

ZOOM IN

The Question:

The role of experts before the International Court of Justice: The *Whaling in the Antarctic* case

Introduced by Chiara Ragni

On 31 March 2014 the International Court of Justice (ICJ) issued its judgment relating to *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, in which it held that Japan's Japanese Whale Research Programme under Special Permit in the Antarctic (JARPA II) contravenes the 1946 International Convention for the Regulation of Whaling and must therefore be ceased.

Key to the dispute was whether Japan's use of lethal means in its whaling programme could be justified under Article VIII(1) of the Convention, which provides any Contracting Governments with the possibility to 'grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research...'. The ICJ addressed, first, the question of how to interpret the term 'scientific research', which is not defined by the Convention and, second, whether the programme's design and implementation were reasonable in relation to its stated objectives. While it found that JARPA II could be characterized as scientific research based on its objectives (which are within the scope of the Scientific Committee's research categories), in order to pronounce on the latter question the ICJ made first-time recourse to scientific evidence provided for by experts appointed by the parties according to Article 63 of its Rules. It is worth noting in this regard that the ICJ has so far been reluctant to use external resources in order to address issues raising scientific problems. The Court's approach in this respect was strongly criticized several years before. In the Joint Dissenting Opinion attached to the *Pulp Mills* Judgment, Judges Al-Khasawneh and Simma observed: 'The adjudication of disputes in which the assessment of scientific questions by experts is indispensable (...) requires an inter-



weaving 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.’ ([2010] ICJ Rep110, para 3).

In principle, the task of experts is to elucidate the facts, and that of the Court is to assess them according to the law, but what about cases, such as the one at issue, where the distinction between scientific and legal problems is not so clear-cut? Is the definition of ‘scientific research’ a problem of treaty interpretation or a question that needs scientific knowledge in order to be addressed? Does the issue of whether lethal methods are necessary or reasonable with respect to stated scientific objectives raise only technical or scientific matters of fact? Should it be treated as a legal issue or as a mixed question of fact and of law? And in the latter case, what is respectively the role of the ICJ and of the experts? As regards the role of experts in clarifying legal or mixed questions, Judges Al-Khasawneh and Simma considered that they ‘will be drawn into questions of legal interpretation through their involvement in the application of legal terms. The conclusions of scientific experts might be indispensable in distilling the essence of what legal concepts (...) come to mean in a given case.’ ([2010] ICJ Rep 116, para 17). However, with regard to this last point it could be questioned whether resorting to an expert opinion concerning questions also involving legal issues would undermine the role of the ICJ and what guarantees could be adopted in order to avoid this risk.

Even once it is established that, as the ICJ in the *Whaling* case clearly suggested, the question whether the scientific programme authorized by Japan complies with Article VIII is an objective one and that it is therefore primarily for the judges to pronounce thereon, one still might wonder why the Court decided to rely on the evidence provided by the parties instead of appointing its own experts. What are the reasons – if any – for this cautious approach?

QIL asked Makane Moïse Mbengue (University of Geneva) and Tullio Scovazzi (University of Milan-Bicocca) to address these questions. By examining different aspects of the ICJ’s practice concerning the use of experts, the two authors offer a comprehensive overview of the problems encountered by the World Court when it is called upon to address legal disputes involving complex scientific questions.

