Whaling in the Antarctic and the Power of Public International Law

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Abstract
The International Convention for the Regulation of Whaling and the associated recent litigation before the International Court of Justice reveal a great deal about the status and power of international law in the 21st Century. Japan's infamous JARPA II whaling programme has been widely criticised as disguised commercial whaling, contrary to the international moratorium on commercial whaling. The ICJ ruled last year that the JARPA II programme was indeed unlawful because the whaling licences involved had not been granted for purposes of scientific research, as demanded by the Convention. The extensive JARPA II programme therefore shows the continued power of local cultural traditions to obstruct the demands of international law. The ICJ judgment, conversely, shows the intensity of review to which the ICJ feels willing to go in deciding whether a specific State has violated its obligations under public international law. The Court engaged in detailed, factually nuanced analysis of the nature of Japan's JARPA II programme in concluding that it was not being undertaken for scientific purposes. The litigation is also testament to the determination of governments and NGOs to ensure the rules of public international law are enforced. Nonetheless, however laudable the aims of the ICJ, there may be grounds to conclude that its interpretation of the Convention was legally flawed and amounted to an improper expansion of the investigative power of international judicial bodies.

Keywords: Conservation, environmental law, Japan, whaling

Introduction

> "Towards thee I roll, thou all-destroying but unconquering whale; to the last I grapple with thee; from hell's heart I stab at thee; for hate's sake I spit my last breath at thee."
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> (The last words of Captain Ahab)
> Herman Melville, *Moby-Dick; or, The Whale* (1851)

Admirers of Herman Melville's *magnum opus* will readily recall the unyielding obsession with which Captain Ahab pursued his vendetta against the titular Whale. The world – and its attitude to cetaceans – has been transformed since the days of men like Ahab, when the oceans crawled with whaling vessels like Melville's ill-fated *Pequod* and the trade in whale oil played a crucial role in the developed economies. Only a handful of nations now maintain extensive whaling fleets. Japan is one of them. Its allegedly scientific Japanese Whale Research Program under Special Permit in the Antarctic Phase II (JARPA II) has attracted international criticism for many years, and after prolonged litigation the International Court of Justice (ICJ) recently declared it unlawful in light of Japan's obligations under the International Convention for the Regulation of Whaling (ICRW).

Of course, no-one suggested that Japan's extensive whaling in the Antarctic was motivated by an Ahabian hatred for cetaceans. But many suspected that the Japanese Government's long-standing commitment to whaling was (and is) uncompromising and inherently ideological, and in that sense is not so unlike Ahab's own. The suspicion was that Japan, moved by economic considerations and a belief in its importance to Japanese cultural identity, was ideologically committed to the perpetuation of whaling, and had refused to subordinate this commitment to its obligations under international law.

To talk with precision about the 'power' of something as complex, multi-faceted and continuously evolving as public international law is difficult. Even though its power can be felt in many areas of life, answering deep conceptual questions about it is problematic. What is the nature of that power? What is its extent? On whom does it act, and how is it to be justified normatively? It is much easier to give examples of the power of public international law at work than to arrive at any precise and universally agreeable formulations about its nature or impact. Consequently this short paper will limits itself to identifying and reflecting on a few aspects of the power of public international law to which the *Whaling in the Antarctic* case draws our attention.

The legislative background

Five international treaties could be seen as directly relevant to Japan's whaling activities in the Antarctic: the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on International Trade in Endangered Species (CITES), the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), the Convention on Biodiversity (CBD) and, most crucially, the International Convention on the Regulation of Whaling itself.[1] In the *Whaling in the Antarctic* litigation, Australia had alleged that Japan was breaching the CBD (specifically Articles 3, 5 and 10(b)) but did not give much in the way of specific facts

[1] For a broad discussion of the applicability of these several international instruments, see Koyano (2013), 201.

to support these allegations and the ICJ judgment devotes reasoned analysis only to the issue of JARPA II's compliance with the ICRW.

The ICRW came into being in 1946, entering force for Japan in 1951. It created a body – the International Whaling Commission (IWC) – empowered to enact rules for the regulation of the whaling industry which would be appended to the Convention's Schedule and become binding on all States Parties, except those entering formal objections to a specific new regulation. Over time the IWC adopted various prohibitions, such as restrictions on the use of factory whaling vessels, whaling in certain geographic areas (most relevantly in the Southern Ocean Sanctuary) and restrictions on the taking of animals from certain whale species. Ultimately the regulatory framework culminated in the moratorium on all commercial whaling adopted by the IWC in 1982 as Paragraph 10(e) of the ICRW Schedule. Some States Parties objected to the moratorium. Japan too objected but eventually capitulated under strong international pressure, especially from the United States. In 1988 Japan stopped commercial whaling operations, and promptly began an extensive programme of "scientific" whaling, involving the grant of special licences from the Japanese government purporting to authorise the taking of whales for research purposes. Japan has maintained that such licences are permitted under the ICRW by virtue of Article VIII, the first paragraph of which provides that "Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research...". However, Japan's now infamous JARPA II whaling programme has been widely derided as disguised commercial whaling, outside the scope of Article VIII and therefore contrary to several rules now contained in the Schedule, most crucially the international moratorium on commercial whaling. The ICJ ruled last year that the JARPA II programme was indeed unlawful because the whaling licences involved had not been granted for purposes of scientific research, as demanded by the Convention. The ICRW and the associated recent litigation before the ICJ reveal a great deal about the status and power of international law in the 21st Century.

The popular power of public international law

The *Whaling in the Antarctic* litigation – and the civic action which heralded it – is testament to the determination of people and governments to ensure the rules of public international law are enforced. Despite the high number of important inter-State disputes to which an instrument of international law might be relevant, it remains comparatively rare for one State to seek legal redress against another before the ICJ. Since only very weighty or high-profile issues tend to be litigated in the leading international fora, every case that eventually finds itself before tribunals such as the ICJ is replete with useful lessons about the way international law can be used to resolve States' disputes and regulate international conduct. *Whaling in the Antarctic* is part of a new trend in the international case law, particularly the jurisprudence of the ICJ. The traditional kind of dispute before the ICJ involves a defendant State having allegedly breached international obligations owed specifically to the plaintiff State. Such obligations are generally owed on the basis of reciprocity – a model conceptually aligned to a private law contract, in which two parties are linked by a voluntarily entered web of bilateral rights and obligations. Alternatively, States sometimes allege that another has acted contrary to international law in a way which has caused direct harm to the complainant State or its interests. The *Whaling in the*

Antarctic scenario is of another kind. Here, Australia and New Zealand alleged that Japan was failing to live up to the responsibilities it had undertaken as part of a global regulatory framework. It is hard to conclude that Japan had breached public international legal duties *to Australia*, or that Australia (particularly) had been wronged by Japan's actions. In the litigation, Japan did not try to argue that Australia – not being an injured State – had no standing to litigate the whaling issue before the ICJ. All parties seem to have assumed that Australia had standing to bring the complaint that Japan had breached an international legal obligation, even though Australia was not particularly affected by Japan's actions.

The case is therefore part of a previously identified trend towards a more communitarian understanding of the enforcement of certain international legal obligations. This is a move away from a contractarian theory towards a conception of international legal norms as a universally binding nexus of rules, and the recognition of an international public interest in allowing States freely to police each other's duties in the international courts. States like Australia seem to be assuming a new role of enforcing international legal duties even when not directly harmed by their violation. The strength of that commitment is demonstrated by Australia's sustained evidence-gathering missions concerning Japan's actions in the Antarctic. The Australian government engaged in lengthy observation of the whaling programmes using its customs vessels, specifically in order to gather evidence for eventual use in international litigation. The newer conception looks less like the private law of contract and more like public regulatory law, akin to the way governments domestically regulate all manner of industries like banking, internet commerce or private sector railways. It amounts to an intensification of the publicness of public international law, resonating more closely with domestic criminal or administrative law, breach of which is modelled as a wrong against the community at large.

The facts surrounding JARPA II and preceding the litigation reveals the power of public international law to enter the popular consciousness and spur to action private citizens – mostly acting through NGOs – in an effort to bring about compliance with those international legal norms. The JARPA and JARPA II programmes led to concerted NGO action for many years. Some groups undertook traditional forms of protest (awareness-raising, lobbying, organising boycotts, etc.) in an attempt to encourage adherence to the existing legal rules in ways undoubtedly legal.[2] Other groups went significantly further. Most famously, the Sea Shepherd Conservation Society began a campaign of disruption to the whaling operations, in a series of acts which has been described as "either borderline- or blatantly illegal".[3] The Sea Shepherds' more extreme tactics included the ramming of whaling vessels, sabotaging propellers, and using lasers (temporarily) to blind whaling crew members. Such acts may well constitute international piracy,[4] or at least breach certain other international legal rules.[5]

Despite the success of the peaceful lobbying in raising global awareness of the issue, it was the vigilante approach which first led to a major – if impermanent – victory for the conservationist cause. The Sea Shepherds' sabotage operations famously thwarted

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2 Moffa (2012), 207.

3 *Ibid* at 203.

4 The United Nations Convention on the Law of the Sea (UNCLOS), Article 101 defines as piracy "any illegal acts of violence...committed for private ends by the crew...of a private ship...and directed on the high seas, against another ship...".

5 For example, Article 1(b) of the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

the JARPA II fleet's operations in 2011, when the Japanese Minister for Agriculture ordered it home, still well short of catch quotas. It has correctly been noted that using tactics which are themselves in probable breach of international legal rules to enforce the norms of public international law when a private non-State actor believes they have been violated has a curious relationship with the project of promoting adherence to international law.[6]

The ICRW in popular consciousness

The Preamble of the ICRW notes that it has been agreed by the represented governments in order to "[safeguard] for future generations the great natural resources represented by the whale stocks", believing that "increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources" and that the new international regulatory framework would "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry". The litigation exposed how instruments of public international law can evolve in the consciousness of the global public and of their States Parties, taking on in the popular imagination meanings unintended by the original signatories. Japan has correctly identified an ideological divide between those who aspire to sustainable commercial whaling and those who oppose it and see the moratorium as having effectively brought it to a permanent end, regardless of eventual recoveries in whale populations.

The limitations in harmonising global norms: cultural resistance

The extensive JARPA II programme shows the continued power of local cultural traditions to obstruct the demands of international law. Although Japan lost the case before the ICJ, the fact that such litigation was necessary at all reveals the difficulty in creating and enforcing globally accepted uniform norms (which is, after all, the fundamental *raison d'être* of public international law). The Japanese government's attitude to its post-moratorium whaling projects, and the litigation in question, has been characterised by recalcitrance and a seemingly genuine belief that the whole dispute is caused by foreign cultural imperialism.

Despite the shortcomings in the reasoning of the ICJ, it is difficult to have much sympathy for what some might see as the Japanese government's victim-complex. The notion that the crux of the dispute is cultural is only true in a remote sense. Although the decision to adopt and maintain the commercial whaling moratorium obviously has a moral and cultural dimension, the crux of the criticism directed at Japan over its JARPA and JARPA II programmes has always been its alleged attempts cynically to circumvent its positive international legal obligations. The desirability of whaling and its cultural worth is a distinct question, logically prior to the debate about whether to ban it under international law. Japan cannot feasibly agree to an international regulatory framework which involves a moratorium on commercial whaling and then complain that to be held to that obligation is due to disagreement about the moral worth of whaling. The dispute is not "is JARPA II moral?" (although it is clear that its international opponents think it very immoral indeed), but "is JARPA II lawful?".

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6 *Supra*, n 3 at 209.

The legal power of public international law

Perhaps most importantly, the ICJ judgment shows the intensity of review to which the ICJ may be willing to go in deciding whether a specific State has violated its obligations under public international law. The ICJ engaged in detailed, factually nuanced analysis of the specific features of Japan's JARPA II programme in concluding that it was not being undertaken for scientific purposes. The reasoning process by which the ICJ reached this conclusion was somewhat convoluted and deserves close analysis.

The ICJ held that the question of whether JARPA II constituted "scientific research" and the question of whether the licences on which the programme depended were granted "for purposes" of scientific research were separable and cumulative questions. It ultimately held that JARPA II did involve objectives and activities that could broadly be considered scientific research, but nonetheless the licences were not granted "for purposes of scientific research" within the meaning of Article VIII, ICRW.

However desirable the cessation of Japan's whaling operations in the Antarctic, the reasoning of the ICJ should be rejected. Its interpretation of the ICRW was unduly complex and improperly expanded the reviewing power of the ICJ. The ICJ's detailed analysis of the specifics of JARPA II was invited by its approach to the meaning of "for purposes of scientific research". There are broadly two rival meanings which the ICJ could have adopted. These can be termed *purpose-as-motive* and *purpose-as-conduciveness*.

Purpose-as-motive would involve a subjective test, examining the internal subjective goals of the Japanese government in awarding the JARPA II licences, and the reasons which in fact moved them to such action. It is in this sense that the child uses the term "purpose", when she protests to her parents that she did not break their favourite vase "on purpose". So too the easily misunderstood academic when he reminds his audience that it is "not his purpose" morally to defend the conduct of the Japanese government (merely to critique the reasoning on which it was judged illegal). On this approach, the only grounds for impugning the grant of the JARPA II licences would be bad faith, involving a finding that the Japanese government's stated motive (scientific research) did not match its true motive (commercial whaling). This would be the least juridically inventive ground on which to declare the JARPA II licences unlawful. It is uncontentious that States are bound by customary international law to abide by Treaty obligations in good faith, a duty now codified in Article 26 of the Vienna Convention on the Law of Treaties (1969). Australia had in fact argued that Japan was acting in bad faith. Japan considered this tantamount to an allegation that "Japan has lied...systematically, as a matter of State policy for almost 30 years".[7] This is indeed a serious allegation for one State to levy against another (although many in the international community believe it to be true). As Judge Owada made clear in his dissenting opinion, an allegation of bad faith must be proved as a fact by the party making it using legally admissible and compelling evidence. The bad faith must also be shown to be attributable to the State of Japan itself, rather than merely to specific private actors. In any case, the ICJ did not decide the case on bad faith grounds,

[7] Submissions on behalf of Japan, per Professor Payam Akhavan.

rejecting the purpose-as-motive approach and accepting as a fact that Japan was genuinely awarding the JARPA II licences in order to promote scientific research.

In sharp contrast to purpose-as-motive stands what can be termed purpose-as-conduciveness. It is in this sense that we speak of "all-purpose flour", or a "multi-purpose gymnasium". It was this reading that the ICJ adopted, holding that "whether the killing...of whales...is for purposes of scientific research cannot depend simply on [Japan's] perception."[8] Rather, the ICJ held that an objective test was necessary.

Judicial review of executive determinations such as the grant of JARPA II licences can take a variety of approaches, depending on the intensity of review appropriate in the circumstances. Some conventionally recognised approaches include checking only the quality of the government's decision-making process (including checking that the proper factors were considered and any improper ones were excluded). The ICJ judgment leaves it unclear which degree of intensiveness the ICJ favoured. At one stage, the majority held that Japan had acted unreasonably in failing to take into consideration the suitability of non-lethal alternatives for collecting data.[9] It is clear, however, that the ICJ did not confine itself to this kind of decision-making procedural review. Nor was it content with assessing whether the decision to award the licences was one a rational and competent government could make (so-called "rationality review"). Instead the ICJ delved into the substance of JARPA II and decided for itself whether JARPA II's "design and implementation are *reasonable* in relation to achieving its stated objectives."[10] The ICJ found against Japan on this question, on examining areas such as the stated sample sizes for various whale species.

Once the ICJ rejected the purpose-as-motive approach and opted for a conduciveness understanding of "purpose", *Whaling in the Antarctic* necessarily became a case about who gets to decide whether a specific national programme is reasonably conducive to the scientific research it purports to promote. New Zealand had complained that "Japan has sought to...accord for itself the right to decide whether a programme of whaling is for [purposes of scientific research]".[11] According to Japan, such a complaint "implicitly requests the Court to substitute its own judgment...as to the character of the special permits". In Japan's submission, "[t]he Court does not have that power".[12] The ICJ did not agree, ruling that the ICJ could reject Japan's view of JARPA II's suitability for its research goals and decide the issue for itself anew.

The decision has been applauded from many directions for striking a wise balance between policing States' conduct and deferring to national discretion in areas of scientific judgment.[13] However, whilst the ICJ repeatedly insisted it would not engage with the issue of scientific merit, a close reading of the majority judgment suggests the ICJ did not stick to the strict division it claims to have respected between legal and scientific questions. The ICJ declined the invitation conclusively to define "scientific research",[14] and expressed no stance on the value of JARPA II's research goals. Nonetheless, in deciding whether the JARPA II licences were for purposes of scientific research, the ICJ essentially vetted the scientific quality of the programme's

8 Judgment of the International Court of Justice at [61].
9 *Ibid* at [137-144].
10 *Ibid* at [67] (emphasis added).
11 *Ibid* at [29].
12 *Ibid* at [27].
13 Plant (2015), 43.
14 *Supra*, n 8 at [73-86].

design. The enquiries in which the ICJ engaged would be hard to distinguish from an enquiry into whether JARPA II constituted "good science". According to the ICJ, its manifold shortcomings did not merely make JARPA II a bad scientific programme, it made it a programme that could not claim to be "for purposes of" scientific research at all.

The ICJ's separation of the Article VIII language into two distinct and cumulative stages of enquiry (whether there was "scientific research" and whether the permits were granted "for the purposes" of scientific research) is curiously convoluted, introducing an artificial complexity into the ordinary meaning of the language. It is tempting to see this as a cunning interpretive technique, yielding a convenient way of declaring JARPA II unlawful without directly ruling Japan to have been acting in bad faith and lying about its true subjective motivations to the international community.

Conclusion

The government of Japan has expressed disappointment that the ICJ held the JARPA II licences to be outside the scope of Article VIII.[15] Nonetheless it has agreed to "abide by the Judgment...as a State that places a great importance on the international legal order".[16] That does not, however, mean Japan has relinquished its designs on the cetacean inhabitants of the Southern Ocean. Instead Japan will "consider [its] concrete future course of actions carefully, upon studying what is stated in the Judgment."[17] In essence, Japan plans to redesign its whaling programme to satisfy the deficiencies which the ICJ concluded disqualified its permits from being for purposes of scientific research.

Public international law is powerful, and that power may well be growing. It is also overwhelmingly a force for good in the world today. Nonetheless we must ensure we keep its power in the right place, namely in the treaties which are agreed between sovereign States after extensive negotiation and compromise. When the language of the treaties is faithfully applied and not stretched to provide a counter-intuitively high level of judicial oversight, there will be times when cynical or suspect actions by States slip through the regulatory net. Nonetheless, there is a realistic prospect that such slippage will lead eventually to a tightening of that easily-penetrated net, prompted perhaps by the large-scale lobbying and awareness-raising done by concerned citizens' groups and NGOs. If such changes are brought about by proper amendment of the actual language of the treaties, power will be kept in the hands of States and not in the hands of judges with little accountability to the global citizenry.[18]

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15 *Statement of the Chief Cabinet Secretary of the Government of Japan,* March 31 2014.

16 *Ibid*.

17 *Ibid*.

18 Some of the arguments put forward in their embryonic state in this short paper will be presented in their mature form in a full-length journal article in the near future. The author will be happy to receive any comments or criticisms in response to this short preliminary work. A contact email address follows the list of references overleaf.

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