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- Conservatory obligations and customary law

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Abstract

This thesis examines what conservatory obligations there are on whaling in customary law and international sources. The focus is on high sea whaling and the main international laws on the high sea concerning living resources and the main whaling conventions. The exploitation of marine mammals is regulated by the *United Nations Convention on the Law of the Seas*, the *Convention on Biological Diversity* and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*. These conventions obligate states to cooperate and take conservatory measures in order to avoid whales from being over-exploited. The specific whaling conventions, the *International Convention for the Regulation of Whaling* and the *North Atlantic Marine Mammal Commission*, have different views on how to conserve whales and set different obligations. The *International Convention for the Regulation of Whaling* have set a moratorium which bans all commercial whaling. The customary law on whaling is not easy to determine. There is probably customary law on the obligation for states take conservatory measures and to cooperate with each other and in appropriate international organizations. How far this customary law stretches is not certain. Some states argue that the moratorium is customary law, but it is unlikely that obligations of the customary law stretches that far.

Sammanfattning

Syftet med uppsatsen är att undersöka staters skyldigheter att vidta bevarande åtgärder, för att skydda valar från överfiske, i internationell rätt och sedvanerätt. Fokus kommer att ligga på valjakt i det fria havet och de för valjakt viktigaste rättskällorna. De viktigaste rättskällorna som gäller generellt för det fria havets levande resurser är *United Nations Convention on the Law of the Seas*, *Convention on Biological Diversity* och *Convention on International Trade in Endangered Species of Wild Fauna and Flora*. De här konventionerna ger stater en skyldighet att bevara valar från överfiske och en skyldighet för staterna att samarbeta med varandra i arbetet för bevarande av valar för en hållbar utveckling av valstammarna. Två konventioner som är specialiserade på valjakt är *International Convention for the Regulation of Whaling* och *North Atlantic Marine Mammal Commission*. Ur konventionen *International Convention for the Regulation of Whaling* kommer ett förbud mot all valjakt i kommersiellt syfte. Sedvanerätten kring valjakt är omdebatterad. Det kan sägas finnas en sedvanerätt att stater har en skyldighet att skydda och bevara valar från överfiske och att samarbeta med andra stater för att motverka överfiske. Det är mer oklart hur långt denna skyldighet sträcker sig, om den täcker in reglerna i förbudet mot valjakt i kommersiellt syfte eller inte. Många länder har tolkat sedvanan olika. Det är inte troligt att sedvanerätten kring valjakt sträcker sig så långt att den innefattar förbudet mot kommersiell valjakt. Den omfattar snarare endast någon form av skyldighet att samarbeta för att skydda valar från överfiske.

Abbreviations

CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
IWC	International Whaling Commission
JARPA II	Japanese Whale Research Program under Special Permit in the Antarctic
NAMMCO	North Atlantic Marine Mammal Commission
UNCLOS	United Nations Convention on the Law of the Seas

1 Introduction

1.1 Background and purpose

I got interested in writing this thesis after reading the ICJ's judgment *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*. The ICJ's judgment ruled whether Japan's science research program was in accordance with the ICRW's moratorium on whaling. It made me wonder about the international laws concerning whaling and how they protect whales from over-exploitation.

The purpose of this thesis is to examine the international laws and treaties concerning whaling and to review how they affect the conservation of whales. I want to find out if there is a customary law regarding conservation of whales.

1.2 Problem statements

The questions I want this thesis to answer are:

1. What are the main international sources concerning whaling?
2. What conservatory measures do these sources obligate states to take?
3. Is there an obligation in customary law to take these conservatory measures?

1.3 Limitations

In accordance to the limitations of this thesis I will have to focus solely on whales and the laws and treaties about whaling. I will not write about fisheries law or maritime law in general. I will also only focus on the most important laws and treaties for whaling of today and not their history. I can not write about all the international laws, treaties and agreements that may have impact on whaling and conservation. I will not explain how to enforce the conservation measures. The focus of my thesis will only be on the laws

of the high seas. I would have liked to inquire into if conservation of whales is an erga omnes obligation, but the page limitation of this thesis paper restricts me from examining more than three problem statement questions. I will also not be able to go into greater depth on the subject of customary law when answering question 3.

1.4 Methodology and material

I will use a legal dogmatic method to evaluate what the sources of law suggests is the customary law of today. The customary law on whaling is not easy to define and is constantly evolving in different directions. Whaling nations and anti-whaling nations argue about how the articles of conventions should be interpreted and what obligations they put on the member states and also states that are not parties to the conventions. There are many different sources of law surrounding the high seas and whaling and it can be hard to identify, apply and interpret them. I will with the legal dogmatic method identify and interpret the main sources concerning whaling and try to detect the customary law from these sources. I will discuss customary law in part 4 of this thesis.

The material I have used to write this thesis consists of books on the subject of international law, environmental law and maritime and fisheries law. I have also read and used several articles concerning whaling, marine biodiversity, sustainable use of the high seas resources and the IWC. The articles want the legal framework for conservative and sustainable measures to be more effective and more extensive. Many of the articles I have read express some form of anti-whaling sentiments, like for example *Whales: Their emerging right to life*¹ and *Co-operation or Chaos?- Article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission*². I have only found a few that are pro-

¹ D' Amato, Chopra, *Whales: Their emerging right to life*.

² Freeland, Drysdale, *Co-operation or Chaos?- Article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission*.

whaling, as for example the article *The whaling issue*³. The material also includes treaties and conventions on the field of whaling and ICJ cases, for example *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*⁴.

1.5 Previous research

There is a lot of previous research on the subject of whaling. Research on the whaling industry has been conducted for a long time. One of the first international conventions on whaling, the ICRW, was adopted in 1946⁵. There is also a lot of research on subjects similar to whaling, like research on international law, environmental law and maritime law.

The material I have found varies concerning what issues they have as focus areas. The material I have used with research closest to my own research is Simone Borg's book *Conservation on the High Seas*⁶, with the difference that her research is about all marine living resources. Whaling will be an interesting subject in the future, especially with the new ICJ judgment that was released this year because of its new interpretation and clarification on the science research exemption to the moratorium.

1.6 Outline

The outline of this thesis is based on my questions in the problem statement. I will answer the questions one by one, giving each question its own part. Part 1 is dedicated to introducing my subject. The first question on the sources of whaling is answered in part 2 starting with a background followed by the main general sources on high seas fishing and later sources specific to whaling. The second question is answered in part 3 and follows the same system as part 2 of going from general to more specific sources on

³ Aron, Burke, Freeman, *The Whaling Issue*.

⁴ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, International Court of Justice Judgment, 31 March 2014.

⁵ ICRW, preamble.

⁶ Borg, *Conservation on the High Seas*.

conservation measures. In part 4 I will discuss and answer question 3, starting with an introduction. Finally I will draw conclusions and make a summary about the answers in the different parts in part 5.

2 Whaling regulation

2.1 Background

Whales have been hunted for centuries all over the world for their oil, meat and bones. The first records of whaling are from the eleventh century in the Bay of Biscay. Soon it became an important commercial industry to many of the world's countries. Whale oil was a very important resource as it was used as lamp oil before the discovery of petroleum products and electricity. The extensive fishing led to depletion of many whale species and near extinction of some species of whales. To ensure that the whales will not become extinct, there are now several international agreements on conservation and sustainable use of whales, such as the moratorium on commercial whaling by the IWC.⁷

2.2 Introduction to the jurisdiction of natural resources on the high seas

Since 1608 when Hugo Grotius published *Mare Liberum* there has been a principle of freedom of the seas. Earlier it applied to all seas without any international restrictions, only the flag state had jurisdiction. There was a freedom to fish everywhere and the sea and its resources was everyone's common property. The freedom of the seas still exists, but with restrictions. It does not include all waters, it only includes the high seas and even there it has some restrictions.⁸

⁷ D'amato, Chopra, *Whales: Their emerging right to life*, pages: 28-29.

⁸ Rayfuse, Warner, *Securing a sustainable future for the oceans beyond national jurisdiction*, pages: 399-400.

2.2.1 United Nations Convention on the Law of the Seas

One of the main sources of law on the high seas is the UNCLOS. Part VII of the convention is about the high seas and in its article 86 it defines the high sea as:

“all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”⁹

In article 87, the freedoms of the high seas are stated. These freedoms apply both to coastal and landlocked countries. The freedom to fish is pointed out in article 87(1)(e) stating that it meets the conditions of section 2 of the UNCLOS and other international laws. Section 2 is about conservation of living resources. I will later go into greater detail about the laws on conservation measures.¹⁰

There is a general restriction to states' freedom of the seas in article 87(2):

“These freedoms shall be exercised by all States with *due regard for the interests of other States* [italics added] in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”¹¹

This condition could be said to show that there is a principle not to abuse the rights and freedoms of others. States should not abuse their right to a common resource so that there is an equitable exploitation of the high seas for all.¹² It is also shown in the *Icelandic fisheries case* that states should pay due regard to the interests of other states when it comes to high seas fishing resources.¹³

⁹ UNCLOS, article 86.

¹⁰ UNCLOS, article 87.

¹¹ UNCLOS, article 87(2).

¹² Birnie, Boyle, *International law and the environment*, pages: 144-145.

¹³ ICJ, *Fisheries jurisdiction case*, page: 41 section II.

In the high seas it is the flag state of the ships that has the exclusive jurisdiction according to article 92 in the UNCLOS. Only the treaties or conventions signed by the states can limit their jurisdiction.¹⁴

2.2.2 Convention on International Trade in Endangered Species of Wild Fauna and Flora

The CITES convention was signed in 1973 and there are 180 member states.¹⁵ It controls or forbids the trade of products of endangered species that are listed in the appendixes of the convention.¹⁶

The convention's conservational thinking is shown in the preamble:

*“Recognizing, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade”*¹⁷

The convention wants to protect against over-exploitation of threatened species through trade restrictions and prohibitions. As we will see later in this paper CITES and UNCLOS both recognize the importance of cooperation between states to ensure the protection of species.

Anthony D’Amato and Sudhir K. Chopra write in *Whales: Their emerging right to life* that CITES trade prohibitions on whales have been very effective. They also write that: “One might cautiously say that CITES had become the enforcement mechanism for the then-stated objective of the IWC, that is, a moratorium on commercial whaling.”¹⁸

2.2.3 Convention on Biological Diversity

CBD is a convention concerning all species around the world. It entered into force in 1993 and more than 187 states have ratified the convention.¹⁹

¹⁴ UNCLOS, article 92.

¹⁵ CITES website, *What is CITES?*

¹⁶ Birnie, Boyle, *International law and the environment*, pages: 625-626.

¹⁷ CITES, preamble.

¹⁸ D’Amato, Chopra, *Whales: Their emerging right to life*, page: 47.

¹⁹ CBD website, *Sustaining life on earth, 2 - an agreement for action*.

The objective of the CBD is according to the conventions article 1:

“...the conservation of biological diversity,
the sustainable use of its components and the fair and equitable sharing
of the benefits arising out of the utilization of genetic resources...”²⁰

In the preamble CBD states that “conservation of biological diversity is a common concern of humankind” and that it is important for states to cooperate globally to ensure sustainable use and biodiversity.²¹

Just as in UNCLOS there is an obligation to cooperate internationally through appropriate organizations on conservation measures on the high seas. This can be found in article 5 of the CBD.²² Otherwise it is each contracting state’s responsibility to ensure that the goals of the CBD are met.²³

A section in the preamble notes that:

“...where there is a threat of significant reduction or
loss of biological diversity, lack of full scientific certainty should
not be used as a reason for postponing measures to avoid or minimize such
a threat.”²⁴

This precautionary principle displays the same line of reasoning as many anti-whaling states use to support the moratorium on commercial whaling. They mean that the uncertainty of the scientific information should promote caution and not be used as a justification for whaling operations.²⁵

²⁰ CBD, article 1.

²¹ CBD, preamble.

²² CBD, article 5.

²³ CBD, article 6.

²⁴ CBD, preamble.

²⁵ Borg, *Conservation on the high seas*, page: 148.

2.3 Sources explicitly on whaling

2.3.1 International Convention for the Regulation of Whaling

The first specific whaling convention regulating whaling on all waters came in 1931. It was not effective in protecting the whales and whaling continued as before with its overexploitation. A new convention, the ICRW, came into force in 1948 and superseded the previous convention.²⁶

The ICRW established the International Whaling Commission as its executive body and it is the principal organization internationally on whaling.²⁷ The IWC adopts regulations of conservation and utilization by amending the schedule of the ICRW. They regulate what species, how much and where its parties can whale, although the parties have a right to object the amendments.²⁸ The IWC has currently 89 member states.²⁹

According to IWC's website only two species of large whales are considered to be in danger of extinction today, but many remain at critically low levels of population.³⁰ In 1986 a moratorium on commercial whaling came into effect, and is still in effect. The moratorium forbids all commercial hunting of whales for the member states. The members of IWC decided on this moratorium because of factors like gaps in the scientific knowledge, needed to set catch limits, and the member states' different views on the acceptability of whaling.³¹

The member states' different views can be seen in their interpretations of the ICRW's preamble. The preamble shows the recognitions and intentions of

²⁶ D'amato, Chopra, *Whales: Their emerging right to life*, pages: 30-33.

²⁷ Freeland, Drysdale, *Co-operation or chaos? – Article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission*, page: 2.

²⁸ ICRW, article 5.

²⁹ iwc.int, *General information*.

³⁰ iwc.int, *Status of whales and conservation and management*.

³¹ Iwc.int, *Revised management scheme*.

the members when they wrote the convention. They recognize in the preamble the;

“interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”³²

and their intention with the convention in;

“Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”³³

The anti-whaling nations consider the preambles intentions of both safeguarding whales by conservation and at the same time seeing a development of the whaling industry as contradicting goals³⁴. The anti-whaling nations have both increased in number and have become more protectionistic, as seen by the vote 24-1 when adopting the moratorium. They have moved beyond the original conservation motives of protecting the whales for the benefit of the whaling industry to protection of whales for moral reason like the whales right to life because of their special status as intelligent, emotional mammals that should not be killed in such violent hunting procedures.³⁵

The whaling nations and advocates for whaling argue that the preamble should not be interpreted in a protectionistic way. The original intention, when the preamble was written, was to conserve the endangered whales to ensure the industry to be able to continue in the future. Whaling should be conducted, but with a priority of conservation to ensure that whales are protected against overexploitation.³⁶

The conservation and hunting of whales are not diverging goals but complementary, according to the whaling nations. Commercial whaling under the conservation provisions of the IWC would not endanger the whale

³² ICRW, preamble.

³³ ICRW, preamble.

³⁴ Freeland, Drysdale, *Co-operation or chaos? – Article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission*, pages: 5-6.

³⁵ D’Amato, Chopra, *Whales: Their emerging right to life*, pages: 40-45.

³⁶ D’Amato, Chopra, *Whales: Their emerging right to life*, page: 34.

stocks. It could be argued that if the moratorium would be lifted, more whaling states would join the IWC and a global and effective system regulating whaling could be created.³⁷

2.3.2 The North Atlantic Marine Mammal Commission

The IWC is not the only organization that specifically regulates whaling. Iceland withdrew from the IWC in 1992 and created the regional whaling organization NAMMCO with Greenland, the Faroe Islands and Norway as a result of their dislike of IWC's management. They argued that IWC no longer followed the rules of ICRW in managing whaling according to the scientific evidence.³⁸

The objective of NAMMCO is stated in article 2 of the Agreement:

“The objective of the Commission shall be to contribute through regional consultation and cooperation to the conservation, rational management and study of marine mammals in the North Atlantic.”³⁹

The organization was also created to fulfill the terms of article 65 in UNCLOS that proclaims that states must cooperate with an appropriate international organization.⁴⁰ There are disagreements on whether or not NAMMCO is an appropriate organization and if it lives up to the cooperation criteria of article 65.⁴¹ I will write more about this and UNCLOS in the conservation part of this paper.

³⁷ Aron, Burke, Freeman, *The whaling issue*, pages: 179-184.

³⁸ Freeland, Drysdale, *Co-operation or chaos? – Article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission*, page: 21-22.

³⁹ NAMMCO, article 2.

⁴⁰ Freeland, Drysdale, *Co-operation or chaos? – Article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission*, page: 21-22.

⁴¹ Freeland, Drysdale, *Co-operation or chaos? – Article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission*, page: 23.

3 Conservation of whaling

3.1 Introduction

In both the *Icelandic Fisheries cases* and the *North Sea Continental shelf case* the ICJ recognized that states have to have due regard for other states' rights and to take conservation measures together. They should take responsibility for taking conservation measures for the benefit for all and to cooperate in good faith to establish a just exploitation.⁴²

3.2 United Nations Convention on the Law of the Seas

The UNCLOS obligates states to cooperate and to take conservative measures in section 2 of part VII in the convention. According to Simone Borg UNCLOS section 2 “may be considered as the primary source regulating the exploitation of living resources on the high seas, according to which...the international community should operate.”⁴³ It is debated if UNCLOS section 2 part VII can be said to codify customary law.⁴⁴

All states have the right to fish subject to the obligations and duties of their treaties including UNCLOS. There is no definition of what conservation measures are, but it gives instructions to states regarding establishing their conservation measures.⁴⁵

They shall for example use “...the best scientific evidence available...” and “...take into consideration the effects on species associated with or dependent on the harvested species...”⁴⁶ There is also no indication of what

⁴² Birnie, Boyle, *International law and the environment*, pages: 651-652.

⁴³ Borg, *Conservation on the high seas*, page: 41.

⁴⁴ Borg, *Conservation on the high seas*, page: 41.

⁴⁵ UNCLOS, article: 116-118.

⁴⁶ UNCLOS, article: 119.

kind of measures must be taken, the criteria to meet is “...measures necessary for the conservation...”⁴⁷

It is up to the flag state to prove that the measures reach the requirement of being necessary. There are other international sources of law creating more detailed standards and minimum standards for specific fisheries.⁴⁸

States have a duty both to take conservation measures for their own national rules and to cooperate with other states in conservation and management of the high seas living resources. They shall cooperate through fisheries organizations.⁴⁹

3.2.1 Cooperation in UNCLOS

The duty to cooperate through appropriate international organization is especially pointed out for marine mammals in article 120 and 65. Article 65 and 120 give the right to regulate the exploitation of whales more strictly than given in section 2 part VII UNCLOS.⁵⁰ Because of the states’ freedom of fishing and their flag state sovereignty, only an international organization can make stricter regulation in the high seas.⁵¹

These regulations taken by international organizations through international cooperation are debated if they are customary law and therefor a requirement to all states. According to Simone Borg the conservation measures taken by cooperating states are the “...minimum necessary requirements to guarantee the conservation of species...”⁵² in areas affected by fishery agreements but also that states argue that “...article 117 allows for unilateral measures and therefor no minimum set of conservation

⁴⁷ UNCLOS, article: 117-118.

⁴⁸ Borg, *Conservation on the high seas*, page: 41-42.

⁴⁹ UNCLOS, article: 117-118.

⁵⁰ UNCLOS, article: 65, 120.

⁵¹ Borg, *Conservation on the high seas*, page: 59.

⁵² Borg, *Conservation on the high seas*, page: 37.

measures can be imposed upon any state unless it specifically agrees to them”⁵³.

UNCLOS only declares that states have to cooperate, it does not say how states should cooperate or what happens if the cooperation fails. Article 65 does not obligate states to become members of organizations, only work through them.⁵⁴ It also obligates states to take necessary conservation measures but it does not imply what the measures are that qualifies as necessary.⁵⁵

3.3 Convention on Biological Diversity and Convention on International Trade in Endangered Species of Wild Fauna and Flora

3.3.1 Cooperation in CBD and CITES

Many treaties on conservation today include the obligation of cooperation and it is seen as a very important part to ensure that the conservation measures works.⁵⁶ CITES emphasizes the importance of cooperation in the preamble and in the fundamental principles in article 2 it says that cooperation between the parties is needed to be able to control the trade.⁵⁷

The wording in CBD’s article 5 on cooperation is somewhat similar to article 65 in UNCLOS. Article 5 in CBD obligates the contracting parties to cooperate through international organizations that are appropriate and competent for the conservation of biological diversity⁵⁸. Both UNCLOS and CBD do not force states to become members of organizations, only to cooperate or work through them. It is also clear that the cooperation must be

⁵³ Borg, *Conservation on the high seas*, page: 42.

⁵⁴ Birnie, Boyle, *International law and the environment*, page: 667.

⁵⁵ Borg, *Conservation on the high seas*, page: 42.

⁵⁶ Birnie, Boyle, *International law and the environment*, page: 608.

⁵⁷ CITES, preamble, article 2.

⁵⁸ CBD, article 5.

with an international organization that is appropriate and competent and focuses on conservation and sustainable use of the living resource.

3.4 The International Whaling Commission and The North Atlantic Marine Mammal Commission

3.4.1 Appropriate organizations

The obligation to cooperate with appropriate international organizations in article 65 of the UNCLOS is stated in a plural term. It has been recognized that it indicates that there can be several organizations that can be the appropriate ones. There are no criteria or examples of what an appropriate organization is in UNCLOS or to what extent a state has to cooperate with an organization to be seen as to work through an organization. Is it fulfilled just to discuss with any organization or does the state have to become a member of the IWC. It is clear that the IWC is an appropriate organization according to the international community but it is debated if NAMMCO also is an appropriate organization.⁵⁹

According to Steven Freeland and Julie Drysdale, the IWC is the “only viable international organization for the management of whaling under Article 65 (and 120) of UNCLOS”⁶⁰ and that NAMMCO is not yet an appropriate organization but it could become one. They think NAMMCO has not got enough member parties yet for it to be an alternative whaling organization to the IWC and that NAMMCO must expand their scope of focus areas from information and science research to a more overall regulation concerning whaling.⁶¹

In my opinion NAMMCO was created by whaling states wanting to avoid the moratorium on whaling and still fulfill the cooperation and conservation

⁵⁹ Freeland, Drysdale, *Co-operation or chaos?* pages: 20-21.

⁶⁰ Freeland, Drysdale, *Co-operation or chaos?* page: 30.

⁶¹ Freeland, Drysdale, *Co-operation or chaos?* pages: 23-24.

criteria of UNCLOS. If NAMMCO was to become an appropriate organization according to article 65 in UNCLOS this would result in the option for states to pick and choose between the regulations they like the best for the time being. I think the purpose of the obligation to cooperate would be lost if there were many different appropriate organizations. The purpose must have been to make the states' different practices more uniform to ensure a sustainable use of the resource. The differing rules in the organizations would make it difficult to govern whaling in a sustainable way and make it hard to know what the minimum necessary standards of conservation measures are.

3.4.2 The moratorium

UNCLOS does not prohibit the killing of whales it only obligates the many states that have signed the convention to take the necessary conservation measures to prevent an over-exploitation of the living resources. UNCLOS gives the states the right to decide over their own whaling policies.⁶²

If a state chooses to be a member of an organization or a treaty it can be obligated to follow that organization's or treaty's rules. The ICRW makes it possible for their commission the IWC to adopt amendments with new rules that the states should follow. The member states have the opportunity to object to the amendments and thereby they will not be bound by that specific amendment.⁶³

The amendments shall according to ICRW article V paragraph 2 be:

“... necessary to carry out the objectives and purposes of this convention and to provide for the conservation, development, and optimum utilization of the whale resources...” and “... based on scientific findings...”⁶⁴

⁶² Aron, Burke, Freeman, *The whaling issue*, page: 182.

⁶³ Aron, Burke, Freeman, *The whaling issue*, page: 182.

⁶⁴ ICRW, article V paragraph 2.

The sentiment of this article is the same as in the preamble of ICRW. There should be conservation measures in order to protect whales from overfishing for the benefit of the whaling industries future killing of whales.⁶⁵

IWC made an extensive and drastic amendment with paragraph 10(e) in the ICRW's schedule. It states that the catch limit on all commercial killing of whales shall be set to zero, starting from 1986.⁶⁶ Not all member parties of the ICRW were willing to adhere to this moratorium on commercial whaling and filed objections to the paragraph. Japan and Peru have withdrawn their objection and are now bound by the moratorium. The Russian Federation, Norway and Iceland are not bound by the provisions in the paragraph since they have not withdrawn their objections and reservation.⁶⁷

There are two exemptions to the moratorium on commercial whaling. One is in paragraph 13 of the Schedule which give aboriginals the right to kill whales for their subsistence need.⁶⁸ The other one is in article VIII of the ICRW giving states the right to grant special permits for killing whales for scientific research purposes.⁶⁹

It was article VIII and the science research exemption that came under inspection in the newly released ICJ case *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*. The case concerns whether or not Japan's whaling research program, JARPA II, was in accordance with the exemption from the moratorium. The court found that for whaling to fall within article VIII it had to be "for the purpose of scientific research"⁷⁰ and that there are two elements to this. One is if the activities are scientific research and the second one is if the killing of whales is "reasonable in

⁶⁵ ICRW, preamble.

⁶⁶ ICRW Schedule, paragraph 10(e).

⁶⁷ ICRW Schedule, paragraph 10(e*).

⁶⁸ ICRW Schedule, paragraph 13.

⁶⁹ ICRW, article VIII.

⁷⁰ ICRW, article VIII (1).

relation to achieving its stated objective”⁷¹. The court finds that JARPA II’s activities can be seen as scientific research, but also that the killing of whales is not a reasonable way of researching its objective. Therefore, ICJ finds that the criteria “for purposes of scientific research” is not met and that Japan has violated its obligations under ICRW.⁷²

I believe that this judgment will stop commercial killing of whales under the disguise of being research and give clearer rules on acceptable ways of killing whales for scientific research. It could lead to more whaling nations leaving the IWC because of their strict ban on whaling. If they join NAMMCO or create another international organization with which they could cooperate, it would lead to a diverging set of rules which would prevent the formation of customary law.

⁷¹ ICJ, *Whaling in the Antarctic*, paragraph: 67.

⁷² ICJ, *Whaling in the Antarctic*, paragraph: 227, 244.

4 Customary law

4.1 Introduction to customary law

Customary law is a binding law between states. Customary law can be formed as a non-written source and it can later be codified into treaties and conventions. Customary law binds all states, not only those that have signed a treaty which includes the practice.⁷³

It is how states behave towards each other internationally, the practice of the states of the world, that form customary law. The method I will use for determining customary law is the one ICJ has developed. ICJ has in several cases pointed out some conditions that the practice has to meet to become a customary law which all the states have to follow.⁷⁴

To form a customary law there has to be a recognized state practice, which should meet three conditions; generality, consistency and uniformity. The practice must also be accepted as a binding law by the states, it must be the state's *opinio juris*.⁷⁵

For a practice to be general, it must be common among a substantial amount of the world's states. A rule can be customary law even though all states are not able to make use of the customary law. The states which are most affected by some practices and have more practice on a certain field can have a greater influence on the development of certain customary law. Those states, which are affected, have also the ability to object to a custom, that will develop, if they will not accept the practice and if they are important enough in that field to persuade others to follow.⁷⁶

⁷³ Dixon, *Textbook on International Law*, page: 39.

⁷⁴ Dixon, *Textbook on International Law*, page: 32.

⁷⁵ Linderfalk (Ed), *Folkrätten i ett nötskal*, pages: 28-29.

⁷⁶ Dixon, *Textbook on International Law*, pages: 34-35.

The practice of states must also be consistent and uniform to be seen as customary law. This means that the general practice must be the same over a longer period of time.⁷⁷

To become binding customary law, the general, consistent and uniform practice must also be the *opinio juris* among states. This means that states must perceive the practice as obligatory and legally binding on the states.⁷⁸

4.2 Discussion on customary law and the conservation of whales

What I have found out when examining the first two questions of this thesis in part 2 and 3 is that the regulation always seems to stem from the regulation in UNCLOS. UNCLOS must be the main and general source of law that dictates how other regulations form. Examples of this is seen in both CBD and CITES. They were both created after UNCLOS and, as we have seen, have similar ideas and objectives as UNCLOS in the preamble and the obligation to cooperate. This is why I will start this discussion on customary law on conservation of whales by examining if UNCLOS is customary law or not. From that answer I will be able to find what conservatory obligations are customary in the specific whaling sources of ICRW and NAMMCO. Since I find CBD and CITES so similar but not as important as UNCLOS when it comes to customary law, I will not examine their role in customary law any further.

4.2.1 United Nations Convention on the Law of the Seas as customary law

As I described before, a law has to meet certain criteria to form customary law according to the system formed by ICJ. The practice has to be general, consistent, and uniform and there has to be the *opinio juris* of states.⁷⁹

⁷⁷ Dixon, *Textbook on International Law*, pages: 33-36.

⁷⁸ Dixon, *Textbook on International Law*, page: 36.

The first criteria of generality is met. UNCLOS is considered to be the primary source on exploitation of living resources on the high sea⁸⁰ and it has 166 member states⁸¹. It is also open for signature to all states.⁸² The second and third criteria of consistency and uniformity must also be seen as fulfilled since the convention got its form in 1982. The regulation concerning the high seas and its conservatory measures have, therefore, been the same for many years, the only thing changing is the number of member states. In the last ten years 20 new members have entered the convention, which means that 145 states have been members for more than ten years.⁸³

The last criteria of customary law that UNCLOS has to fulfill is *opinio juris*. The principles of UNCLOS must be accepted as law and states must believe that they are bound by the practice⁸⁴. I find different views on whether or not states believe they are obligated to follow UNCLOS and if the states that have not signed the convention think they are bound by the practices in UNCLOS.

It seems that many of the UNCLOS articles can be seen as customary law when looking at the ICJ criteria. P.W. Birnie and A.E. Boyle write in *International law and the environment* that there is strong evidence of articles in UNCLOS being customary law, especially in jurisdictional matters, but not all practices have become customary yet.⁸⁵ They believe that cooperation and conservation is customary law, because of the many

⁷⁹ Linderfalk (Ed), *Folkrätten i ett nötskal*, pages: 28-29.

⁸⁰ Borg, *Conservation on the high seas*, page: 41.

⁸¹ Oceans & law of the sea, United Nations, *Chronological list of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013*.

⁸² UNCLOS, article 305.

⁸³ Oceans & law of the sea, United Nations, *Chronological list of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013*.

⁸⁴ Dixon, *Textbook on International Law*, page: 36.

⁸⁵ Birnie, Boyle, *International law and the environment*, pages: 151, 656.

regulations confirming it, but it is unclear to what extent they think the obligations stretches.⁸⁶

For whaling the important articles in UNCLOS is article 65 and 120. If there is a customary obligation of cooperation with an appropriate international organizations for conservation of whales that applies to all states, it would mean that states would have to follow at least the conservatory minimum standards set by that organization. As debated before in part 3.4.1 it is unclear if IWC is the only organization that is appropriate and to what extent the states have to cooperate with the organization. Simone Borg points out that states have both interpreted article 120 to require all states to comply with the appropriate organizations stricter conservatory measures irrespectively if they are member states or not and other states have refused to cooperate at all⁸⁷.

One of the countries that interpret UNCLOS as being customary law is the United States. They think article 65 and 120 is customary law and that states are obligated to follow, as they see it, the appropriate organization IWC. United States made this clear in 1997 when they thought Canada did wrong when killing whales even though Canada at the time was not a member of UNCLOS or the ICRW.⁸⁸

The states may object to the IWC amendments such as the moratorium. The states that object to these stricter rules by organizations are not bound by their obligations. In a way it also prevent customary law to form. When states opt out of conventions like the ICRW to form their own organizations it also prevents the harmonization process that could lead to customary law.

⁸⁶ Birnie, Boyle, *International law and the environment*, page: 142.

⁸⁷ Borg, *Conservation on the high seas*, page: 60.

⁸⁸ Freeland, Drysdale, *Co-operation or chaos? – Article 65 of United Nations Convention on the Law of the Sea and the future of the International Whaling Commission*, page: 19.

I do not think there is a customary law today that forces states to follow the rules of the ICRW. However I believe there is a customary law in the obligation to cooperate with an organization or between states on conservative measures, because of the number of member states in UNCLOS and the many other conventions and treaties also stating the importance of cooperation. It is not clear how much a state need to cooperate or with what organization. I think it would be good if the two big organizations would merge in order to harmonize the conservatory measures more to secure a minimum standard of conservation and more information on how many whales that are taken. I think the moratorium could be lifted for some species of whales if there is a global organization controlling whaling, which would mean that the anti-whaling and the whaling nations would have to work together in one organization.

5 Conclusion

The answer to my first question of this thesis, what the main international sources of whaling are, was not too hard to find although their impact on whaling was hard to evaluate. The main source is UNCLOS because it is a general law that gives instructions and obligations on how to follow the other regulations. The big specific whaling sources are the ICRW and NAMMCO. They help states cooperate on how to whale sustainably through conservatory measures.

There are many different conservatory measures states can take in order to protect whales from over-exploitation and extinction. The second question, on what conservatory measures states are obligated to take, differ a lot depending on what agreements they are members of. States that have the strictest rules on whaling are those states in ICRW that have not objected to the IWC's moratorium amendment with a zero catch quota. Most states are member states to UNCLOS and it obligates states to take necessary conservation measures and cooperate with other states and appropriate organizations. It is not defined in UNCLOS what necessary conservatory measures are, which is the minimum standards for states to take. It is unclear if non-member states have conservatory obligations in the same way as the members of the conventions ICRW and NAMMCO.

This thesis has shown that there is not a conclusive answer to the third question, if there is an obligation in customary law to take conservatory measures. States have different views on how obligating the conventions surrounding whaling are, which leads to there not being a clear *opinio juris*. There can be no customary law without the *opinio juris* of states believing that the practices of the conventions are binding. UNCLOS, including article 65 and 120, is probably customary law but that does not necessarily mean the ICRW's moratorium amendments become customary law. The criteria of customary law; generality, consistency and uniformity and *opinio*

juris, are not fulfilled when it comes to the ICRW and its' moratorium. In conclusion I think that the customary law is that states have to take conservation measures and cooperate. It is not customary law to cooperate with a certain organization. To what extent they have to cooperate and take conservatory measures for whales is also not yet determined by customary law. If more states follow the moratorium and believe it to be obligatory to all states it could become the customary law in the future.

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