

The Legality of Japan's scientific whaling under international law

Expert Evidence by Professor Donald R. Rothwell

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A. INTRODUCTION

1. Qualification and Expertise

I am Professor of International Law at the ANU College of Law, Australian National University. I hold the degree of Bachelor of Arts and Bachelor of Laws (University of Queensland), Master of Laws (University of Alberta), Master of Arts (University of Calgary), and Doctor of Philosophy (University of Sydney). Previously I held the position of Challis Professor of International Law and Director of the Sydney Centre for International and Global Law, University of Sydney (2004-2006), and various teaching positions at the Faculty of Law, University of Sydney (1988-2004). My research has a specific focus on law of the sea, law of the polar regions, international environmental law and implementation of international law within Australia. My major publications amongst 11 books and over 100 book chapters and articles include *The Polar Regions and the Development of International Law* (1996); *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (2001) co-edited with Alex Oude Elferink, and most recently *Towards Principled Oceans Governance: Australian and Canadian Experiences and Challenges* (2006) co-edited with David VanderZwaag. In November 2006, I chaired the Report of the Sydney Panel of Independent International Legal Experts on *Japan's Special Permit ("Scientific") Whaling Under International Law*, and in November 2008 chaired the Canberra Panel addressing the same issue. I was also a member of the Paris Panel of Independent Legal Experts on *Special Permit "Scientific" Whaling Under International Law* (May 2006).

2. My Instructions

I have been asked to consider the legality, or otherwise, of Japan's scientific whaling under international law as expert evidence in support of the defence of Junichi Sato and Toru Suzuki.

3. Outline of Submission

These submissions commence with a summary of the major conclusions, followed by the main body of evidence which provides background to the legal arguments and then an assessment of Japan's conduct under the provisions of the 1946 International Convention for the Regulation of Whaling, the 1982 United Nations Convention on the Law of the Sea, and the 1992 Convention on Biological Diversity. These submissions conclude with a short summary.

4. Summary of the Major Conclusions

Conclusion 1

Japan's unilateral interpretation of Article 8 of the International Convention for the Regulation of Whaling is an abuse of right and is contrary to international law and in violation of the Convention because of the large numbers of minke whales taken under JARPA II.

Conclusion 2

Japan's take of fin whales under Article 8 of the International Convention for the Regulation of Whaling is contrary to an interpretation of the Convention which respects the precautionary principle under international law and other related international environmental norms due to the listing of fin whales as endangered under provisions such as Appendix I of the Convention on International Trade of Endangered Species of Wild Fauna and Flora.

Conclusion 3

Japan's failure to respect repeated Resolutions of the International Whaling Commission to halt the conduct of its special permit program in the Southern Ocean, and in particular IWC Resolution 2007-I, place Japan in contravention of its international legal obligations under the 1982 United Nations Convention on the Law of the Sea to engage in cooperation with respect to the "conservation of marine mammals".

Conclusion 4

Japan's failure to undertake an environmental impact assessment of the JARPA II program is in violation of the 1992 Convention on Biological Diversity which requires the conduct of environmental impact assessment when an activity is likely to have significant adverse effects on biological diversity.

B. MAIN BODY OF EVIDENCE

Background

1. Japan conducts its “Japanese Whale Research Program in the Antarctic” (JARPA) in purported reliance upon the provisions of the 1946 International Convention for the Regulation of Whaling (ICRW) which Japan has been a party to since 1951. JARPA was originally commenced in the 1987/88 season and continued until the 2004/5 season. The principal focus of JARPA was the take of minke whales (*Balaenoptera bonaerensis*) with an initial catch of 300 +/-10% which was increased to 400 +/- 10% in the 1995/96 season.
2. In 2005 Japan announced its intention to commence JARPA II, which commenced in the 2005/6 season. Under JARPA II, Japan has sought to take 850 +/-10% minke whales (*Balaenoptera bonaerensis*), 50 fin whales (*Balaenoptera physalus*) and 50 humpback whales (*Balaenoptera novaeangliae*). Whilst JARPA II commenced in full as from the 2007/8 season, the take of humpback whales has to date been suspended.
3. Japan has continued to take both minke and fin whales under JARPA II in purported reliance upon the special permit provisions of the ICRW. Article VIII of the Convention relevantly provides:

Article VIII

(1) 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 subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

(2) Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.

4. Beginning from the 1985/86 season, the killing of whales for commercial purposes has been forbidden under amendments made to paragraph 6 of the Schedule of the ICRW. In addition, paragraph 7 of the Schedule creates the Southern Ocean Sanctuary which covers a vast area of the Southern Ocean. Within this area, no commercial whaling operations are to take place.

International Convention for the Regulation of Whaling

5. There are three grounds upon which Japan's conduct of JARPA II fails to comply with the International Convention for the Regulation of Whaling:
 - JARPA II constitutes commercial whaling in violation of the moratorium on commercial whaling laid down in para. 10 (e) of the Schedule to the ICRW
 - JARPA II is not whaling "for the purposes of scientific research" as required by the ICRW, Article VIII, and does not meet the requirements of para. 30 of the Schedule to the ICRW; and,
 - JARPA II constitutes an abuse of right to the conduct of special permit whaling under the ICRW, Art. VIII.
6. With respect to the first claim, the parties to the ICRW adopted the moratorium on commercial whaling in 1982, which came into effect from the 1985/6 whaling season under para. 10(e) of the Schedule to the ICRW. By operation of ICRW, Art. 1(1) the Schedule forms an "integral part" of the ICRW, and is therefore binding in full upon the parties. As from 1 April 1988 Japan has accepted the moratorium as a binding prohibition on commercial whaling.
7. Japan has maintained that the 1982 moratorium was not based on sufficient scientific evidence, and should be lifted. Moreover it lodged an objection to the Southern Ocean Whale Sanctuary when it came into force in 1994 in relation to Antarctic minke whales. This suggests the continuing interest of Japan in commercial whaling as it is only that form of whaling which is absolutely prohibited in the Southern Ocean Whale Sanctuary.
8. Whether JARPA II violates the moratorium on commercial whaling must be determined by reference to the relevant provisions of the ICRW and the Schedule in accordance with accepted principles of treaty interpretation. Under Article 31 of the Vienna Convention on the Law of Treaties, which is widely accepted as part of customary international law and is binding upon Japan, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.
9. Relevantly, para. 10(e) of the Schedule to the ICRW provides:

[C]atch limits for the killing of commercial purposes of whales from all stocks for the 1986 coastal and the 1985/6 pelagic seasons and thereafter shall be zero.

The effect of this provision is to establish an indefinite prohibition on the killing of whales for “commercial purposes”. It therefore falls to be determined whether JARPA II amounts to whaling for “commercial purposes”. This should be decided by an objective assessment of JARPA II, independently of the way in which it has been described by Japan.

10. Article VIII (2) of the ICRW specifically requires that whales taken under special permit shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government which has granted the permit. However, this provision cannot be read in such a way as to deprive the moratorium on whaling for “commercial purposes” of effect. Instead, these provisions should be interpreted, as far as their language permits, consistently with one another. Such an interpretation would permit Japan to make use (including commercial use) of products from genuine scientific whaling activities, but would not allow whaling activities which may be characterised as having a substantially commercial purpose, even if that purpose was not the exclusive, or even a dominant, purpose.
11. Relevant factors to take into account in determining the true character of JARPA II include:
 - the substantial increase in the number of whales taken between the JARPA and JARPA II programs;
 - the range of species which are harvested;
 - the extent to which JARPA II promotes commercial or economic goals in Japan such as the maintenance of employment and infrastructure in the whaling sector; and,
 - the increased supply of whale meat to domestic commercial markets.
12. On these grounds it can be concluded that the dominant purpose for which JARPA II is conducted is for commercial purposes and not for the purposes of scientific research and accordingly Japan’s conduct of JARPA II is in violation of the moratorium on commercial whaling as provided for under the Schedule to the ICRW.
13. The second and related argument is that JARPA II does not meet the requirements of the ICRW because it does not constitute whaling for the purposes of “scientific research” under Article VIII. In addition, it is arguable that Japan has not

complied with the procedural requirements for submission and review of proposals for Special Permit whaling by the Scientific Committee of the IWC.

14. It could be expected that Japan would seek to argue and adduce evidence to the effect that JARPA II is a bona fide scientific program and meets the requirements of the ICRW, and that this is a view that enjoys support amongst some members of the IWC. However, Article VIII is an exception to the general provisions of the ICRW regulating whaling, and accordingly as a matter of treaty law should be construed narrowly. Special permit whaling conducted under Article VIII must therefore be conducted exclusively and not partially or incidentally for the “purposes of scientific research”. As JARPA II amounts to whaling for “commercial purposes”, as such the program cannot be characterised as whaling for exclusive “purposes of scientific research”.

15. In addition, JAPRA II does not meet the criteria for Article VIII special permit whaling established through the practice of the IWC and the IWC Scientific Committee. In this regard, it is noted that IWC Resolution 2003-2 stated that special permit whaling should only be permitted:

- in exceptional circumstances;
- must meet critically important research needs;
- satisfy criteria established by the IWC Scientific Committee;
- be consistent with the IWC’s conservation policy;
- be conducted using non-lethal research techniques;
- ensure the conservation of whales in sanctuaries; and,
- must not assume the characteristics of commercial whaling.

IWC Resolution 2003-2 recalls that these criteria have been endorsed in over 30 resolutions since the commencement of the 1982 moratorium of commercial whaling.

16. A third argument is that JARPA II constitutes an excessive and extravagant reliance upon Article VIII of the ICRW such as to amount to an abuse of right. Of particular significance here is the emerging evidence of the viability of non-lethal means of scientific research into whales stocks, which supports an argument that an insistence upon a right of ‘lethal’ means of scientific research notwithstanding provisions of the ICRW directed towards conservation and the general intent of the Schedule and the Resolutions amount to an abuse of right. In particular, Japan’s insistence on its right to take fin whales under JARPA II is contrary to an

interpretation of the ICRW which respects the precautionary principle under international law and other related international environmental norms due to the listing of fin whales as endangered under provisions such as Appendix I of the 1973 Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES).

17. In this regard it is noted that:

- Japan has exercised its right to conduct special permit whaling for purposes outside the scope of Article VIII of the ICRW, which is the relevant international framework for the conduct of such activity;
- That Japan's programme of lethal research under the JARPA II program, threatens the internationally agreed conservation efforts of the Parties to the ICRW, including those which have been accepted by Japan such as the moratorium on commercial whaling and CITES, and thus threatens to cause injury to their collective and individual interests in conserving whales.

The 1982 United Nations Convention on the Law of the Sea (LOSC)

18. The 1982 United Nations Convention on the Law of the Sea (LOSC) is considered to be the "Constitution for the Oceans" and Japan has been a party to the Convention since 1996. The provisions of the LOSC applicable to whaling may be divided into two categories; those applicable within the exclusive economic zone (EEZ), and those applicable within the high seas. As Japan does not recognise claims to an EEZ asserted offshore Antarctica, this opinion will focus exclusively on the high seas.

19. The high seas regime of the LOSC recognises several important freedoms, including under Article 87 the freedom of fishing and the freedom of scientific research. However these freedoms are not unlimited, and are subject to restrictions under both the LOSC and other rules of international law relating to the conservation and management of high seas living resources, including whales. Article 87 of the LOSC therefore reinforces the obligations of Japan to comply with its treaty obligations under the ICRW, even when seeking to exercise its rights under the LOSC.

20. Section 2 of Part VII of the LOSC sets out a comprehensive regime of obligations requiring Japan to cooperate fully and faithfully in the conservation of whales and other living resources of the high seas. Article 116 requires that Japan must cooperate with other parties to the LOSC in the conservation and management of

living resources in the area of the high seas. Article 116 stipulates that states enjoy a right to fish on the high seas subject to (a) their treaty obligations, (b) the rights and duties as well as the interests of coastal States in relation to marine mammals, and the provisions of Section 2 of Part VII. Likewise under Article 117, Japan has the “duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.” Under Article 118 Japan must cooperate with other States “in the conservation and management of living resources in the areas of the high seas”. In its whaling programs Japan must take measures which are designed, on the best scientific evidence available, “to maintain or restore populations of [whales] at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors” taking into account the standards recommended by the IWC. Specifically in relation to whales, Article 120 of the LOSC provides that the provisions of the LOSC Article 65 are applicable to the high seas.

21. JARPA II has not been conducted in conformity with these substantive obligations requiring cooperation in good faith to conserve and manage high seas marine living resources. In particular, Japan’s conduct of JARPA II was designed and is now being executed essentially on a unilateral basis with no meaningful cooperation with interested states, especially Australia and New Zealand, offshore whose claimed Antarctic territories Japan conducts its JARPA II operations.
22. This conclusion that Japan’s actions are in breach of the LOSC is supported by the failure of Japan to subject JARPA II to scrutiny under the procedures established by the IWC. The IWC is the “appropriate international organization” for achieving the “conservation, management and study of whales” (LOSC, Article 120). The particulars of non-compliance by Japan with the LOSC include Japan’s failure to submit JARPA II to detailed assessment by the IWC pursuant to the Guidelines for Review of Special Permits under the ICRW, and the ongoing calls from within the IWC requesting Japan to halt the conduct of JARPA II, including most recently Resolution 2007-1.
23. The LOSC also contains in Article 300 a general obligation upon State parties to act in good faith and “to exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which could not constitute an abuse of right.” The effect of this provision is to import general principles of international law relating

to the abuse of right doctrine. As has been noted above with respect to Japan's interpretation of the ICRW, it can likewise be argued that Japan's interpretation of the LOSC in support of its rights to undertake JARPA II is an abuse of right and in violation of international law.

The Convention on Biological Diversity (CBD)

24. The Convention on Biological Diversity (CBD) is a broad ranging agreement that seeks to protect the earth's biodiversity, including the variability of living organisms found in marine ecosystems (Article 2). The objectives of the CBD include the 'conservation of biological diversity' and the 'sustainable use of its components' (Article 1). On these grounds, the CBD has application to the conduct of whaling activities that have a significant actual or threatened impact upon marine biological diversity. Japan became a party to the CBD on 28 May 1993.
25. The central obligation of parties to the CBD is set out in Article 3 which provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.
26. Article 5 of the CBD also requires parties to cooperate with one another 'directly, or where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction.' Under Article 14 CBD parties must adopt appropriate measures requiring environmental impact assessment of proposed projects likely to have significant adverse effects on biological diversity with a view to minimising such effects. They must also promote 'notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States, or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral agreements as appropriate'.
27. States which are parties to the ICRW and are also parties to the CBD are under obligations:
 - (1) to conserve whales both within the limits of territorial jurisdiction and beyond;

(2) to ensure that special permit whaling does not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction;

(3) to cooperate with other parties to the CBD, through the ICRW to conserve whales in areas beyond national jurisdiction; and,

(4) to prepare appropriate environmental impact assessments in respect of proposals to conduct special permit whaling.

28. Japan's conduct in approving JARPA II without first subjecting the proposed activity to environmental impact assessment is contrary to the CBD and in violation of international law. At a minimum an environmental impact assessment in relation to JARPA II should have addressed not only the potential impact of the program upon targeted whale species, but also biological diversity more generally having regard to the potential of JARPA II to affect adversely associated and dependent ecosystems.

29. As JARPA II has not been subject to an environmental impact assessment process at a national or an international level, and instead is a unilateral whaling program that has not been formally reviewed or endorsed by the IWC Scientific Committee, Japan has not cooperated with other parties to the CBD through the ICRW to conserve whales in the Southern Ocean. Consequently, Japan's conduct in relation to JARPA II falls short of the level of cooperation required by Article 5 and is in breach of its international law obligations under the CBD.

C. CONCLUSION

Japan's conduct of JARPA II is in violation of three international law conventions to which Japan is a party:

- 1946 International Convention for the Regulation of Whaling
- 1982 United Nations Convention on the Law of the Sea
- 1992 Convention on Biological Diversity

Japan's actions in permitting the conduct of JARPA II are accordingly in violation of international law.