

# The Beginning of the End? The International Court of Justice's decision on Japanese Antarctic Whaling

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The International Court of Justice's (ICJ) recent decision concerning whaling in the Antarctic has been hailed in some quarters as signalling an end to Japanese whaling.<sup>1</sup> The case, originally lodged by Australia in 2010 (with New Zealand intervening to join Australia's action in November 2012), is a landmark ruling in international law by clarifying the nature of Japanese whaling; the legality of which has been contested by animal protection activists and conservationists for many years. Yet while the Court's decision can be welcomed as identifying that Japanese whaling in the Southern Ocean should not be permitted under the current arrangements, it does not entirely outlaw Japanese whaling. However, this preliminary reading of the judgment identifies much of interest to animal law scholars in its discussion of the necessity of using lethal methods of killing animals for scientific research and the requirements on reviewing such methods.<sup>2</sup>

## The Whaling Convention and Moratorium on Whaling

The text of the 1946 *International Convention for the Regulation of Whaling* (the Whaling Convention) makes it clear that it was intended to 'provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'.<sup>3</sup> The Whaling Convention thus has trade and exploitation of whale stocks as its basis rather than being purely an international conservation or animal protection measure.<sup>4</sup> In this context the Whaling Convention provides for an economic value to be placed on wildlife and its regulation as a resource. Species protection concerns relating to the extinction of various species as a result of human interference<sup>5</sup> and the need to conserve animals that will otherwise be driven to extinction are also partially reflected in the Whaling Convention's provisions.

A Moratorium was put in place with effect from 1986 which effectively banned commercial whaling.

However The International Whaling Commission (IWC) acknowledges that Norway continues to take North Atlantic common minke whales within its Exclusive Economic Zone, and Iceland takes North Atlantic common minke whales and also North Atlantic fin whales, within its own Exclusive Economic Zone.<sup>6</sup> Norway and Iceland take whales either under objection to the moratorium or under reservation to it which allows them to establish their own catch limits and provide information to the IWC on whales caught. The Russian Federation has also registered an objection to the Moratorium but does not currently exercise it.

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<sup>1</sup> Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) - Judgment of 31 March 2014.

<sup>2</sup> It is accepted that the Court's judgment is specific to the requirements of the International Convention for the Regulation of Whaling but the judgment contains some wider discussion on the expectations of scientific research involving animals.

<sup>3</sup> International Convention for the Regulation of Whaling, preamble to the Convention.

<sup>4</sup> Nurse, A. (2013) *Animal Harm: Perspectives on Why People Harm and Kill Animals*, Farnham: Ashgate.

<sup>5</sup> White, R. (2007) *Green Criminology and the pursuit of social and ecological justice in Piers Beirne and*

Nigel South (eds) *Issues in Green Criminology: Confronting harms against environments, humanity and other animals*, Cullompton: Willan.

<sup>6</sup> International Whaling Commission (2014) *Commercial Whaling*.



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Article VIII of the Whaling Convention allows the taking of whales under the ‘scientific exemption’ which allows individual states to issue permits to ‘kill, take, or treat whales for purposes of scientific research subject to such other conditions as the Contracting Government thinks fit.’<sup>7</sup> This provision effectively exempts state authorised scientific whaling from the convention and while it requires each Government issuing such permits to report to the IWC on the number of permits it issues, in practice it allows each state to decide the size and scope of any scientific whaling program and to self-regulate by issuing its own permits. While in principle a state needs to justify its special permit whaling programme to the IWC, the extent to which there is scrutiny of a scientific programme sufficiently robust to overturn state sovereignty without recourse to an international court is questionable. Japanese whaling recommenced in 1987 under the JARPA Research Plan and then continued from the 2005-2006 season under the JARPA II programme by issuing permits to the Institute of Cetacean Research described in the ICJ’s judgment as a foundation established under Japan’s Civil Code and historically subsidized by Japan. JARPA II’s activities include modelling competition among whale species and improving the management

procedure for Antarctic minke whale stocks. The methodology includes lethal sampling of three whale species: Antarctic minke whales, fin whales and humpback whales and the program’s extensive use of lethal methods has long been viewed by its opponents as evidence of commercial whaling.<sup>8</sup> Yet despite the persistent voicing of concerns by NGOs and other commentators, Japan’s programme has continued largely uninterrupted since 2005-2006. Arguably the lack of an effective enforcement mechanism within the IWC necessitated legal action under the Whaling Convention via an international court.

#### **Australia Versus Japan**

In 2010 Australia lodged a complaint with the ICJ asking the Court to find that the killing, taking and treating of whales under special permits granted by Japan are not ‘for the purposes of scientific research’ within the meaning of Article VIII of the Whaling Convention. The Australian case specifically concerns Japan’s JARPA II Research Plan which allowed whales to be taken in the Southern Ocean under permits issued by the Japanese Government. While accepting that meat from harvested whales would enter into the consumer market, Japan maintains that JARPA II is a scientific research programme and that its primary purpose is to collect data on whales and ecosystem management.

In bringing the case, Australia sought to determine that Japan’s JARPA II whaling was commercial and not scientific whaling and so went

against the spirit of the Whaling Convention as well as being unnecessary animal exploitation; facilitated by exploiting a potential loophole in the Whaling Convention. Conservationists and activists have long maintained that Japan’s activities were commercial whaling and that JARPA II allowed for unlawful commercial exploitation of whales under the guise of scientific research. As part of the remedy for its alleged breaches of the Whaling Convention, Australia was also asking the ICJ to declare that Japan should: cease to issue any further permits for scientific whaling; should revoke any permits or authorization for the JARPA II programme; and should also cease the JARPA II programme.<sup>9</sup> JARPA II is structured in six-year phases but has no specified termination date.<sup>10</sup>

#### **Use of Lethal Methods**

JARPA II’s Research Plan specifies use of both lethal and non-lethal methods to achieve its research objectives. During proceedings, Japan argued that lethal sampling was ‘indispensable’ to JARPA II’s objectives of ecosystem monitoring and multi-species competition modeling. Japan argued that it did not use lethal methods any more than was necessary, while Australia argued that Japan has an ‘unbending commitment to lethal take’ and that ‘JARPA II is premised on the killing of whales.’<sup>11</sup> Australia further argued that a variety of non-lethal research methods, including satellite tagging, biopsy sampling and sighting surveys would be more effective ways to achieve Japan’s claimed objectives and to gather data.

<sup>7</sup> International Convention for the Regulation of Whaling, Article VIII, paragraph 1.

<sup>8</sup> WWF (2007) Japanese Scientific Whaling.: Irresponsible Whaling, Irresponsible Science, Switzerland: WWF.

<sup>9</sup> Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) – International Court of Justice, Judgment of 31 March 2014 - Para 23 and 244.

<sup>10</sup>Ibid, Para 119.

<sup>11</sup>Ibid, Para 128 to 133.

The Court's deliberation on this aspect in part turned on the necessity of using lethal methods and in part on whether the evidence that Japan had considered non-lethal methods and was able to justify its seemingly persistent use of lethal methods was sufficient. Scientific research and other forms of animal exploitation should generally seek to minimize unnecessary suffering or harm to animals, recognising their status as sentient beings unable to advocate for their protection.<sup>12</sup> The Court concluded that there was no basis on which to conclude that the use of lethal methods in scientific whaling is unreasonable per se, but considered that there were weaknesses in the JARPA II Research Plan's consideration of non-lethal methods. In particular, there was no evidence that Japan had examined whether it would be feasible to combine a smaller lethal take with an increase in non-lethal sampling, and that there appeared to be a preference for lethal sampling because it provides a source of funding to offset the cost of the research.<sup>13</sup> The Court accepted that the activities carried out by Japan under the JARPA II programme could be broadly

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characterized as scientific research.<sup>14</sup> However, since the Moratorium was announced Japan has continued scientific whaling almost continuously initially through JARPA (commenced within a year of the Moratorium) and subsequently via JARPA II. Australia maintained that Japan had essentially used lethal methods as a significant part of the programme despite advances in technology that arguably made such methods outdated for some of the programme's objectives. The lack of any significant break in operations to review the data, methodology and future requirements was noted by the Court as giving weight to Australia's theory that Japan's priority was simply to maintain whaling operations 'without any pause' and that sample sizes are not driven by purely scientific considerations.<sup>15</sup>

#### Scientific or Commercial?

While it was not the Court's role to determine the scientific merits of Japan's whaling programme, it did consider whether the specifics of the whaling programme were such that it could be determined as taking whales 'for the purpose of' scientific research' and it is here that animal protection advocates may be most interested in the Court's deliberations.

First, the Court commented on the open ended nature of JARPA II which appears to be an indefinite whaling programme. The Court concluded that a time frame with intermediate targets would have been more appropriate but also commented on the scientific outputs arising from JARPA II. The Court

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noted that the first research phase of JARPA II (2005-2006 through to 2010-2011) has been completed but that Japan could only point to two peer-reviewed papers that have emerged from JARPA II to date. While Japan also pointed to symposia presentations and other programme documents, the Court concluded that 'in light of the fact that JARPA II has been going on since 2005 and has involved the killing of about 3,600 minke whales, the scientific output to date appears limited.'<sup>16</sup> The Court also noted discrepancies between the target and actual take sizes and the fact that Japan had taken few humpback or fin whales, despite these seemingly being an integral part of the programme. It concluded that target sample sizes are larger than reasonable in relation to achieving JARPA II's objectives and that the actual take of fin and humpback whales was largely, if not entirely, a function of political and logistical considerations. The ICJs view was that there was evidence to suggest that the programme could have been adjusted to achieve a far smaller sample size and that Japan had failed to explain why this was not done. The Court was critical of the fact that Japan had neither revised JARPA II's objectives nor methods to take account of the actual number of whales taken. It concluded that the evidence did not establish that the programme's design and

<sup>12</sup>Wise, S. (2000) *Rattling the Cage*, London: Profile Books.

<sup>13</sup>Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) - Judgment of 31 March 2014 - Para 133 to 144.

<sup>14</sup>Ibid, Para 88, 127 and 172.

<sup>15</sup>Ibid, Para 156.

<sup>16</sup>Ibid, Para 219.

implementation were reasonable in relation to achieving its stated objectives and concluded that the special permits granted by Japan for the killing, taking and treating of whales under the JARPA II programme are not for purposes of scientific research as required by Article VIII of the Whaling Convention.

### Judgement

The Court, noting that JARPA II is an ongoing programme decided that measures going beyond declaratory relief were warranted. It ordered Japan to revoke any extant authorization, permit or licence to kill, take or treat whales under JARPA II and to refrain from granting any further permits under the programme. For animal protectionists, the implication of the ICJ's conclusions are that Japanese Antarctic whaling is commercial whaling and thus unlawful under the Whaling Convention due to the Moratorium. The Court's judgment alludes to this by pointing out that prohibitions in the Schedule to the Convention allude to scientific whaling, aboriginal subsistence whaling and commercial whaling. The Court noted that it considers that all whaling which does not fit within Article VIII of the Whaling Convention is subject to paragraph 10(e) of the Schedule which specifically relates to commercial whaling.<sup>17</sup>

The ICJ's judgment has been widely reported as the Court telling Japan to halt whaling although strictly speaking this is not the case given that the ruling applies only to the

JARPA II programme and permits issued under its auspices. Japan has confirmed that it will abide by the ruling but its whaling in other areas such as the North Pacific will continue.<sup>18</sup> Japan is also reported to be considering revising its whaling programme for a smaller catch.<sup>19</sup> In theory such a move could address the issues raised in the ICJ's judgment and Japan could legitimately establish a revised programme which meets the 'scientific purposes' criteria. However for now, Japanese whaling in the Antarctic would seem to have ended as a result of scrutiny under international law and through the international justice system.

<sup>17</sup>Ibid, Para 231.

<sup>18</sup>Agence France-Presse (2014) Japan confirms cancellation of whale hunt in response to court ruling, Guardian Online: <http://www.theguardian.com/>

[environment/2014/apr/03/japan-confirms-cancellation-annual-whale-hunt](http://www.theguardian.com/environment/2014/apr/03/japan-confirms-cancellation-annual-whale-hunt) [Accessed 16 April 2014]

<sup>19</sup>Reuters (2014) Japan considers smaller whale catch after international court ruling, Guardian Online:

<http://www.theguardian.com/environment/2014/apr/01/japan-smaller-whale-catch-court-ruling-antarctic> [Accessed 16 April 2014]