

Whaling in the Antarctic (*Australia v. Japan: New Zealand intervening*)

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Historical Context

The practice of hunting and killing whales for various purposes, known as whaling, has a long history across various cultures around the world, especially in coastal communities.¹ However, by the early 20th century, new methods of industrialized hunting practices led to the severe depletion of many whale species, which resulted in rising international concern over whale populations and environmental impacts. In response to these concerns, the International Whaling Commission (IWC) was established in 1946 under the International Convention for the Regulation of Whaling (ICRW). The main goal of the IWC was to conserve whale stocks and regulate the whaling industry, as states at that time viewed marine animals as economic resources to be managed to ensure their long-term survival.² The ICRW outlined how increases in the size of whale stocks would allow for an increase in the number of whales which may be captured, as a way to ensure states' abilities to continue whale hunting practices without endangering whales as natural resources, and major whaling states across the world, including Iceland, Japan, and Norway supported the ICRW and the IWC.³

Throughout the 1960's-1970's, international environmental attitudes began to shift, as many states began to view living resources as needing protection regardless of their economic value.⁴ After decades of lobbying by environmental groups and elaborate attempts to shape political control over the institution, the IWC adopted the 1982 Moratorium on Commercial Whaling to

¹ National Geographic Society. (n.d.). The big fish: A history of whaling. Retrieved October 27, 2024

² International Whaling Commission. (1946). *International Convention for the Regulation of Whaling*

³ Johns, L. (2022). *Politics and international law: Making, breaking, and upholding global rules*. Cambridge University Press.

⁴ *Ibid*



protect endangered whale species, which took effect in 1986.⁵ Under this moratorium, all commercial whaling activities were banned, but the IWC allowed its members to issue Scientific Permits for continued legal whaling—if such whaling was conducted for scientific purposes.⁶

Japan was one of a handful of countries that consistently opposed the Moratorium on Commercial Whaling, and following the ban, Japan officially ceased commercial whaling but continued whaling practices using Scientific Permits, in accordance with Article VIII of the ICRW.⁷ Japan introduced the Japanese Whale Research Program under the Special Permit in the Antarctic (JARPA) in 1987 to study whale population dynamics and ecosystem impacts, aiming to study various biological aspects, including age, sexual maturity, and migration patterns of the Antarctic minke whale.⁸ In 2005, this program was expanded under the name JARPA II, which included additional species—like the fin and humpback whales—and aimed to double the number of minke whales killed. JARPA II's objectives were broader, including not only population structure studies but also ecosystem monitoring and research on sustainable whaling.⁹ JARPA II has been met with increased resistance from the IWC and several countries, including Australia and New Zealand, who argued that JARPA II was not truly scientific but a pretext for commercial whaling.

Legal Framework

The ICRW, established in 1946, aims to conserve whale stocks and regulate the development of the whaling industry. The convention created the IWC as the regulatory body to oversee whaling practices, set catch limits, and promote conservation. While originally designed to support

⁵ Ian Hurd (2012), “Almost Saving Whales: The Ambiguity of Success at the International Whaling Commission,” *Ethics & International Affairs* 26: 103–112.

⁶ International Whaling Commission. *Commercial whaling: Management and conservation*.

⁷ Johns, L. (2022). *Politics and international law: Making, breaking, and upholding global rules*. Cambridge University Press.

⁸ Institute of Cetacean Research. (1987). *Japanese Whale Research Program under Special Permit in the Antarctic (JARPA)*.

⁹ Institute of Cetacean Research. (2005). *Japanese Whale Research Program under Special Permit in the Antarctic - Phase II (JARPA II)*.



sustainable whaling, the ICRW has evolved as environmental attitudes have shifted and conservation concerns have grown. Originally designed to help countries study whale populations to aid conservation and regulate commercial activities, Article VIII of the ICRW allows member states to issue special permits for killing, taking, and treating whales “for purposes of scientific research.”¹⁰ This provision gives countries discretion to issue their own permits without direct IWC approval, and Article VIII does not explicitly define scientific research criteria or limit the methods used—leading to debates about what constitutes legitimate “scientific” whaling.

As the ICRW’s regulatory body, the IWC establishes rules, oversees member activities, and promotes whale conservation. The IWC’s Scientific Committee is tasked with assessing whaling proposals, including those for scientific permits, to provide non-binding recommendations.¹¹ However, the IWC lacks enforcement powers, and member states retain the right to self-regulate their scientific programs. In 1994, the IWC designated the Southern Ocean as a whale sanctuary, prohibiting commercial whaling in this area.¹² Yet, it is unclear whether this sanctuary status prohibits whaling under the Article VIII pretense of scientific research.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) requires states to prevent, reduce, and control pollution and environmental harm to marine life. UNCLOS does not directly regulate whaling, but Article 192 mandates that states protect and preserve the marine environment, including biodiversity and ecosystems. Further, UNCLOS Articles 61 and 65 emphasize sustainable management and conservation of marine resources, with Article 65 specifically recognizing the need for “international cooperation in the conservation of marine

¹⁰ International Whaling Commission. (1946). *International Convention for the Regulation of Whaling*

¹¹ Encyclopædia Britannica, inc. (n.d.). *International Whaling Commission*. Encyclopædia Britannica.

¹² International Whaling Commission. (n.d.). *Sanctuaries: Management and conservation*.



mammals” and allowing states to prohibit or regulate the exploitation of marine mammals more strictly than UNCLOS requires. Article 238 of UNCLOS asserts that all states have a universal right to conduct marine scientific research, especially in the high seas—areas beyond national jurisdiction—and Article 240 sets general principles for the conduct of such research, maintaining that methods and techniques must be appropriate to the research’s objectives.¹³

The 1959 Antarctic Treaty and its related agreements, known as the Antarctic Treaty System (ATS), aim to promote scientific cooperation, environmental preservation, and peaceful activities in Antarctica. The ATS does not specifically address whaling, but it emphasizes ecosystem conservation within the Antarctic region and has led to the establishment of marine protected areas and environmental protocols.¹⁴ The 1991 Protocol on Environmental Protection to the Antarctic Treaty designates Antarctica as a “natural reserve, devoted to peace and science,” and also prohibits any activity that could impact the Antarctic environment adversely.¹⁵

Institution of Proceedings

Australia instituted proceedings against Japan on May 31st, 2010, on the basis of Japan’s continued pursuit of a large-scale whaling program under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II). Australia alleged that Japan breached its obligations assumed under the ICRW, as well as its other international obligations for the preservation of marine mammals and the marine environment. As the basis for the jurisdiction of the Court, Australia invoked the Optional Clause of the ICJ statute, which allows states to make declarations accepting the ICJ’s jurisdiction as compulsory. Australia referred to

¹³ United Nations. (1982). *United Nations Convention on the Law of the Sea*.

¹⁴ Antarctic Treaty. (1959). *Antarctic Treaty*.

¹⁵ Secretariat of the Antarctic Treaty. (1991). *Protocol on Environmental Protection to the Antarctic Treaty*.



declarations recognizing the Court's jurisdiction as compulsory that were issued by both Australia and Japan on March 22nd, 2002, and July 9th, 2007, respectively.¹⁶

New Zealand filed a declaration of intervention in the case on November 20th, 2012, contending that, as a party to the ICRW, it had a direct interest in the construction that might be placed upon the Convention by the Court in its decision in the proceedings.¹⁷ New Zealand relied on Article 63, paragraph 2 of the ICJ statute, which gives any state the right to intervene in the proceedings if the court is involved in interpreting a treaty to which that state is a party.¹⁸

Points of Contention

Key points of contention in the Whaling in the Antarctic case raise essential questions for further investigation. First, what constitutes “scientific research” under Article VIII of the ICRW, and how should international standards determine the boundaries between legitimate scientific activity and commercial whaling? Additionally, how binding are the IWC's 1982 Moratorium on Commercial Whaling and the Southern Ocean Whale Sanctuary, and to what extent do these restrictions apply to research exemptions? Another pressing question is how UNCLOS principles on environmental protection, biodiversity, and sustainable resource use may influence whaling practices—do these principles impose additional conservation responsibilities beyond those specified in the ICRW? Finally, where should the balance lie between a state's sovereign right to utilize marine resources and the collective international duty to uphold conservation commitments, particularly in high seas areas like the Southern Ocean? These questions highlight

¹⁶ International Court of Justice. (2010). *Whaling in the Antarctic (Australia v. Japan): Application instituting proceedings*.

¹⁷ International Court of Justice. (2013). *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Declaration of Intervention by New Zealand*.

¹⁸ International Court of Justice. (1945). *Statute of the International Court of Justice, Article 63, Paragraph 2*.



the complex intersection of treaty interpretation, conservation obligations, and state sovereignty in international law.

