Between Law and Science: A Commentary on the Whaling in the Antarctic Case

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1. Introduction

In March 2014, the International Court of Justice (ICJ, the Court) issued its judgment on the merits in the dispute between Australia and Japan, with New Zealand intervening, regarding Japan’s whaling programme in the Antarctic. Australia’s primary contention in its application was that Japan’s whaling programme in the southern hemisphere (JARPA II) breached certain provisions of the International Convention for the Regulation of Whaling (ICRW). Japan contended, however, that JARPA II fell within the exception carved into Article VIII of the ICRW, which authorises Contracting Governments to issue special permits to its nationals to kill whales ‘for purposes of scientific research’. The crux of the issue to be decided by the ICJ was whether JARPA II benefited from Article VIII, and therefore, whether the killing of whales under this programme was ‘for purposes of scientific research’. The Court, by a majority of twelve votes to four, found the answer to be in the negative, thus deciding against Japan.

Several questions of vital importance to international dispute-settlement proceedings have been raised as a result of the way the proceedings were conducted and the way the Court reasoned its decision.

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1 Whaling in the Antarctic (Australia v Japan, New Zealand Intervening) (Judgment) [2014] ICJ Rep 226.
3 Ibid art VIII(1).
4 Whaling in the Antarctic (n 1) 49.
5 Whaling in the Antarctic (n 1) 247(2).
In this case, complex scientific issues arose and were intertwined with legal issues. Questions involved the definition of ‘scientific research’ in Article VIII of the ICRW, a term, the meaning and scope of which were crucial to the dispute. A further important question was whether lethal methods were necessary or reasonable with respect to the stated scientific objectives of JARPA II. In such situations, especially when deciding mixed questions of law and fact, it is not easy to determine the respective roles of the Court and of the experts appointed either by the parties or by the Court. It is equally important to consider whether the Court should rely on evidence provided by party-appointed experts, or whether it should appoint experts of its own.

2. The blurred distinction between factual and legal issues

The function of the ICJ is to decide disputes ‘in accordance with international law’. However, fact-finding is also an essential, indeed indispensable component of the Court’s function. Without facts, law as ‘clarified’ or ‘developed’ by international courts and tribunals would be a mere abstraction. Sound fact-finding is required to deal efficiently with ‘the complexities involved in the serious and rigorous sifting of evidence’. Indeed, if the ‘law lies within the judicial knowledge of’ the

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7 *Whaling in the Antarctic* (n 1) 73-86.
8 ibid 88.
9 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38(1).
‘international judge’ (jura novit curia), facts lie at the periphery of judicial control and demand to be rationalised through the adjudicatory process. Judges cannot be expected to be well-informed on all subjects that require specialised knowledge, such as science. At the same time, scientists, regardless of their potential contribution to the international dispute-settlement process, cannot be expected to settle disputes ‘by the application of principles and rules of international law’. It certainly remains the duty of the judge to adjudicate on legal issues, and not of the scientist acting as an expert.

An important task for the Court is thus to clearly identify scientific issues, as separate from legal issues. The situation is further complicated if the question to be decided involves interwoven scientific and legal issues. Two situations, which merit discussion as examples of each of the above scenarios, arose in the Whaling Case and are analysed below.

2.1. Definition of ‘scientific research’ – a legal or factual question?

As mentioned above, crucial to deciding the Whaling dispute was the definition of the term ‘scientific research’ in Article VIII of the ICRW. Being a term in a treaty, it could be a legal exercise for the Court – an exercise of treaty interpretation. On the other hand, as necessitated by the first step of treaty interpretation, the term has an ordinary meaning, which could arguably require scientific expertise to interpret.

13 Fisheries Jurisdiction Case (Germany v. Iceland) (Jurisdiction of the Court) [1973] ICJ Rep 56.
18 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(1): ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’
Counsel for Australia had put forth the views of one of its scientific experts to define this term in the context of the ICRW, while Japan countered that this was a question of treaty interpretation. In its majority decision, the Court was not persuaded by the criteria put forth by Australia, to constitute ‘scientific research’. According to the Court, this definition merely reflected scientific opinion, and did not serve to interpret the term in the context of the ICRW. However, the Court did not go on to define the term, predicated its decision instead on the reasoning that JARPA II was not ‘for purposes of’ scientific research, even if the programme included scientific research.

In making this determination, the Court used, in its own words, an ‘objective standard of review’. Thus, although the definition of ‘scientific research’ in the context of this dispute was certainly an exercise of treaty interpretation, it was an exercise that the Court did not explicitly undertake. One reason for this could be a concern that there was, among the judges, a lack of certainty as to whether this was, after all, an issue within the purview of their judicial function. It is certainly evident from several separate and dissenting opinions that a number of members of the Court did not think it appropriate for the Court to determine whether a research programme constituted ‘scientific research’, a task that ‘befits scientists, not jurists.’

Nevertheless, the Court need not have shied away from interpreting the phrase, since a certain technical aspect of the question does not preclude the Court adjudicating upon what is primarily a legal issue.

19 Whaling in the Antarctic (n 1) 74.
20 ibid 75.
21 ibid 82: ‘Their conclusions as scientists, however, must be distinguished from the interpretation of the Convention, which is the task of this Court.’
22 ibid 86: ‘Nor does the Court consider it necessary to devise alternative criteria or to offer a general definition of scientific research.’
23 ibid 247(2).
24 ibid 67.
26 Whaling in the Antarctic (Dissenting Opinion of Judge Yusuf) ibid para 44.
2.2. The problem of necessity of lethal methods – a legal issue or a mixed question of law and fact?

A slightly more complicated question arose in analysing whether the use of lethal methods was necessary or reasonable with respect to the stated scientific objectives of JARPA II. The Court considered this a necessary enquiry since, according to the majority opinion, in order to ascertain whether a programme’s use of lethal methods was ‘for purposes of scientific research’, it had to consider whether the elements of the programme’s design and implementation were reasonable in relation to its stated scientific objectives.

A question of legal interpretation certainly arises here, since it is a matter of interpretation of a treaty provision. However, it is by no means a purely legal question, as evidenced by the criteria that the Court used to assess whether JARPA II was ‘for purposes of scientific research’. The Court went into great detail on these criteria, including decisions regarding the use of lethal methods, the scale of the programme’s use of lethal sampling, the methodology used to select sample sizes, a comparison of the target sample sizes and the actual take, the time frame associated with a programme, the programme’s scientific output, and the degree to which a programme co-ordinates its activities with related research projects.

These various factors demand a level of expertise that goes beyond the Court’s judicial decision-making capacity, as an adjudicator of legal issues. It is clear that the Court realised this, since it relied heavily on presentations of experts from both Australia and Japan’s legal teams when examining relevant elements of the programme’s design and implementation, using that part of the expert testimonies that both sides agreed upon.

The issue of necessity of lethal methods is thus a mixed question of law and fact, one that the Court must decide with assistance from experts in the field. This brings us to a related and important considera-

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27 ICRW (n 2) art VIII.
28 Whaling in the Antarctic (n 1) 67.
29 ibid 88.
30 Nick Gales and Marc Mangel called by Australia and Lars Wallye called by Japan.
tion – the delineation of the roles of judge and expert while deciding the issue.

3. The role of the ICJ and of experts in deciding mixed questions of law and fact

As succinctly summed up by judges Al Khasawneh and Simma in their joint dissent in the Pulp Mills dispute,

‘the adjudication of disputes in which the assessment of scientific questions by experts is indispensable … requires an interweaving of legal process with knowledge and expertise that can only be drawn from experts properly trained to evaluate the increasingly complex nature of the facts put before the Court. … The Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties.’

Thus, legal disputes raising complex technical issues require an application of both the judicial mind, as well as expert opinions. However, the Court must be careful to ensure that the dispute remains, at its core, a legal dispute before a court of law, and hence the judges must remain in control of the proceedings. The purpose of the expert opinion is only to assist the Court in establishing and elucidating the facts to adjudicate upon the issues presented to it. Even when expert advice is sought, it is in principle always the Court that must determine the significance of the factual dimension of a case. Judges thus remain in control of the proceedings as well as the decision-making, carefully considering all evidence presented to the Court, drawing conclusions from it, making


32 Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya) (Judgment) [1985] ICJ Rep 228; see also Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) (Declaration of Judge Yusuf) [2010] ICJ Rep 219.

33 G White, The Use of Experts by International Tribunals (Syracuse University Press 1965) 164.
their own determination of the facts and applying relevant rules of international law to those facts which they have found to exist.\textsuperscript{34} It remains for the Court to discharge exclusively judicial functions, such as interpretation of legal terms, legal categorization of factual issues, and assessment of the burden of proof.\textsuperscript{35} Such recourse to expert assistance, even on issues that are inherently legal, in no way undermines the role of the ICJ as a judicial organ. The Statute of the Court clearly permits it to seek expert opinion at any time.\textsuperscript{36} Further provisions on experts include allowing them to participate in oral hearings\textsuperscript{37} and permitting the questioning of experts following the procedure laid down in the Rules.\textsuperscript{38} The Rules make it evident that parties are permitted to call experts of their own\textsuperscript{39} and that experts may be subject to questioning by parties as well as judges.\textsuperscript{40} The Court may appoint or call for experts of its own accord as well.\textsuperscript{41} Indeed, the Court’s legitimacy is most likely to be enhanced through the taking of independent expert evidence.\textsuperscript{42} As the illustration of the Whaling case demonstrates, even \textit{prima facie} legal questions may require the inferences of scientific experts to render a well-reasoned judgment. Thus it is imperative that international courts (and not only the ICJ) rule on such mixed scientific and legal issues after due consultation with experts.

Simultaneously, the method of appointing experts and the procedure for taking expert evidence during the proceedings are all vital considerations that could strengthen or undermine the ICJ’s role in dispute

\textsuperscript{34} Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 14, 72-73.

\textsuperscript{35} Pulp Mills Joint Dissent (n 31) 113; S Rosenne, ‘Fact-Finding before the International Court of Justice’ in Essays on International Law and Practice (Martinus Nijhoff 2007) 235, 250.

\textsuperscript{36} ICJ Statute (n 9) art 50.

\textsuperscript{37} Ibid art 43.

\textsuperscript{38} Ibid art 51.


\textsuperscript{40} ICJ Rules (n 39) art 65.

\textsuperscript{41} Ibid art 62, 67.

\textsuperscript{42} C Foster, ‘New Clothes for the Emperor? Consultation of Experts by the International Court of Justice’ (2014) 5 J Intl Dispute Settlement 144.
settlement.43 At the first stage, the Court is presented with a choice – of consulting experts that are part of the legal teams of the parties, or of using independent Court appointed experts.

4. Who should appoint experts – the parties or the Court?

In the Whaling case the ICJ solely relied on experts put forth by the parties, as part of their respective legal teams. Whether the Court should rely solely upon evidence presented by the parties in cases involving scientific issues is also an important issue in such litigation. Such a course of action is not new for the ICJ, and caused much concern to several dissenting judges in the Pulp Mills case.44

Though the Statute and Rules of Court envisage the appointment of experts by either the parties or the Court, there are notable differences in the procedure for hearing each category of expert. Experts appointed by parties under Article 43 of the Statute act as counsel before the Court.45 In contrast, experts appointed under Rule 62 can be cross-examined by parties, as well as questioned by the Court.46 These essential procedural safeguards make it preferable for the appearance of experts as witnesses rather than as part of the party’s legal team. The Court is also at liberty to appoint any individual or organisation to prepare an expert report,47 which parties are given the opportunity to comment on.48 Although a better alternative to experts appearing as counsel, this is probably not as useful a procedure as the one laid down in Rule 62, which, in providing for cross-examination, leads to greater

43 F Romanin Jacur, ‘Remarks on the Role of Ex Curia Scientific Experts in International Environmental Disputes’ in N Boschiero, T Scovazzi, C Pitea, C Ragni (eds), International Courts and the Development of International Law (TMC Asser Press 2013) 444; Foster (n 42) 152.
44 Pulp Mills Joint Dissent (n 31) 111: ‘We are not convinced by the claim that, in a case like the present one, scientific expertise can satisfactorily be supplied, and acted upon by the Court, by experts acting as counsel on behalf of the Parties under Article 43 of the Statute.’ See also, Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment of 20 April 2010) (Separate Opinion of Judge Greenwood) [2010] ICJ Rep 221, 231.
45 Pulp Mills Joint Dissent (n 31) 111.
46 ICJ Rules (n 39) art 65.
47 ICJ Statute (n 9) art 50.
48 ICJ Rules (n 39) art 67.
transparency. A greater flexibility available under Article 50, however, is that the Court can call for such a report at any time during the dispute, even when oral proceedings are not on-going.

The ICJ has also taken recourse to ‘invisible’ experts or ‘experts fantûmes’ (ie experts retained by the Court for purely internal consultation) in certain boundary or maritime delimitation cases.\(^{49}\) However, it is not only important that the Court consult experts in deciding complex scientific disputes, it is also important that the parties are given the opportunity to comment on the Court’s choice of expert and the evidence produced by the expert, leading to overall transparency in the proceedings. These concerns are based on the good administration of justice.\(^{50}\)

However, in the Whaling case, the Court may have relied on evidence provided by parties instead of calling for its own experts, because with respect to science, where opinions and discoveries are often overturned by new research and conflicting opinions exist, it would be helpful for the Court to assess evidence put forth by opposing parties and to come to its own conclusions with the assistance of diverse experts. These experts could also be cross-examined in court. This should not necessarily be seen as a ‘cautious’ approach, rather a prudent one, affording the Court with the opportunity to survey a wide array of scientific opinions before deciding on the legal issues.

5. **Conclusion: coherent procedures for experts at the ICJ**

The need for the appointment of experts is an inescapable reality of litigating international disputes involving complex scientific issues. Several disputes where such experts proved indispensable have already been decided by the ICJ. However, these do not demonstrate a pattern with respect to appointment of experts and the procedure followed thereafter.

\(^{49}\) *Pulp Mills* Joint Dissent (n 31) 114.

It is useful to look to the World Trade Organisation (WTO) dispute settlement organs for guidance, since the WTO is one organisation which has developed sophisticated procedures for the appointment of independent experts and the collection and examination of scientific evidence. The WTO Appellate Body (AB) has also addressed the requirements of due process in appointing experts. ICJ judges have also cited the WTO expert consultation process with approval. Most importantly, experts are appointed by a WTO panel in a two-step consultation process, with both written and oral phases. In the latter phase, parties, during a ‘joint meeting’, comment on the expert reports as well as comments of the opposing party. This phase gives the opportunity to the panel and parties to understand the principles underlying the scientific arguments in a given case. However, the WTO AB has not favoured an investigative approach, warning panels against finding in favour of a complainant that has not established a prima facie case.

Some, like Caroline Foster, have favoured the process under Article 50 of the Statute, advocating close interaction between the Court and experts, while ensuring that the Court remains in charge of deciding the case. Another important factor that cannot be stressed enough is ensuring due process and transparency throughout the process, thus permitting cross-examination of experts and comments by parties on reports, if any. Foster also suggests that the Court should take an investigative approach, rather than an adversarial one, since this ‘may better enable the court or tribunal to build up a solid and coherent understanding of the science.’

52 Pulp Mills Joint Dissent (n 31) 115-116.
53 Ibid.
55 Foster (n 42) 152; Romanin Jacur (n 43) 442.
56 Foster (n 15) 101.