos, J.M., Joppa, L.N., Gittleman, J.L., Stephens P.R., & Pimm, S.L. (June 22, 2014). *Estimating the Normal Background Rate of Species Extinction.* Conservation Biology, Vol. 29, No. 2, 452-462. Retrieved from: https://onlinelibrary.wiley.com/doi/pdf/10.1111/cobi.12380

[100] National Geographic. (Acc. July 3, 2019). *Mass Extinctions.* Retrieved from: https://www.nationalgeographic.com/science/prehistoric-world/mass-extinction/

[101] Convention for the Protection of World Cultural and Natural Heritage. (1972). Preamble.

The failure of the state to provide a well-established management system will result in immense destruction of the cultural value of indigenous groups and/or the extinction of the whale species from its natural habitat.

4.1. The Future Measures

The discussion in this fourth chapter is aimed to re-examine the current legal perspective by reflecting on the case studies provided in the previous chapter. The result of the examination will be utilized to find out whether there is anything that could be changed in order to cover the deficiency in the current practice as well as the opportunity to create a better whaling management for the indigenous people in the future. The chapter will be divided into two sub-divisions. The first one will discuss the prospective measure of the balancing act by collaborative instruments. The purpose is to cover the gap in current legislation by using other related legal instruments in a collaborative manner. The second one will delineate the possibility of collaborative whaling management partnerships between the indigenous community and the government agencies in order to avoid any possible conflict that might develop in the balancing process. The outcome of this chapter aimed to contribute to the future management of whale conservation while respecting the rights of indigenous people in their homeland.

4.1.1. Collaborative Instruments

It has been quite clear from the presented case studies that the core problem of this issue is laid on the insufficient legal instruments in the national and international level. Even though the foundation has been set in order to protect the conservation of the whale while preserving the traditional practice of indigenous groups, the overlapping interest and the loopholes in the provisions cannot always be evaded in the real practice. For example, the most relevant law provisions on whale protection, such as ICRW and CITES, is only taking a single-issue and specific approach. This is not really practical in some reasons, mainly because the instruments cannot be implemented flexibly when it is needed. The ICRW that playing a pivotal role in the international effort to protect the whales from extinction is somehow having a significant shortcoming in its enforcement. The lack of weapons to enforce its provisions makes the offenders have little to fear to cross the line. Specifically, ICRW has three significant weaknesses when it comes to the enforcement: firstly, a member state may choose to exempt itself from the IWC regulation by filing an objection containing their disagreement. Secondly, the scientific permit provisions allowing the member state to conduct its own scientific research concerning the

moratorium, including the research on the whale stocks. This is caused by the reluctance of the IWC to impose the moratorium or quota to the whaling nations due to inaccurate data. This can be a backfire for the IWC since the whaling nations may manipulate the data to justify their whaling practices. Lastly, the Commission does not have authority to enforce the punishment. Instead, such power is vested in the member state to take action over the violator in its jurisdiction, and much illegal whaling occurs without the cognition of the IWC.[102] In short, the IWC and ICRW can be considered as a toothless instrument referring to its incapability to ensure the compliance of the member state. Concerning this issue, the joint implementation from other legal documents to cover the loopholes that exist in one another might be taken into account in strengthening the enforcement in whale conservation.

Firstly, the UNCLOS might be the best chance that IWC can have to reinforce its provisions as it is one of the international conventions that widely signed and ratified by a huge number of countries (168 ratifications). The most significant provision to support the enforcement of the IWC is laid down on Article 65 UNCLOS, which stated that:

> "Nothing in this Part restricts the right of a coastal state or the competence of an international organization, as appropriate, to prohibit, limit, or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management, and study."[103]

This article, particularly the emphasis on the 'appropriate international organizations,' may be applicable for the IWC to strengthen their position in overseeing the whale conservation. While the term of international organization might refer to other independent bodies, IWC is currently the only organization that maintains any type of whaling management authority over the global whale stocks.[104] Thanks to this provision, it may be argued that all member parties of the UNCLOS are required to comply with the IWC as it is the only 'appropriate international organization' on

[102] Zemantauski, Jared. (2012). *Has the Law of the Sea Convention Strengthened the Conservation Ability of the International Whaling Commisson?*. 43 U. Miami Inter-Am. L. Rev. 325. Retrieved from: http://repository.law.miami.edu/umialr/vol43/iss2/5

[103] United Nations Convention on the Law of the Sea. (1982). Article 65.

[104] Zemantauski, Jared. (2012). *Has the Law of the Sea Convention Strengthened the Conservation Ability of the International Whaling Commisson?*. 43 U. Miami Inter-Am. L. Rev. 325. Retrieved from: http://repository.law.miami.edu/umialr/vol43/iss2/5

whale management. The provision implies that the member states are demanded to conform to the IWC regulations except when their domestic measures in the conservation of whale are stricter than the ICRW provisions.[105] Moreover, during the drafting of UNCLOS, Article 65 was generally assumed as the consolidation of the role of the IWC in all matters related to whale management. This view led to the contention by pro-whaling nations which were saying that the absence of alternative options of the 'appropriate international organizations' would force them to be bound with the IWC regulations even though they are not the member of it.[106] This is such a huge advantage for the IWC as it could impose its provisions as long as the targeted state is a party of UNCLOS. Furthermore, regarding the jurisdiction of the IWC, the Article 1 Para 2 of ICRW is stressing the convention authority over the factory ships, land stations, and whale catchers upon the jurisdiction of the Contracting Governments and all waters where the whaling is prosecuted.[107] This provision granted the jurisdiction to the IWC to exercise its regulations over all waters of the globe, including a state's territorial sea. Again, the Article 65 of UNCLOS supports this control by asserting that 'nothing in this Part restricts the competence of an international organization to prohibit, limit, or regulate the exploitation of marine mammals more strictly than provided in this Part.'[108] It can be interpreted that the UNCLOS allows the IWC to revoke a sovereign right of a state in the EEZ on behalf of cetacean's management. Not to mention Article 120 UNCLOS that also emphasize the power of Article 65 to regulate the conservation and management of marine mammals even on the high seas.[109] Lastly, the capability that UNCLOS may offer for the enforcement of ICRW is on the dispute settlement procedure where one nation could bring an issue against another in case of the interpretation of rights and responsibility of UNCLOS's member states.[110] Point out Part XV Section 2 Article 286 of UNCLOS about Settlement of Disputes which stated, 'any dispute arises from the interpretation or application of the UNCLOS provisions shall,

[105] Bowman, M., Davies, P., & Redgwell, C. (2010). *Lyster's International Wildlife Law (Second Edition).* Cambridge: Cambridge University Press, 185.
[106] Steven Freeland & Julie Drysdale. (2005). *Co-operation or Chaos? — Article 65 of United Nations Convention on the Law of the Sea and the Future of the International Whaling Commission.* 2(1) Macquarie Journal of International and Comparative Environmental Law I, 4. Retrieved from: http://classic.austlii.edu.au/au/journals/MqJlICEnvLaw/2005/1.html
[107] International Convention for the Regulation of Whaling (ICRW). (1946). Article 1.
[108] United Nations Convention on the Law of the Sea. (1982). Article 65.
[109] United Nations Convention on the Law of the Sea. (1982). Article 120.
[110] Zemantauski, Jared. (2012). *Has the Law of the Sea Convention Strengthened the Conservation Ability of the International Whaling Commisson?*. 43 U. Miami Inter-Am. L. Rev. 325. Retrieved from: http://repository.law.miami.edu/umialr/vol43/iss2/5

where no settlement is reached between parties involved, be submitted to the court or tribunal having jurisdiction at the request of involved parties.'[111] In this case, when IWC is trying to exercise its law on a nation's sovereign rights or high seas granted by Article 65 and 120 including whaling quota or moratorium, the dispute settlement provisions in Part XV of UNCLOS can be invoked as the IWC is taking a form as the result of the interpretation of UNCLOS provision. Hence, any dispute arises from the relationship between UNCLOS and IWC regarding cetacean management will be subject to the dispute settlement under UNCLOS.[112] Besides, for a state that not a party of the IWC like Indonesia, could be demanded to comply with the IWC rules since it has ratified the UNCLOS provisions. This action—if implemented correctly—can solve the regulatory vacuums in Indonesia by obliged the state to set the whaling quota and create sustainable whaling management for the indigenous people in the area. Since Indonesia does not have a stricter regulation on whale conservation, Article 65 UNCLOS can work out effectively to impose the IWC regulations to fulfill its duty on conservation of marine mammals. Meanwhile, for the US, since it has a stricter regulation compared to the IWC, the same article is not necessary to be invoked.

Secondly, the possibility of joint implementation would also give a prospective future for three prominent legal instruments to cooperate in reaching the same objective: conservation on biological diversity. These three instruments are ICRW, CBD, and CITES. Aside from the same main objective that pursued by these regulations, the CBD primarily could provide an umbrella for the recognition of the dependence of indigenous and local communities on biological resources, including whale. The role of international, regional, and global cooperation among states along with the participation of intergovernmental organizations and NGOs also recognized in the CBD. Moreover, the formulation of the precautionary principle for the utilization and conservation of biological diversity is highlighted to indicate where the states are heading in fulfilling their conservation duty.[113] These are critical points that legal instrument should have to balance the interest of all stakeholders. In this case, if the ICRW and CITES able to develop a more significant linkage with CBD, the three can work in harmony to cover the loopholes exist in one another. As

[111] United Nations Convention on the Law of the Sea. (1982). Article 286.
[112] Zemantauski, Jared. (2012). *Has the Law of the Sea Convention Strengthened the Conservation Ability of the International Whaling Commisson?*. 43 U. Miami Inter-Am. L. Rev. 325. Retrieved from: http://repository.law.miami.edu/umialr/vol43/iss2/5
[113] Couzens, Ed. (2014). *Whales and Elephants in International Conservation Law and Politics: A Comparative Study*. Oxon: Routledge, 224.

an illustration, the formulation 'Joint Implementation Committees' might be considered to integrate common aims, work, and process of the implementation of the three.[114] The easiest way is also can be started by integrating the principles in the CBD to the IWC to make it applicable to the management of whales. This measure also actually had been discussed in 2010 (IWC 62) though it was a missed opportunity.[115] The acknowledgment of Article 8 CBD pertinent to the right of indigenous people can also work in tandem with the ICRW Schedule on aboriginal subsistence whaling thus balancing the interest between the preservation of traditional culture and the conservation duty. The CITES will lastly play its card to complete the conservation effort in case illegal commercial whaling is identified during the strictly-regulated whaling practice under the other two instruments. If the collaboration of these three can be executed correctly in the manner of completing each other, the protection of natural biodiversity, including whale will be stronger than ever.

4.1.2. Collaborative Partnerships

The role of local communities, including the indigenous people in protecting the natural resources in the area where they live, must be recognized. Several indigenous groups especially have a strong bond with the whale concerning to identity of their culture as a whale hunter as well as subsistence purpose. While this act can be considered as a threat to whale and its positive contribution in recycling nutrient in marine biological community (known as *whale falling*), the prohibition of any taking by indigenous groups would impair the enjoyment of their right to self-determination and their traditional way of life.

Regarding the concern mentioned above, the participatory processes are necessary in order to enhance problem-solving abilities and provide access for the indigenous peoples in the decision-making. When the working program of a state's government is aligned with the necessities of the indigenous group in the area of conservation, any prospective conflict could be dodged while at the same time improve the law implementation and the conservation effort of the state. In this way, the indigenous people and marine mammals could interact in a mutually beneficial manner. As a basis of this act, the Principle 7 of the 1992 Rio Declaration on Environment and Development pertaining to the concept of intra-generational equity may be closely related. It can be interpreted that, while the state should acknowledge the indigenous right of subsistence whaling in their

[114] Ibid., 225.
[115] Ibid.

territory, the indigenous peoples should—in return—contribute to the protection and preservation of whale stocks as an expression of solidarity to the environmental problems faced by international community as a whole.[116]

The engagement of indigenous people and/or local communities in the development and implementation of the regime on biodiversity conservation has been demonstrated in most regimes. The most viable one can be seen in the CBD Preamble that asserting its recognition on the traditional dependence of indigenous communities. This is also supported by its following provisions, especially the Article 8 which requires the state to respect, preserve and maintain knowledge, innovations, and practices of indigenous people that relevant for the conservation and sustainable use of biological diversity.[117] It can be interpreted that as the whaling practice is essential for the socio-cultural needs of indigenous people, the participation of the concerning group in the conservation effort can be beneficial to maintain the cultural practices and provide whale hunting in a sustainable manner without deteriorating the whale population. This is also supported by UNDRIP Article 29 asserting the right of indigenous people in the conservation and protection of their lands and resources as well as the state's obligation to establish and implement assistance program for the fulfillment of such protection.[118] However, in order to begin the participation measure, the state firstly needs to ensure that the indigenous people have sufficient knowledge regarding the conservation management. Raising awareness of the declining trend in the whale population due to unsustainable whale hunting can be one of the ways to establish a mutual understanding between indigenous people and the state. This is not an issue for a well-established whaling management system in a developed country such as the US. The Makah tribe of Washington State has its own educational system for the Makah's offspring regarding the whaling practice as well as proper acknowledgment on the applicable whaling rule. Nevertheless, for the developing country with insufficient regulation and limited understanding of the scientific knowledge on the whaling impact, the lack of knowledge would only lead to the ignorance of conservation management. As an illustration, in the interview of the village priest of Lamalera tribe in Indonesia regarding the alleged commercial whaling, he was argued that there is no harm

[116] Bowman, M., Davies, P., & Goodwin, E. (2016). *Research Handbook on Biodiversity Law.* Cheltenham (UK): Edward Elgar Publishing Limited, 305

[117] Convention on Biological Diversity. (1992). Article 8 (j).

[118] United Nations Declaration on the Rights of Indigenous Peoples. (2007). Article 29.

in selling fish since it was not stolen and it is not illegal drugs either.[119] Moreover, from the same piece of article, the villagers of Lamalera reveals that they landed around 20 sperm whales a year along with uncountable numbers of smaller pilot whales, dolphins and mantas.[120] These are the results of the lack of adequate information and socialization provided by the state to manage the whaling practice in Lamalera since the villagers cannot be expected to obtain the knowledge by themselves. In this case, the conservation agenda needs to be discussed and explained to the villagers, including the status of traditional whale hunting as well as the advantages the villagers will obtain from sustainable hunting.[121] Furthermore, the involvement of the representatives of the indigenous group is also crucial in monitoring and subsequent management effort of the agenda in order to yield a responsible connection of the indigenous to the whale as well as gain trust from them to achieve mutual understanding on the whale conservation. This model is similar with the right-based approaches where the use of living marine resources is managed through the development of spatial plans and implemented through right-based measures such as licenses and quotas, but in this case, the right is mandated to the non-State actors instead of the state.[122]

In regard to the economic aspect of the tribe, the state may develop the partnership in the conservation management with the indigenous people by a *win-win* solution. For example, the state may be allowing the whaling practice with agreed quota with the indigenous group annually. This quota is decided based on the subsistence necessity of the local's consumption per-year and prohibited to be sold outside the local communities (see section 2.3 for the rules of sharing). This has to be strictly regulated to prevent the possibility of commercial purpose that might occur from the economic incentive. In return to the compliance of this agreement, the indigenous community would be facilitated by the state to fulfill their economic aspect in other means. For instance, as an exchange of selling the whale products for the economic benefit, the indigenous would be allowed to earn income from tourism aspect: whale watching. Whale watching has been a rapidly grown industry worldwide, which contribute to USD 299.5 millions of global direct expenditure in 1998 alone.[123] This is an up-and-coming program for the conservation management since it will directly

[119] Emont, Jon. (August 3, 2017). *Lamalera Journal: A Whaling Way of Life Under Threat.* The New York Times. Retrieved from: https://www.nytimes.com/2017/08/03/world/asia/whaling-lamalera-indonesia.html
[120] Ibid.
[121] Mustika, P.L.K. (2006). *Marine Mammals in the Savu Sea (Indonesia): Indigenous Knowledge, Threat Analysis and Management Options* (Master Dissertation), 135. Retrieved from: https://researchonline.jcu.edu.au/2064/
[122] Rodgers, Christopher. (2013). *The Law of Nature Conservation.* Oxford: Oxford University Press, 242.
[123] Mustika, P.L.K. (2006). *Marine Mammals in the Savu Sea (Indonesia): Indigenous Knowledge, Threat Analysis and Management Options* (Master Dissertation), 136. Retrieved from: https://researchonline.jcu.edu.au/2064/

benefit the local indigenous people as a sustainable alternative in the profit earnings, as well as providing a stable and growing whale populations in the area.[124] As this is not a small plan program, the indigenous group should be supported by capacity building on tourism management in order to be able to maintain the whale watching effectively while maximizing the whale conservation effort in the area.

4.2. Concluding Remarks

Finally, the last discussion chapter of this thesis aimed to contribute to improving the future legal measures on whale conservation while respecting the traditional practice of indigenous people. Such delicate balancing act is impossible to perform on a single-issue regime due to the marine ecosystem that perceived to be in a vulnerable position. Hence, the broad-spectrum efforts need to be enhanced to advance the conservation of whale and preservation of indigenous culture. Previously, the main weaknesses of current legal instruments, especially ICRW and IWC, as the only organization that maintain whaling management internationally has been identified. The most lethal shortcoming among others is its 'toothless' nature, which results in the less legal implications arise from the negligence to its provisions. This is not a problem for a nation that has stricter whaling management in its domestic law such as MMPA of the US, but for the country with a less-established system, this may adversely impact the whale populations due to the lack of legal foundation on the management of whale conservation. As a result, unsustainable whaling may occur involving the commercial whaling in the guise of scientific or aboriginal subsistence whaling. Moreover, reflecting the Lamalera tribe in Indonesia, the lack of indigenous knowledge for the whale conservation and unregulated whaling quota by Indonesian government has resulted in the overhunting of whale in the Savu Sea as a critical migratory route of cetaceans and show the symptoms of illegal commercial whaling including other protected marine species.

Therefore, in this chapter, two measures have been proposed to tackle the issue generated from the case studies presented in chapter 3. The first one is employing collaborative instruments to address the loopholes in the existing regulations, while the second one is proposing the partnership collaboration between the local government and indigenous people. The outcome of the discussion is elaborated as follows: firstly, from the model of collaborative instruments, the researcher found that the deficiency on the enforcement of the IWC can be addressed by a stronger legal implication

[124] Ibid.

derived from UNCLOS provisions. This is possible to be done since the UNCLOS provides a specific article asserting the obligation of the state members to be involved in the conservation of marine mammals, in cooperation with the appropriate international organization in which the IWC can easily claim on. In this way, IWC can impose its provisions utilizing the dispute settlement procedures of UNCLOS to produce legal implications, as well as enforcing its regulations even to the non-member state of the IWC. The UNCLOS, in this case, has a vast number of member states which can be very advantageous for the IWC to expand its authority on whale management. Secondly, the collaboration of three legal instruments with the same goal: CBD, IWC, and CITES also need to be considered for joint implementation. The CBD can act as the umbrella by involving a broader subject on the conservation of biodiversity, including the participation of the indigenous people and asserting the obligation of the state on the conservation effort. Besides, the provisions in CITES will play its role when the allegation to the commercial whaling practice is identified in a specific area, while the IWC will manage any type of whaling management in the area where it is prosecuted including a state's sovereignty area and high seas. If these three can be collaborated accurately, the loopholes in one another can be addressed as it will become a robust regime on the whale conservation.

On the other hand, the means of the collaborative partnership will be prospective in managing the whaling practiced by indigenous people. Considering the issue as mentioned earlier concerning to the lack of knowledge of an indigenous group regarding the whale conservation, it would be better if the state involves the participation of the indigenous group in the decision-making process as well as the management of the whaling practice in the area. The acknowledgment of indigenous people about the declining whale population due to unsustainable whaling that will also adversely impact their whaling practice in the future can be an initial step that state should be socialized to the community. Furthermore, the agreement between the state and indigenous group pertaining to the whaling quota per-year and the limitation of whaling should also be the agenda of the state to create a sustainable traditional whaling practice. In return of this favor, the partnership can be continued by offering an economic incentive to the hunting village by means of tourism activity such as whale watching, as it potentially generates a considerable income for the villagers to sustain their life as an alternative of whale hunting. Lastly, the state is advised to involve the representative of the indigenous people in the monitoring process and subsequent management of

the whale conservation in order to nurture the responsible feeling to the indigenous group in conducting the whale protection.

Chapter V

5. Conclusion

In a big picture, this thesis aimed to shine the light on the conflicting interest of the state to protect the whale as an endangered species listed in most of the international and national legal instruments, while respecting the rights of the indigenous people which also protected under the law. This conflict is occurred due to the whaling practice conducted by certain indigenous groups to fulfill their subsistence and cultural needs as it has been carried out for hundreds of years by their ancestors. The ceased of the whaling due to conservation management may impair the identity, traditional culture, and the way of life of these indigenous groups. Therefore, a balancing act is needed by the state in order to create equilibrium for the preservation of these two interests. Departed from this concern, the discussion in this thesis designed to respond to the overarching question: *'what is the role of international and domestic law in addressing the conflicting interest between respecting the culture of indigenous peoples and protecting whales?'.* In order to answer this, three subchapters are presented to build the milestones leading to the vital issue:

Firstly, the relationship between the conservation of whale and the protection of cultural interests in international law is discussed in order to give initial insights for the reader about the problem. The discussion is established by giving definitions about the indigenous people in the international and national level as it is still facing conceptual problems on both levels. In the international regime, even though there is no firm foundation that used as a single definition of indigenous people, UNDRIP and ILO Convention No. 160 are highlighted in this thesis as it contains specific elements to describe the indigenous people and the latter as the only international binding instrument related to the indigenous rights. Meanwhile, for the national levels, this thesis examined the recognition of indigenous people in two different countries where the case studies conducted: United States and Republic of Indonesia. The result is quite surprising as the United States shows a full recognition and well-established foundational principle pertaining to the status and rights of the Indian tribes along with its special body to maintain the relationship between the tribes and the states. In contrary with the United States, however, Indonesia is still left behind on the recognition and management of indigenous people since the researcher cannot found a single regulation containing the specific rights of indigenous people acknowledged in Indonesia. Although the term of 'customary communities' indeed mentioned in some national legislation, there is no noticeable

embodiment of this recognition which leads to the conclusion that the definition and rights of indigenous people in Indonesia are still insufficient due to the inconsistencies of the Indonesian government. Furthermore, the concept of whale protection under international law is brought up in order to give essential knowledge to the reader concerning the current legislation. This is highlighted by the role of IWC as the embodiment of ICRW in managing the global whale stocks in any type of whaling. The other related legal instruments such as CITES and UNCLOS also mentioned in this part as alternative regulations of the whaling practice. In order to connect the dots, the first discussion is concluded by providing the explanations on the relationship between whaling and indigenous people by underlining the aboriginal subsistence whaling. The result of this chapter is emphasizing that the only way to legalize the whaling practice by the indigenous group is by obtaining the recognition of their practice as an aboriginal subsistence whaling.

Secondly, the real whaling practices in two different part of the world are presented to find out how possible conflicts have been dealt with in practice. The study is conducted in a developed country (United States) and developing country (Republic of Indonesia) to grasp the issue in the broader perspective as US is a party of the IWC while Indonesia is not. This comparison aims to identify the different method of the government in a developed and developing country in handling such issue, so better whaling management can be adapted to facilitate the practice. This discussion also completed with the view on current legal perspectives in both whaling nations to find out to what extent the whaling practice of an indigenous group has been managed in a sustainable manner and accordance to the law. As a result, it is found that the US has better whaling management for the Makah tribe by imposing its own national law, MMPA, to conduct the whaling management with stricter scientific requirements compared to the IWC. Due to the restriction of precedent IWC moratorium and now the MMPA, the Makah tribe is respecting the decision by halting its whaling practice for around two decades now. On the other hand, Indonesia still lacks sufficient legal instrument to accommodate the whaling practice by the Lamalera tribe since it also not a part of the IWC. Until now, the Lamalerans are still conducting an unsustainable whaling practice with a fluctuated number of landed whales record each year. The lack of knowledge of the indigenous people and unclear regulations pertaining to whale conservation is expected as the main reason for this issue.

Thirdly, this part is designed to identify and address the possible failure of whaling management identified in the presented case studies. As the following step, this chapter proposes possible

measures that probably can be taken into account for future whaling management while not disregard the whaling culture of the indigenous group. The collaborative instruments and collaborative partnerships models are offered to cover the main problems such as the lack of enforcement of the IWC and insufficient knowledge of the indigenous people regarding whale conservation. For the first point, the collaboration of IWC and UNCLOS is highlighted as UNCLOS provisions can be used to stimulate the legal implications of the IWC to be enforced to the UNCLOS member states. Moreover, the researcher proposed the possibility of joint implementation between CBD, IWC, and CITES in covering the loopholes exist in the three as well as strengthening and expanding the scope of whale conservation. Meanwhile, the second part delineates the importance of collaborative partnerships between local government and indigenous people in whale conservation management. The impetus for the indigenous would be granted the whaling quota per-year—with a strict restriction to the selling of whale products—and alternative economic resource from tourism activity. The involvement of indigenous people in monitoring and subsequent management of whale conservation also worth to be considered in order to trigger a responsible feeling for the indigenous in whale conservation.

Finally, these milestones have led us to answer the big question of this thesis regarding the role of international and domestic law in addressing the conflicting interest between these two regimes. From here, it can be concluded that while international law is playing a considerable role in maintaining the global whale population as well as upholding the rights of indigenous people, still, the state is holding a crucial responsibility to maintain the whale management and indigenous people's rights in their jurisdiction. However, in case the regulations vacuum occurs, the utilization of collaborative international law can be effective to address the issue. In international and national level, the delicate balancing act needs to be performed by the state in the means of providing effective legal measures that can be used by the indigenous people to challenge their right on the whaling practice. This is, of course, should be done in a precautionary manner not to deteriorate the whaling population. The partnerships program between government and indigenous people to achieve mutual understandings on the whaling management is thereof essential in order to create a harmonious relationship between the state, indigenous people, and whale as the protected species.

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