

## INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

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### 1. The Historical Context

As an object of consumption, the whale has been hunted for centuries for its oil, bones and meat. The history of whaling appears to have begun thousands of years ago, possibly 2200 BC. It is believed that the first organised hunt was conducted by the Basques in 700 AD, followed by the Flemish and the Normans, and then the British and the Dutch, surpassing the whaling activities of the Basques. Spain, Norway and France started whale hunting in the ninth century AD. The British, the Dutch and the Germans expanded their whaling activities to the North Atlantic. Japan and Russia are considered to have started coastal whaling in the twelfth century and the United States in the sixteenth century. The early period of whaling was characterised by whaling from land stations, as the main method, with the use of hand-thrown harpoons and nets from rowing boats. After that, the captured whales were processed in coastal waters. Subsequent to the depletion of coastal whale resources, the period of pelagic – that is to say, open ocean– whaling began. Pelagic whaling also resulted in the expansion of whaling techniques, Russia establishing stations in Korea, and land stations opening in many other littoral states, such as Australia and Canada. With the development of new technology, land stations lost their importance. Whales were processed entirely on-board factory ships, which resulted in States expanding their operations beyond territorial waters. New technology also contributed to the increase of caught whales. These included shell harpoons with an explosive head detonating inside the whale, which shortened the time of dying for a whale, and sonar devices and helicopter tracking (on modern history of whaling see: J.N. Tønnessen and A.O. Johnsen, *The History of Modern Whaling* (R.I. Christophersen trans., C. Hurst & Company 1982); L. Larry Leonard, 'Recent Negotiations Toward the International Regulation of Whaling,' (1941) 35 *AJIL*, p. 90, 92; Kurkpatrick Dorsey, *Whales and Nations. Environmental Diplomacy on the High Seas*, University of Washington Press, 2014; Malgosia Fitzmaurice, *Whaling and International Law*, Cambridge University Press, 2015). Unlimited and unregulated whaling commenced in 1883 and lasted for 21 years, which proved more than stocks of whales could sustainably stand. Until 1883, there is no reliable data on the number and type of species caught. Tønnessen and Johnsen are of the view that despite the lack of data, it is without doubt that all species of whales were caught. Another invention contributing to an increase in the number of the whale species hunted occurred in 1921 when Peter Sørille patented a 'slip-way' for factory ships. Pelagic whaling technologies allowed the mass exploitation of whales, and thousands of whales were caught every year, particularly in the Antarctic. Antarctic pelagic whaling quadrupled in the course of three successive periods between the years 1927-1931. However, over-production and over-expansion coincided with the world economic crisis and a decrease in the price of all raw materials, which resulted in the collapse of the whaling industry. Overexploitation of whales during the period between the two World Wars led to the conclusion of two international conventions on the protection of whales: the 1931 Geneva Convention for Regulation of Whaling (155 L.N.T.S. 349) and 1937 Agreement for the Regulation of Whaling (8 June 1937, 190 L.N.T.S. 79). The 1931 and the 1937 Whaling Conventions did not prove to be particularly effective, but they provided a legal framework for the future regulation of whaling, which, although not perfect, continues at present and is regulated by the 1946 International Convention for the Regulation of Whaling (ICRW).

### 2. Regulating Whaling in International Law: the International Convention for the Regulation of Whaling

In 1946, states gathered to regulate whaling, establishing a new institution that was at the same time very conservative and radical to a certain degree (on history of the

negotiations of ICRW see Kurkpatrick Dorsey, *Whales and Nations. Environmental Diplomacy on the High Seas*, University of Washington Press, 2014). Relying on scientific expertise, the drafters of the Convention followed the more progressive tradition of the United States in trying to reconcile the needs of industry with those of the conservation of whale stocks (as exemplified in the Preamble to the Convention by the reference to sustainable use). Acting United States Secretary of State, Dean Acheson, declared that whales were ‘the wards of the entire world’, a ‘common resource’ that must be conserved. He emphasised the need for cooperation in the use of the world’s resources, arguing that the conference illustrated ‘increasing cooperation among the nations in the solution of international conservation problems.’ Against this background, the Convention’s objective appears to have been to serve as a means towards achieving such cooperation aimed at the conservation of whale stocks. The approach of the United Kingdom was not so much focused on conservation of the world’s whales as on preservation of the whaling industry. This attitude was by and large dictated by the postwar conditions prevailing in United Kingdom, namely, scarcity, hunger, and want. It is also worth mentioning a remark made by C. Girard Davidson, Assistant Secretary of the United States Department of the Interior, that science was the key to sustainable use. He also explained his vision for the International Whaling Commission (the “IWC”), the central body of the Convention, to be that of a body of scientific excellence, the vocation of which would be the careful management of resources belonging to the whole world, thus contributing to ‘a more peaceful and happy future for mankind.’ The negotiations of the ICRW were eventful. Delegates agreed to two clauses from the United States progressive-era laws: protection of aboriginal whaling, and authorisation for collecting whales for scientific purposes, with both of these grounds for whaling being outside the stipulated quotas. There were some unexpected events concerning the arrival of the Soviet delegation, which, to ensure their participation in the Convention, gained some concessions from the other delegates, such as an extended season 1946–47.

Two issues in particular caused a certain degree of disagreement amongst the delegates: the tacit acceptance system of operation of the Convention (which involved an opting-out procedure), and the two-thirds voting procedure for any amendment to the agreed schedule of regulations. The former survived; while the latter was changed to three-quarters of the parties to the Convention in order to make an amendment, thus ensuring that a greater portion of the contracting parties was necessary to effect any change. The Norwegian delegation advocated that the IWC be afforded competence to adopt binding decisions. The United Kingdom also favoured a stronger IWC. However, there were delegations which were fully satisfied with the IWC not being granted the competence to take binding decisions, such as the French and Dutch delegations, both of which were against a stronger IWC given that such a development would have been to the detriment of their own interests, which were best served by their governments. The opting-out system was considered necessary as the proposed model of the IWC created a new agency that would have curtailed the freedom of action of states on the high seas and therefore, would have had negative implications on the ability of states to pursue their particular economic benefit unfettered. Without the inclusion of the opting-out procedure, the United States, the Netherlands, France, and the Soviet Union would not sign the ICRW. Dorsey has observed that, in retrospect, the failure to reject the opting-out system had been the greatest mistake of the 1946 meeting. It is not a surprise to note how opting-out mechanisms often led to the undermining of the collective efforts of a group of states. For instance, it is not unknown for states to resort to the opting-out mechanism in order to avoid implementing decisions detrimental to their interests. Still, Dorsey’s reflections aside, the refusal to include any such mechanism could have reasonably led to the alienation of some states, thus undermining whatever chances for interstate cooperation and action may have existed at the time. Norwegian and British position vis-à-vis the opting-out procedure was based on inaccurate projections with regard to future developments. The Norwegian and the British had not foreseen the expansion of Soviet whaling; and were of the view that Japan would not be admitted to whaling on a permanent basis. Having miscalculated in their outlook, they adhered to a vision of the future of the whaling industry in which Norway and the United Kingdom dominated, to the exclusion of other serious whaling nations. The

proposal to subject the IWC to the oversight of the Food and Agriculture Organisation (the 'FAO') also did not gain acceptance.

The delegates broke the negotiations into two parts: the first part was agreeing on a new Protocol modelled on the 1945 Protocol to regulate the whaling season between 1947–48; and the second part was to negotiate a more complex convention – namely, the 1946 ICRW – to establish the International Whaling Commission. Such an approach would give more time to the signatories of the ICRW to ratify it. Most importantly, the Convention retained the annual limit, established in 1944, of 16,000 blue whale units (the 'BWU') in Antarctic waters. The United States, Norwegian and United Kingdom delegates were of the view that such quota should be based on continuity, so that they could establish a statistical basis on which to be able to determine the number of whales. In addition, Remington Kellogg, the United States delegate, argued that the quota of 16,000 BWU was meant to set the limit that constituted two-thirds of the annual catch in the last seven peaceful seasons, which had been too intensive. The quota did not satisfy most delegates who considered it to be too high. The BWU was later criticised and abandoned.

Issues such as the complete protection of certain species (the ban on commercial whaling or moratorium), the establishment of whale sanctuaries, and the organisation of aboriginal whaling are inherited from these earlier Conventions. These legal approaches correspond to the opposing views of the whale as a sacred object and the whale as a utilitarian animal. Therefore in this inter-war period we have the beginning of international law's approach to a whale as an object of, on the one hand, an economic exploitation and thus a subject to legal regulation; on the other, the totemic object; and the object of, almost, worship.

The International Convention for the Regulation of Whaling consists of the Convention itself, as well as a Schedule that is an integral Part of the Convention text. The Convention sets out the general regulatory scheme for the management of whale stocks. The Schedule, according to Article V (1), introduces standards to be followed regarding 'conservation and utilization' of whale species. It deals with the specific issues relating to conservation, such as: open and closed seasons; whaling methods; size limits for each whale; and inspection of whaling ships. Article III (2) sets out the procedure for the amendment of the Schedule, which must be effected by a three-quarters majority of voting members. There have been several subsequent amendments to the Schedule, including the imposition of the Moratorium, the establishment of the Indian Ocean Sanctuary and the Southern Ocean Sanctuary.

The ICRW does not actually include a generic definition of a 'whale'. Instead, it lists species under its protection in the Schedule to the Convention. The Schedule only lists so-called "great whales". Such totemic whales as the narwhal whale, which are medium-sized, are probably outside of the remit of the ICRW. However, in order to preserve such objects of beauty as the narwhal, many states claim that the International Whaling Commission has a remit to deal with all whales. In practice, the Convention's object of regulation remains vague and difficult to determine.

The whaling regime under the Convention provides for three types of whaling: commercial (at present zero 'quotas'); aboriginal (indigenous whaling); and scientific whaling.

The Preamble to the ICRW includes amongst its aims 'the proper conservation of whale stocks and . . . the orderly development of the whaling industry.' Thus it preserves the historical binary objectives of conserving whale stocks and preserving the industry. However, even in terms of this fairly contained objective, the International Whaling Commission (IWC) has never really successfully 'delivered.' Stocks, especially in the past, were inadequately monitored, and depletion has continued. As a result (but, against the backdrop of a very much changed membership and a fundamentally different concept as to what the purpose of control should be), in 1982, the IWC introduced a complete ban on commercial whaling (known generally as the Moratorium or 'zero quotas'), which came

into effect in the season 1985-1986. The Moratorium was intended, however, only to be temporary. It was anticipated that stocks would recover and that, in due course, safe and sustainable levels of stocks of at least some species would have recovered sufficiently to allow a resumption of whaling. However, all attempts at finding an acceptable basis for a properly controlled resumption of whaling have so far failed, and the Moratorium is still in effect.

Conflicting attitudes to the Moratorium exemplify the meaning of a 'whale' for different societies. They show the vast and impossible to cross dividing line between two diametrically opposed camps: conservationist (conservation of whales for ultimate exploitation) and preservationist (the whale as a beautiful object which should not be exploited). The vague and indecisive wording of the Convention clearly indicates that most of the issues in relation to the ICRW are contentious, starting with its binary object and purpose: the conservation and management of whale stocks in order to provide for the 'orderly development of the whaling industry,' and, on the other, recognition that whales are a 'general trust,' to be safeguarded for 'future generations.' Norway and Iceland have opted out for the Moratorium on whaling and are conducting legal commercial whaling operations. Scientific whaling is based on Article VIII of the ICRW and outside of the regulatory scope of the IWC. The permits for scientific whaling are issued by national authorities.

Nonetheless, substantial levels of whaling continue, on the alleged basis of other provisions of the ICRW, and to a considerable extent outside the direct purview of the IWC. While there are also other points of contention including the validity of sanctuaries introduced or proposed by the IWC and of the IWC terms such as 'aboriginal whaling,' above all it is 'scientific whaling' and the issue of a resumption of commercial whaling that underlies the state of conflict that currently exists. The IWC is riddled with irreconcilable problems and has become a divisive body. There are still a few states which passionately uphold what they see as an almost inalienable right to continue commercial whaling, and there has thus developed a fundamental difference of attitude among the Member States of the ICRW towards whaling and, indeed, towards the very underlying objectives of the Convention and Commission. For this limited number of remaining 'whaling nations,' whaling – albeit in these days in a properly controlled and sustainable manner – remains a legitimate activity along with other sustainable forms of exploitation of marine resources. However, for the largely non-whaling nations, vociferously backed by the powerful lobby of environmental and preservationist NGOs – as well as by much general public opinion – whaling in any form is seen as an unnecessary and, indeed, immoral activity which should, at least as an eventual objective, be permanently banned (Charlotte Epstein, *The Power of Words in International Relations*, MIT Press, 2008; Peter Davies, 'Cetaceans' in Michael Bowman *et al.*, *Lyster's International Wildlife*, 2<sup>nd</sup> ed., Cambridge University Press, 2010).

One of the factors that has been suggested as detrimental to the effectiveness of the Whaling Convention is its advanced age. The ICRW was negotiated and structured almost seventy year ago and its main provisions were based on two pre-war treaties from 1931 and 1937. The basic structure of the Convention reflects the approaches to environmental matters of the period when it was negotiated and, as such, it was not based on principles that characterise the contemporary approach to environmental protection. It may be argued that the imposition of the Moratorium on whaling and its continuation is an expression of the application of the precautionary principle (approach) within the IWC. One of the major weaknesses of the ICRW is its very rudimentary international enforcement mechanism. The main responsibility for the enforcement of the provisions of the Convention remains with the Parties to the Convention. According to Article IX (1), a State Party to the ICRW is in charge of its enforcement in respect to actions of 'persons under its jurisdiction,' as for the prosecution of its violations. The IWC now has to attempt to operate as a forum within which irreconcilable conflicts of interest are resolved. The aspirations of the whaling nations, as they stand at present, simply cannot be met without some level, however contained, of resumption of commercial whaling. On the other hand, the aspirations of the preservationists, now a majority within the IWC, cannot be entirely fulfilled unless the possibility of any resumption of commercial whaling is abandoned. Therefore the most

important and daunting question is whether the ICRW is still a relevant international instrument, or whether would it have to be revised (or even abandoned as an obsolete treaty) given that it is falling short of meeting the current set of needs of the parties to it. The lack of common understanding, and the acrimonious atmosphere between the members of the Whaling Commission, has had a paralysing effect on the functioning of the Commission, and has led to international litigation, discussed in the next section.

### 3. The Whaling in Antarctic case (*Australia v. Japan, New Zealand Intervening*)

One of the most incendiary questions under the ICRW has become Japanese scientific whaling, which led to the *Whaling in Antarctic (Australia v. Japan, New Zealand Intervening)* Judgment of the International Court of Justice (ICJ) in 2014 (Malgosia Fitzmaurice & Dai Tamada, *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment*, Brill/Nijhoff, 2016). Both Australia and New Zealand alleged that Japanese scientific whaling (so called JARPA II) was in fact not ‘in purpose of scientific whaling’. The Court agreed and ordered Japan to withdraw all pending scientific permits. The Court’s Judgment only applied to this particular scientific whaling by Japan but will not affect any future whaling. In its judgment, the ICJ reiterated its view that JARPA II appeared to involve activities that could broadly be characterised as part of scientific research, but that the evidence was insufficient to establish that the programme’s design and implementation were reasonable in relation to achieving its stated objectives. The ICJ concluded that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II had not been ‘for purposes of scientific research’ (pursuant to Article VIII, paragraph 1 of ICRW). However, The ICJ was of the view that Japan had met the requirements of paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling with regard to its JARPA II Programme.

The question as to whether the ICJ is an appropriate forum to discuss scientific questions concerning whaling also arose. Both Judges Owada and Abraham suggested that the ICJ lacked the required expertise to do so (Judge Hishashi Owada, Dissenting Opinion and Judge Ronny Abraham, Dissenting Opinion; William de la Mare, Nick Gales and Mare Mangel, ‘Applying Scientific Principles in International Law on Whaling’, (2014) *Science* 345 (6201); Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge University Press, 2011).

There is also the issue of the application of the standard of ‘objective reasonableness’. What was the role of the ICJ in applying such a standard in this case: engaging in *de novo* review, or leaving this to the discretion afforded to states issuing permits which is subject to review by the Scientific Committee and by the IWC. Lawyers frequently do not feel comfortable with science. Certainly, whaling issues cannot be discussed without science and in the *Whaling* case, all the experts appearing before the Court were scientists, and their evidence played a fundamental role in the Court’s Judgment. The functioning of the IWC is based on science and one of the main issues that has been repeatedly raised in connection with its work is the purported lack of a sound scientific basis for decision-making. Generally speaking, the role of science in environmental law is very complex. Overall, we witness a trend in the valorisation of science and, more particularly, science-based policy-making, in various instances of interstate cooperation, be it in treaty-based international or supranational organisations, the WTO or transnational policy networks. The argument goes that practice at the level of international cooperation seems to find science attractive for its objectivity, freedom from bias and independence from the theories within which the resultant data are rationalised.

As has been correctly observed, the ICJ’s decision revealed the weaknesses of the review process within the IWC and its Scientific Committee, where science mixed with politics, not an uncommon phenomenon in inter-governmental *fora* where political considerations habitually determine outcomes. In relation to the *Whaling* case, there were views expressed that the current ecosystem approach and the notion of common heritage of

humankind may be considered by states as matters that give rise to obligations *erga omnes* and *erga omnes partes*, and thus result in redress pursuant to Article 48 of the International Law Commission (ILC) Articles on State Responsibility (Simone Borg, ‘The Influence of International Case Law on Aspects of International Law Relating to Conservation of Living Marine resources beyond National Jurisdiction,’ (2012) 23 *Yearbook of International Environmental Law* 44-79, 67–71. See also, Giorgio Gaja ‘The Protection of General Interests in the International Community,’ (2011) *RCADI* 364, 171–80).

#### 4. Post –Judgment Whaling in Japan

On 18th November 2015, Japan announced its plans to take 333 minke whales in the Antarctic. It submitted a draft of the New Scientific Research Programme in the Antarctic Ocean (the ‘NEWREP-A’) to the Chairman of the IWC Scientific Committee and the IWC Secretariat. The new programme is proposed for the duration of 12 years and it established ‘intermediary targets’ with a review by the IWC Scientific Committee after six years. The programme also provides for collaboration with the Commission for the Conservation of Antarctic Marine Living Resources (the ‘CCAMLR’) and several Japanese research institutes (such as on polar issues and fisheries). Japan cancelled its 2014-15 hunt and resumed it in 2016.

In October 2015 Japan modified its Optional Declaration or compulsory jurisdiction of the International Court of Justice excluding disputes relating to living marine resources from the Court’s jurisdiction, thus preventing all further disputes regarding whaling from being submitted to the ICJ.

#### Related Materials

##### A. Legal Instruments

Convention for the Regulation of Whaling, Geneva, 24 September 1931, League of Nations, *Treaty Series*, vol. 155, p. 351.

[International Agreement for the Regulation of Whaling \(with Declaration\)](#), London, 8 June 1937, League of Nations, *Treaty Series*, [vol. 190](#), p. 80.

[Protocol amending the International Agreement of 8 June 1937, and the Protocol of 24 June 1938, for the regulation of whaling, signed at London, on 26 November 1945](#), London, 26 November 1945, United Nations, *Treaty Series*, [vol. 11](#), p. 43.

[International Convention for the Regulation of Whaling](#), Washington, 2 December 1946, United Nations, *Treaty Series*, [vol. 161](#), p. 74.

##### B. Jurisprudence

International Court of Justice, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, [Dissenting opinion of Judge Abraham of 31 March 2014](#).

International Court of Justice, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, [Dissenting opinion of Judge Owada of 31 March 2014](#).

International Court of Justice, [Whaling in the Antarctic \(Australia v. Japan: New Zealand intervening\). Judgment](#), *I.C.J Reports 2014*, p. 226.

##### C. Doctrine

S. Borg, “The Influence of International Case Law on Aspects of International Law Relating to the Conservation of Living Marine Resources beyond National Jurisdiction”, *Yearbook of International Environmental Law*, vol. 23, 2012, p. 44.

- Ed Couzens, *Whales and Elephants in International Conservation Law and Politics: A Comparative Study*, Routledge, 2014.
- P. Davies, "Cetaceans", in M. Bowman *et al.*, *Lyster's International Wildlife Law*, Cambridge University Press, Cambridge, 2010, p. 150.
- K. Dorsey, *Whales and Nations. Environmental Diplomacy on the High Seas*, University of Washington Press, Seattle, 2014.
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- W. de la Mare, N. Gales, M. Mangel, "Applying Scientific Principles in International Law on Whaling", *Science*, vol. 345, issue 6201, 2014, p. 1125.
- G. Nagtzaam, *The Making of International Environmental Treaties, Neoliberal and Constructivist Analysis of Normative Evolution*, Edward Elgar Publishing, 2009.
- J. N. Tonnessen, A. O. Johnsen, *The History of Modern Whaling*, University of California Press, Berkeley and Los Angeles, 1982.