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Project Title 1: Global Protection of Human Rights

At present, there is considerable debate concerning the proposed referendum on independence for Scotland. The issue has arisen whether the referendum should also include a question on “Devo plus” or an enhanced form of autonomy for Scotland. You are required to write a report analysing (a) whether claims for greater autonomy or independence for Scotland are recognized under international human rights law, and (b) the conditions that need to be met to ensure recognition of these claims.

Project Title 2: Law of the Sea

Whaling - the relationship between IWC and NAMMCO in relation to the Convention on the Law of the Sea art. 65 on the "appropriate international organizations" for the "conservation, management and study" of cetaceans.

Silje Elise Bertheussen.

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DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

Signed: ..... (candidate)

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This work is the result of my own investigations, except where otherwise stated. Where correction services have been used, the extent and nature of the correction is clearly marked in a footnote(s).

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Introduction

The origin of self-determination for a people can be traced back to the fifteenth century [1], but was not endorsed as a legal right until the adoption of the United Nations Charter [2]. The right to self-determination has later been recognised as a human right in many international instruments [3], most notably common art. 1 of the International Covenant on Civil and Political rights (ICCPR) [4] and International Covenant on Economic, Social and Cultural Rights (ICESCR) [5], which stipulates that «all peoples have the right of self-determination» [6]. Despite the acknowledgement as a fundamental human right, the application of self-determination is very controversial due to the potential of breaking up a State, and has rightfully been called a phrase «loaded with dynamite» by former United States Secretary of State Robert Lansing. Demands for self-determination for a people exist worldwide, but will in this dissertation be addressed in relation to the right in international human rights law to autonomy or independence for Scotland, which is a constituent part of the United Kingdom along with England, Northern Ireland and Wales.

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[1] For a more thorough explanation of the origin of the right, see Philip Alston, *People's rights*. (Oxford University Press 2001) 11-26.

[2] Charter of the United Nations and Statute of the International Court of Justice (Adopted 26 June 1945, entered into force 24 October 1945) Ch-o (UN Charter) art.1(2) and 55.

[3] For example the African Charter on Human and Peoples' Rights (Adopted 27 June 1981) 1520 UNTS 217 art. 20; Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (Adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383, art. 7, regarding Indigenous and Tribal Peoples; Conference on Security and Co-operation in Europe Final Act, Helsinki 1975; Declaration on Principles Guiding Relations between Participating States art. VIII.

[4] International Covenant on Civil and Political rights (Adopted 16 December 1966, entered into force 23 Marcg 1976) 999 UNTS 171 (ICCPR).

[5] International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966, entered into force3 January 1976) 993 UNTS 3 (ICESCR).

[6] Cf. ICCPR and ICESCR Art.11. For convenience, the article will hereinafter be referred to as ICCPR art.1.

Scotland already has powers over certain matters after the Scottish Parliament was established in 1999 [7]. This was done after the British Government made provisions to hold a referendum in Scotland to establish a Parliament and delegate powers which was then under the power of the British Parliament [8]. Claims for further power over Scotland for the Scottish Parliament has however not silenced and the Scottish Government has proposed a referendum to be held in 2014 regarding independence from the United Kingdom.

As the ICCPR is among the highest ratified treaties in the world [9] and the most «definitive legally binding statement of the contemporary right of self-determination» [10], this Covenant
will provide the foundation for the further discussion. The Covenant has been ratified by the United Kingdom without any reservations regarding Scotland, and the right to self-determination thus applies to all «peoples» in the United Kingdom.

The right to self-determination entails, inter alia, the right for a people to «freely determine their political status and freely pursue their economic, social and cultural development» [11], which ensures that the people decide how these

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[7] Scotland Act 1998, provision 28-36. Further delegated powers have later been made in relation to, inter alia, health, education and environment

[8] Referendums (Scotland and Wales) Act 1997, Chapter 61.1.

[9] The Covenant currently has 167 parties , see <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-4&chapter=4&lang=en#Participants> accessed 25.09.2012.

[10] Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 Virginia Journal of International Law 1, 18.

[11] Cf. ICCPR art.1.1.

areas of society should be organized and managed. The observance of the right to self-determination is also important to ensure that other human rights, such as the right to express their opinion [12] or come together as an assembly to discuss the issue [13] are respected by the State [14]. The importance of the right is demonstrated by it being the only common article of the ICCPR and ICESCR, being placed apart and before the other rights of the Covenants [15] and its recognition as a «general principle of international law» [16].

ICCPR was made justiciable by the adoption of the Optional Protocol to the Covenant [17] which allows the Human Rights Committee to receive and consider communications from individuals who claim to be victims of a violation by a State Party of any of the rights of the Covenant [18]. This has not been signed or ratified by the United Kingdom, which prevents claims of violations of the ICCPR in the United Kingdom to be brought before the Committee. This would nevertheless not make a claim for independence or autonomy for Scotland justiciable, since the Committee does not accept claims of violation of the right as it is a collective right and the Protocol only accepts communications from

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[12] Cf. ICCPR art. 10.

[13] Cf. ICCPR art. 11.

[14] Cf. ICCPR General Comment No. 12: The Right to self-dermination of peoples (Art. 1), 13.03.1984, pp.1. The Human Rights Committee is entitled to make such general comments as it considers appropriate to the States Parties, cf. ICCPR art. 40.4.

[15] Ibid.

[16] *Reference re Secession of Quebec* (1998) 2 SCR 217 (Canada), para 114.

[17] Optional Protocol to the International Covenant on Civil and Political Rights (Adopted 16 December1966, entered into force 23 March 1976) 999 UNTS 171.

[18] Ibid art.1. An Optional Protocol to the International Covenant on Civil and Political rights has also been adopted, but not yet entered into force.

individuals, cf. art. 1 of the Optional Protocol [19]. Art. 1 has nevertheless been taken into account by the Committee in relation to other claims of the ICCPR [20], and can thus have influence in that regard.

The topic of the dissertation is self-determination for Scotland, and will therefore not expand on topics that are not relevant to the Scottish situation, such as the right of minorities or the use of force. The dissertation will further analyze which conditions must be met to ensure recognition of claims for self-determination under international human rights law and whether it recognizes the claims for greater autonomy or independence for Scotland.

Main Part

I. «People»

The first condition prescribed by ICCPR art. 1 to enable the exercise of the right to self-determination is that it must be exercised by a «people». The right is hence a group right, which can not be exercised by an individual, like most other human rights, but by a group of individuals considered a «people». Despite the importance of clarifying who the right to self-determination is incumbent upon, art. 1 does not describe the conditions for determining who is a «people» or the characteristics such a group must entail. A universal definition

[19] Human Rights Committee, *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990), para 32.1 and Human Rights Committee, *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), para 6.3.

[20] Human Rights Committee, *Ms. Marie-Hélène Gillot v. France*, Communication No. 932/2000, U.N. Doc. A/57/40 at 270 (2002), para 13.4.

of who is a «people» has neither been agreed upon during the nearly fifty years since the ICCPR was adopted, and the issue is still disputed. Providing a definition of who is a «people» is important to ensure whether the right is incumbent upon, eg., the residents in Scotland, as suggested by the Scottish Parliament in the referendum proposed to be held in 2014, all the citizens of the United Kingdom or a different group.

Many attempts have been made to describe a «people» by an ethno-national definition, which would provide an effective means to clarify who the recipients of the right to self-determination are. Such a definition was applied in the Greco-Bulgarian Communities case [21], where the former Permanent Court of International Justice considered a «community» as a group of people with, inter alia, the characteristics of «..living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity..» [22]. A similar definition has been used by the United Nations Educational, Scientific and Cultural Organization (UNESCO), which prescribes that a «people» must enjoy some or all features such as «a common historical tradition, racial or ethnic identity, cultural homogenity, linguistic unity and territorial connection» [23]. This has however essentially remained a working definition for UNESCO [24]. Reference to ethno-national characteristics was also made in an advisory

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[21] *The Greco-Bulgarian «Communities»*, Publications of the Permanent Court of International Justice. Series B.-No. 17 (31July 1930).

[22] Ibid 21. Note, however, that self-determination was still considered a political principle, not a legal right at this time, cf. Aaland Islands Dispute Report by the Commission of Rapporteurs, LN Council Doc. B7 21/68/106 (1921) 317

[23] Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, SNS-89/CONF.602/7 (22.02.1990).

[24] Rhona K.M. Smith, *Textbook on International Human Rights*. (3rd edition, Oxford University Press 2007) 255.

opinion regarding the right for Quebec to secede from Canada under international law [25], but the court did not elaborate further on this as it was not regarded necessary in the specific case. McCorquodale rejects an ethno-national definition as objective, as he considers this likely to reinforce a «developed-world, colonial, male construct of a 'people'» [26]. He suggests that a very flexible definition must be adopted, albeit without describing what such a definition should entail [27]. A very flexible definition can, however, create difficulties in establishing who the «people» in a specific case is, as it can include groups which have not traditionally been considered a people. No ethno-national definition has so far been universally accepted, and such characteristics can thus not be applied when considering who the holders of the right to self-determination are.

As mentioned, the UN Charter, which established the United Nations, was the first international instrument to endorse self-determination as a legal right. The only direct reference to self-determination in the Charter is as a principle to develop «friendly relations among nations» [28]. The Charter further refers to «peoples» in regard to Non-Self-Governing Territories as territories «whose peoples have not yet attained a full measure of self-government» [29] and to territories held under the International Trusteehsip System as each territory «and its peoples» [30]. The wording of the two latter provisions indicates that the

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[25] *Reference re Secession of Quebe*c (n 16) para 125.

[26] Daniel Moeckli, Sangeeta Shah, & Sandesh Sivakumaran, *International Human Rights Law* (Oxford University Press 2010) 370.

[27] Ibid.

[28] Cf. art. 1(2) and 55.

[29] Cf. UN Charter, art.73.

[30] Cf. UN Charter art.76.

«people» referred to, is the inhabitants of these dependent territories and thus not the whole population of a State. It also indicates that the right is not applicable outside the colonial context.

Kelsen interprets the right to self-determination in the Charter as a right to «sovereign equality», and not as a right to self-determination for dependent peoples. He argues that the reference in art. 1(2) to «relations between nations», means relations between States as only States had rights under international law at the time of adoption of the Charter, and that the right thus only applied to independent States [31]. Higgins supports this interpretation on the basis that art. 73 and 76 of the Charter does not refer to self-determination directly and that independence was not considered the only proper outcome for dependent territories [32]. Quane further argues that the reference to self-determination in the Charter applied to both States and the inhabitants of dependent territories. As only States were considered as having rights under international law at the time, these were entitled to self-determination as a legal right which meant «sovereign equality» and the obligation of other States not to interfere with the internal affairs of the State. Self-determination for dependent territories, however, meant self-government or independence as a political goal to be pursued, cf. art. 76(b) of the Charter [33]. Smith, on the other hand, asserts

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[31] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*. (Praeger 2010) 53.

[32] Rosalyn Higgins, *Problems and Process: International law and how we use it.* (Oxford University Press 1998) 112.

[33] Helen Quane, 'The United Nations and the evolving right to self-determination' (1998) 47 International & Comparative Law Quarterly 537, 547.

that the purpose of proclaiming self-determination in the Charter, was to end colonization [34].

From the 1960s to the 1980s, many former dependent territories became independent or exercised the right to self-determination in other ways, and the number of member States of the United Nations increased rapidly. This was furthered by the 'Declaration on the granting of independence to colonial countries and peoples' [35], which proclaimed immediate steps to be taken in all territories which had «not yet attained independence» to ensure transfer of all powers to the peoples of those territories [36]. The 'Declaration on Principles of International Law concerning Friendly Relations' [37] also stated that the separate and distinct status of such territories shall exist «until the people of the colony or Non-Self-Governing Territories have exercised their right of self-determination» [38]. Although resolutions are not legally binding, the latter is regarded as internationally agreed clarifications of the principles of the UN Charter, cf. art. 1, and is considered customary international law [39], as it is being followed in State practice and acted upon as legally binding, thus fulfilling the requirement of *opinio juris*. Despite the specifications regarding dependent territories, the

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[34] Smith (n 24) 257.

[35] Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960).

[36] Ibid, para 5.

[37] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

[38] Ibid 124, preambular six.

[39] *Military and Paramilitary Activities in and against Nicaragua*' (Nicaragua v. United States of America) (Merit) [1986] ICJ Reports 1986, p. 14, para 191-193 and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion 2010, para 80.

resolutions do, however, refer to «all» peoples, which indicates that the right to self-determination is applicable outside the colonial context.

The International Court of Justice (ICJ) later endorsed the legal right to self-determination as applicable to all colonies in the Namibia opinion [40]. The court was here asked to provide an advisory opinion of the legitimacy of South Africa, which had earlier been assigned as the mandate holder for South-West Africa (Namibia), to maintain their presence in South-West Africa despite resolutions by the UN General Assembly and Security Council which condemned this. The court stated that «the subsequent development of international law in regard to non-self-governing territories.. made the principle of self-determination applicable to all of them» [41], thus establishing that the right to self-determination applies to all colonies. In the Western Sahara Advisory Opinion [42], where the court was asked to decide whether Western Sahara was terra nullius at the time of colonization by Spain, the court further stated that the principle of self-determination had to be exercised through the free and genuine expression of the will of the «peoples of the territory». The «territory» referred to here was the territory of Western Sahara, which indicates that the right to self-determination is a right for inhabitants of a colony [43].

The practice under the decolonization era demonstrates that the right to self-determination was referred to as applicable to inhabitants of dependent

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[40] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (*1970), Advisory opinion 1971.

[41] Ibid para 52.

[42] *Western Sahara* Advisory Opinion 1975.

[43] Ibid, para 162.

territories. These were usually territorially clearly distinguished from the colonial power, and easy to identify. The few colonies left today [44], has however led to the question of whether self-determination can be applied outside the colonial context, thus whether a «people» can be other than inhabitants of dependent territories.

During ratification of the ICCPR, India declared that art. 1 should apply only «to the peoples under foreign domination» and not to «sovereign independent States or to a section of a people or nation» [45]. This was objected to by three States [46], and the lack of support by other States, indicates that this view was not shared by other States. The need for India to declare their position on the topic, also signifies that the common perception among States was that self-determination applied to people in all States.

An interpretation of the wording of ICCPR art. 1, cf. the Vienna Convention on the Law of Treaties [47], supports the view that self-determination is not limited to people in colonies. Most importantly, art. 1 does not differentiate between what group of peoples are entitled to self-determination, but simply states that this is a right for «all» peoples. This is essential as the text, as the expression of the will of the member States, shall be interpreted in good faith «in accordance with the ordinary meaning to be given to the terms of the treaty» [48]. Paragraph 2

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[44] Palestine and Western Sahara being the few left.

[45] Declaration by India, I, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec> 'accessed 25 September 2012'.

[46] See CCPR/C/2/Add.5 (1982),3, and CCPR/C/2/Add.4 (1980), 4.

[47] Vienna Convention on the Law of Treaties (Adopted and opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

[48] Cf. art. 31.1.

further specifies that the natural wealth and resources may be freely disposed of by all peoples. The right to natural resources can not logically be limited to territories under colonial rule, but must apply to all peoples, including those outside the colonial context. Paragraph 3 also prescribes that promotion of the right of self-determination «includes» dependent territories [49]. If self-determination was meant to be confined to colonies, it would not be necessary to clarify this [50].

The Human Rights Committee has further emphasized that all States, not just colonial powers, are required to report on their obligations after art. 1 [51], which would not be necessary if self-determination was limited to colonies.

This interpretation is supported by the East Timor case [52], where the court was requested to determine whether the inhabitants of East Timor, a former Portugese colony, should be requested by the occupying state, Indonesia, when entering into an agreement with Australia in regard to its continental shelf. The ICJ proclaimed that the right of peoples to self-determination has an «erga omnes character» [53], hence an obligation on all States to protect, which indicates that it is not limited to people in dependent territories. The court further emphasized that self-determination is one of the «essential principles of contemporary international law» [54], which suggests that the right is still

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[49] Cf. art.1.3.

[50] Alston (n 1) 27.

[51] General Comment 12 (n 14) para 3.

[52] *Case Concerning East-Timor* (Portugal v. Australia) (Merits) [1995] ICJ Rep 1995.

[53] Ibid para 29.

[54] Ibid.

applicable even though most colonies have already exercised their right to self-determination.

The judgment of the previous mentioned case regarding secession of Quebec, however, stated that «people» can refer to «only a portion of the population of an existing state» [55]. The court interpreted this on the basis of the simultaneous reference to "nation" and "state" in documents where the right to self-determination had developed, and argued that the two terms did not mean the same. The court further stated that if «people» were restricted to the population of existing states, this would render the granting of a right to self-determination largely duplicative [56]. The court did however not provide further discussion of this or analyse whether the inhabitants of Quebec were a «people» in relation to self-determination, which gives less weight to the argument that a «people» can be only a part of the population of a State.

The lack of cases where the right to self-determination has been recognized outside the colonial context, aggravates the argument that self-determination is applicable for «people» who are not inhabitants in colonies. The uncertainty of the question has also been recognized by the ICJ [57]. State practice nevertheless demonstrates that self-determination has occurred outside the colonial context, like the reunification of Germany [58] and dissolution of the

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[55] '*Reference re Secession of Quebec*' (n 16) para 124.

[56] Ibid.

[57] '*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo',* (n 39) 82.

[58] Treaty on the Final Settlement With Respect to Germany, Moscow, 12.08.1990.

USSR and Yugoslavia [59]. The recognition of self-determination in the Helsinki Final Act [60], which only applied to European States, which were obviously not colonies, confirms this view. Quane supports this interpretation on the basis of State practice and territorial integrity [61].

The above mentioned sources indicate that the «people» entitled to self-determination, cf. ICCPR art.1, are the citizens of the whole territory. In this particular case, the «people» entitled to self-determination are all the citizens of the United Kingdom. The claim by the Scottish Government to hold a referendum where only residents of Scotland can vote is thus incompatible with international human rights law.

II. Exercising the right to self-determination

II.1. Procedures for exercising the right

ICCPR art. 1 further prescribes that by virtue of the right to self-determination, the people «freely determine» their political status and economic, social and cultural development [62]. This establishes that the people, namely the inhabitants of the United Kingdom, must be consulted of how self-determination should be exercised. The Western Sahara Advisory Opinion established that

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[59] The European Community's Declaration on Yugoslavia and its Declaration on the Guidelines on recognition of New States in Eastern Europe and the Soviet Union (16.12.1991) (1992).

[60] Helsinki Final Act (n 3).

[61] Quane (n 33) para 570.

[62] ICCPR art.11.

this must be done on the basis of a «free and genuine expression of the will of the peoples concerned» [63]. This applies in both regular elections to choose representatives of government and members of parliament and in the special case of exercising the right to self-determination.

The procedure for exercising self-determination entails two conditions that have to be met to ensure that the right is properly exercised. Other States must first of all not interfere with the internal affairs of other States, as this will adversely affect the exercise of the right to self-determination [64] and conflict with the sovereignty of the State. No other States must thus interfere in the exercise of the right to self-determination for the citizens of the United Kingdom.

The inhabitants must further be free from interference or manipulation from their own State when the right to self-determination is exercised [65]. This prevents the authorities from misleading the inhabitants as to who and what they are voting for and ensures that the will of the people is ascertained and followed. It also ensures that other rights, such as the right to effective participation [66] and freedom to seek, receive and impart information and ideas [67] is observed.

The means to ensure the will of the people, is up to the discretion of the State as long as it expresses their wishes, but has typically been conducted by a

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[63] *Western Sahara* (n 42) para 55.

[64] General Comment 12 (n 14) para 6.

[65] Antonio Cassese, *Self-determination of peoples: A legal reappraisal*. (Cambridge University Press 1995) 53.

[66] See, ie., ICCPR art. 25.

[67] ICCPR art. 19.2.

referendum or election [68]. The people must have a genuine choice to be able to exercise the right and thus have more than one alternative, which must be clear so that there is no confusion of what the vote entails. The number of votes required to win, is up to the discretion of the State, but McCorquodale argues that to ensure that the result reflects the free will of the people, more than 50% of the casted votes must reflect the winning alternative [69]. The conditions to be eligible to vote are also up to the State in question, but must not be an «unreasonable restriction» on the right to participate in the conduct of public affairs [70]. In the case of Gillot v. France [71], the authors claimed a violation of the effective right to participation [72] as they were not entitled to vote in a referendum concerning self-determination for the former french colony New Caledonia, due to the lack of fulfillment of the conditions of length of residence in the territory. The Human Rights Committee considered this restriction as an objective element to differentiate between residents regarding their relationship with New Caledonia [73], as the purpose of the referendum was to provide means of determining the opinion of, not the whole of the national population, but the persons "concerned" by the future of New Caledonia [74]. Limitations were therefore «legitimized by the need to ensure a sufficient definition of identity» [75].

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[68] Moeckli, Shah & Sivakumaran (n 26), 378.

[69] Ibid.

[70] Human Rights Committee, '*Chiiko Bwalya v. Zambia'*, Communication No. 314/1988, U.N. Doc. CCPR/C/48/D/314/1988 27.07.1993, para 6.6.

[71] Gillot et al (n 20) 22.

[72] Cf. ICCPR art. 25.

[73] Gillot et al (n 20) para 13.8.

[74] Ibid para 13.3.

[75] Ibid para 13.16.

This was however done in a former colony and is not directly applicable to Scotland.

The exercise of the right to self-determination for Scotland must be exercised through a procedure where the will of the inhabitants of the United Kingdom is ensured.

II.2. Substantive content of the right to self-determination

The exercise of the right to self-determination depends on the specific situation and the wish of the people, as it is up to them to «freely determine» the political status and development [76]. The content of the right can be exercised by, eg., self-government, free association or integration with an independent State, establishment of a sovereign and independent State, or any other political status freely determined by the people [77].

The many ways of exercising the right to self-determination can largely be divided into two categories. External self-determination changes the international relationship between the people exercising the right and the original State as well as other States [78], and is exercised by, eg., association or integration with another State, or independence. Internal self-determination changes only the internal relationship within a State, but not to other States,

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[76] Cf. ICCPR art.1.1.

[77] UNGA Res 2625 (n 37) para 124.

[78] Moeckli, Shah & Sivakumaran (n 26) 376.

and can be exercised by, eg., autonomy or federation. The claims discussed in this dissertation is whether Scotland has a right to greater autonomy or independence under international human rights law, and therefore has both an internal and external side. The two issues will be discussed separately below.

II.2.1. The claim for greater autonomy for Scotland

The first issue that arises is whether Scotland is entitled to greater autonomy under international human rights law. The current powers of the Scottish Parliament are delegated by the Parliament of the United Kingdom and thus based on an act under national legislation, not by exercising the right to self-determination in international human rights law. Delegated powers and autonomy based on the the right to self-determination are distinct and must not be confused, although they might have the same effect in practice. The former is an act under national discretion as an expression of the will of the population of the United Kingdom and can theoretically be revoked at any time if the will of the population changes, while the latter is an international human right exercised on the basis of the inherent right of a «people».

The internal aspect of self-determination has not been directly adressed in many legal instruments, but was referred to in the 'Declaration on Principles of International law' [79] which, as stated above, is considered customary international law [80]. The declaration stated that the territorial integrity or political unity of sovereign and independent States possessed of a government

[79] UNGA Res 2625 (n 37).

[80] Cf. note 39.

«representing the whole people belonging to the territory without distinction as to race, creed or color» [81], could not be dismembered or impaired. The reference to «representative government» demonstrates that the will of the people must be the basis upon which self-determination is exercised. The requirement of representative government has traditionally been interpreted as an obligation upon governments to represent the whole population without excluding anyone on the basis of the differences mentioned above. This ensures that other human rights, such as the right to effective participation [82], including the right to vote [83] and to be able to stand for election [84], and to express your opinion [85], are upheld. Violation of these rights can thus amount to a violation of the right to internal self-determination.

During the last few decades, however, many groups within independent States has been granted autonomy with regard to certain issues such as health, education and environment [86]. These powers have been granted by the independent State to the specific group under national legislation and is often restricted to a specific territory within the existing State borders. This is considered an effective method of compromising with groups within a State who claim the right to secession [87], as it enables such groups to decide certain areas

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[81] UNGA Res 2625 (n 37) para124.

[82] Cf. ICCPR art. 25.

[83] Cf. ICCPR art. 25(b).

[84] Cf. ICCPR art. 25(a).

[85] Cf. ICCPR art. 19.

[86] For a review of circumstances where this has ocurred, see, ie.; Marc Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 European Journal of International Law 111, 117.

[87] Ibid, 115.

of society by themselves while preserving the territorial integrity of the State. It also ensures that the group is adequately represented, as their interests may simply be outnumbered by the numerical domination of another group in a national Parliament, such as the Scots would be compared to the English in the British Parliament [88]. Autonomy can thus ensure a level playing field so that the interests of the group is adequately taken into account [89]. This has led to the question of whether autonomy, as a means of exercising self-determination, is part of international human rights law.

The issue has mainly been discussed by academics since the 1990s, when previous Soviet areas were granted autonomy, and there are therefore not many international sources on the issue. This is also due to the focus of academics on who the «people» is and whether there is a right to external self-determination.

It might seem natural that autonomy, like secession, is recognized under international human rights law, as it as other human rights is a universal right of international concern and should thus include all aspects of self-determination. It is also a less severe means of exercising self-determination than independence as it prevents disruption of the territorial integrity [90].

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[88] Around 5 million people live in Scotland, compared to 51 million in England.

[89] Jane Wright, 'Minority Groups, Autonomy, and Self-Determination' (1999) 19 Oxford Journal of Legal Studies 605, 618, where the term is used in relation to minorities.

[90] Ibid para 625.

The only instrument where the right to autonomy has been directly expressed, is the 'Declaration on Indigenous Peoples' [91], which states that indigenous peoples have the right to self-determination [92] in terms of «autonomy or self-government in matters relating to their internal and local affairs» [93]. This is however a declaration, and is not legally binding upon States. It is also specifically restricted to indigenous peoples, who are in a special position as they in many occassions were the first settlers of the territory and often has a close relation to the lands. State practice also reveals that autonomy is exercised by delegation of the independent State, not as a means to ensure exercise of the right to self-determination [94].

Musgrave argues that State practice demonstrates that much of the international community has not recognized autonomy as an acceptable form of self-determination [95]. He further argues that the reluctance of States to grant autonomy to sections of their populations is based on a fear of «Balkanization», and that due to the «absence of express language and reluctance among States», autonomy is not a part of international human rights law, but rather an internal arrangement under the discretion of the State [96]. Kirgis, however, argues that claims for autonomy can be recognized under international human rights law if the government does not represent the whole people belonging to

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[91] United Nations Declaration on the Rights of Indigenous People, UNGA Res 61/295 (13 September 2007).

[92] Ibid art.3.

[93] Ibid art. 4.

[94] Weller (n 86) 117 and Thomas D. Musgrave, *Self-Determination and National Minorities*. (Oxford University Press 1997) 208.

[95] Musgrave (n 94).

[96] Ibid.

the territory. He claims that the degree of representative government is tied to the destabilization of the region and that this will be reflected so that «if a government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect. If a government is extremely unrepresentative, much more destabilizing self-determination claims may well be recognized» [97]. There is however no acknowledgement of such an argument in international human rights law.

The lack of recognition in State practice and international human rights instruments, indicates that international human rights law does not recognize autonomy as a means of ensuring the right to self-determination. The claim for autonomy for Scotland is thus not recognized under international human rights law.

II.2.2. The claim for independence for Scotland.

The other issue under consideration is whether Scotland's claim for independence is recognised under international human rights law.

Independence, often referred to as "secession" due to partition of territory from the original State, is the most controversial form of external self-determination

[97] Frederic L. Kirgis Jr., 'Editorial Comment: The Degrees of Self-Determination in the United Nations Era' (1994) 88 American Journal of International Law 304, 308.

as it disrupts the territorial integrity of the original State [98]. It also leads to the new State gaining jurisdiction over all matters inside its new territorial boundaries. Secession can be exercised by separating a part of the territory of a State, thus creating a new, independent State and maintaining the existing State boundaries, or by creating an independent State on the basis of territory from several independent States. There are nevertheless dangers of breaking up a State, such as the «russian doll syndrome», where independence for one people influences other parts of the State and region to claim independence. This will often lead to the original State being broken up into smaller and smaller parts to ensure every group has its own territory, which can lead to decrease of natural resources and lack of food, as well as creating internal conflicts and turmoils.

Independence for a part of an existing State is a political aspiration for many groups [99], but has been argued as inapplicable outside the colonial context. Many States argued this in the proceedings regarding the declaration of independence for Kosovo [100], but the ICJ was not able to give an opinion of this, and stated that this was «a subject on which radically different views» existed [101]. State practice demonstrates, however, that secession has occurred, albeit only in a few instances, such as in Bangladesh, Croatia, Kosovo and South Sudan, and independence must thus be applicable outside the colonial context.

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[98] Cf. ie.; CERD General Recommendation No. 21: Right to self-determination, 23.08.1996 para 6;
UNGA Res 1514 (n 35); Helsinki Final Act (n 3) art. VIII.

[99] Eg.,the Sami Peoples in Northern Europe and the Basques in Spain.

[100] '*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo',* (n 39) para 82.

[101] Ibid.

The claim for unilateral secession, which occurs where a group unilaterally prescribes itself as independent without consulting with the rest of the citizens of the original State, has been claimed by many groups. This issue was referred to the court regarding secession for Quebec, but was rejected by the judges. The judgment established that although there was no «explicit denial of such a right» [102], there was neither a «specific authorization for unilateral secession» [103]. Unilateral secession has also been rejected by the Committee on the Elimination of Racial Discrimination [104], and the right for Scotland to unilaterally declare itself independent is thus not recognized by international human rights law.

Because of the controversy of disrupting the territorial borders of a State, exercise of the right to self-determination outside the colonial context is usually considered fulfilled through internal self-determination. This enables a people to pursue their political status and economic, social and cultural development «within the framework of an existing State» [105], while preserving the territorial integrity. This was argued by the judges in the case regarding secession of Quebec, who stated that the Helsinki Final Act [106] refers to the expression of a people's external political status «through the government of the existing State» [107], save in exceptional circumstances. This demonstrates that the right to self-

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[102] *Reference re Secession of Quebe*c (n 16) para 112.

[103] Ibid, para 111.

[104] General Recommendation 21 (n 98) para 6.

[105] *Reference re Secession of Quebe*c' (n 16) para 126.

[106] Helsinki Final Act (n 3)

[107] *Reference re Secession of Quebe*c (n 16) para 129.

determination is not an absolute human right, such as eg., the prohibition on torture [108].

One situation that can provide such an exceptional circumstance, is where the people is subject to «alien subjugation, domination or exploitation» [109]. This is however clearly not an issue for Scotland.

It has further been claimed that a group has the right to «remedial secession». This occurs where the suppression of the group in the original State has been or still is, in such a state that they should be entitled to independence as a remedy for the situation. Many States claimed that this situation applied to Kosovo and that Kosovo was thus entitled to secession, but the court stated that whether international human rights law contained a legal right to «remedial secession», was contested [110]. The reluctance of the ICJ to rely on «remedial secession» as a basis for independence, indicates that it can not be applied to a group that claims independence. It would nevertheless not be relevant to Scotland, as such a situation is not present.

Many international instruments regarding self-determination specifies that the territorial integrity shall be upheld where the government represents the whole people of the territory without distinction as to race, creed, color or similar

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[108] Cf. ICCPR art.7.

[109] *Reference re Secession of Quebe*c(n 16) para 133.

[110] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 39) para 82.

differences [111]. This has been endorsed by the Canadian Supreme Court [112] and the African Commission on Human and People's Rights [113], and implies that such differences shall not, eg. deny people the right to vote, stand for election or choose freely their representatives for elections as it is up to the people to decide who should represent them. If, however, the government, does not represent the whole people based on such differentiations, the people is entitled to exercise external self-determination.

Although the population of Scotland has the same right to be represented in the national government and Parliament as other parts of the United Kingdom, their population is less than ie., England, which in practice will mean that their votes will be less than those of the English in an election or referendum. This provokes the question of whether the government of the United Kingdom is representative of the whole population. The reference to «representative» government, can however not mean that every group of a State is entitled to the same number of representatives in a government, but that every vote has the same weight, with the result that those votes which are numerically more equals more representatives. This was supported by the Canadian Supreme Court, which proclaimed that Quebec was not entitled to exercise external self-determination as the population was «equitably represented» [114] and their internal self-determination was not denied.

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[111] See, ie.; UNGA Res 2625 (n 37) p. 124; *Loizidou v Turkey* (1997) 23 EHRR 513, Concurring Opinion of Judge Wildhaber 535; '*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo',* (n 39) para 82 in regard to independence as a «remedial right to secession» due to the situation in Kosovo.

[112] *Reference re Secession of Quebec* (n 16) para130.

[113] Human Rights Committee, *Katangese Peoples' Congress v. Zaire*, African Commission on Human and People's Rights, Comm. No. 75/92 (1995 para 6.

[114] Reference re Secession of Quebec (n 16) para 136.

The territorial integrity of the United Kingdom must thus be preserved, as the Scottish claim for independence is not recognized under international human rights law.

Conclusion

The discussion made above demonstrates that the claims for greater autonomy or independence for Scotland are not recognized under international human rights law, albeit for different reasons. The right to autonomy is not recognized because it is not a part of international human rights law, but a matter of national discretion. Autonomy can thus be delegated by the State at any time if it so wishes, but is not a human right for a group on the basis of self-determination in international human rights law. The claim for independence, however, is a part of international human rights law, but is not recognized for Scotland because of the need to maintain the territorial integrity of the United Kingdom. The proposal by the Scottish government to hold a referendum where only those resident in Scotland are eligible to vote is therefore not consistent with international human rights law, as the right to self-determination must be exercised by the whole population of the State.

If a referendum is held despite these legal barriers, and greater autonomy or independence is favoured by the Scots, this could however be difficult to ignore in practice for the Government of the United Kingdom. This demonstrates the importance of political factors in the practice of the right to self-determination,

which complicates the development and understanding of the right. This is especially the situation in the United Nations, where practice has been inconsistent and dependent on what is most beneficial for the States and members of the Security Council [115]. The uneven practice is also due to the obligation not to interfere with the internal affairs of other States. As political concerns are also an important factor of whether new States and hence their exercise of the right to self-determination are recognized by other States, this further complicates the issue. Although such recognition is not legally binding of whether the exercise of self-determination is correctly exercised, it will have great impact in practice. There is therefore a need for further elaboration of the right to self-determination, without the emphasis of political factors in a specific case.

[115] The Security Council is is the only organ of the United Nations entitled to authorize operations to maintain international peace and security, cf. UN Charter, art. 24(1).

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Project Title 2: Law of the Sea

Whaling - the relationship between IWC and NAMMCO in relation to the Convention on the Law of the Sea art. 65 on the "appropriate international organizations" for the "conservation, management and study" of cetaceans.

Introduction

The Law of the Sea Convention (LOSC) [116] has since its adoption thirty years ago, provided a more comprehensive regime for the seas than ever before [117], and has been highly ratified [118]. The convention provides a framework that, inter alia, regulates the rights and obligations of the contracting States in the different maritime zones, settlement of disputes and establish obligations to cooperate.

As a party to the LOSC, the coastal State has sovereign rights for the purpose of «exploring and exploiting, conserving and managing the natural resources» in the Exclusive Economic Zone (EEZ) [119], which is an area not extending 200 nautical miles from the baseline [120]. The coastal State is nevertheless required to determine the «allowable catch» of the living resources in the zone [121], which must be designed to conserve species to produce the «maximum sustainable yield» [122] and utilize them with the objective of «optimum utilization» [123]. Art. 65, first sentence, however, prescribes that these obligations do not apply to marine mammals in the zone, as the coastal State or a competent international organization can «prohibit, limit or regulate the exploitation of marine mammals

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[116] United Nations Convention on the Law of the Sea (Adopted 10 December 1982, opened for signature 1 July 1983, entered into force 16 November 1994) 1833 UNTS 3 (LOSC).

[117] R.R. Churchill & A.V. Lowe, *The law of the sea*. (3rd edition, Manchester University Press 1999) 22.

[118] The Convention is currently ratified by 162 parties, see <www.un.org/depts/los/reference_files/status2010.pdf> 'Accessed 26 September 2012'.

[119] Cf. LOSC art. 56.1(a).

[120] Cf. LOSC art. 57.

[121] Cf. LOSC art. 61.1.

[122] Cf. LOSC art. 61.3.

[123] Cf. LOSC art. 62.1.

more strictly» than this. This enables the coastal State to freely decide whether marine mammals can be caught in the EEZ, and exempts it from the previous mentioned obligations. Marine mammals is a collective term for aquatic air-breathing species with mammalias, and consist of the Orders Cetacea, Pinnipeds and Sirenians, as well as sea otter and polar bear [124]. Marine mammals differ from fish and other living living resources of the sea not only in regard to their size, but also due to their vulnerability to marine pollution and to be captured, and is therefore recognized as best managed under the discretion of the coastal State.

Art. 65, second sentence, further obliges member States to cooperate «with a view to the conservation of marine mammals» and to work through the «appropriate international organizations» for the «conservation, management and study» of cetaceans . Although cetaceans exist in all waters, the obligation to cooperate in regard to them is thus heavier in the EEZ than in other jurisdictional zones of the coastal State, where the State has more sovereign rights [125]. The contracting States are also under a greater obligation to cooperate on cetaceans than other subspecies of marine mammals, as the States are only obliged to cooperate «with a view» to the «conservation» of marine mammals [126]. This is further emphasized as the member States «shall» work through such organizations for their «conservation, management and study», as opposed to highly migratory species, where States are only obliged to cooperate «directly or through» appropriate international organizations, «with

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[124] Annalisa Berta and James L. Sumich, *Marine Mammals: Evolutionary Biology*. (Academic Press 1999) 1.

[125] Cf. LOSC art. 2.1., 8 and 33.

[126] Cf. LOSC art. 65, first sentence.

a view» to ensuring «conservation» [127]. Many of the highly migratory species will nevertheless be under the heavier obligation of art. 65, as many of them are also cetaceans [128]. This heavier obligation regarding cetaceans, which consist of the sub-orders Mysticeti and Odontoceti and encompass 75 different species of whales, dolphins and porpoises [129], might be due to their slow maturation rates [130], slow growth in populations [131] and the uncertainty of the results of the research conducted.

Despite the obligation undertaken by the member States, art. 65 does not itself define what the «appropriate international organizations» for the conservation, management and study of cetaceans are. This has led to confusion among States as to whether the organization referred to is the International Whaling Commission (IWC) [132] or whether other organizations, such as the North Atlantic Marine Mammal Commission (NAMMCO) [133] is appropriate. The lack of specification of which organizations are competent is partly due to the framework nature of the LOSC, which relies on other international intruments to prescribe the specific regulation. This ensures that the LOSC is updated without having to amend the convention, but also entails that such instruments do not

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[127] Cf. LOSC art. 64.1.

[128] Cf. LOSC Annex I.

[129] Cynthia E. Carlson, 'International Regulation of Small Cetaceans: The Law of the Sea Conference' (1984) 21 San Diego Law Review 577, 580.

[130] Ibid, 581.

[131] Kimberly S. Davis, 'International Management of Cetaceans under the New Law of the Sea Convention' (1985) 3 Boston University International Law Journal 477, 479.

[132] Established by the International Convention for the Regulation of Whaling (Adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 65 (ICRW).

[133] Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic (Adopted and opened for signature 9 April 1992, entered into force 8 July 1992) (NAMMCO Agreement).

always exist, or that there might be a lack of consensus of which instrument the LOSC refers to.

The issue of which organizations art. 65 refers to has not been solved internationally, but is important to determine in order to ensure that cooperation on cetaceans is undertaken and that the contracting State parties fulfill their obligations under the LOSC. It is also important as the same obligation is incumbent upon the member States in relation to the conservation and mangement of marine mammals in the high seas [134].

The dissertation will further discuss whether the IWC and NAMMCO, as a regional case study, are «appropriate international organizations» for the conservation, management and study of cetaceans, cf. LOSC art. 65, second sentence, and will further analyze different sources that can explain whether these organizations are appropriate. Part I will analyze the meaning of art. 65 itself on the basis of the Vienna Convention on the Law of Treaties (Vienna Convention) [135], while Part II examines secondary sources, notably the practice of the IWC and NAMMCO, relevant international tribunals and Agenda 21 [136].

[134] Cf. LOSC art. 120.

[135] Vienna Convention on the Law of Treaties (Adopted and opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

[136] United Nations Conference on Environment and Development (UNCED) 1992, Agenda 21.

Main Part

Part I - LOSC art. 65

The starting point to understand what the «appropriate organizations» for the «conservation, management and study» of cetaceans are, is to examine the meaning of art. 65 itself. The analysis of the article will be made on the basis of the Vienna Convention, which is the only legally binding international instrument regarding the interpretation of international treaties between States, and has been ratified by a high number of States [137].

I. 1. Vienna Convention art. 31

The principal provision of the Vienna Convention is art. 31, which prescribes a treaty to be interpreted «in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose» [138]. This ensures that what the parties have agreed upon, namely the text of the treaty, which is the formal expression of the intention of the member States, is the main source.

Art. 65 first of all obliges the member States to «work through» the appropriate international organizations. This is a rather vague description of the cooperation

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[137] The Convention currently has 111 parties, see <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf.>. 'Accessed 26 September 2012'.

[138] Cf. Vienna Convention (n 20) art. 31.1. LOSC art. 300 repeats the need to fulfill the obligations in «good faith».

required by the State, and does not define whether the State is required to, eg., join the organization, consult it or follow their advice or recommendations.

Support for the interpretation that «work through» requires the States to join the organizations considered appropriate, can be found when comparing with other articles of Part V, where the States are obligated to «cooperate» [139], which is a weaker obligation. If the same meaning was to be given to cooperation regarding cetaceans, it would be natural to use the same language in art. 65. This interpretation is claimed by the United States, which has alleged that the obligation requires member States to join the IWC, which they consider as the appropriate international organization for the conservation and management of whales [140]. McDorman, however, argues that it would be unreasonable for membership in LOSC to entail automatic membership in another treaty regime [141], as this will conflict with the principle of sovereignty of a State, which establish that a State must agree explicitly to be legally bound by an instrument.

During the negotiations, Canada argued that the obligation to «work through» the appropriate international organizations, was observed merely by consulting with the «scientific bodies of such organizations» [142]. This has been rejected by Davies, on the basis that it is contrary to the wording of the article and the consistent regulation in the LOSC of uniform international management of

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[139] Cf. LOSC art. 64.1 and 65, first sentence.

[140] President William J. Clinton, 'Message to the Congress on Canadian Whaling Activities' [1997] Weekly Compilation of Presidential Documents 175.

[141] Ted L. McDorman, 'Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention' (1998) 29 Ocean Development and International Law 179, 188.

[142] Written Statement by the Delegation of Canada (2 April 1980) U.N. Doc. A/Conf.62/WS/4 (April 10th 1980), Annex, 2.

migratory and highly migratory species, as well as the lack of support by other sources [143]. The vagueness of art. 65, can however not dismiss such an interpretation.

The obligation to «work through» the appropriate, international organizations can further mean that the member State must adhere to the authority of an organization, without having to become a member of the organization. This has been rejected by McDorman, who argues that to require a State to accept the regulatory authority of an international organization on the basis of art. 65, will «change the purpose of the sentence from cooperation to jurisdiction» [144], and thus contravene the wording. He does not consider the obligation to require a State to join an organization or be involved in its decision-making processes, but to «positive contribution or sharing of experience, expertise, or information designed to positively assist the work of the international organization» [145]. Burke further argues that since IWC members for example can avoid regulation through the objection procedure [146], unlike non-members, it would not be fair to require non-members of the IWC to be bound by their regulations [147].

To not infringe upon the sovereignty of the State and the sovereign rights of the coastal State in the EEZ, art. 65 can not require a State to join an international organization and adhere to its recommendations. To interpret the provision in

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[143] Davis (n 16) 506.

[144] McDorman (n 26) 184.

[145] Ibid 186-7.

[146] ICRW (n 17) art. V(3).

[147] William T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*. (Clarendon Press 1994) 286-295.

good faith, cf. the Vienna Convention art. 31, the obligation must, however require the State to have a somewhat institutionalised relationship with the organization. A balance between these two sides suggests that the obligation to «work through» the appropriate international organizations requires the State to participate in the discussions and fora of the different appropriate organizations. This ensures that the States are engaged with the organization, while not infringing upon their sovereignty.

Art. 65 further prescribes that the States must work through «the» appropriate international organizations. This indicates that the article refers to specific organizations [148] and not «any» organizations, as there would otherwise have been no reason to include «the» in the text. Although this does not prevent the member States from forming or joining other organizations, it ensures that they can not oppose to work through the organizations considered appropriate. McDorman suggests that where there is more than one «appropriate» organization for the specie in question, the State can choose which organization it wants to work through [149]. This must however be rejected as art. 65 specifically refers to «the» appropriate organizations, and cooperation must therefore be done through such organizations.

The article also proclaims that the potential organizations must be «appropriate», without describing the conditions that have to be met for the organizations to be recognized as such, except it must be «international», and thus have global jurisdiction to be «appropriate». The reference to the

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[148] Davis (n 16) 504.

[149] McDorman (n 26) 186.

organizations being able to work for the «conservation, management and study» of cetaceans, implies however, that an organization must possess these characteristics to be «appropriate» [150]. The ordinary meaning of «conservation» refers to preservation of the species, while «management» ensures regulation of the species, by means such as setting quotas and directly deciding the status of the stocks. «Study», on the other hand, reflects research and tests to gain more knowledge about the species, for aims such as conservation and management. The United Nations Division Affairs and the Law of the Sea Office for Legal Affairs consider the «competent or relevant international organizations» of art. 65 to be the IWC, the Food and Agriculture Organization (FAO) and the United Nations Environment Program (UNEP) [151]. As the IWC is the only organization among the three listed that deals specifically with cetaceans, indicates however that the appropriate organizations are not limited to these three.

Despite the lack of conditions of what establishes an organization as «appropriate», some conditions are, in the authors view, natural to lay down. The organization must provide neutral advice based on scientific studies which it has the capacity to perform itself, and be open to new member States, and other inter-governmental and non-governmental organizations to ensure transparency and legitimacy. The organization should also be engaged by a certain amount of States in the area of the jurisdiction, to demonstrate its legitimacy among the States.

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[150] Alf Hakon Hoel, 'Regionalization of International Whale Management: The Case of the North Atlantic Marine Mammals Commission' (1993) 46 Arctic 116, 122.

[151] (1996) 31 United Nations Law of the Sea Bulletin 82.

Art. 65 finally prescribes that the member States must work through the appropriate international «organizations», which demonstrates that more than one organization is appropriate. As the various species of cetaceans and their natural habitat, allocation and reproduction capabilities differ greatly, this suggests that which organization is «appropriate», depends on the specie, eg. different organizations for whales, dolphins and porpoises, or depending on the place in which they reside. This would ensure that the different appropriate organizations are specialized to conserve, manage and study the specific specie, which can be difficult in an organization with a broader jurisdiction. This suggests that the IWC, which conserves and manages «whales» [152], is the appropriate international organization for this type of cetacean. «Whales» is a non-scientific concept that originates from the whaling industry, which refers to the large cetaceans have traditionally hunted by the industry [153]. The small cetaceans are, broadly speaking, all the species within the order Odontoceti except the sperm whale, as well as the minke whale of the order Mysticeti, while the large cetaceans are the remaining species of the order Mysticeti as well as the sperm whale [154].

The preamble of the LOSC recognizes the desirability to ensure «the equitable and efficient utilization» of the sea's «resources, the conservation of their living resources and the study, protection and preservation of the marine environment» [155], which is further supported by the reference to the hope that

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[152] Cf. ICRW (n 17) Preamble eighth preambular.

[153] Carlson (n 14) 581.

[154] Ibid.

[155] Cf. LOSC Preamble fourth preambular.

the convention will contribute to, inter alia, «cooperation..among nations» [156]. This demonstrates the desire of and obligation for States to cooperate.

The interpretation of LOSC art. 65 in accordance with the Vienna Convention art. 31 thus indicates that the article prescribes different species of cetaceans to be conserved, managed and studied by different, specific organizations which has the necessary expertise and competence and which the State parties should participate in the discussions and foras of. The article is however still unclear as to which specific organizations it refers to, and I will therefore examine supplementary means of interpretation to ensure the meaning of art. 65.

I.2. Vienna Convention art. 32

The Vienna Convention further prescribes that when the interpretation after art. 31 leaves the meaning ambigious or obscure, or the result is manifestly absurd or unreasonable, «recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion», to confirm or determine the meaning of the provision [157]. This permits the examination of other sources when the expression of the text of the treaty is unclear. Preparatory works for international treaties are, however, not always a reliable source to determine the meaning, as the negotiating parties are mainly concerned with achieving consensus on the matters that are most important for their State during negotiation. As the

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[156] Cd. LOSC Preamble seventh preambular.

[157] Cf. Vienna Convention (n 20) art. 32.

LOSC was voted over as a «package deal» [158], where the different articles were not voted on separately but as a whole, it was especially important to obtain consensus to adopt the convention and ensure that as many States as possible became parties. This resulted in many of the articles being agreed upon as a compromise, by using equivocal language, such as in art. 65, and leaving contentious issues to be determined by subsequent agreements or to the discretion of coastal States or tribunals [159].

The first draft of the article which later became the provision on cooperation of cetaceans, was the first Informal Single Negotiating Text (ISNT) from the Third Session of UNCLOS III [160]. This stated in art. 53.3 that «States shall co-operate either directly or through appropriate international organizations with a view to the protection and management of marine mammals» [161]. The first paragraphs of the article dealt with fishing for highly migratory species, as many of the highly migratory species are also cetaceans [162]. The two issues were later set out in separate provisions [163], which demonstrated that the obligations to cooperate in regard of marine mammals and cetaceans was in addition to the obligation to conservation of highly migratory species [164].

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[158] Patricia Birnie, Alan Boyle, Catherine Redgwell, *International Law and the Environment.* (3rd edition, Oxford University Press 2009) 714.

[159] Ibid 715.

[160] Informal Single Negotiating Text, U.N. Doc. A/Conf.62/WP.8/pts. I-III, 1975. International Legal Materials 14 (1975) 710.

[161] Ibid, 725.

[162] LOSC Annex I.

[163] Highly migratory species are regulated in LOSC art. 64.

[164] Myron H. Nordquist, *United Nations Convention on the Law of the Sea 1982. A Commentary.* Vol II. (Martinus Nijhoff Publishers 1993), para 65.5.

This formulation was essentially used until the second revision of the text [165], when the United States pushed for changes in art. 53 [166] to ensure clarification and strengthening of the conservation requirements [167]. During the eighth session, the United States held two unofficial meetings which according to the report by the United States' delegation was «attended by all affected interests.. to make clear that there is a minimum conservation standard for marine mammals both within and without the economic zone» [168]. The same report expressed that there was «substantial unanimity for proposed changes reflecting such a conservation objective» [169] and that there had been «progress» concerning discussion of «the need to accommodate appropriate regional organizations for the conservation of stocks where those stocks did not need to be adressed on a global scale» [170]. This indicates that conservation was considered necessary and able to be under the jurisdiction of international bodies, and that some cetaceans should be adressed by regional organizations.

At the resumed eight session [171], the United States presented a new and revised version of art. 53 in a working document to Committee I [172], which was

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[165] Revised Single Negotiating Text, U.N. Doc. A/Conf.62/WP.8/Rev. pt. II, 1976.

[166] U.S. Delegation Report to the Third United Nations Conference on the Law of the Sea, Seventh Session (Resumed), 1 August - 15 September 1978, New York, 245.

[167] Davis (n 16) 509-510.

[168] U.S. Delegation Report to the Third United Nations Conference on the Law of the Sea, Eight Session, (19 March - 27 April 1979), 36.

[169] Ibid.

[170] Ibid.

[171] 19 July to 24 August 1979.

[172] Doc. c.2/Informal Meeting/49.

not discussed by the Committee. This was reintroduced at the Ninth Session [173] without objections, and incorporated into the second revision of the ISNT, which ultimately became the final version of art. 65. Although the final article does not distinguish between small and large cetaceans, it was noted at the session that art. 65 was formulated as an «umbrella provision», where the IWC should manage large cetaceans, while management of smaller cetaceans taken incidentally, should be left to regional fishing organizations [174]. This was supported by some Latin-American States, which argued that the IWC did not have jurisdiction over small cetaceans [175]. Canada agreed that the IWC was the competent body for large cetaceans, but noted that small cetaceans in the EEZ should be managed by the coastal State [176].

The preparatory works clarify the discussion above in regard to large cetaceans to some extent, as the negotiating States seems to have considered the IWC as the appropriate organization to conserve, manage and study large, but not small cetaceans. Even though consensus was not reached to clarify this in the provision, it seems unlikely that art. 65 would be adopted if it was to have a meaning that would contravene the interpretation by a high number of the negotiating States. Davis argues that the problems of negotiating other parts of the LOSC, suggests that art. 65 referred to an organization «with a long history

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[173] U.S. Delegation Report to the Third United Nations Conference on the Law of the Sea, Ninth Session, 27 February - 4 April, 1980, New York, 33.

[174] Ibid.

[175] Carlson (n 14) 611.

[176] Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Ninth Session) Statement by the delegation of Canada (2 April 1980), Document A/CONF.62/WS/4.

of regulating the whaling industry to which negotiators were able to defer» [177]. Such an organization is obviously the IWC. The negotiating States seem to have further differentiated between the direct and indirect taking of small cetaceans. Direct taking of small cetaceans is where the animal is purposely taken to be harvested, while incidental taking occurs by chance, while harvesting other species. As incidental taking of small cetaceans was most likely to occur in relation to fishing at the time of adoption of the LOSC, it would seem most apppriate for this to be under the jurisdiction of regional fishing organizations. The preparatory works does not, however, indicate which organizations were appropriate for the direct take of small cetaceans. A reason for this can be the lack of use of small cetaceans at the time of negotiation of the LOSC, and thus a lack of apparent need to conserve, manage and study small cetaceans. It may also be due to the support by some States during negotiations to establish an International Cetacean Commission, which would regulate all cetaceans, and thus supersede the IWC [178]. Such an organization was also proposed by the United States in a draft proposal during the sixth session [179], but not endorsed. The establishment of such a body never occurred, however, and an organization for the global regulation of all cetaceans has never been established.

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[177] Davis (n 16) 509

[178] Canada Department of External Affairs, Communique No. 62, 'Canada Withdraws from the International Whaling Convention and Commission', (26 June, 1981) 2.

[179] Working Papers on the United States Delegation to the Sixth Session, United Nations Conference on the Law of the Sea, June 1977.

Part II - Secondary Sources

II.1. Practice by relevant actors

II.1.1 The International Convention for the Regulation of Whaling.

The International Convention for the Regulation of Whaling (ICRW) [180] was established in 1946 by States which were all active in whaling at the time [181] to «provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry» [182]. The convention is thus meant to both conserve and manage the whale stocks. The ICRW is open to any State [183], but mainly conisted by active whaling States until the middle of the 1970s, when non-whaling nations started to join [184], and currently has 89 contracting governments. The convention is managed by the International Whaling Commission (IWC) [185], which has set up six committees [186].

As mentioned above, «whale» is not a scientific term, but a phrase used by the whaling industry to identify the large cetaceans traditionally hunted [187]. This has led to confusion of whether «whale» also includes small cetaceans and whether

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[180] ICRW (n 17).

[181] Burke (n 32) 284.

[182] ICRW (n 17) Preamble eighth preambular.

[183] Ibid art. X(2).

[184] Davis (n 16) 485.

[185] ICRW (n 17), art. III.

[186] The IWC can establish committees «as it considers desirable to perform such functions as it may authorize», ibid art. III (4).

[187] Carlson (n 14) 581.

the IWC is competent to manage,conserve and study these species. The use of the term «whale» in the convention, does however indicate that the term should be interpreted as it was used, namely to refer to large cetaceans, and that the IWC only has jurisdiction over these cetaceans. If the jurisdiction of the IWC included small cetaceans, it would otherwise have been natural to use the general term cetaceans [188].

Annexed to the Final Act of the Washington Conference which established the ICRW, was a «Chart of Nomenclature of Whales». The Chart lists different species of large cetaceans traditionally hunted by the whaling industry, including two species of bottlenose whale, which was recommended to be accepted as a «guide by the governments represented at the Conference» [189]. The chart is an official document from the conference and provides a natural reference of the jurisdiction of the IWC. It is, however, not an integral part of the ICRW and not legally binding upon the member States, which suggests that the jurisdiction of the IWC is not limited to the species of the Chart.

The practice of the IWC has largely revolved around large cetaceans as prescribed in the Chart, and the Commission has, inter alia, studied these species, determined quotas for commercial, scientific and aboriginal whaling and whale killing methods [190]. The nature of the IWC thus complies with the

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[188] Burke (n 32) 293.

[189] International Agreement for The Regulation of Whaling: The International Whaling Conference, Washington, D.C., 20 November - 2 December 1946, Final Act, Recommendation IV.

[190] See, eg. IWC Annual Report 2011, p. 15-19, and 24.

requirements in art. 65, which has led States and academics to consider the IWC as the only organization legitimate to regulate large cetaceans [191].

The competence of the IWC to manage and conserve small cetaceans has been equally supported [192] and disputed by the member States [193]. In 1974, the Scientific Committee established the Sub-Committee on small cetaceans, which was to clarify the taxonomy of small cetaceans and identify their needs for conservation and study [194]. The Commission recognized the disagreement of the compentence of the IWC in regard to small cetaceans [195], and later proposed that the convention should be amended to include all cetaceans to allow for the management and conservation of small cetaceans [196]. Such consensus has not been obtained, which has prevented the IWC from conserving and managing small ceteceans. The Commission has however recognized the competence of the Scientific Committee to give non-binding advice to the IWC on all cetaceans [197] and issued resolutions to encourage member States to provide information and take «appropriate steps» to address

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[191] See, inter alia; Carlson (n 14) 589; Birnie, Boyle, Redgwell (n 43) 724; Birnie in George W. Keeton and Georg Schwarzenberger, *1983 Yearbook of World Affairs* (Westview Press 1983) 241; to a lesser extent, Churchill & Lowe (n 2) 317.

[192] See, inter alia, IWC Annual Report 2008 32; IWC Annual Report 2006 39; IWC Annual Report 2002 40.

[193] See, inter alia, IWC Annual Report 2009 35; IWC Annual Report 2006 39; IWC Annual Report 2003 44; IWC Annual Report 2004 43; IWC Annual Report 2003 35-36; IWC Annual Report 2001 31.

[194] International Whaling Commission/Scientific Committee/Subcommittee on Small Cetaceans, Report of the Meeting on Smaller Cetaceans (1974) 891-945.

[195] Ibid.

[196] Report of the Sub-Committee on Small Cetaceans, IWC/SC/28 Rep. 3 Annex L (1976). Reprinted in 27 Report of the International Whaling Commission 480 (1977).

[197] Report of the Preparatory Meeting to Improve and Update the International Convention for the Regulation of Whaling, 1946 (Rejkjavik, May 1981) IWC/33/20 (1981) 4.

the advice of the Scientific Committee [198]. This work is furthered by the establishment of the IWC Voluntary Small Cetacean Fund, which supports research to improve conservation for small cetaceans [199]. The IWC has further stated that their jurisdiction of small cetaceans can only be extended to direct takes [200], which complies with the view that incidental catch of small cetaceans should be under the jurisdiction of regional fishing organizations.

The Commission has become very politicized the past decades, as the member States are divided on whether it should promote conservation of the whale stocks or development of the whaling industry [201]. The issue of whether a State should preserve or harvest whales is a very political sensitive issue in the member States, and does not always depend on the research provided, but rather by appealling to the moral of killing whales, as they are considered as very similar to humans [202]. This issue has been intensified after many non-whaling States joined the IWC in the 1970s and the Moratorium on Commercial Whaling was established in 1982 [203], where catch limits were set to zero due to the danger of depletion of whale stocks. The moratorium was to be «kept under review» and can be lifted at any time [204], but this requires a three-fourths

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[198] See, ie. IWC Resolution 1997-8, «Resolution on Small Cetaceans» IWC 49th Meeting (1997) and IWC Resolution 2001-13, «Resolution on Small Cetaceans» IWC 53rd Meeting (2001).

[199] Established by IWC Resolution 1994-2, «Resolution on Small Cetaeans», IWC 46th Meeting, (1994).

[200] Report of the Preparatory Meeting to Improve and Update the International Convention for the Regulation of Whaling, 1946 (Reikjavik May 198) IWC/33/20 (1981) 5.

[201] Cf. ICRW (n 17) Preamble eighth Preambular.

[202] A. D'Amato and S.K. Chopra, 'Whales: Their Emerging Right to Life' (1991) 85 American Journal of International Law 21, 22.

[203] International Convention for the Regulation of Whaling, Schedule As amended by the Commission at the 63rd Annual Meeting Jersey, Channel Islands, July 2011 para 10 (E).

[204] Ibid.

majority in the IWC [205] and has not been obtained. The IWC is thus currently only focused on the «conservation» and not the management of whales. The political sensitivity has led to the opinions of the members of the Scientific Committee to be colored by their view on whether whaling is desirable. This is especially problematic due to the problem of acquiring sufficient information, which enables the information to be interpreted in different ways.

Although the IWC was considered appropriate to manage large cetaceans by the time of adoption of the ICRW, its ineffectiveness and failures to be neutral suggests that it might no longer not be appropriate[206]. There is, however, no other international organization concerned with large cetaceans, and the existence of an established organization with such a long history and high ratification as the IWC, will present obstacles for any other organization to replace it [207]. The politication of the IWC does, however indicate that their jurisdiction should not be expanded to include small cetaceans, as the politication will be transferred to small cetaceans as well.

The IWC could have been recognized as an appropriate international organization to manage and conserve small cetaceans in the past, when international organizations for small cetaceans were few. As the IWC has not been able to obtain a majority to amend the ICRW to include small cetaceans, indicates however that small cetaceans are not within their jurisdiction. This

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[205] ICRW (n 17) art. III(2).

[206] Burke (n 32) 287.

[207] Schiffman in William C.G. Burns and Alexander Gillespie (ed.), *The future of cetaceans in a changing world* (Transnational Publishers 2003) 180.

interpretation is supported by several academics [208] and it has also been noted that the importance of small cetacean stocks in the context of local fishing activities as well as the probability of an overwhelming burden on the IWC, suggests that regional organizations are more appropriate to manage small cetaceans [209]. The research provided by the IWC in regard to small cetaceans does not contravene this interpretation, as this is not legally binding upon the parties and as study of cetaceans in different forums are desirable.

The IWC is open to other States and organizations, performs its own research, is highly ratified and is comprised of both whaling and non-whaling nations. Such a composition of States can ensure balance in the research undertaken, but the Commission proven to not always be neutral due to political factors. The wording of the ICRW, the Chart and the practice of the IWC all indicate, however that the IWC is competent to manage and conserve large cetaceans. They can not conserve and manage small cetaceans, but can conduct research and give non-binding advice on these species.

II.1.2. The North Atlantic Marine Mammal Commission.

The North Atlantic Marine Mammal Commission (NAMMCO) [210] was established in 1992 by the Faroe Islands, Greenland, Iceland and Norway to contribute through regional consultation and cooperation to the «conservation,

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[208] See, inter alia, John A. Knauss, 'The International Whaling Commission— Its Past and Possible Future' (1997) 28 Ocean Development & International Law 79, 83; Burke (n 32) 293; Carlson (n 14) 589; Davis, (n 16) 479-480 note 17; Hoel (n 35) 122; in a lesser degree, Churchill & Lowe (n 2) 317, which refers to the IWC a the «principal» organization for cetaceans.

[209] Burke (n 32) 264.

[210] NAMMCO Agreement (n 18) art. 1.

rational management and study of marine mammals in the North Atlantic» [211]. The Commission is thus of the nature that LOSC art. 65 prescribes for an international organization for cetaceans to be considered appropriate, but has broader jurisdiction than the IWC. NAMMCO is open to other parties with the consent of the existing parties [212], although new members have not occurred in the two decades since the Commission was established [213]. NAMMCO consists of six committees, including a Committee on Hunting Methods and a Scientific Committee.

NAMMCO was established partly to «fill a gap with respect to regional intergovernmental cooperation on the study and management of pinnipeds» and to provide a forum for cooperation on cetaceans [214]. Another reason for the establishment of NAMMCO was however due to the preservationist approach in the IWC the last decades, as whaling nations did not feel that their interests were being «adequately represented» [215]. This was exacerbated by the Annual Meeting of IWC in 1991, where the IWC did not follow the recommendations of the Scientific Committee on a Revised Management Procedure [216]. The establishment of NAMMCO demonstrated that other organizations than the IWC could be appropriate to conserve, manage and study cetaceans, and showed

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[211] Ibid art. 2.

[212] Ibid, art.10.2.

[213] Other States than the current members was however part of the negotiation process, but Canada and the USSR decided not to sign the Memorandum of Understanding which stated that the parties would work towards the development of mechanisms to ensure the conservation and joint management of shared stocks.

[214] Memorandum of Understanding to establish the North Atlantic Committee for Coordination of Marine Mammals Research (Adopted 1990).

[215] Steven Rattner, 'Conservationists Gain a Victory in Hunting Ban on Sperm Whales', The New York Times (New York 27 July 1981) A3, col 1.

[216] Hoel (n 35) 119.

the possibility to leave IWC in favour of NAMMCO, which would undermine the work of the IWC.

Prior to the establishment of the Memorandum of Understanding to establish an informal North Atlantic Committee for Cooperation on Research on Marine Mammals (NAC), it was universal agreement among the negotiating parties that a potential mechanism was intended to supplement already existing organizations, and not replace them [217]. The signatories to the Memorandum, however, later expressed that NAC could serve as an alternative to other organizations such as the IWC [218]. As the negotiating parties considered small cetaceans not to fall under the competence of the IWC [219], they envisaged a future for NAMMCO in this respect [220].

NAMMCO can not provide legally binding obligations upon its members [221]. Its recommendations are non-binding and has, inter alia, provided further research, conservation [222] and advice on hunting methods of both small [223] and large [224] cetaceans. Although it is competent to «manage» marine mammals [225], it can thus not regulate cetaceans directly, like the IWC does in relation to large

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[217] Ibid, 118.

[218] Burns and Gillespie (ed.) (n 92) 144.

[219] Hoel (n 35) 119.

[220] Ibid 118.

[221] NAMMCO Agreement (n 18) art. 5.

[222] NAMMCO Annual Report, 2011, 84 and 97-99.

[223] See, inter alia; NAMMCO Annual Report 1997, Section 2, Management Committee, 6, 12-13; NAMMCO, Annual Report 2003, 78; NAMMCO, Annual Report 2011 84.

[224] See, inter alia; NAMMCO, Annual Report 1997, Section 1, Council 15-16; NAMMCO, Annual Report 2002, Section 1, Council 22; NAMMCO Annual Report, 2010 101.

[225] NAMMCO Agreement (n 18) art. 2.

cetaceans and which is the cornerstone of management of species. This lack of competence to provide legally binding obligations could be due to the fear of infringing on the competence of the IWC. This ensures that there is no legal conflict between NAMMCO and IWC, although this can be changed by an amendment of the convention. Such an amendment is however unlikely, as it would undermine the reputation of NAMMCO and fuel the discussion of which organizations are«appropriate», which is a discussion NAMMCO will probably not prefer due to the uncertainty of which organizations art. 65 refers to.

Finally, the NAMMCO agreement states that the agreement is «without prejudice to obligations of the Parties under other international agreements» [226]. This suggests that NAMMCO was not meant to conflict with other treaties, such as the LOSC and ICRW, and that their work shall not conflict with the conservation and management of large cetaceans by the IWC. The Vienna Convention prescribes this to mean that «the provisions of that other treaty prevails» [227], and the ICRW will thus prevail over NAMMCO in case of conflict in the future.

As stated above, the negotiating parties of the LOSC intended regional organizations to conserve and manage stocks that did not need to be adressed on a global scale, and an organization such as NAMMCO could thus be appropriate to conserve, manage and study small cetaceans [228]. The scientific advice provided by NAMMCO has been hailed as important, although the lack

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[226] Ibid art. 9.

[227] Vienna Convention (n 20) art. 30.2.

[228] NAMMCO Agreement (n 18) art. 2.

of openness to other States implies that the Commission is not neutral in regard to its scientific research and recommendations, as the parties are obviously in favour of harvesting whales. That only two of its members are independent States [229], further indicates that NAMMCO is not an «appropriate» organization, although this is also due to the limited area of jurisdiction. NAMMCO must however be considered «appropriate» to conserve and study small cetaceans, but since their advice is not legally binding upon their members, can not be considered appropriate to «manage» small cetaceans. They can also provide studies on large cetaceans.

II.2. Tribunals

II.2.1. International Tribunal for the Law of the Sea.

The International Tribunal for the Law of the Sea (ITLOS) was established by the adoption of the LOSC [230], and is competent to determine settlement of disputes concerning the interpretation or application of LOSC [231]. ITLOS has however not been referred a case concerning which organizations are appropriate for the consevation, management and study of cetaceans and has therefore not provided an authoritative interpretation of the meaning of art. 65.

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[229] The Faroe Islands and Greenland are autonomous areas of Denmark.

[230] LOSC Annex VI.

[231] Cf. LOSC art. 287.1(a).

II.2.2. The International Court of Justice.

The International Court of Justice (ICJ) [232] is the principal judicial organ of the United Nations [233], and can also determine the interpretation or application of the LOSC [234]. The court has not yet been referred a case regarding art. 65, but Australia has however submitted a complaint against Japan concerning whaling in the Southern Ocean Sanctuary in the Antarctic [235], which allegedly breaches Japan's obligations under, inter alia, the ICRW [236]. The case has not yet been determined, but may touch upon the question of which organization is the «appropriate» for whales, and consequently for cetaceans, which can clarify the matter further.

II.3. Agenda 21.

During the 1992 United Nations Conference on Environment and Development (UNCED), 178 States adopted Agenda 21 [237]. This is a plan of action regarding human impact on the environment which shall be implemented by governments and the United Nations system [238], and provides recommendations on how

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[232] Established by the Statutes of the International Court of Justice.

[233] Charter of the United Nations and Statute of the International Court of Justice (Adopted 26 June 1945, entered into force 24 October 1945) Ch-o (UN Charter) art. 92.

[234] Cf. LOSC art. 287.1(b).

[235] *Application Instituting Proceedings, Whaling in the Antarctic (Australia v. Japan)* (Pending) ICJ Press Release 2010/16 1 June 2010.

[236] Ibid.

[237] Agenda 21 (n 21).

[238] Cf. Ibid, Preamble 1.3.

challenges to the environment can be managed. The plan is not legally binding [239], but has been recognized as an important instrument [240].

Agenda 21 repeats LOSC art. 65 almost verbatim in regard to sustainable use and conservation of marine living resources on the high seas and under national jurisdiction [241], which signifies the importance of the LOSC. The plan further recognizes IWC as responsible for the conservation, management and regulation of «whaling» [242]. The article does not distinguish between large and small cetaceans or whales, which is natural due to the controversy of whether the IWC is competent to regulate small cetaceans. Since the IWC has in practice only regulated large cetaceans, suggests however that the reference to «whales» means large cetaceans.

The agenda furthermore recognizes the studies made by the IWC of both large whales and «other cetaceans» [243]. This indicates that the IWC is competent to study all cetaceans, and is thus consistent with the interpretation above that study of cetaceans can be made by any organization concerned with marine mammals, even if it is not competent to conserve and manage these. This is supported by the fact that the article does not prescribe IWC with the «responsibility» to study all cetaceans, as it does in relation to conservation, management and regulation. The differentiation between «large» and «other»

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[239] Ibid.

[240] Inter alia in the Report of the World Summit on Sustainable Development, Johannesburg, South Africa,2002, A/CONF.199/20 para 30.

[241] Cf. Agenda 21 (n 21), art. 17.47 and 17.76.

[242] Ibid art. 17.62.(a) and 17.90.(a).

[243] Ibid, art. 17.62.(b) and 17.90.(b).

cetaceans, also supports the view that these should be distinguished and regulated by different organizations.

Finally, Agenda 21 recognizes the work made by other organizations for the conservation, management and study of cetaceans and other marine mammals [244]. This demonstrates the significance of other organizations than the IWC on cetaceans and marine mammals. Agenda 21 does not, however, prescribe «responsibility» or «regulation» of cetaceans to such other organizations, as with the IWC [245], and does not clarify which organizations it considers competent to conserve and manage small cetaceans.

Agenda 21 thus prescribes the IWC as the competent organization to conserve and manage large cetaceans, as well as acknowledging both the IWC and other organizations as competent to study large and small cetaceans. It also acknowledges the work of other organizations to conserve and manage «other», thus small, cetaceans, without mentioning which organizations these are.

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[244] Ibid, art. 17.62.(c) and 17.90.(c).

[245] Ibid, art. 17.62.(a) and 17.90.(a).

Conclusion

The sources examined above, demonstrate that which organizations are «appropriate», depends on whether the cetacean is «small» or «large». This is because they have biological differences, but also because large cetaceans have traditionally been harvested and used as a resource, while small cetaceans have not. Practice furthermore shows that while the study of cetaceans has been made by different organizations, this has not occurred in relation to management and conservation. This indicates that there is a distinction between the appropriate organizations for the study, and for the management and conservation of cetaceans. As all research can provide useful information about the species, their living conditions and quantity, this can be made by any organization with the mandate to do this with regard to marine mammals. The management and conservation of large cetaceans has traditionally been done by the IWC, which must be the appropriate organization for the management and conservation of large cetaceans. Small cetaceans should however be managed and conserved on a regional basis, as these are in a better position to know the natural habitat and other living conditions of the species. The appropriate organization would thus depend on the region, but could in the case of conservation and study, but not management, in the North Atlantic be NAMMCO [246].

Cooperation between the various organizations involved in conservation, management and study of ceaceans is already undertaken by some

[246] Other appropriate organizations can be the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS) and the International Committee for the Recovery of the Vaquita (CIRVA).

organizations, and such further cooperation can ensure the determination of which organizations are «appropriate», or at least ensure that organizations do not contradict each other in respect of conservation and management. Although the work of NAMMCO and IWC does not currently conflict, it can not be dismissed that it will in the future, especially if Norway withdraws from the IWC or the advice of the organizations conflict.

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