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SCIENTIFIC RESEARCH WHALING: AN INTERNATIONAL LAW PERSPECTIVE

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ABSTRACT

"Ships are expendable; the whales are not."

- Paul Watson

The practice of whaling has been conducted for centuries around the planet for varying purposes. Something that was done as a tradition, in the beginning, became an act of overexploitation and economic gains later. The sudden bloom experienced in the whaling industry during the Industrial Revolution and World Wars created a global imbalance in whaling thus resulting in the endangerment of whale stocks. Herein, the historical practice of whaling and its contemporary controversy of commercial-scientific whaling highlights the need for preventive actions, appropriate and clear legal provisions, and sustainable regulation. Under the international legal regime, the International Convention for the Regulation of Whaling (ICRW), the United Nations Convention on the Law of the Sea (UNCLOS), and the International Whaling Commission (IWC) became responsible for regulating the whaling industry and ensuring the conservation of the marine environment, including the management of whale stocks. These advancements became the greatest developments in the matter of whaling, however, they also led to the creation of new challenges. Accordingly, this article delves into the historical, cultural, legal, political, economic, social, scientific, and environmental aspects attached to the act of whale hunting. It focuses on the interaction between the UNCLOS, the International Convention for the Regulation of Whaling (ICRW), and the International Whaling Commission (IWC), along with the lacunas present therein, while emphasising the opinions and actions of the pro-whaling nations, anti-whaling nations, as well as NGOs.

INTRODUCTION

Whales, a part of the Cetacean order, and one of the super-intelligent species, are also frequently stated to be the humans of the seas. With a variety of mysteries, myths, and religious and faithful sentiments attached to whales, the thoughts, care, and affection of people towards them keep on gaining new heights. Certain Indigenous communities around the world are stated to have a historical connection with whales, followed through generations as traditions and certain activities practised for the collective well-being of all. However, the significance of whales is not only limited to these traditional and cultural aspects based on humanity, whereas their importance is weighed more for the commercial gains derived from them. The usage of whales for meat, oil, baleen, carving, making perfumes, etc., fulfils the economic interests of

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humans achieved through the killing of whales also known as whaling. Nonetheless, it also helps in the biological and ecological study of whales, respectively done through scientific research whaling.

Even though natural resources are declared to be the global commons, the role played by humankind and human interests continues to interfere with the life underwater, whether directly or indirectly, thus impacting their whole existence in the first place. Hence, the conservation and preservation of such an important aquatic creature found in the deep seas and oceans on Earth is considered to be an essential task at the hands of humans. Moreover, for the continuance of their cultural and economic aspects, regulation of whaling is also necessary. These facets are therefore addressed by international law, especially the law of the sea and international environmental law. Nevertheless, the ambit of whales and whaling is far-stretching, wherein whales are now a part of world politics, trade, commerce, law and order, capitalism, as well as anthropological discrimination. The process of an aquatic creature becoming the subject of such huge developments is the question that needs to be pondered upon. Therefore, this article studies the historical and legal developments regarding the practice of whaling while focussing on the debate of scientific research whaling, wherein a 360-degree perspective of the varying international, national, and public approaches towards whales and whaling is provided.

HISTORICAL AND LEGAL BACKGROUND

The practice of whaling is found to be centuries old, wherein research suggests that it possibly began around 2200 BC. Whaling for the first time was supposedly done in 700 AD by the Basques, subsequently by the Flemish, the Normans, the British, and the Dutch.[2] Later on in the ninth century other European countries such as France, Spain, and Norway, in the twelfth century Russia, and in the sixteenth century the United States of America (USA), respectively, started whale hunting.[3] It is believed that in Japan the practice of whaling dates back to the Jomon period (13000 BCE - 300 BCE) wherein since then the consumption of whale meat was considered to be a tradition.[4] Whale hunting became a tradition and a part of cultural identity for certain indigenous communities hunting in the Atlantic, Arctic, and Pacific oceans.

The history of whaling shows that in the beginning, whale hunting was done in the coastal areas, and was later on shifted to the open oceans or high seas due to the depletion of whales along the coasts as well as the advancement in technology. Thus, whaling continued for the fulfilment of basic needs from whale products, however, 18th century onwards a limited scale whaling drastically expanded into large-scale commercial whaling. With the intensification of the Industrial Revolution, the whaling states started unregulated and unlimited whaling. Norway, Iceland, Britain, and Japan were the biggest whaling countries at that time. Furthermore, with the development and introduction of new technologies for whale hunting, the whaling industry enlarged to a previously unimaginable extent. Moreover, a rising requirement for whale oil created tough competition among the whaling countries.

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[2] Malgosia Fitzmaurice, *International Convention For The Regulation Of Whaling*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, https://legal.un.org/avl/ha/icrw/icrw.html.
[3] *Id*.
[4] Adrian Peace, *The Whaling War: Conflicting Cultural Perspectives*, 26 ANTHROPOLOGY TODAY, 5 (2010), https://www.jstor.org/stable/40650035.

The earliest method of whaling from land stations transformed into steam-powered whale catchers during the 19th century, to aircraft-fitted floating ship factories during the First World War.[5] Subsequently, during the Second World War, the demand for whale meat and oil surged heavily for providing rations to the forces due to the increasing food shortage. Such continuous commercial whaling led to overexploitation and extinction of certain species of whales, leaving others endangered.

With the growing concern about the decreasing whale population, the League of Nations decided to address the said issue by proposing an international conference on the conservation of whales in 1927, however, it was repudiated by many countries.[6] In furtherance of the first step to regulate whaling, the Geneva Convention for Regulation of Whaling[7] was adopted in 1931, which was superseded by the 1937 Agreement for the Regulation of Whaling[8] and its subsequent Protocols of 1938[9] and 1945[10].

Based on the legal framework provided in the 1937 Agreement and its Protocols, the International Convention for the Regulation of Whaling[11] (ICRW) was formed and duly adopted. It led to the consequent establishment of the International Whaling Commission (IWC) as per Article III of the ICRW. Presently, the ICRW regulates whaling all around the world.

INTERRELATION BETWEEN THE UNCLOS, THE ICRW, AND THE IWC

The contemporary international law that addresses marine mammals, promotes their conservation, and regulates their exploitation, especially of whales and whaling, comprises customary law as well as international instruments such as the UNCLOS and the ICRW. Since the ICRW predates the UNCLOS and as it is the only international convention governing whales, the ICRW and the IWC are covered under the provisions of the UNCLOS irrespective of the lack of their direct mention in the same. Keeping aside the timeline, it can be stated that the topics of whales and whaling form a part of the marine mammals subject, which is further part of the law of the sea, therefore, the ICRW is a part of the UNCLOS, and the IWC is a recognised authority under it.

Currently, the ICRW is the only international legal framework that deals with the utilisation, regulation, and conservation of whales as marine resources. The preamble to the ICRW states that its purpose is "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."[12] Furthermore, the Convention consists of the Schedule which is an integral part of the ICRW and is legally binding on all the

[5] *A History of Whaling*, SCIENCE AND MEDIA MUSEUM (Sept. 28, 2023, 6:30 AM), https://www.scienceandmediamuseum.org.uk/objects-and-stories/history-whaling.
[6] *Id*.
[7] Geneva Convention for Regulation of Whaling (signed 24 September 1931, entered into force 16 January 1935).
[8] International Agreement for the Regulation of Whaling (signed 8 July 1937) 4406 LNTS 79.
[9] Protocol Amending the International Agreement of 8 June 1937 for the Regulation of Whaling (signed 24 June 1938).
[10] Protocol Amending the International Agreement of 8 June 1937, and the Protocol of 24 June 1938, for the Regulation of Whaling (signed 26 November 1945) 148 UNTS 43.
[11] International Convention for the Regulation of Whaling (with annexed Schedule) (signed 2 December 1946) 2124 UNTS 72 (ICRW) art 8.
[12] *History and Purpose*, INTERNATIONAL WHALING COMMISSION (Sept. 28, 2023, 11:15 AM), https://iwc.int/commission/history-and-purpose.

members. This Schedule provides the IWC-approved measures and provisions that are essential for the regulation of whaling and the conservation of whales.

The UNCLOS consists of certain provisions specifically Article 65 and Article 120 that govern marine mammals.

Article 65 states that,

"Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study."[13]

Herein, Article 65 is applicable only in the Exclusive Economic Zone (EEZ) as it comes under Part V of the UNCLOS. During the UNCLOS conferences and its adoption, the IWC was the only completely operating international authority regulating whaling since 1946 and thus was considered to be the principal international regime for cetaceans. Accordingly, the international organisation having the appropriate authority concerning the conservation, management, and study of cetaceans as mentioned in the article is the IWC, which is the only globally functioning whaling regime.

Moreover, the interpretation of Article 65 obligates all the members of the UNCLOS to follow and work through the IWC regulations and resolutions on studying, conserving, and managing the cetaceans even if they are not parties to the ICRW, i.e. the IWC. The UNCLOS demands the cooperation and compliance of its members with the IWC which was recognised by Agenda 21 to be an appropriate international organisation for cetaceans in 1992, as it fulfilled the requirements of Article 64 of the UNCLOS.[14]

Furthermore, on one side the interpretation concerning the authority of the IWC in EEZ can be that Article 65 grants the power to the IWC to intrude on the sovereign rights of a nation and apply its own rules while managing and regulating the whale stocks and the practice of whaling.[15] Thus, the IWC can exercise its jurisdiction over the EEZ of its non-member nations through the UNCLOS. On the other side, the same provision can be interpreted as that under Article 65 a coastal state has the right to regulate the exploitation of marine mammals present in its EEZ, and can apply stricter regulations than ICRW, regardless of the fact whether that state is a member of the IWC or not. Thus, according to the second interpretation, the ICRW does not affect the sovereign rights of the coastal states over marine mammals in their EEZs.[16]

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[13] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) (UNCLOS) art 65.

[14] Rachelle Adam, *The Japanese Dolphin Hunts: In Quest of International Legal Protection for Small Cetaceans*, 14 ANIMAL L. 133 (2007).

[15] Jared Zemantauski, *Has the Law of the Sea Convention Strengthened the Conservation Ability of the International Whaling Commission?*, Vol. 43 No. 2 THE UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW, (2012), https://www.jstor.org/stable/23339458.

[16] *Unit 6 - International Convention for the Regulation of Whaling*, UNITED NATIONS INFORMATION PORTAL ON MULTILATERAL ENVIRONMENTAL AGREEMENTS, https://leap.unep.org/sites/default/files/2020-09/Book%20-%20Unit%206%20-%20International%20Convention%20for%20the%20Regulation%20of%20Whaling.pdf.

Article 120 of the UNCLOS states that,

"Article 65 also applies to the conservation and management of marine mammals in the high seas."[17]

Since Article 120 is provided in PART VII of the UNCLOS, it declares the similar applicability of all the provisions from Article 65 to the High Seas, thus including the confusion of dual interpretation on the authority to regulate, conserve, and manage whale stocks on high seas, as well as to prohibit the practice of whaling therein. Taking into consideration the language, phrasing, and interpretations of Articles 65 and 120, it can be inferred that these articles consist of vast uncertainties and complex ambiguities that are hard to understand and implausible to implement, nonetheless, easy to exploit.

Furthermore, Part XV of the UNCLOS which provides provisions for the settlements of disputes, subjects the member parties of the ICRW and the UNCLOS, or only the members of the UNCLOS to these legally binding provisions. Wherein the members can exercise the dispute settlement provisions of the UNCLOS when there is a violation of the ICRW or the IWC regulations, when the authority of the IWC is questioned concerning its interference with the sovereign rights of nations in EEZs, when there is a conflict over the regulatory or prohibitive actions of the IWC, when there is a disagreement regarding the application or interpretation or non-compliance with the ICRW and/or the UNCLOS, etc. Thus, any disputes arising from the relationship between the UNCLOS and the IWC, including the IWC as the "appropriate" international organisation to be "worked through" with regards to cetacean management, and the abilities granted to the IWC by Articles 65 and 120 of UNCLOS to place stricter regulations (including a moratorium) in EEZ's and the high seas respectively, fall under the jurisdiction of Part XV of UNCLOS.[18]

Based on the provisions of UNCLOS, the IWC can become a signatory and thus can take advantage of its dispute settlement provisions, however, the IWC lacks the authority to do so because of the failure of the ICRW in allowing the IWC to make decisions for itself. The IWC is also not vested with the power to enforce its resolutions and regulations on member nations by the ICRW.

Thus, the UNCLOS, the ICRW, and the IWC are linked with each other at various points, mutually empowering the application of respective legal provisions and regulations necessary in the management and conservation of the whaling stocks. Nevertheless, this interconnection and dependency also highlights the lacunas present in the functioning of the said three authorities. The UNCLOS legally recognises the powers and authority vested in the IWC by the ICRW, it further upholds and supports the functioning and application of the same. However, the legitimacy of the UNCLOS delegated powers to the IWC, and the clarity in the interpretation of the legal provisions, along with the implementation of the same, remains ambiguous.

[17] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) (UNCLOS) art 120.

[18] Jared Zemantauski, *Has the Law of the Sea Convention Strengthened the Conservation Ability of the International Whaling Commission?*, Vol. 43 No. 2 THE UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW, (2012), https://www.jstor.org/stable/23339458.

SCIENTIFIC RESEARCH WHALING: A CONCEPTUAL ANALYSIS

Types of Whaling

The practice of whaling is conducted in pursuance of cultural interests, commercial interests, and scientific interests. Thus, based on these specific purposes and interests, the ICRW provides provisions for the three different types of whaling: Aboriginal Subsistence Whaling, Commercial Whaling, and Scientific Whaling.

a) Aboriginal Subsistence Whaling

Aboriginal Subsistence Whaling is also known as indigenous whaling, wherein whale hunting amounts to a significant part of the cultural life of certain communities. Whaling is pursued by these native communities in consideration of their traditional values and nutritional needs. The IWC has recognised and allowed Aboriginal Subsistence Whaling, since herein the aim does not constitute large-scale whale hunting and gaining money in return. The objective promoted by the IWC with respect to indigenous whaling is that the population of whales must be balanced and maintained while satisfying the basic cultural, nutritional, and subsistence requirements of the native people. Therefore, in the span of every six years, the IWC sets catch limits for Aboriginal Subsistence Whaling, and the catches taken by the indigenous communities are to be reported back to the IWC. As per the IWC data, currently, aboriginal subsistence whaling is conducted in four countries namely Denmark (Greenland), St Vincent and the Grenadines (Bequia), Russia (Chukotka), and the USA (Alaska and Makah Tribe of Washington State).[19]

b) Commercial Whaling

Commercial Whaling is conducted to earn money from whale products such as whale meat, bones, oil, etc. It was hugely carried out in the 19th and 20th centuries leading to overexploitation and continuous depletion in whale stocks. Therefore, to address this issue the IWC in 1982 decided to completely ban commercial whaling (zero quotas) from the season of 1985-1986, which came to be known as the Commercial Whaling Moratorium. The 1982 Moratorium applies to the members of the IWC, wherein members have the option to register a formal objection to it or join the IWC with reservation to the moratorium. Russia had objected to the moratorium but did not exercise it. Norway had filed an objection to the moratorium, while in 1992 Iceland had left the IWC and re-joined with a reservation to the moratorium in 2002. Therefore, presently, Norway and Iceland conduct commercial whaling and decide their individual catch limits for whaling in their EEZs, wherein they need to provide all the data to the IWC regularly. Japan left the IWC and started practising commercial whaling in 2019.

c) Scientific Whaling

Scientific Whaling is also known as Special Permit Whaling. It is done to understand the biological aspects of whales and to contribute to the scientific knowledge about marine mammals. Article VIII of the ICRW provides legal provisions regarding scientific research whaling, it states that,

[19] *Aboriginal Subsistence Whaling*, INTERNATIONAL WHALING COMMISSION, (Sept. 30, 2023, 8:50 PM), https://iwc.int/aboriginal.

"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.

3. Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.

4. Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data."[20]

Article VIII authorises member countries to conduct whaling for the purpose of scientific research, wherein the member countries themselves have the authority to decide and regulate the whaling catch limits. The governments of member countries can issue special permits for scientific research whaling projects subject to the advisory scrutiny report of the IWC. These governments are required to provide the figures of catches taken along with the scientific data produced from the special permit whaling to the IWC regularly. Before leaving the IWC, Japan used to conduct special permit whaling under its Japanese Whale Research Program in Antarctic Ocean (JARPA), Second Phase of Japanese Whale Research Program in Antarctic Ocean (JARPA II), Japanese Whale Research Programme in the North-western Pacific Ocean (JARPN), Second Phase of Japanese Whale Research Programme in the North-western Pacific Ocean (JARPN II), New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A), and New Scientific Whale Research Program in the North-western Pacific Ocean (NEWREP-NP) scientific research programs.

Scientific Whaling Controversy

The practice of scientific research whaling has been a controversial topic at the international level since the late 20th century. There is an extreme divide visible especially among the member nations of the IWC as well as in other nations and non-state actors. Ambiguity in the legal provisions, differences in interpretations, diversity of reasons and methods of whaling, and misuse of available provisions form the fundamental basis of this conflict.

Article VIII of the ICRW authorises whaling for the purpose of scientific research, however, the Convention itself fails to define the term "scientific research" and which activities it

[20] International Convention for the Regulation of Whaling (with annexed Schedule) (signed 2 December 1946) 2124 UNTS 72 (ICRW) art 8.

constitutes. Thus allowing the nations to exercise the liberty in interpreting it as per their self-interests. Further, the government of a member nation of the IWC has the legal authority to permit scientific research whaling projects wherein the IWC or any other nation has no say in it. Besides, the contention that the meaning of whales is different for all hugely contributes to the Moratorium conflict. These legal gaps allow the nations to conduct commercial whaling and overexploitation of marine mammals under the disguise of the scientific research provision. The environmental and legal concerns raised through such dishonest practices and the endangerment of whale stocks had mobilised hostile actions among nations and non-state actors, which has now infiltrated international trade and world politics.

The scientific whaling debate comprises three actors who are operating at international and national levels based on divergent perspectives.

a) Anti-Whaling Nations

The anti-whaling nations consist of the USA, the United Kingdom, Australia, France, New Zealand, etc., wherein these nations constitute the majority votes in the IWC. The anti-whaling perspective is against all the acts resulting in the exploitation of whales, especially commercial whaling (direct as well as indirect). These nations believe that any type of whaling is an unnecessary, unethical, immoral, and barbaric act that needs to be condemned and banned all over the world. A shift in conversation from an ecological perspective to the welfare and rights of whales can be observed herein. Whales are used as a contemporary totem symbolising a civilised way of life, thus diverting the attention of the public towards the evils of whaling.

The anti-whaling nations have established an emotional connection between the whales and their citizens, wherein the whales and their conservation have now become an issue of national interest. They have branded the whaling nations, specifically Japan, and the use of whale products as barbaric, cruel, and uncivilised. Certain anti-whaling nations such as Australia have authorised national projects and mercy missions to save whales. These nations have imposed sanctions on Japan and have created a diplomatic drift to pressurise Japan into stopping its practice of whaling. They have accused Japan of conducting large-scale commercial whaling by authorising special permits for scientific research whaling projects.

However, under the pretext of creating a close bond between humans and whales, contributing to the trust needed to save the whales for future generations, as well as emphasising the necessity to protect the relationship between humanity and nature, these anti-whaling nations have established multi-million dollar whale-watching and whale conservation industry.[21] These anti-whaling campaigns are backed by the lobbied money, external influence, selfish interests, and people-pleasing vote-winning "green" tags.

b) Pro-Whaling Nations

The pro-whaling category of nations includes Japan, Iceland, Norway, etc., wherein Japan as a whaling nation has been excessively highlighted at the international level. The pro-whaling perspective is that whaling is similar to other kinds of natural resource utilisation and is done in a regulated and sustainable manner. It is mainly based on the anthropological perspective. For whaling countries like Japan, the practice of whaling holds historical, cultural, and

[21] Adrian Peace, *The Whaling War: Conflicting Cultural Perspectives*, 26 ANTHROPOLOGY TODAY, 5 (2010), https://www.jstor.org/stable/40650035.

traditional significance which forms the identity of the whaling communities. For them whaling is a way of life, wherein the act of whaling and consumption of whale meat (gyoshoku bunka) is considered to be a part of Japanese heritage passed down since the Jomon period. It is claimed that whale meat provides proteins and nutrients essential for the body which is very crucial for the indigenous and other whaling communities.

The behaviour of accusing and pressuring done by anti-whaling nations that are subjected towards Japan are said to be acts of cultural imperialism according to the Japanese public opinion. The domination of Western nations against the cultural heritage of a non-Western nation has been interpreted as a challenge to the right of Japanese to live as they choose.[22] Such nationalistic sentiments have given additional significance to whale meat eating as an act challenging the cultural imperialism of the anti-whaling regime. It has become a subject of sovereign rights, national identity, and cultural integrity of whaling nations. Further, Japan has questioned the legitimacy of Aboriginal Subsistence Whaling permitted to be practised by certain nations based on their cultural, nutritional, and subsistence interests while Japan has been denied the same irrespective of similar reasons.

As a response to the requirements of the IWC, provisions of the ICRW, and the Commercial Whaling Moratorium, Japan established the Institute for Cetacean Research (ICR) to support its scientific research projects. The ICR aimed to collect scientific data that could justify the lifting up of the commercial whaling moratorium by the IWC. It forms the scientific whaling policy on behalf of the Japanese Government. The ICR works in close connection with the Ministry of Agriculture, Forestry and Fishing (MAFF) and its Fisheries Agency. The transparency in the functioning of these institutions and open broadcasting of all the scientific information gathered through scientific research whaling programmes contribute to the forming of strong pro-whaling public opinion without any criticism and contradictions. These institutions play a crucial role in shaping the issue of whaling into a matter of traditional and cultural integrity, food security, and national identity for the Japanese people.

c) Role of NGOs

Certain NGOs namely Greenpeace, the Sea Shepherd Society, etc., have been aggressively supporting anti-whaling campaigns and conducting hostile actions against whaling nations. These NGOs are termed to be environment-friendly and animal welfare rights-promoting non-state actors.

The NGOs have gained substantial influence in international politics by lobbying the importance of owning the "green tag" and acting against the pro-whaling notion. They have created a demand for individuals, corporations, and governments to establish that they are eco-friendly and conscious about the rights of whales. In pursuance of capitalist interests, they have supported the removal of whale products from markets and the imposition of trade constraints on whaling nations by identifying whales as an endangered species globally. The best way to raise huge funds for the NGOs has been architected by holding environment protection as well as animal welfare movements that emphasise the urgency of banning whale hunting while targeting the whalers as enemies. Herein, the governments, corporations, and NGOs act unitedly towards forming a solid public opinion for green, eco-friendly, and anti-whaling notions while internally filling up their pockets with innocent public money. Capitalism plays

[22] *Id*.

a huge role in the whitening of black money sponsored as funds to these anti-whaling NGOs in return for achieving the "civilised" label, title of producing "green products" and "green state of mind" by the governments and corporations, occurring at both national and international levels.[23]

Furthermore, these NGOs hold a principal position in manipulating the information conveyed through the media by creating a public appeal for support, while pressurising governments and corporations into endorsing their opinions and actions. In return, these NGOs express their support and validate the actions of their sponsors as done for the greater good of protecting whales and environment conservation, respectively declared throughout the national as well as international media platforms.[24]

There are instances wherein these NGOs crossed the borderline of activism to piracy by attacking Japanese whaling and fishing vessels.[25] They had gotten themselves involved in the direct surveillance of these vessels and had committed myriad acts of obstruction by chasing the vessels, harassing and assaulting the people on these vessels, and contributing to the sinking of vessels.[26]

Therefore, the controversy of scientific whaling is constituted by numerous different contentions duly represented by the actions of its respective stakeholders. It is fuelled by the universal necessity of the promotion of self-interests and commercial gains while infiltrating into the scope of nationalistic sentiments, cultural integrity, and sovereign identity. It deals with the public opinion of the whaling war through the most effective capitalist and political platforms.

AUSTRALIA v. JAPAN: NEW ZEALAND INTERVENING CASE

The ban on commercial whaling established by the IWC in 1982 through its Moratorium had led to the excessive invocation of Article VIII provision of the ICRW, i.e. scientific research whaling. Nations such as Iceland and Japan have utilised the special permit provision to dwell in scientific research whaling by organising special programs. Subsequently, various nations questioned the legitimacy of the scientific research whaling projects conducted by Japan. They had alleged that under the disguise of scientific whaling, Japan was actually conducting commercial whaling. The *Whaling in Antarctic Case (Australia V. Japan: New Zealand Intervening*)[27] is based on the above context.

Analysis of the Case and Judgment

In May 2010, Australia filed a case against Japan in the ICJ, questioning the operation of JARPA II. Australia and New Zealand had collectively alleged that even though JARPA II was based on the purpose of scientific research whaling, in reality, it was used as a tool for the exploitation of whales for commercial purposes by Japan. They had asked the Court to revoke

[23] Arne Kalland, *Whale Politics and Green Legitimacy: A Critique of the Anti-Whaling Campaign*, Vol. 9 No. 6 ANTHROPOLOGY TODAY, 6 (1993), https://www.jstor.org/stable/2783216.
[24] *Id.*
[25] Riswanda Imawan, Adde Marup Wirasenjaya and Muhammad Yafi Zhafran, *Japan's Rejection Of International Norms Against Whaling*, E3S WEB CONF. (Nov. 5, 2021), https://doi.org/10.1051/e3sconf/202131604016.
[26] Adrian Peace, *The Whaling War: Conflicting Cultural Perspectives*, 26 ANTHROPOLOGY TODAY, 5 (2010), https://www.jstor.org/stable/40650035.
[27] Australia v. Japan: New Zealand intervening (Whaling in the Antarctic), I.C.J. Reports 2014, p. 226.

the permissions granted under Article VIII of the ICRW to scientific research activities that are misused and to impose a complete cease on the application of JARPA II.

The Court had focussed on determining whether JARPA II was operating for the purpose of scientific research based on the legal aspects of the issue while providing due regard to the related scientific evidence. It decided to consider the research objectives of JARPA II as the standard of review, wherein according to the Court, the design and implementation of the programme must be reasonable and achievable through the declared research objectives to justify its legitimacy. The Court established its opinion that scientific research must be involved in a program having the purpose of scientific research, so as to be covered under Article VIII of the ICRW. Based on the said opinion, it questioned whether the lethal take was scientific research and whether the lethal take was for scientific research purposes. It also questioned the enlargement of the number of whale hunts under JARPA II.

The Court held a two-step process to assess the JARPA II. It stated that the activities conducted under JARPA II can be broadly characterised as scientific research, but concluded that the objectives of the programme are not practically achievable based on the mixed timespan between JARPA and JARPA II, unequal catches taken of specified whale species that are not as per the previously decided catch limits which must have led to vague and unreliable findings, limited data available on the scientific study done through whaling, and incomplete peer review of the results obtained from JARPA II, thus stating that JARPA II did not function for the purpose of scientific research.

On 31st March 2014, the ICJ through its judgment[28] by 12 votes to 4 held that the special permits granted to JARPA II by the Japanese government do not come under the provisions of Article VIII of the ICRW and that Japan had failed to act in accordance with its obligations under the 1982 Commercial Whaling Moratorium. Furthermore, the Court ordered the revocation of all the special permits granted under Article VIII of the ICRW concerning JARPA II.

The Court had declared that the judgment delivered is only applicable to this case, i.e. functioning of JARPA II, and not applicable to other scientific research whaling programmes permitted under Article VIII of the ICRW. Moreover, the issue of examination and reviewing of scientific research whaling was comprised more of science rather than law, wherein it was based on scientific terminologies, scientific models, scientific data and calculations, sample size, scientific findings, etc. Therefore, even though the ICJ assessed and dealt with all the scientific components of whaling, it failed to provide a legally accepted definition of the term "scientific research" that can be recognised and applicable in the domain of international law. This failure will result in the continuation of the confusion around scientific research as well as misuse of the same through other scientific research whaling programs.

Aftermath of the ICJ Judgment

In accordance with the judgment, Japan stopped the implementation of JARPA II. In 2015, Japan proposed two new scientific research whaling projects specially permitted under Article VIII, namely NEWREP-A, and NEWREP-NP. Further, to prevent the submission of future

[28] *Id*.

whaling disputes to the ICJ, Japan altered its optional declaration on the ICJ's compulsory jurisdiction by excluding the Court's jurisdiction in the matters of living marine resources.[29]

On 24th December 2018, Japan's Abe cabinet declared the withdrawal of Japan from the IWC. The declaration also stated that Japan will resume commercial whaling inside its territorial waters and EEZ from July 2019.

CONCLUSION AND SUGGESTIONS

Conclusion

The practice of hunting whales also known as whaling dates back thousands of years. According to the needs of humans, the purposes behind whaling kept on changing throughout generations, thus leading to an increase in the exploitation of whales. Therefore, what was once a traditional and cultural practice, consequently became a commercial act. The greed for whale products resulted in a huge drop in the population of whales, thus creating a need for regulating the practice of whaling all around the world. The ICRW was adopted to address these concerns through the establishment of the IWC as an intergovernmental body. However, the dominance of anti-whaling nations led to an imbalance in the votes of the IWC's democratic structure resulting in the sanctioning of the Commercial Whaling Moratorium. Such extreme divide among the member nations further backed by the lobbying of NGOs had led to a global conflict on whale as a right v. protection of whales from whaling as a right. It subsequently resulted in the fuelling of mass public sentiments about heritage and traditions, cultural integrity, national pride, sovereignty rights, food security, cultural imperialism, international pressure, capitalist interests, political and financial lobbying for green tags, animal welfare and rights, etc., depending on the pro-whaling or anti-whaling perspective of their nations.

The approach towards the scientific research whaling controversy needs to be changed since the ICRW and the Moratorium were adopted in the mid and late 20th century respectively, based on the situations and attitudes towards the environmental matters prevailing at that time. Therefore, the circumstances in world politics, international trade, and commerce have drastically transformed since then, along with the intensity of whaling conducted, the purposes of whaling, and the population of whale stocks present in the oceans. Thus, the international community needs to neutrally examine and understand the relevancy of the ICRW as well as the IWC in the present scenario, since it can be observed that these authorities are falling short of meeting the current demands of their members (whaling - political, cultural, economic, environmental and social), implementing of international law, and regulating the ecological and developmental balance of whale stocks. Besides, while introducing the Moratorium it was intended to be in effect temporarily till the effective recovery of whale stocks at sustainable levels is achieved, however, it is still in effect. Therefore, the ambiguities in the provisions of the ICRW and the UNCLOS as well as vagueness in the actions of the IWC are adversely impacting the relations between nations, corporations, and their citizens by creating hostility against one another. Wherein, national identity and cultural integrity have become potent forces as globalisation has rendered spatial boundaries relatively unimportant.[30]

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[29] Malgosia Fitzmaurice, *International Convention For The Regulation Of Whaling*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, https://legal.un.org/avl/ha/icrw/icrw.html.

[30] Adrian Peace, *The Whaling War: Conflicting Cultural Perspectives*, 26 ANTHROPOLOGY TODAY, 5 (2010), https://www.jstor.org/stable/40650035.

Suggestions

The author seeks to propose certain suggestions to address the issue of whaling based on the loopholes present in the legal instruments of the ICRW and the UNCLOS as well as the defective functioning of the IWC. These suggestions are as follows:

i. An authentic and valid definition of the term "Scientific Research" (used in Article VIII of the ICRW) needs to be accepted and adopted under international law, determined through an appropriate international legal authority such as the ICJ, or the United Nations Drafting Committee, or any other international stakeholder.

ii. The legal provisions provided in the UNCLOS need to be simplified and made precise by removing all the ambiguities therein, especially concerning Articles 65 and 120, also the appropriate applicable interpretation of the same must be provided to avoid further confusion in its pertinence. (For example – varied interpretation of Article 65 of the UNCLOS.) Furthermore, appropriate definitions of the words used in the provisions must be provided.

iii. The IWC needs to adopt regulations and resolutions based on the advice of its Scientific Committee, thus balancing the legal and scientific aspects in the sustainable management of the practice of whaling.

iv. The decisions made in the IWC must be unbiased, duly following the democratic system of an equal say in its functioning while taking into consideration the cultural, economic, subsistence, and scientific interests of members towards the act of whaling and its implications. Even if the officials are representing their nations in the IWC, the decisions must be taken in the bona fide interests of all, since the primary aim is to regulate whaling and conserve whale stocks.

v. The Commercial Whaling Moratorium must be lifted by the IWC, and those nations who want to pursue commercial whaling must be allowed to do so within the IWC-determined catch limits so that these nations will be able to fulfil their economic interests and it will prevent the misuse of the special permit of conducting scientific research whaling under Article VIII of the ICRW.

vi. The IWC should have an intermediary nations-specific team that regularly monitors the scientific research whaling programmes, their functioning, and findings, along with other types of whaling so as to maintain transparency in the said operations as well as the statistics of the catches taken and methods used to do the same. Wherein, if misused, an appropriate independent legal body must have the authority to examine and review the operations of that scientific research whaling programme, and based on its findings it can enforce changes in the programme that are required to be in alliance with the law and can revoke the permits granted if necessary.

vii. The IWC as an independent and unbiased body must be given the power to enforce its regulations and resolutions on its members.

viii. The powers, rights, and obligations of the NGOs functioning at national and international levels must be clearly declared by the appropriate international legal authority such as the UN. NGOs under the pretext of working for the application of international environmental law and upholding animal rights must not be allowed to get involved in sensitive and

eminent matters among the nations in dispute respectively. (For example – NGOs attacking the Japanese whaling and fishing vessels in the high seas.