

Book Review: Whaling and International Law

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Whaling and International Law by Malgosia Fitzmaurice is a timely, comprehensive and engaging work. Timely because it responds to the recent *Whaling in Antarctica case* before the International Court of Justice (‘ICJ’) on the dispute between Japan and Australia concerning Japan’s scientific whaling,¹ and to the developments that followed this Judgment. Comprehensive because it focuses on important issues concerning whaling placing the International Convention for the Regulation of Whaling (‘ICRW’) in its historical and modern landscape. The book looks at the political and economic background, which led to the conclusion of the 1931 and 1937 Conventions, and contrasts them to the 1946 ICRW that forms the focus of the study. It examines the latter treaty through the lenses of the dispute that was brought before the ICJ, and discusses numerous treaties that apply to whaling and their relationship to the ICRW, namely: the Law of the Sea Convention (‘LOSC’), the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (‘ASCOBANS’), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (‘CITES’), and the Convention on Biological Diversity (‘CBD’). Engaging because it deals in a balanced way with legal questions that touch on science, ethics and politics, and does so in a way that interests both specialists in international environmental law as well as general international lawyers.

The structure of the book is logical and thematic, analysing legal questions surrounding the activity of whaling. It begins by providing the history of whaling (Chapter 2), moves on to the International Convention for the Regulation of Whaling (Chapter 3), and the International Whaling Commission (Chapter 4), touches on the argument that non-indigenous commercial whaling may be part of peoples’ cultural diversity (Chapter 5) as well as animal rights (Chapter 6). It then discusses the interaction of the International Whaling Commission with other organisations and treaties (Chapter 7), and analyses indigenous whaling (Chapter 8) before providing a case study on the protection of the narwhal whale (Chapter 9) and a set of conclusions (Chapter 10). The issues discussed are numerous, but this review will focus on four points, which demonstrate the manner in which the book approaches international law governing whaling, as well as wider questions of general international law.

1. Treaty Bodies, Amendment, and Interpretation

The first point relates to treaties over time, and more particularly their amendment and interpretation in light of the creation of treaty bodies. The ICRW established the International Whaling Commission (‘IWC’), which is essentially a Conference of Parties: it is comprised of delegates of all states parties. The IWC can amend the treaty by taking decisions on the basis of a three-quarter majority, while parties can opt-out from a decision by objecting to it. It can also adopt non-binding recommendations. The book approaches the IWC through the prism of

¹ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, ICJ Reports 2014, p. 226 (‘Whaling in Antarctic case’).

the *Whaling in Antarctica case*. In relation to the amendment procedure, in the *Whaling in Antarctica case* the ICJ considered that the IWC had amended the Schedule many times, and immediately after this observation it suggested that the functions conferred on the IWC have made the ICRW an ‘evolving instrument’.² Fitzmaurice persuasively argues that the opting-out system and the three-quarter majority voting system are not features that necessarily lead to the conclusion that the Convention is a ‘evolving instrument’. Rather, they may suggest that the treaty terms are static for those states that have opted out from the amendments by objecting (p. 91).

In relation to treaty interpretation in the *Whaling in Antarctica case* the Court found that while Article VI of the ICRW states that ‘[t]he Commission may [...] make recommendations [which] are not binding, when [these recommendations] are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention.’³ The Court further explained that IWC resolutions adopted without the support of all States parties to the Convention, and without the concurrence of Japan, cannot be regarded as subsequent agreement, or as subsequent practice within the meaning of Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties (‘VCLT’). This phraseology suggests that recommendations adopted by consensus, as long as they are not objected to by any treaty party, may establish the agreement of the parties concerning the treaty’s interpretation within the meaning of VCLT Article 31(3)(a) and (b). The importance of the Judgment in this respect is also demonstrated by the fact that the International Law Commission (‘ILC’) in its 66th (2014) session, almost a month after the Judgment was issued, considered the Second Report of the Special Rapporteur on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties. The ILC adopted on first reading Draft Conclusion 10 on ‘Decisions adopted within the framework of a Conference of States Parties’, and in this context it considered the ICJ Judgment and followed its approach. Draft Conclusion 10 recognises that decisions of Conferences of Parties may embody a subsequent agreement or give rise to subsequent practice within the meaning of VCLT Article 31(3)(a) and (b) and subsequent practice within the meaning of VCLT Article 32.

2. Standing to Invoke Responsibility for a Breach of Community Interest Obligations

The second point that *Whaling and International Law* allows the reader to reflect on is standing to invoke responsibility for breaches of international obligations that are owed collectively among a group of states transcending their individual interests: obligations *erga omnes partes*. Under the Articles on the Responsibility of States for Internationally Wrongful Acts (‘ASR’),⁴ which reflect the state of customary international law on this point, while *injured states* may claim cessation,

² Ibid, para. 45.

³ Ibid, para. 46.

⁴ Text of the draft articles on the responsibility of states for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, *Yearbook of the International Law Commission*, 2001, Vol. II, pp. 26-30.

assurances and guarantees of non-repetition of the internationally wrongful act, and reparation (ASR Article 42), *states other than an injured state* may claim cessation and assurances of non-repetition of the wrongful act (ASR Article 48).⁵ Fitzmaurice argues that despite some arguments to the contrary (p. 112), obligations under the ICRW are *erga omnes partes*. Any treaty party as a state other than the injured state may invoke responsibility for the breach of these obligations, and the *Whaling in Antarctica case* is a case of such community interest standing, as Australia pleaded before the Court (pp. 109-112).

However, the *Whaling in Antarctica case* raises another point about settling international disputes concerning *erga omnes partes* obligations through international courts and tribunals. While standing is a matter of admissibility separate to the issue of jurisdiction, restrictions on jurisdiction may be a reason for which a claimant may choose to present its standing in a manner that does not prejudice jurisdiction. Australia requested only a declaration that Japan's conduct was in breach of its treaty obligations, and an order requiring the cessation of Japan's internationally wrongful acts.⁶ This may suggest that Australia was bringing a complaint not as an injured state, but as a state other than the injured state. However, the fact that Australia has not claimed reparation does not necessarily mean that it is not entitled to it as an injured state. Rather, Australia's claim could be seen as an instance where a state brought an express claim as a state other than the injured state, because bringing a claim as an injured state might have prejudiced the Court's jurisdiction. In the oral pleadings, Australia's counsel expressly stated that Australia brought the claim *not as an injured state*, but on behalf of a collective interest.⁷ It is possible that Australia in fact was an injured state, because part of Japan's conduct complained of was taking place within a maritime zone over which Australia claimed sovereign rights. But, should Australia have assented that it was specially affected on this particular ground in order to establish standing, it *might* have prejudiced the Court's jurisdiction: Australia's declaration to the Court's compulsory jurisdiction did not apply to 'any dispute [...] arising out of, [...] or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation.'

The Court accepted that the dispute did not fall within the exception of Australia's declaration of acceptance of the Court's compulsory jurisdiction. It found that it had jurisdiction, given that the exception in Australia's declaration to the Court's compulsory jurisdiction had to do with delimitation disputes, while the dispute between the two parties did not involve overlapping claims over maritime zones. In this respect it found it 'significant' that Australia 'did not contend that Japan's conduct is unlawful because the whaling activities take place in the maritime zones over which Australia asserts sovereign rights'.⁸ In any event, Japan

⁵ According to the ASR, as a progressive development, they may also claim reparation in the interest of the injured state or of the beneficiaries of the obligation breached. Text of the draft articles on responsibility of States for internationally wrongful acts with commentaries thereto, Report of the Commission to the General Assembly on the work of its fifty-third session, *Yearbook of the International Law Commission*, 2001, Vol. II, pp. 31-143 at 127, para. 12.

⁶ Memorial of Australia, *Whaling in the Antarctic (Australia v. Japan)*, 9 May 2011, <http://www.icj-cij.org/docket/files/148/17382.pdf>, para. 7.1.

⁷ CR 2013/18, p. 28.

⁸ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, ICJ Reports 2014, p. 226.

did not object to Australia's pleading about its 'community interest' standing, which could be considered as implicit acceptance that Australia had standing as a state other than an injured state. Be that as it may, the Court did not address standing at all; it considered the case admissible, thus implicitly accepting Australia's standing, presumably as a state other than the injured state.

3. Scientific Evidence before International Courts and Tribunals

The third point that *Whaling and International Law* skilfully demonstrates is that the 'role of science in cases concerning environmental matters is as important as that of law' (p. 104). An example of where the book considers this issue is in relation to scientific evidence before the ICJ. The book focuses on the manner in which the ICJ used scientific evidence in the *Whaling in Antarctica case*, and puts the analysis in the context of other relevant ICJ case law. In *Pulp Mills* the parties used experts as counsel, and the Court considered it important to state in the Judgment that it would be more helpful to avoid such practice and rather call experts or witnesses who can thus be submitted to questioning by the other party and by the Court.⁹ In contrast, in the *Whaling in Antarctica case* the ICJ resorted for the first time to scientific evidence provided by experts appointed by the parties according to Article 63 of the Court's Rules. The Court did not appoint experts itself pursuant to Article 50 of the Court's Statute, but relied 'in an exceptionally extensive manner on expert evidence when examining relevant elements of the programme's design and implementation' (p. 104). Although for Fitzmaurice the Court missed a chance to resort to Court appointed experts (p. 103), she is of the view that the *Whaling in Antarctica case* 'will set the standard regarding the use of experts in the adjudication of disputes that turn on scientific facts' (p. 105).

However, a contrast can be drawn with rules on experts of other tribunals some of which would have jurisdiction over disputes that may involve scientific or technical issues. In the *Indus Waters Arbitration (India/Pakistan)*,¹⁰ the Tribunal comprised jurists and an engineer, pursuant to the arbitration clause. This composition may have allowed the Tribunal to deal in depth with the expert evidence submitted by the parties, and may illustrate how the composition of special arbitral tribunals in specialized areas may assist in improving the understanding of the technical aspects of the legal dispute (e.g. specialized arbitral tribunal under Annex VIII of LOSC for disputes concerning fisheries, marine environment and marine scientific research). This option was not available to Australia in relation to Japan's JAPRA II programme: Japan has not made a relevant declaration accepting the jurisdiction of such tribunal pursuant to LOSC Article 287. But, there is some value in contemplating whether and how different the treatment of scientific evidence would be, if such a dispute found its way to such a specialised tribunal under LOSC.

⁹ *Case concerning Pulp Mills on the river Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, p. 14 at 72, para. 167.

¹⁰ *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award, 18 February 2013: <https://pcacases.com/web/sendAttach/1681>; *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Final Award, 20 December 2013: <https://pcacases.com/web/sendAttach/48>.

4. Indigenous Whaling and Cultural Diversity in relation to Non-Indigenous Whaling

Finally, an important aspect of the book is the discussion of indigenous whaling (Chapter 7) as well as cultural diversity and non-indigenous non-scientific whaling (Chapter 4). In relation to both issues the book analyses the human rights angle of these topics, as well as the manner in which they have arisen and have been addressed within and outside the framework of the IWC. While the ICRW does not include any provision concerning aboriginal whaling ('meat and products of grey or right whales that are to be used exclusively for the local consumption by the aborigines'), the Schedule to the ICRW excludes it from the definition and provisions governing commercial whaling. The IWC has endeavoured to define aboriginal whaling over the years, but its definition and distinction from commercial whaling has not been sufficiently clear. This lack of clarity may have important side-effects: either the manner in which cultural diversity is dealt with by the IWC departs from the interpretation of Article 27 of the International Covenant on Civil and Political Rights ('ICCPR') by the Human Rights Committee (p. 251), or may allow for any aboriginal (and not only subsistence related) whaling (p. 260).

In contrast, the cultural diversity argument about whaling focuses on non-indigenous commercial whaling. Chapter 5 connects the human rights developments and the UNESCO instruments concerning cultural identity with the activity of whaling. It discusses in detail the arguments made (by Japan, Iceland, Norway and the Faroe Islands) and identifies the differences in the articulation of these arguments: for instance, while in Japan there is a spiritual and religious component in the cultural diversity argument (pp. 130-137), the same is not the case of Iceland, Norway and the Faroe Islands (pp. 138-147), whose arguments seem to involve a sense of 'duty' to 'engage in whaling as a means of resisting the dominant Western/continental cultural trends [...]' (p. 148). The analysis concludes that the 'survival of species *should* trump cultural considerations'¹¹ by positing that to kill off a species in order to fulfil cultural identity would be detrimental to the culture itself: the culture in question will become extinct as soon as the species is extinct (p. 151).

The exposition of the dilemma in Chapter 4 provides fertile ground for a more systemic debate about the relationship between 'community values' that are protected by or reflected in international law, especially in the form of community interest obligations: how does international law deal with conflicts of obligations that are of 'community interest' nature: e.g. indigenous peoples' rights and cultural identity rights v. conservation of species?

Whaling and International Law is a thought-provoking and thoroughly researched work. It raises and addresses questions from the point of view of the rules that deal with whaling, but also from the point of view of general

¹¹ Emphasis added.

international law: the law of treaties, the law on state responsibility, science and the law, as well as conflicts of 'community values' that may also give rise to conflicts of norms (e.g. indigenous peoples' rights v. conservation of species). For these reasons, this book is a very useful work not only for the specialist in the international law of fisheries, wildlife or whaling, but also for the general international lawyer.