CIFILE Journal of International Law (2021), *Journal Vol. 2, No. 3, 14-20 (2021)*

Print ISSN: 2563-6820
Online ISSN: 2563-3341

Legal Analysis of the judgment of the International Court of Justice on the whaling in the Antarctic (Australia v. Japan: New Zealand intervening)

Abbas Poorhashemi *1* ***Sahar Zarei*** *2*

1. President of the Canadian Institute for International Law Expertise (CIFILE), Toronto, Canada

2. Assistant Professor of Law, Faculty of Human Sciences, Shahr-e-Qods Branch, Islamic Azad University, Tehran, Iran (corresponding author)

DOI: 10.30489/CIFJ.2020.240844.1022

ARTICLE INFO

Article history:

Received: 22 August 2020
Accepted: 07 October 2020
Online: 04 May 2021

Keywords:

International Court of Justice, Whaling in the Antarctic, Australia v. Japan: New Zealand Intervening, International environmental law

ABSTRACT

Environmental protection is confronted by many political, economic, and social problems. In the case regarding whaling in the Antarctic (Australia v. Japan: New Zealand Intervening) in March 2014, the International Court of Justice (ICJ) decided that the Japanese whaling programme in the Antarctic (JARPA II, in force since 2005) did not comply with "scientific research objectives." as set out in the Convention. The Court concluded that the catching, taking, and killing whales under the Japanese programme did not qualify as an exemption provided in Article VIII of the International Convention for the Regulation of Whaling (1946), which authorizes the contracting parties. The purpose of this study is to examine and analyze the ICJ's judgment in this case and to demonstrate the opportunities and challenges of this judgment in the progressive development of international environmental law. The first section of this paper will examine the background and context of the case. The second section will analyze the judgment of the Court. Finally, the third section will identify the opportunities and challenges of the Court's judgment in the progressive development of international environmental law.

1. Introduction

The International Court of Justice (ICJ) is a principal judicial body of the United Nations since 1946 and has a crucial role in international law, including international environmental law. The function of the ICJ is not only to reflect the existing international legal rules, but it also plays a crucial role in evolving regulations since it does not only settle the contentious cases between sovereign States but also confirms *opinion juris* -the state practice in international law. Therefore, the ICJ plays a significant role in announcing the rules and regulations that influence states' behavior in many aspects of international law, especially in international protection of the environment.

Certain aspects of the development of international environmental law have been considered in light of some judgments and precedents of the ICJ in recent years. This function of the Court includes the emergence, development, and stabilization of some of the concepts and principles of international environmental law. ICJ

delivered one of such judgments on March 31, 2014. concerning "Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)."

2. Background and the context of the judgment of the International Court of Justice on the whaling in the Antarctic (Australia v. Japan: New Zealand intervening)

In the case concerning whaling in the Antarctic (Australia vs. Japan), the Australian government instituted a proceeding against the government of Japan in the ICJ on May 31, 2010. Australia, in its Application, claimed that Japan breached specific provisions of the International Convention for the Regulation of Whaling (ICRW, 1946) and other international obligations on the protection of the marine environment by continuing the long-term whaling programme in the south pole concerning the second phase of its research programme on the Antarctic (JARPA II). The government of Australia claimed that the continued execution of an extensive whaling programme by Japan as part of the second phase of their research programme.

Scientific Committee on Whales in Antarctica under a Special Permit in the Antarctic "JARPA II" constituted a breach of its obligations under the International Convention for the Regulation of Whaling (ICRW, 19) and other international obligations relating to the conservation of the marine environment.

In its Application, Australia requests the Court to order Japan: (a) to terminate the implementation of the JARPA II Programme; (B) to revoke any license, authorization or license in this issue and (c) to ensure that no further action will be undertaken under JARPA II programme or any similar programme (Whaling in the Antarctic, ICJ, 2014).

Moreover, according to the Application instituting proceedings from Australia, the Japanese government has continuously violated the following obligations in different conventions: (1) the basic principles included in Articles II and III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), in conjunction with the introduction of the sea apart from exceptional cases, and connection with a catch of whales; (2) provisions of articles 3, 5 and 10 of the Convention on Biological Diversity (1992), (3) commitments to ensure that activities within their jurisdiction or control would not cause danger to the environment of other countries or regions outside of their national territory; (4) cooperation with the other parties, either directly or through a competent international organization and taking necessary measures to prevent or minimize the negative impacts on biodiversity. The Australian government requested the Court for compensation by the Japanese government by considering the above reasons and arguments.

The government of Australia claimed that Japan's real intention in conducting JARPA II is to maintain its whaling operation and that the programme is commercial whaling in disguise (Application of Australia 2010).

Subsequently, the government of Japan rejected all these allegations. It insists that none of the provisions relied on Australia not applicable to JARPA II, which is carried out exclusively for scientific research purposes. Japan further asserted that it did not breach any procedural obligations under paragraph 30 of the Regulation.

On the other hand, according to Article 63 (2) of the Statute of ICJ, the government of New Zealand filed a statement of intervention in the case in the Registry of the Court on November 20, 2012. New Zealand stated that it intended to avail itself of its right of intervention as a non-party to the case in the Court by Australia against Japan. Consequently, the Court decided on February 6, 2013, that the statement of intervention filed by New Zealand was admissible (Whaling in the Antarctic, ICJ, 2014).

3. Analysis of the judgment of the Court on the whaling in the Antarctic (Australia v. Japan: New Zealand intervening)

The International Court of Justice (ICJ) delivered its judgment concerning whaling in the Antarctic (Australia v. Japan, New Zealand, was intervening on March 31, 2014. Firstly, according to this judgment, it holds jurisdiction to examine Australia's Application of May 31, 2010, unanimously. Australia bases the jurisdiction

of the ICJ on the declaration made by both Parties under Article 36, paragraph 2, of the Statute of the Court. Based on the representation made by both parties, any dispute relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone, and the continental shelf or about such delimitation or resulting from the exploitation of these zones is subject to the jurisdiction of the ICJ (Poorhashemi, A., 2020).

Secondly, the Court held by twelve votes to four that the special permits issued by Japan under JARPA II do not conform to paragraph 1 of Article VIII of the International Convention for the Regulation of Whaling (1946). Indeed, according to paragraph 1 of Article VIII, "*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 the 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*" (International Convention for the Regulation of whaling 1946).

In this context, on the one hand, the Court examined this provision in order to interpret the function of this paragraph. The Court observes that Article VIII is an integral part of the Convention and must, therefore, be construed in the light of the object and the purpose of the Convention. However, since Article VIII (1) provides that "whales may be killed, caught or treated in accordance with the provisions of this Article without any need to comply Provisions of this Convention, "whaling activities carried out under a special permit meeting the requirements of Article VIII. For this reason, the ICJ analyzes the relationship between Article VIII and the object and purpose of the Convention. They were taking into account the preamble and the other relevant provisions of the Convention. It observes that there is no justification for interpreting Article VIII either in a restrictive sense or in an extensive sense. The Court stated that the "scientific research programme" needed to develop scientific knowledge and that they could pursue a purpose other than the conservation or sustainable exploitation of whale stocks. This emerged from the guidelines established by the IWC[1] regarding the scientific committee's review of scientific license proposals. Therefore, JARPA II should adopt a program to improve the conservation and management of whale stocks and improve the protection and management of others (Whaling in the Antarctic, ICJ, 2014).

Thirdly, the Court approved by twelve votes to four, "by granting special permits to kill, take and treat fin, humpback and Antarctic minke whales[2] in pursuance of JARPA II have not acted in conformity with its obligations under paragraph 10 (e) of the Schedule to the International Convention for the Regulation of Whaling" (Press Release of the ICJ 2014). According to paragraph 10 (e), "… catch limits for the killing for commercial purposes of whales from all stocks for 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice. By 1990 at the latest, the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits" (Schedule to the International Convention for the Regulation of Whaling 1946). Based on this logic and argument, the Court accepted that Japan's real intention in conducting JARPA II is to maintain its whaling operations is a commercial purpose.

Fourthly, the Court started by twelve votes to four that Japan has not acted in conformity with its obligations under paragraph 10 (d) of the Schedule to the International Convention for the Regulation of Whaling

[1]International Whaling Commission.

[2]The Antarctic minke whale species (Balaenoptera bonaerensis) is one of the smallest and most abundant of the rorqual whales, the largest group of baleen whales. This sleekly shaped species has a distinctly pointed head and a sickle-shaped dorsal fin located two-thirds of the way down the body. It is interesting to note that the upper parts of the Antarctic minke whale are dark grey and its underbelly is white, with pale streaks on the side and pale flippers. For more information about Antarctic minke whales see: http://www.arkive.org/antarctic-minke-whale/balaenoptera-bonaerensis/

concerning the killing, capturing, and treating of fin whales under JARPA II (Press Release of the ICJ 2014). The parties of the Convention under paragraph 10 (d) have an obligation to define a moratorium on the taking, killing, or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. The suspension mentioned in this paragraph applies to sperm whales, killer whales, and baleen whales, except minke whales (Schedule to the International Convention for the Regulation of Whaling 1946). For this reason, Japan did not define a moratorium on the taking, killing, or treating of whales by factory ships or whale catchers attached to factory ships in conducting JARPA II.

Fifthly, the ICJ decided in its judgment by twelve votes to four that Japan has not acted in conformity with its obligations under paragraph 7 (b) of the Schedule to the International Convention for the Regulation of Whaling concerning the killing, capture, and treatment of fin whales in the "Southern Ocean Sanctuary" in conducting JARPA II (Press Release of the ICJ 2014). In effect, subparagraph 7(b) of the Schedule declared that commercial whaling, whether by maritime operations or from land stations, is prohibited in a region designated as the "Southern Ocean Sanctuary." This Sanctuary comprises the waters of the "Southern Hemisphere southwards" of the specific line mentioned in this subparagraph (Schedule to the International Convention for the Regulation of Whaling 1946). In this perspective, the Court did not consider Japan's operations under a programme of JARPA II as a legal operation in the Southern Ocean Sanctuary region.

Sixthly, unlike the judgments as mentioned above, the Court announced in its decision by thirteen votes to three that Japan has complied with its obligations under Paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling in conducting JARPA II (Press Release of the ICJ 2014). According to paragraph 30 of the Schedule, all contracting parties shall provide the Secretary to the International Whaling Commission with proposed scientific permits before they are issued and insufficient time to allow the Scientific Committee to review and comment on them…(Schedule to the International Convention for the Regulation of Whaling 1946). This decision of the Court could be made because Japan provided the Secretary to the International Whaling Commission with proposed scientific permits before conduction JARPA II.

Finally, the ICJ decided by twelve votes to four that Japan shall revoke all permits, authorizations or licenses issued in the structure of JARPA II and to refrain from granting any new license for the conduction of this programme (Press Release of the ICJ 2014). This part of the judgment of the Court could be considered as a final judgment in this case. For this reason, the ICJ did not consider any compensation or other remedy mentioned in the Application of Australia.

4. Opportunities and challenges of the judgment of the Court in the progressive development of international environmental law

Concerning opportunities of the Court's judgment in this case for the progressive development of international environmental law, it is essential to note that this judgment tries to apply a positive performance to protecting the environment, including the marine environment. In this case, the ICJ paid particular attention to the protection of the marine environment according to the three environmental conventions; CITES Convention (1973), Biodiversity Convention (1992), and ICRW (1946). Besides, this case showed that the ICJ judges give great importance to their jurisdiction on environmental issues. It is crucial to mention that the Court, in this judgment, recognized *Erga Omens* rules[3] in environmental protection matters. The complexity of human-caused environmental damage, the limit of prevention and compensation of damage in the national, regional and global context are the main limitations of the development of international law (Khalatbari &

[3] *Erga Omnes* rules are known as the obligations of the states towards the international community as a whole. According to the ICJ judgment in the 'Case concerning Barcelona traction, Light and Power Company' (Belgium v. Spain 1970): "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of al1 States. In view of the importance of the rights involved, al1 States can be held to have a legal interest in their protection; they are obligations *erga omnes*" (Case concerning Barcelona traction, Light and power company, Belgium v. Spain, 1970).

Poorhashemi 2019). The decisions of the Court emphasized the implementation of environmental conventions, including multilateral marine environmental agreements.

Moreover, the interpretation of the Court concerning Article VIII (1) of the International Convention for the Regulation of Whaling (1946) can be considered generally as a development of international law. As mentioned above, the ICJ observed that Article VIII is an integral part of the Convention and must be interpreted in the light of the object and the purpose of the Convention and taking into account the preamble and the other relevant provisions of the Convention. It was observed that there is no justification for interpreting article VIII either in a restrictive sense or in a piece of excellent knowledge. Therefore, this interpretation of the provisions of the International Convention can be considered a new approach for analyzing the International environmental treaties. In addition, the approach adopted by the ICJ for interpreting the scope of the derogation regime introduced by paragraph 1 of Article VIII of the Convention is entirely following the customary principles which codified in the law of the Treaty (Vienna Convention 1969), to take an ordinary meaning of the terms in the context and the light of the object and the purpose of the Convention. For this reason, the Court showed that the Article VIII did not constitute a self-sufficient regime, but instead constituted an "integral part" of the 1946 Convention to specify the conditions for granting a license for whaling.

However, some issues could be identified in the judgment of the Court in this case for the progressive development of international environmental law.

First of all, one of the most critical challenges facing the ICJ is relating to its jurisdiction. In fact, "jurisdiction" in International law is the *sine qua non* for the exercise of judicial powers. Where it is lacking, an international judicial body cannot exercise legally binding judicial control over the States. For this reason, jurisdiction is the authority and legal power by which the ICJ takes cognizance of and decides cases. The ICJ lacks the requisite authority, any attempt to take notice of, and decides upon any case to be declared null and void (Ogbodo, S. Gozie 2012).

Secondly, the judgment of the ICJ in this issue is not implemented correctly by Japan. Even if Japan initially accepted (at least officially) the ICJ's decision regarding the JARPA II programme, ulterior it announced the construction of a replacement programme. Thus, in November 2014, Japan presented the launch of a new "scientific whaling" project in the Antarctic starting in 2015. Officially named NEWREP-A, this new project is more widely known among whale scientists under the name "JARPA III." In this programme, Japan plans to hunt 333 minke whales per year (NEWREP-A 2015). In this context, if the Court has accepted that "scientific whaling" for research purposes in some cases could be justified, it is necessary for Japan to take into account the arguments and conclusions of the judgment of the ICJ for scientific whaling purposes.

Moreover, the International Whaling Commission adopted in September 2014, in its 65th meeting in Slovenia, under Resolution 2014-53, to restrict the issuance of any whaling license for scientific research following the criteria established by the Court. Under this resolution, all proposals for the scientific research purpose should be evaluated by the Commission's Scientific Committee and reviewed to verify their compliance with the ICJ criteria before the possible issuance in this matter. However, the proposed scientific research JARPA III presents the same problems as JARPA II. In this context, any allocation of permits under this new programme could be contrary to the obligation to take into account the Court's arguments and conclusions concerning the JARPA II programme and could, therefore, be contrary to the judgment of the ICJ and International law.

Finally, the effectiveness of the judgment is another challenge facing the ICJ as a principal judicial body of the United Nations. Indeed, after over seven decades of its creation, the Court's influence is going to decline. For this reason, according to Ogbodo S. Gozie, to revitalize the impact and effectiveness of the Court, some vital reforms must be undertaken in the ICJ system. These reforms must address the process of election and re-election of ICJ judges; the conflict of interest arising from the presence of permanent members of the United Nations Security Council on the Court; the issue of the

Court's compulsory jurisdiction; and the appointment of *ad hoc* judges under Article 31 of the Statute of the ICJ (Ogbodo, S. Gozie 2012).

Regarding the new development of this case, Japan announced in December 2018 that it would withdraw from the "International Whaling Commission" and will continue its commercial whaling in the future (Simon Denyer, Akiko Kashiwagi 2018). This decision was prompting several condemnations from other governments and NGOs around the world. Japan argues that the Commission failed to meet its original dual mandate in 1946 to balance preserving whale stocks and the "orderly development" of the whaling industry. After failing to reach an agreement at a world conference in Brazil in September 2018 to resume commercial whaling, Japan is now carrying out its threat to withdraw entirely from the international organization. It could also be considered another challenge of the development of international environmental law.

5. Conclusion

The International Court of Justice delivered its judgment concerning whaling in the Antarctic on March 31, 2014 (Australia v. Japan, New Zealand intervening). According to this judgment, the Japanese whaling programme in the Antarctic JARPA II did not consider "scientific research." For this reason, the catching, taking, and killing of whales under this programme did not qualify as an exemption provided in Article VIII of the International Convention for the Regulation of Whaling (1946), which authorizes the contracting parties the capture whales for scientific research purposes. Finally, the Court ordered Japan to cease JARPA II immediately. Despite the judgment of the ICJ, Japan launched a new "scientific whaling" project in the Antarctic starting in 2015. This new project (NEWREP-A 2015) raises the question of the effectiveness of the judgment of the ICJ in international disputes.

It is clear that the judgment of the Court, in this case, provides new opportunities for the progressive development of international environmental law. As mentioned above, the Court tries to apply a positive performance on the protection of the marine environment according to the global environmental conventions such as CITES Convention (1973), Biodiversity Convention (1992), and ICRW (1946). However, some challenges facing the judgments of ICJ restrict the functions of the Court as a principal judicial body of the United Nations. Indeed, the current situation of international environmental protection is focused on the effectiveness of the various sources of international law, including treaties and judicial decisions. This effectiveness of the source of international law presents itself as one of the most significant current challenges to global environmental protection.

Moreover, the variety of sources of international environmental law is another challenge facing this branch of law (Poorhashemi & Arghand 2013). The normative plurality characterizes international environmental law. Indeed, the more than five hundred multilateral treaties, many more bilateral treaties, and even more soft law instruments are the normative foundation of international environmental law. Besides, several "environmental" cases are currently listed on the International Court of Justice agenda.

The internationalization approach can be considered as a solution to these challenges. For this purpose, international cooperation has gradually should become generalized to confront threats to the global environment. Environmental protection has also become global through the negotiation of international conventions to protect the global environment and the Application of the judgments of the ICJ.

Finally, the future development of international environmental law in its realistic expectation could be used to solve the jurisdiction and compliance of the decisions of the ICJ in global environmental protection.

References:

1. Application of Australia (2010), Application instituting proceeding filed in the Registry of the International Court of Justice, Whaling in the Antarctic (Australia v. Japan), May 31, available at http://www.icj-cij.org/docket/files/148/15951.pdf;

2. Case concerning Barcelona traction, Light and power company, Belgium v. Spain (1970), http://www.icj-cij.org/docket/files/50/5387.pdf;

3. Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), Washington;

4. Convention on Biological Diversity (1992), Rio de Janeiro;

5. International Convention for the Regulation of whaling (1946), Adopted at Washington on December 2, the text available at https://treaties.un.org/doc/Publication/UNTS/Volume%20161/v161.pdf;

6. Khalatbari Yalda, Poorhashemi Abbas (2019), "Environmental Damage": Challenges and opportunities in International Environmental Law, CIFILE Journal of International Law (CJIL), Vol. 1, No. 1, 21-28, summer 2019. DO I 10.30489/CIFJ.2019.93906;

7. Ogbodo, S. Gozie (2012) "An Overview of the Challenges Facing the International Court of Justice in the 21st Century," Annual Survey of International & Comparative Law: Vol. 18: Iss. 1, Article7. Available at: http://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/7;

8. Press Release of the ICJ (2014), Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), unofficial, No. 2014/14, March 31;

9. Poorhashemi, S. A., Arghand, B (2013), International Environmental Law, Dadgostar publication, Tehran;

10. Poorhashemi, A., (2020). Emergence of "International Environmental Law": as a new branch of International Public Law.". CIFILE Journal of International Law, 1(2), 33-39. DOI: 10.30489/cifj.2020.218985.1013

11. Proposed Research Plan for New Scientific Whale Research Programme in the Antarctic Ocean (NEWREP-A), (2015), the Government of Japan, available at https://iwc.int/private/downloads/e8A5ojvS22YjJ64vnDT2LA/NEWREP_A.pdf;

12. Schedule to the International Convention for the Regulation of Whaling (1946), available at http://us.whales.org/sites/default/files/work/schedule-august-2012.pdf;

13. Simon Denyer, Akiko Kashiwagi (2018), Japan to leave International Whaling Commission, resume commercial hunting, Washington Post, December 26, 2018;

14. Whaling in the Antarctic' (Australia v. Japan) (2010), Application instituting proceedings, ICJ Reports No. 148, pp. 4-20, viewed January 20, 2017, http://www.icj-cij.org/docket/index.php?p1=3&p2=3;

15. Whaling in the Antarctic, (Australia v. Japan: New Zealand Intervening) (2014), Judgment, ICJ Reports No. 148, p. 226, viewed January 20, 2017, http://www.icj-ij.org/docket/index.php?p1=3&p2=3;