



Japan's whaling following the International Court of Justice ruling: Brave New World – Or business as usual?

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ABSTRACT

Since 1987, Japan has conducted extensive special permit whaling (“scientific whaling”) in the Antarctic and North Pacific. This has been viewed by many as a way to circumvent the International Whaling Commission’s (IWC) moratorium on commercial whaling, which was implemented in 1985. Recently, Australia took Japan to the International Court of Justice (ICJ) over this issue. Using various criteria, the Court ruled that Japan’s whaling was not “for purposes of scientific research” as required by Article VIII of the International Convention for the Regulation of Whaling, and ordered Japan to immediately cease its JARPA II whaling program in the Antarctic. Despite optimism that the Court’s ruling might spell the end of Japanese whaling in the Antarctic and even elsewhere, Japan has indicated that it will redesign its whaling programs and continue operations. Based upon Japan’s history at the IWC, I argue here that this was an expected outcome; I predict the course of events over the next months, and suggest that the ICJ ruling, while satisfying as an independent vindication of Japan’s critics, represents little more than a temporary setback for that nation’s whaling enterprise.

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1. Introduction

On March 31st 2014, the International Court of Justice (ICJ) in the Hague issued a much-anticipated decision in the case of *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*.¹ The case centered on a long-standing controversy: Japan’s pursuit of “special permit whaling” (also known as “scientific whaling”) as a means to – depending on one’s point of view – either conduct legitimate lethal studies of whales in the Antarctic, or circumvent the International Whaling Commission’s (IWC) current moratorium on commercial whaling. Australia took Japan to court, claiming the latter. The 16 justices on the Court ruled, by a vote of 12–4, that Japan’s whaling was not “for purposes of scientific research”, and that the Antarctic whaling program known as JARPA II should therefore immediately cease.

The decision was greeted with great celebration and optimism by Australia, together with other anti-whaling nations and non-governmental organizations (NGOs). Would this finally spell the end of Japan’s whaling in the Southern Hemisphere, or perhaps even of their whaling industry altogether? After all, domestic demand for whale meat in Japan is low, the industry is heavily subsidized, the single factory ship is aging, and whaling is regarded

by many in Japan as an international embarrassment [1,2]. Others further suggested that the Court’s ruling was precedent-setting, and represented a new model for resolution of disputes involving science and the law [3].

As someone with considerable experience at the IWC’s Scientific Committee, I suggest here that the ICJ ruling represents little more than a temporary setback for Japan. I predict that, beginning in 2015 and irrespective of any criticisms or protests, Japan’s whaling will continue much as before, albeit with some superficial changes that Japan will claim brings the whaling into compliance with the ICJ’s ruling.

Whaling today is managed under the International Convention for the Regulation of Whaling (ICRW) 1946. The Convention created the IWC, and virtually from its outset failed to attain its stated objective “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry” [4]. Member states refused to acknowledge increasingly obvious population declines, consistently set catch limits and quotas too high, and ignored what would eventually be revealed as a 30-year global campaign of illegal whaling by the USSR [5].

By 1982, however, membership of the IWC had swung sufficiently towards anti-whaling nations to produce the three-quarters majority required to pass a moratorium (more accurately, a zero catch limit) on commercial whaling, which came into effect in 1985 with that year’s Antarctic whaling season. However, two major exceptions in the Convention allowed whaling nations to

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¹ [http://www.icj-cij.org/docket/index.php?](http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=148&k=64)

[p1=3&p2=1&code=&case=148&k=64](http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=148&k=64)

continue operations. First, member states can, within 90 days, object to any decision and not be bound by it; both Norway and Iceland conduct whaling today under this provision. Second, Article VIII of the ICRW allows nations to issue permits “to kill, take and treat whales for purposes of scientific research”. Japan decided to withdraw its original objection to the moratorium under a U.S. threat of fisheries sanctions [1], then utilized Article VIII to continue its whaling operations in both the Antarctic and the North Pacific.

The Japanese Whale Research Program Under Special Permit in the Antarctic (JARPA) began in 1987, and when it came to an end in 2005 it was immediately succeeded by a new program named JARPA II; indeed, this transition occurred before the IWC's Scientific Committee had been given a chance to review the final results of JARPA I. Likewise, the Japanese scientific whaling research program in the North Pacific (JARPN) ran from 1994 to 1999, and was succeeded in 2000 by JARPN II. Together, these programs have, since 1987, killed several times more whales than were taken under Article VIII by all nations combined prior to the moratorium,² leading to charges (denied by Japan) that the research is a spurious cover for continued commercial whaling (for details of the two sides of this argument see [6,7]).

This debate about the true purpose of the JARPA II program was reflected in the focus of the ICJ case brought by Australia. Put simply, and although not stated as such by the Court, the key question was this: was JARPA II fundamentally a whaling operation that included some science, or was it conducted, primarily or exclusively, for the purpose of research? Japan maintained that its whaling was legal within the framework of the ICRW; Australia claimed that it was simply a way to circumvent the moratorium, and was not for “purposes of scientific research” as explicitly stated in the text of Article VIII.

After hearing extensive testimony by Australia and Japan, the Court assessed whether JARPA II was “for the purposes of scientific research”. In this regard, the Court considered several criteria [3]: the scale of the lethal research; the manner in which sample sizes were selected; a comparison of intended sample sizes with the number of animals actually killed; the timeframe of the scientific whaling program; the program's publication record; and the extent to which JARPA II attempts to co-ordinate its work with other research projects.

The Court duly decided that, when judged by these and other measures, Japan's Antarctic whaling was not “for purposes of scientific research” and therefore violated Article VIII of the Convention. In a key portion of the ruling, the Court agreed with the Australian contention that the sample sizes (the number of whales to be killed) were set by Japan using considerations that were not scientific in nature.

In its conclusion, the Court ruled (among other things):

- “that the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling”
- “that Japan, by granting special permits to kill, take and treat fin, humpback and Antarctic minke whales in pursuance of JARPA II, has not acted in conformity with its obligations under paragraph 10 (e) of the Schedule to the International Convention for the Regulation of Whaling”³

² Between 1987 and 2012, Japan killed 14,660 whales in the Antarctic (10,476) and North Pacific (4184). Most of these (12,829) were minke whales, *Balaenoptera acutorostrata*, or Antarctic minke whales, *B. bonaerensis* (source: IWC).

³ Paragraph 10 (e) of the IWC Schedule is that introduced in 1982 that set commercial catch limits to zero; i.e. it is the provision generally referred to (albeit rather inaccurately) as “the moratorium”. The Schedule is an integral part of the

- “that Japan shall revoke any extant authorization, permit or license granted in relation to JARPA II, and refrain from granting any further permits in pursuance of that programme.”

Importantly, the ICJ judgement represented the first time that an objective international body, independent of the IWC, had reviewed and assessed Japan's scientific whaling – and in doing so had found it wanting. By implication, the ruling also stood as a condemnation of the intractably mired process used by the IWC Scientific Committee to review and discuss scientific whaling programs; until recently, such reviews featured full participation by Japan in not only the review, but also in the writing of the subsequent report. Such reports invariably featured numerous statements along the lines of “Some members felt... In contrast, others disagreed...”, and debates often included charges by Japan that criticisms were politically motivated. Not surprisingly, the Scientific Committee could never reach agreement on either endorsement or condemnation of a scientific whaling program.⁴

Although the Court did not attempt to judge the quality of science conducted by JARPA II, its ruling lent independent support to what many on the IWC Scientific Committee had been saying for years: that Japan's whaling was an abuse of Article VIII, pursued to circumvent the IWC moratorium. Elsewhere in the judgement and associated justices' opinions one can find additional support for other long-standing criticisms of JARPA II, including its poor publication record, irrelevance to IWC management objectives, and failure to use equally or more effective non-lethal methods to achieve its scientific objectives (see, for example, [7,8]).

Because Japan had agreed to abide by the Court's decision, the ruling forced the cancellation of the 2014/15 whaling season for JARPA II. In the immediate aftermath of the Court's announcement, there was much debate in the media and within the anti-whaling NGO community regarding how Japan would respond in the long-term. The ruling applied only to JARPA II, not to the parallel JARPN II program in the North Pacific; given that exactly the same criticisms had been leveled at the latter, perhaps Japan would cancel that too in deference to the Court's ruling? Would Japan abandon the Southern Hemisphere altogether? And how would the IWC react to all this?

Since those early days of celebration for Australia and its allies, matters have taken a rather more sobering – and, I would argue, entirely predictable – turn. Indeed, it did not take Japan long to regroup from what was initially thought by some to be a major blow to its whaling enterprise. On April 18th 2014, the Minister of Agriculture defied the predictions of more optimistic analysts by announcing that Japan would submit a plan for a new program of Antarctic whale research to the IWC, and also that it would

(footnote continued)

Convention which lays out, among other things, catch limits and whaling regulations.

⁴ It is worth noting here one of the dissenting judges (Justice Yusuf) opined that the Court was effectively undertaking scientific review, something that he felt the IWC's Scientific Committee did well enough already:

“It is a pity that instead of such a legal assessment, the Court has engaged in an evaluation of the design and implementation of the programme and their reasonableness in relation to its objectives, a task that normally falls within the competence of the Scientific Committee of the IWC.”

However, this was apparently based upon an erroneous belief. Yusuf states that:

“As a matter of fact, when the Scientific Committee took the view in the past that a permit proposal submitted by a State did not meet its criteria, it specifically recommended that the permits sought should not be issued.”

In fact the Scientific Committee has never done this, and given its current mired process, never will. Justice Yusuf was apparently confusing the Scientific Committee with a non-binding resolution passed by the Commission in 2003.

operate the JARPN II program in 2014 as planned, albeit with a sample size reduced from 380 to 210 whales.⁵

Then on June 9th, the Japanese Prime Minister, Mr. Shinzo Abe, said: "I want to aim for the resumption of commercial whaling by conducting whaling research in order to obtain scientific data indispensable for the management of whale resources."⁶ That Mr. Abe said this despite the fact that the research Japan conducts has been deemed by many scientists as largely irrelevant to management, or could be conducted using non-lethal methods, was a firm indication that Japan has no intention of listening to any contrary arguments – whether from an august body such as the ICJ or lesser entities – with regard to its self-perceived right to whale.

The following day, Joji Morishita, a senior Japanese official and longtime representative at the IWC, went further and suggested that the ICJ's decision was actually good for Japan because it reaffirmed the legality of whaling, and allowed Japan to propose a new research plan as long as it took into account the Court's criticisms.⁷

No one should be surprised by this. The refusal to change whaling operations in response to what many perceive as rational criticism has been a fundamental feature of Japan at the IWC for decades. Indeed, it follows an unfortunate pattern commonly exhibited by whaling nations since the formation of the IWC. Major examples include frequent use of uncertainty in abundance estimates to deny the existence of population declines and the need for lower catch limits, exploitation of IWC procedures to block or delay progressive measures, and use of Convention loopholes to circumvent unfavorable decisions. As noted by many observers (e.g. [5,9,10]), in many respects these actions define the history of whaling management at the IWC, especially in the decades prior to the moratorium.

A key aspect of this issue is the likely influence, in internal debates within Japan, of the Institute of Cetacean Research (ICR), the quasi-governmental organization that conducts the special permit research whaling, and of the Ministry of Agriculture and Fisheries with which ICR has strong ties. ICR is funded by proceeds from the sale of meat and other products that derive from scientific whaling, as well as by government subsidies [1]. This is a key point, because without the financial support that derives from scientific whaling, ICR would likely cease to exist, at least in its present form. In short, the ICR needs whaling, and whaling needs the ICR.

Since the IWC moratorium came into effect in 1985, much effort and money has been expended, notably by anti-whaling NGOs, to try to stop Japan from killing whales under what many consider to be the guise of research. However, despite extensive NGO media campaigns, diplomatic protests and other actions, little has changed. I would argue that this is because, to date, no one has made Japan pay a real price for its whaling. Many hoped that the ICJ decision would represent just this sort of substantive damage, manifest as a major blow to Japan's international reputation, and thus make the government reconsider whether continued whaling under Article VIII was worth the cost. Yet Japan's recent actions and plans make it clear that this is not the case. As noted by Hirata [1], Japan's unwillingness to relinquish whaling also stems from the power wielded by pro-whaling government agencies and bureaucrats in terms of decision-making, which is largely imperious to other points of view.

⁵ http://www.nytimes.com/2014/04/19/world/asia/japan-says-it-will-resume-whaling-off-antarctica.html?_r=0

⁶ <http://www.theguardian.com/environment/2014/jun/09/japan-pm-commercial-whaling-shinzo-abe-antarctic-hunt> (sic)

⁷ <http://www.reuters.com/article/2014/06/10/us-japan-whaling-idUSKBN0ELOYQ20140610>

Here is how this will likely play out in the coming months. Japan will devise a new research plan for the Antarctic (although this will effectively be "JARPA III", it might be given a new and different name to distinguish it from the ICJ-sullied JARPA II program). Several aspects of this new program will be designed to convey the impression that Japan has listened to the criticisms in the ICJ judgement, and indeed given the wide latitude with which "research" is subjectively defined it will probably be difficult for an antagonist to convincingly demonstrate that the research program is not consistent with the Court's judgement. At least in the initial "feasibility" phase, there will be reduced sample sizes and additional non-lethal research; the latter will be cast as "experiments" to assess the viability of such work, which in due course will be judged impractical, ineffective, or an otherwise insufficient substitute for lethal methods.⁸ Mindful of the fact that the ICJ criticized Japan's lack of external collaboration in its special permit whaling, the design of the new program will feature input from independent international scientists; in reality, however, it is likely that the individuals whose input is included will be researchers who, while not directly affiliated with ICR, are not unsympathetic to whaling.

The new program will be presented to the IWC Scientific Committee, where it will be subject to the usual extensive critiques (see, for example, [12,13]); and, as in the past, Japan will change nothing in response, will insist that the research is bona fide and necessary, will label critical comments on its proposal as "unconstructive", and will accuse those responsible for the criticisms of being politically motivated. In late 2015, the new program will be implemented, and Antarctic whaling will continue as before. Similarly, some adjustments will be made to the North Pacific operation, but nothing fundamental will change.

Critically, Japan's continued conduct of its scientific whaling programs with these changes will effectively put the onus back on others to challenge its actions, since Japan itself will not ask the Court to review its new whaling program. Given Australia's recent change to a conservative government, that nation will almost certainly not take Japan back to the ICJ; indeed, now-Prime Minister Tony Abbott, while still in opposition in 2010, made clear his opinion that taking Japan to the ICJ was wrong.⁹ With the principal advocate for the case withdrawing, there are no other obvious contenders for this role.

Meanwhile, there will certainly be no revolution in the predictable way that the IWC conducts its business. It is important to note that Japan requires no "permission" from either the Scientific Committee or the Commission to conduct its scientific whaling programs. There has already been an attempt by New Zealand to strengthen the way in which special permit whaling proposals and program results are reviewed, in the form of a draft resolution that, if passed at the next Commission meeting in September 2014, would instruct the Scientific Committee to deal with special permit proposals and reviews of research in a manner consistent with the ICJ judgement.¹⁰ However, Japan and its allies will exploit an inability to reach agreement to successfully resist this and any other similar efforts, and the Scientific Committee will continue to be mired in disagreement.

Nothing short of an amendment to the IWC's Schedule, or a renegotiation of the Convention itself, will change things. The

⁸ For example, despite the fact that Japanese whalers have had no problem hitting Antarctic minke whales with harpoons, Japan has repeatedly claimed that using a crossbow or gun to obtain small biopsy samples from the animals (something which other researchers successfully manage on a routine basis) is impractical (see [11], p. 71).

⁹ <http://www.theage.com.au/national/abbott-rejects-whaling-legal-bid-20100111-m2oe.html>

¹⁰ Document IWC/65/14. Draft resolution for IWC 65. Whaling under Special Permit. Submitted by New Zealand. <https://archive.iwc.int/pages/view.php?ref=3452>

former requires a three-quarters majority, which neither side is presently close to, and there is no possibility of any agreement to pursue the radical latter option.

As for the contention by de la Mare et al. [3] that the ICJ decision has implications beyond jurisprudence, in practical terms this is arguably an unrealistically optimistic view. They state that “The ICJ’s approach represents a model for separating scientific matters and the nonscientific agenda in other complicated disputes involving science, society, and law. The ICJ demonstrated that it is possible to sit above the detailed technicalities of scientific research and still determine whether practices were for purposes of science or non-science.”

While this may well be true in theory, theory is of little value if it fails to effect change in the real world. Such change will not happen because of this judgement: Japan will continue business as usual in the coming years, while pursuing its long-term plan of attempting to obtain the votes necessary to lift the IWC moratorium and reinstate commercial whaling (probably through renewed outreach and financial incentives to selected developing countries and small island nations). The ICJ decision, while satisfying to Japan’s critics as an independent vindication of their views, was little more than a temporary setback for that nation’s whaling.

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