

The Struggle Between Conservation and Sovereignty: The ICJ's Decision in Whaling in the Antarctic and Its Implications in International Environmental Law

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I. Introduction

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations since 1946 and plays a vital role in international law, including international environmental law. The ICJ functions to reflect existing international laws by not only settling contentious cases between sovereign states, but also confirming *opinion juris* – the state practice in international law. This includes ruling crucial judgements in relation to the development and stabilization of international environmental law, most clearly exemplified in the *Australia v. Japan* case in 2014 pertaining to Japanese commercial whaling. Commercial whaling can be defined as “the practice of hunting and killing whales for the purpose of selling and trading their meat and other products derived from them”.² In 2014, the ICJ ruled that Japan was exercising commercial whaling and ordered Japan to revoke existing whaling permits.

This article will examine the successes and limitations of the ICJ ruling, exploring its contributions to international conservation law and its broader implications for the ongoing struggle between state sovereignty and collective environmental responsibilities. Ultimately, the article will argue that while the ruling set an important precedent in strengthening the interpretation of

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² Natural Resources Defense Council. “Commercial Whaling 101.”

<https://www.nrdc.org/stories/commercial-whaling-101>.

international conventions, such progressive outcomes are minimized by the limitations of international judicial mechanisms.

II. *Australia v. Japan: Case Overview*

Historical Context

Japanese whaling – the active hunting of whales – began in the 12th century.³ However, Japanese whaling on an industrial scale initiated in the 1890s as Japan began participating in the modern whaling industry. Throughout the 20th century, Japan was heavily engaged in commercial whaling and operated the world's largest commercial whaling fleet until 1982, when the International Whaling Commission (IWC) – a body established under the International Convention for the Regulation of Whaling (ICRW) – mandated a pause in commercial whaling on all whale species and populations to allow whale stocks to replenish, with the exception of scientific research catches; this pause is often referred to as the commercial whaling moratorium.

The Loophole: Scientific Permit Whaling

Despite the moratorium, Japan continued its endeavors in commercial whaling through special permit whaling. Special permit whaling – “scientific” whaling – is categorized differently by the IWC and is not subject to the moratorium. Under Article VIII of the ICRW, nations are permitted to kill whales for scientific research purposes.⁴ However, the IWC does not regulate scientific whaling; instead, countries are asked to submit special permit research proposals to the IWC for scientific scrutiny, and the permits are issued by individual countries. Thus, in 1986, Japan issued itself a scientific permit to hunt 825 minke whales and 50 sperm whales every year for ten years.⁵ Employing the scientific research provision in the agreement, the Japanese Institute of Cetacean

³ Japan Whaling Association. “History of Whaling.”

⁴ International Whaling Commission. “Special Permit Whaling.” <https://iwc.int/permits>.

⁵ UPI Archives. “Japan to Use Loophole to Hunt Whales.” *UPI*, April 8, 1987.

<https://www.upi.com/Archives/1987/04/08/Japan-to-use-loophole-to-hunt-whales/8039544852800/>.

Research continued to hunt whales under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II). Such whales were then sold commercially and used in Japanese markets and restaurants, primarily as a source of meat consumption.

The ICJ Judgement

On May 31, 2010, Australia challenged Japan with respect to “Japan’s continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II), in breach of its obligations assumed by Japan under the ICRW, as well as its other international obligations for the preservation of marine mammals and the marine environment.”⁶ Claiming that Japan was using a scientific research programme to mask a commercial whaling venture, Australia cited the provisions of Article 36, paragraph 2 of the Court’s Statute as basis for the jurisdiction of the Court, which referred to declarations recognizing the Court’s jurisdiction as compulsory.

Upon finding that the declaration of intervention was admissible, the Court held public hearings from June 26 to July 23, 2013. During such hearings, Australia and Japan presented their respective oral arguments, with the aid of experts that each party had called upon. In its appeal, Australia requested the Court to order Japan to terminate the implementation of the JARPA II Programme, to revoke any license or authorization in this issue, and to ensure that no further action will be undertaken under JARPA II.⁷ In response, Japan rejected all allegations of breaching procedural obligations and, further, asserted

⁶ Briand, François, et al. “An Open Letter to the Government of Japan on ‘Scientific Whaling.’” *The New York Times*, May 20, 2002. Archived from the original (PDF) on August 19, 2007.

⁷ International Court of Justice. “Case Concerning Whaling in the Antarctic (Australia v. Japan).” <https://www.icj-cij.org/case/148>.

that whaling was carried out exclusively for scientific research purposes. The Court confirmed that it had jurisdiction to entertain the case.⁸

The Court turned to the question of the interpretation of Article VIII of the 1946 Convention, paragraph 1, which states that the parties “may grant to any of [their] nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research.” The Court noted that “even if a whaling programme involves scientific research, the killing, taking, and treating of whales pursuant to such a programme does not fall within Article VIII unless these activities are ‘for purposes of’ scientific research.” In order to ascertain whether the programme’s use of legal methods is “for purposes of” scientific research, the Court examined whether the elements of the programme’s design and implementation reflected its stated scientific objectives.

Regarding Article VIII, the Court determined that although JARPA II could generally be characterized as scientific research, the programme’s design and implementation were not “reasonable in relation to achieving its stated objectives.”⁹ The Court concluded that JARPA II failed to adopt a program to improve the conservation and management of whale stocks. In addition, the Court found that Japan had breached the ICRW’s moratorium on commercial whaling. Hence, the Court concluded by twelve votes to four that the special permits issued by Japan for the killing, taking, and treating of whales in respect to JARPA II were not “for purposes of scientific research.” Moreover, as JARPA II was an ongoing programme, the Court ordered that Japan “revoke any extant authorization, permit or license to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits” for the programme.

⁸ International Court of Justice. “Declarations Recognizing the Jurisdiction of the Court as Compulsory.”

<https://www.icj-cij.org/declarations>.

⁹ United Nations. “Court Orders Halt to Japan’s Antarctic Whaling Programme.” UN News, March 31, 2014. <https://news.un.org/en/story/2014/03/465062>.

III. Analysis of the Judgment: Implications of the Ruling

Successes

The ICJ's ruling can be construed in a positive light due to its successes in the sphere of international environmental law. With respect to progression towards protecting the marine environment, the case demonstrated that the ICJ judges place great emphasis on their jurisdiction on environmental issues. A paramount issue the ICJ had to settle was the question of whether to adopt a restrictive or wide approach in interpreting Article VIII, as it would determine the extent of discretion afforded to an authorizing state.¹⁰ The restrictive approach advocated by Australia would have implied that the increasingly conservation-oriented approach within the ICRW demanded an interpretation of Article VIII that would limit the level of discretion afforded to Japan. On the other hand, Japan argued in favor of a wide approach that the article was a free-standing provision that affords the authorizing state a wide discretion to grant permits without the interference of the IWC or other states. Young argues that the court was not convinced by either argument, and instead emphasized the dual nature of the purpose of the ICRW – the conservation of whales and their sustainable exploitation. The court adhered to this dual purpose through means such as the determination of sample sizes in JARPA II. The court noted the significant deviation between sample sizes and the actual taking of whales over the course of implementing JARPA II, and concluded the sample sizes were unreasonable in respect to the objectives of JARPA II. Further, the court noted the design and implementation of the program in relation to its open-ended time frame, stating that a feasible time frame with tangible targets would have been more appropriate for a scientific research

¹⁰ Young, Michaela. "Whaling in the Antarctic (Australia v Japan: New Zealand Intervening): Progressive Judgment or Missed Opportunity for the Development of International Environmental Law?" *The Comparative and International Law Journal of Southern Africa* 48, no. 1 (2015): 59–88. <http://www.jstor.org/stable/26203827>.

program. In this way, the Court made evident efforts towards conservation in order to alleviate human-induced environmental damage in the global context.

Moreover, the Court's interpretation of Article VIII can be considered as a development of international law. Poorhashemi argues that because the ICJ worked to effectively analyze the relationship between Article VIII and the object and purpose of the Convention as an entity, it was able to observe that there was no merit to interpreting Article VII in both a restrictive and extensive sense.¹¹ The Court took into account not only the preamble, but also other relevant provisions within the Convention in order to make the most well-supported judgment. This method of interpretation of the provisions of international conventions can be considered as a new approach for analyzing the application of international environmental treaties.

Further, an instrumental factor in the evaluation of the judgement of the ICJ is evolutionary treaty interpretation – “the process of construing treaty provisions in such a manner as to ensure that the treaty remains of validity and relevance notwithstanding the ever changing context within which treaties operate.”¹² The ICJ maintains that treaties are not static but are instead “living instruments” that should be guided by the surrounding context within which the provision operates. This is arguably reflected in the *Australia v. Japan* case, as the court rejected Australia's claim that JARPA II's use of lethal methods alone was sufficient to immediately rule against Japanese commercial whaling. The court acknowledged the dichotomy of views of ICRW member states regarding whaling and recognized the fact that it is not the court's role to resolve such policy issues, but instead to resolve a specific dispute between two parties in

¹¹ Poorhashemi, Abbas, and Sahar Zarei. “Legal Analysis of the Judgment of the International Court of Justice on the Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening).” *CIFILE Journal of International Law* 2, no. 3 (2021): 14–20.

<https://ssrn.com/abstract=3863733>.

¹² Boyle & Chinkin *The making of international law* (2007) 266-269.

relation to the interpretation of the Convention. This approach allowed the court to avoid entering a policy debate among ICRW member states while simultaneously ensuring that IWC recommendations are taken into account through its determination of the unlawful nature of JARPA II. Hence, the court deliberately considered the political status quo in its evolving context, reinforcing the progressive precedent that treaties in international law are perpetually evolving.

Another notable outcome of the ruling is its impact on international advocacy and public awareness. The ICJ ruling attracted significant attention from both anti-whaling organizations and the public, intensifying domestic Japanese dissent and global scrutiny of Japan's whaling activities, and hence generating public support for conservation efforts. Namely, environmental organizations such as the World Wildlife Fund (WWF) and Sea Shepherd have since leveraged the ICJ's findings to further campaign against whaling, employing the decision as a foundation to argue against pseudo-scientific whaling practices in international forums.¹³ This has fostered international support for stronger enforcement of ICRW regulations, strengthening the anti-whaling movement and enhancing collaboration in the international community in favor of conservation.

Limitations

Yet, the Court ruling also underscores the limitations of international judicial mechanisms. First, the way in which Japan exploited a loophole in the ICRW that allowed commercial whaling for decades highlights the challenges of interpretations of wording – in this case of the phrase “for the purposes of scientific research.” This gap was further reinforced by the court's lack of analysis regarding the specific meaning of “scientific research” in its judgement

¹³ Sea Shepherd Australia. "The Whales Have Won: ICJ Rules Japan's Southern Ocean Whaling Illegal." Last modified March 31, 2014. <https://www.seashepherd.org.au/latest-news/the-whales-have-won-icj-rules-japans-southern-occea/>.

on the grounds that a closer examination of the term was unnecessary in the circumstances of the case.

Furthermore, the case exemplifies the conflict between national sovereignty and global environmental obligations, exhibited by Japan's subsequent actions following the Court's rejection of the claim that JARPA II served the purposes of scientific research. Japan continued whaling under the revised program New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A) in 2015. The ICJ was unable to eradicate NEWREP-A because while the ICJ ruling identified that JARPA II did not meet the criteria for scientific research under the ICRW, it did not eliminate the Article VIII provision that permits lethal research. Further, the court failed to indicate whether Japan's obligation to cooperate was based on the ICRW or general international environmental law. Japan used both the provision and lack of clarity to claim that NEWREP-A aligned with the ICJ's requirements for scientific research and the standards of the ICRW, asserting that it had addressed the ICJ's findings. Although the program had a lower annual target for whale captures relative to JARPA II, it nonetheless involved lethal methods, culminating in continued international criticism. Under the new research whaling program, Japan hunted 333 Antarctic minke whales each year from 2015 to 2018.¹⁴

It can be argued that by ruling against Japan and ordering it to cease its whaling activities, the ICJ reinforced its role as a mediating body of international environmental standards and emphasized its authority to hold states accountable for violations, thus contributing to the development of international environmental law. For instance, the ruling set a precedent for future cases involving environmental protections, such as in the recent developments in the *Pakistan v. India* case under the Indus Water Treaty (IWT). Initially a series of

¹⁴ Institute of Cetacean Research. *Outline of the New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A)*.

disputes and arbitration cases under the Permanent Court of Arbitration (PCA) related to water rights on the Indus River system, the case has seen new tensions surface over India's construction of additional hydroelectric projects.¹⁵ Pakistan called for arbitration while India advocated for a neutral expert, culminating in an impasse on dispute resolution mechanisms similar to that of *Australia v. Japan*.

However, Japan's shift to NEWREP-A indicates its deliberate efforts to adapt without fundamentally changing its practices and highlights the way in which states prioritize national interests over international commitments, raising imperative questions about the effectiveness of international legal mechanisms in ensuring that states adhere to their commitments in the face of competing interests. Thus, the case reflects the challenge of reconciling state sovereignty with the need for collective action to address global environmental issues, as states may find means to circumvent international rulings while claiming compliance.

Japan eventually withdrew from the IWC in 2019, allowing it to resume commercial whaling within its territorial waters and exclusive economic zones without the burden of restrictions imposed by the IWC and international diplomatic adversities.¹⁶ Within its geographic perimeter, Japan continues to expand its whale hunt, establishing its aim for 2024 at 142 minke whales, 187 Bryde's whales, 25 sei whales, and 59 fin whales.¹⁷ This demonstrates the limitations of the presence of a body of authority – namely the ICJ – in international environmental law, as it can often encourage states to withdraw their commitment in its entirety to alleviate burdens, ultimately opposing the initial objective of the enforcement mechanism. Hence, it can be argued that the

¹⁵ International Court of Justice. *Jadhav (India v. Pakistan)*.
<https://www.icj-cij.org/case/168>.

¹⁶ International Whaling Commission. "Management and Conservation: Commercial Whaling."
<https://iwc.int/management-and-conservation/whaling/commercial>.

¹⁷ Japan Whaling Association. "History of Whaling."

ICJ ruling ultimately undermined the perceived credibility and authority of both the ICJ and the IWC.¹⁸ This is relevant to one of the most pertinent challenges facing the ICJ in the status quo in relation to its jurisdiction, as an international judicial body is unable to exercise legally binding judicial control over sovereign states.

Moreover, a prominent failure of the ICJ was its inability to consider external influences on the ICRW. As aforementioned, it is evident that the court deliberately considered the political status quo in its evolving context, reinforcing the progressive precedent that treaties in international law are perpetually evolving. The court also considered relevant provisions within the Convention in addition to the preamble, as argued by Poorhashemi. However, the status quo that the court considered is limited merely to the internal evolution of the ICRW. In its argument, Australia submitted a number of international law commitments outside of the ICRW that Japan and Australia had ratified to protect biodiversity that were relevant to the interpretation of Article VIII. The failure of the court to consider such external influences contributed significantly to its decision to place less arduous restrictions on Japan in its right to grant scientific whaling permits, and ultimately allowed for Japan to exploit the legal loophole to continue commercial whaling.

An additional ramification of Japan's withdrawal is exacerbated tensions in the international community between pro- and anti-whaling countries. Specifically, countries such as Australia and New Zealand perceived the withdrawal as a direct response to a lack of compromise on whaling practices and expressed strong disappointment, undermining the intended role of the ICJ to maintain international peace and security. Further, anti-whaling organizations have expressed their dissent. In 2002, the WWF published an

¹⁸ Guillaume Gros, *The ICJ's Handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?*, *Journal of International Dispute Settlement*, Volume 6, Issue 3, November 2015, Pages 578–620, <https://doi.org/10.1093/jnlids/idv024>

open letter to the Japanese in the New York Times, asserting that “Japan’s whale research program fails to meet minimum standards for credible science”.¹⁹ In this way, it can be argued that the ICJ ruling, while intending to achieve international conservation and cooperation, established a forum for increased hostility in practice.

IV. Recommendations

The inherent limitations of the ICJ ruling in *Australia v. Japan* calls for a plethora of reforms to more effectively bridge the tension between conservation and sovereignty. First, a number of the ramifications concern the lack of clarity regarding the term “scientific research.” International conventions – in this case the ICRW – should clarify potentially ambiguous terms in extensive detail, through means such as determining exact requirements or quotas for programs to be considered scientific research. Additionally, the court should consider a closer examination of the ambiguous term based on these grounds in its process of review for a legally sound judgement.

Similarly, the court should seek to provide reasons explaining the basis for concluding that authorizing states are under a duty to cooperate, such as characterizing the duty as entailing requirements of consultation with other relevant member states – in this case regarding scientific whaling operations. Well-reasoned and justified judgements are imperative in maintaining the legitimacy of the ICJ as a judicial body and in enhancing compliance from member states.

Finally, the court should seek to engage more critically with the case through a deliberate consideration of external factors that may have significant influences on relevant parties to ensure that the initial legal document is truly a “living instrument” that evolves according to its surrounding global context.

¹⁹ Briand, François, et al. “An Open Letter to the Government of Japan on ‘Scientific Whaling.’” *The New York Times*, May 20, 2002. Archived from the original (PDF) on August 19, 2007.

This includes relevant developments in international law, such as other laws or conventions that the authorizing state may have committed to, that would result in a decision imposing more effective means to ensure legal compliance.

V. Conclusion

The International Court of Justice delivered its judgment concerning Japanese whaling in the Antarctic on March 31, 2014. According to this judgment, JARPA II did not hold merit to be considered “scientific research” under Article VIII of the ICRW. Subsequently, the Court ordered Japan to cease JARPA II immediately. The *Australia v. Japan* case reflects significant progress in the scope of international law. The ruling advanced the interpretation of the ICRW, established a precedent for accountability in conservation law, and strengthened global advocacy against practices disguised as scientific research. Through its decision, the ICJ underscored the importance of transparency and established a standard for interpreting treaty obligations, reinforcing the global movement toward conservation.

However, the inherent challenges of the ruling highlight the complexities of enforcing international environmental agreements when national interests and sovereignty are at stake. This case underscores the difficulty of achieving full compliance – seen by Japan’s continuation of whaling under the revised program NEWREP-A – as countries may prioritize domestic practices over global environmental commitments. This effectively raises questions about the authority of the ICJ in international law and the long-term effectiveness of international judicial decisions in securing collective action.

Ultimately, *Australia v. Japan* illustrates both the potential and constraints of international courts in addressing global environmental agendas. While the ICJ ruling provided valuable legal clarity and empowered conservation efforts, the case also reveals the limits of judicial authority when faced with state resistance. This duality reinforces the need for continued

diplomatic engagement, perpetual discourse, and a series of legal reforms to reconcile sovereignty with shared responsibilities on the international stage.