The ICJ *Whaling Case*: Missed Opportunity to Advance the Rule of Law in Resolving Science-Related Disputes in Global Commons?

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Abstract

A number of treaties relating to the global commons include provisions which rely on science, or scientific research, without defining these terms (e.g. climate change, Antarctica). Disputes relating to what counts as genuine science and/or the appropriate responses to science are a feature of these regimes. Against this context, the *Whaling Case* before the International Court of Justice (ICJ) created hopes that the court would advance the rule of law by interpreting the concept of "scientific research" under the Whaling Convention. We argue that the court missed an opportunity by adopting a narrow approach which involved assessing the Japanese whaling programme in terms of its own objectives, by use of a standard of review test extracted from World Trade Organization (WTO) jurisprudence. On close inspection the ICJ implicitly adopted a definition of science while maintaining that it was doing no such thing. We argue that the Court should have proceeded to interpret scientific research under Art. VIII of the Whaling Convention applying the international law rules on treaty interpretation and informed by direct evidence from scientific experts which it is entitled to call on under its Statute. The *Whaling Case* thus represented a missed opportunity.

I. Introduction

In a 2013 lecture, Judge *Peter Tomka*, President of the International Court of Justice stated:

> "[T]he 'rule of law' is not just some fashionable buzzword that has seeped its way into the vernacular of international lawyers. Quite to the contrary, it epitomizes all that is noble about the mission statement of international law, and encapsulates that discipline's profound commitment to core values that are often mirrored in domestic conceptions of the rule of law."[1]

Judge *Tomka* cited the (then *sub judice*) dispute over Japanese whaling in the Southern Ocean as being one of several important cases with "significant repercussions on the environment" through which the Court would undertake its commitment to the "promotion of the international rule of

[1] *P. Tomka*, The Rule of Law and the Role of the International Court of Justice in World Affairs, Inaugural Hilding Eek Memorial lecture by H.E. Judge *Peter Tomka*, President of the International Court of Justice, at the Stockholm Centre for International Law and Justice, 2.12.2013. ICJ website: <www.icj-cij.org> (accessed 4.5.2016).

law and peaceful inter-State relations" by "clarifying points of international law".[2] On 31.3.2014 – less than six months after Judge *Tomka*'s speech, the Court delivered its judgment in the *Whaling Case*.[3] In this article we examine whether the ICJ in this decision met the expectations of its President.

The *Whaling Case* is an example of a science-related dispute in relation to a so-called "global commons"[4] treaty regime which deal with resources or elements of the global ecological system outside of national jurisdiction, such as the climate, the high seas, Antarctica and Outer Space.[5] Resolving disputes arising in relation to such regimes consistent with the international rule of law is an imperative of growing importance and the *Whaling Case* offered great promise in terms of creating a valuable precedent in this respect.

The *Whaling Case* arose from the long-standing and continuing dispute about whether Japan's legal whaling programme is legitimately "for the purposes of scientific research". Two trenchantly anti-whaling states, Australia and New Zealand, claimed Japan was not undertaking scientific research, but rather was undertaking commercial harvesting, contrary to a current moratorium under the 1946 International Convention on the Regulation of Whaling (ICRW).[6] All three states are parties to that Convention. The majority of the ICJ declared that Japan's JAPRA II whaling programme was not for the purposes of scientific research.

The victory of Australia and New Zealand in this case was initially greeted by the environmental movement as a "win for science". Many scientists, who had been frustrated by the deadlocks within the ICRW regime, were similarly buoyed by the decision. For instance, *de le Mare et al* reported in the journal *Science*, that the "ICJ's approach represents a model for separating scientific matters and the nonscientific agenda in other complicated dis-

[2] *P. Tomka* (note 1), 12.

[3] *Case concerning Whaling in the Antarctic* (*Australia v. Japan: New Zealand Intervening*), (herein the "*Whaling Case*") Judgment, ICJ Reports 2014, 226 – in the following abbreviated as "judgment" and either "merits" for primary judgment, or by dissenting or separate judge if name of judge included.

[4] *J. Brunnée*, Common Areas, Common Heritage and Common Concern, in: D. Bodansky/J. Brunnee/E. Hey (eds.), The Oxford Handbook of International Environmental Law, 2007, 550, 557.

[5] *J. Brunnée* (note 4), 558 et seq. Treaties with science related provisions include: Art. 7 Protocol on Environmental Protection to the Antarctic Treaty, ILM 30 (1991), 1455. Art. 143 United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3; Art. I, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 UNTS 205; Arts. 3 & 4, United Nations Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107.

[6] International Convention for the Regulation of Whaling, 2124 UNTS 1.

putes involving science, society, and law".[7] For its part, Japan expressed "deep disappointment" in the decision but indicated that as "a state that respects the rule of law ... Japan will abide by the decision of the court".[8] However, others – notably legal scholars – have been more circumspect in their appraisal of the case and whether it solved the actual problem taken to the Court.[9]

Much of the concern amongst legal scholars has been that the ICJ only resolved the dispute in very narrow terms, while avoiding deeper questions of what constitutes legitimate science either under the ICRW or more generally. That concern was borne out with the subsequent actions of Japan, which continued hunting whales under a separate programme in the North Pacific Ocean in 2014.[10] In 2015 Japan withdrew its consent to compulsory ICJ jurisdiction over any further disputes about whaling and established a new "scientific" whaling programme NEWREP-A.[11] It will do this by setting a quota for the lethal harvesting of approximately 4,000 whales in the southern ocean over 12 years. In 2016, 333 whales are to be killed, which so far has included almost 200 pregnant females.[12]

Minke whales are not endangered – although true assessment of stock numbers is nearly impossible – but are classified as "near threatened"; evidence suggests that they have been in decline since circumpolar surveys into

[7] *W. de la Mare/N. Gales/M. Mangel*, Applying Scientific Principles in International Law on Whaling, Science 345 (2014), 1125 et seq. See *P. J. Clapham*, Japan's Whaling Following the International Court of Justice Ruling: Brave New World – Or Business as Usual?, Mar. Pol'y 51 (2015), 238 et seq.

[8] Japan Times, Japan's Antarctic Whale Hunts Not Scientific, ICJ START Deck, U.N. sides with Australia, orders Japan to halt annual catches, AFP-JIJI, AP, KYODO, <http://www.japantimes.co.jp>.

[9] See e.g. *M. Mbengue/R. Das*, The ICJ's Engagement with Science: To Interpret or Not to Interpret?, Journal of International Dispute Settlement 6 (2015), 568 et seq. *R. Moncel*, Dangerous Experiments: Scientific Integrity in International Environmental Adjudications after the ICJ's Decision in Whaling in the Antarctic, Ecology Law Quarterly 42 (2015), 305, 307. *B. Gogarty/P. Lawrence*, The ICJ Whaling Case: Science, Transparency and the Rule of Law, Journal of Law, Information and Science 23 (2014/2015), 134 et seq.

[10] After announcing that it would comply with the decision, Japan launched a whaling expedition in the North Pacific Ocean and is reportedly preparing an amended scientific programme for the Antarctic. *Y. Wakatsuki/S. Brown*, Japanese Whaling Fleet Set to Sail Despite Recent Ruling, CNNWIRE, 25.4.2014, available in LEXIS, News & Business Library, Wire Services Stories File.

[11] Government of Japan, Research Plan for New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A), International Convention on The Regulation of Whaling, 2016, 11, <http://www.icrwhale.org>.

[12] <http://news.nationalgeographic.com>.

their numbers began in the 1980s.[13] As of yet the reason for that decline has not been identified. Regardless, their overexploitation and subsequent decline led to limits as earlier as the 1970s and total protection under the 1982 moratorium on commercial whaling pursuant to Art. 5 of the International Convention on ICRW [see Part III below].

Western media, science and international relations commentators generally decried Japan's actions as constituting either a direct breach of the ICJ decision or at least being an intentional circumvention of it. Hence, the *National Geographic* argued that Japan's hunt "was in blatant disregard of the International Court of Justice's 2014 ruling".[14] Even editorials in the *Japan Times* warned that "the decision to resume whaling in the Southern Ocean is a major blunder on Japan's part because it undermines its rule-of-law diplomacy".[15] Writing in the journal *Nature*, members of the International Whaling Commission (IWC) Science Committee claimed that the "ostensible" programme was "unscientific" because Japan had "failed to alter its plans in any meaningful way" following the ICJ decision.[16] They further implied that Japan was exploiting the intractable and politicized ICRW process making any review with that body "useless".

Reactions to the decision have tended to ignore consideration of whether the ICJ's decision contributed, or even undermined, the rule of law. This article will analyze the *Whaling Case* from a rule of law perspective. In the first part we will discuss what is meant by the rule of international law and what the Court's role is in maintaining it. While we recognize that there are differences of opinion about these questions, we accept the propositions about the basic universal criteria underlying the concept put by President *Tomka* in his 2013 address on the rule of law. In the second part of the paper we will use these criteria to critically analyze the decision of the majority in the *Whaling Case*. In the final part of the article we sketch elements of how the Court should have approached the case, highlighting the treaty interpretation issue relating to valid science, and how the Court could have

[13] See IWC Whale Population Estimates maintained, at <https://iwc.int>; see also *R. Williams/N. Kelly/O. Boebel/A. S. Friedlaender/H. Herr/K.-H. Kock/L. S. Lehnert/T. Maksym/J. Roberts/M. Scheidat/U. Siebert/A. S. Brierley*, Counting Whales In a Challenging, Changing Environment, Scientific Reports 4 (2014), 4170; *D. G. Ainley/D. Jongsomjit/G. Ballard/D. Thiele/W. R. Fraser/C. T. Tynan*, Modeling the Relationship of Antarctic Minke Whales to Major Ocean Boundaries, Polar Biology 35 (2012), 281 et seq.

[14] *R. Bale*, Japan Kills 200 Pregnant Minke Whales, National Geographic (Online) <http://news.nationalgeographic.com>.

[15] *J. Kingston*, Resumption of Antarctic Whaling Flouts Rule of Law, The Japan Times, 21.11.2015, <http://www.japantimes.co.jp>.

[16] *A. S. Brierley/P. J. Clapham*, Whaling Permits: Japan's Whaling Is Unscientific, Nature 529 (2016), 283.

better performed its interpretive task, including by itself calling scientific experts. The purpose here is to demonstrate – with an eye to future disputes – that it is feasible for the Court to meet both the requirements of resolving the dispute before it and also the requirements of the rule of law.

II. The Rule of Law as a Critical Lens

> "[T]he 'rule of law' should have the same characteristics at both [domestic and international] levels: that there is an independent and impartial judiciary, that laws are adequately made known, clear and accessible, and are applied equally to all." [H.E *Tomka* J, 2013, President of the ICJ, 2013].

1. Caveats

At the outset we acknowledge that there is a lively debate as to the extent to which the rule of law exists at the international level. Much of this debate arises from the implementation gap between the promise of rule of law and realities of state practice.[17] In assessing whether the ICJ in the *Whaling Case* met the expectations articulated by its President *Peter Tomka*, we do not engage in the broader debate about the rule of law at the international level. Rather, we take as our starting point general characteristics of the rule of law articulated by *Peter Tomka* in his speech and as confirmed and elaborated in various international instruments. We share *Tomka*'s notion that the rule of law is an important aspirational goal, accepted by the international community.[18] This means that we will take certain representations by the United Nations (UN) and its key representatives as to the commitment and content of the rule of law at face value. Identifying a number of key principles of the international rule of law allows us to structure our analysis as to whether the ICJ in the *Whaling Case* lived up to its promise.

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[17] *R. Higgins*, The Rule of Law: Some Sceptical Thoughts, in: R. Higgins (ed.), Themes and Theories, 2009, 1330. The realist perspective is reflected in *E. A. Posner*, Do States Have a Moral Obligation to Obey International Law?, Stanford L. Rev. 55 (2003), 1919 and *J. L. Goldsmith/E. A. Posner*, The Limits of International Law, 2005. See *A. van Aaken*, To Do Away with International Law? Some Limits to "The Limits of International Law", EJIL 17 (2006), 289 et seq.

[18] See *S. Chestermann*, Rule of Law, MPEPIL, July 2007, para. 40. See also *S. Chestermann*, An International Rule of Law, Am. J. Comp. L. 56 (2008), 331 and Sir *A. Watts*, The International Rule of Law, GYIL 36 (1993), 15.

We accept and examine the proposition stated by President *Tomka* that given "the ICJ's principal role within the United Nations framework" it is an "important agent for strengthening and upholding the rule of law on the international plane", through, *inter alia,* "pronouncements [which] have … helped clarify the content and scope of customary norms" and "interpretation of a particular international convention".[19] As addressed below, this creates an expectation that, for the Court to properly fulfil this role, it will not only resolve the particular dispute before it but also exercise an equally important duty to do so in a manner which furthers the rule of law. But this assumes that the rule of law has some meaningful content, and to this we now turn.

2. What Is the Rule of Law?

Before considering what the rule of law is within the United Nations framework it is worth noting that there is a lack of consistency in terms of this concept with some, reference being made to the "rule of law at international law", the "rule of international law", the "international rule of law" and so on. While generally it seems that these terms are used interchangeably, for clarity we will use the term "rule of law" as a shorthand to refer to the rule of international law throughout this article except where quoting from others.

To our knowledge neither the ICJ, nor its predecessor, the Permanent Court of International Justice (PCIJ) has ever articulated what the rule of law means either generally or within the context of international law specifically. This may be due to the fact that the concept is understood to form, as Judge *Tomka*, states, an "undeniable component of the UN landscape and architecture"[20] in which case no parties have ever challenged its relevance or called upon the Court to resolve a dispute about its meaning or content. Nevertheless, we can, as outlined below, identify some common principles which have been universally endorsed at the international level.

There is a tendency to talk of the rule of law in general terms that reflect indicia common to all national legal system. One frequently cited such definition is the 2004 of the (then) UN Secretary General, *Kofi Annan*, who described the rule of law within the international legal order as being:

[19] *P. Tomka* (note 1), 6.
[20] *P. Tomka* (note 1), 11.

> "a principle of governance in which all … entities … including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated … *adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law … legal certainty, avoidance of arbitrariness and procedural and legal transparency*".[21](italics added)

Subsequent declarations of the UN have adopted similar language. For instance the UN General Assembly *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (the "Rule of Law Declaration") includes a commitment to "international law and justice, and to an international order based on the rule of law" and a recognition of "the importance of fair, stable and predictable legal frameworks"[22].

Justice *Tomka*, in recognizing the contested nature of some of these criteria, summarizes the concept as follows "the rule of law at the international level promotes *predictability and equality* in the relations between states and other subjects of international law and *restricts the use of arbitrary power*"[23]. He echoes the requirement that the rule of law requires a fair, stable and predictable framework and adds that such a framework should ensure that "laws are adequately made known, clear and accessible, and are applied equally to all"[24].

3. Criteria for the Rule of International Law

Our rule of law analysis rests on the following normative criteria which are found in Justice *Tomka's* speech and in addition are reflected in the UN instruments referred to above.

Clarity. Relatedly, the law must be prospectively written, accessible and most importantly those bound by it must be able to understand it. That is it must be clear and not obscure or uncertain.

Predictability. Subjects of the law must know what their rights and duties are in advance and be able to predict what sort of behavior is within the law and

[21] Report of the UN Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (23.08.2004).

[22] UN General Assembly Res. 67/1. Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (30.11.2012), UN doc. A/67/L.1.

[23] *P. Tomka* (note 1), 12.

[24] *P. Tomka* (note 1), 2.

which is not. By implication laws should not be retrospective or sanction past conduct when subjects could not have been aware of the legality or illegality of their actions.

Consistency. That the law will be consistently applied and not arbitrary in application to some subjects and not others depending on their relationship (or lack thereof) with the law maker or enforcer. That is, everyone is subject to the law.

Equality. Relatedly, when the law is actually applied to two subjects engaged in equivalent conduct, that the legal consequences will be equivalent. That is, everyone is equal before the law.

Supremacy. The law must bind its subjects not the other way around. That means that the scope of legal obligations should not be left to subjects to decide; otherwise they will adopt interpretations which are self-interested or avoid liability.[25] Instead the terms of any obligation must be capable of and subject to independent ascertainment by an independent and impartial court or tribunal not the parties to the agreement individually. In conventional jurisprudence this might be referred to as "objective", rather than "subjective" determination of obligations.

4. The Fundamental Nature of the Rule of Law Within the International Legal Order

The Preamble of the UN Charter does not specifically mention the rule of law, but does declare the determination of the peoples of the United Nations to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". Chapter 1 of the Charter states that UN members and organizations are committed to:

> "maintain international peace and security, and to that end … to bring about by peaceful means, and in conformity with the principles of justice and international law, settlement of international disputes …"

Read together these, along with the various commitments made to the establishment and maintenance of the UN system can be seen as the basis for the rule of international law. So much is reaffirmed by UN Declarations specifically reaffirming the commitment of states to the rule of law, invoking the Charter as the source of the principle. Hence, in the *United Nations Millennium Declaration* the General Assembly resolved to:

[25] In this respect President *Tomka* cites Art. 14 of the 1949 International Law Commission *Declaration on Rights and Duties of States*: "[e]very State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law."

> "strengthen respect for the rule of law in international as in national affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, *in compliance with the Charter of the United Nations,* in cases to which they are parties.[26] (emphasis added)

States' commitment to the rule of law can therefore be said to derive from: their ratification of the Charter of the United Nations; subsequent participation in the United Nations General Assembly; entry into treaty relations; and their submission to the jurisdiction of the ICJ and United Nations Security Council.[27] It has also been consistently and repeatedly reaffirmed through resolutions adopted by the UN General Assembly, including consecutive Declarations on the Rule of Law at the National and International Level.[28]

In *toto* these various documents and declarations evidence a commitment to the rule of law and an understanding that it is both essential to and a contingent part of the UN system. This includes a commitment to the rule of law with respect to treaties entered into under the mantle of the UN System.

5. The Role and Duty of the ICJ to the Rule of Law

Nothing in the ICJ's statute *expressly* requires it to adhere to or uphold the rule of law. However, as President *Tomka* observes, the goal of peaceful settlement of international disputes articulated in Art. 1 of the UN Charter is "intimately tied to the Court's function".[29] This notion of the ICJ as the principal organ of the UN system within a rule of law framework is enshrined in more recent declarations specific to the rule of law. For instance, the Rule of Law Declaration:

> "recognize[s] the positive contribution of the International Court of Justice, the principal judicial organ of the United Nations, including in adjudicating dis-

[26] UN General Assembly Res. A/55, UN Doc. A/55/L.2 (18.9.2000), Art. 9.

[27] Art. 2 Declaration on the Rule of Law at the National and International Levels, GA Res. 67/1, UN Doc. A/RES/67/1 (30.11.12), See also Resolutions adopted by the General Assembly on The Rule of Law at the National and International Levels, GA Res. 64/116, UN Doc. A/RES/64/116 (15.1.2010) and GA Res. 66/102, UN Doc. A/RES/66/102 (13.1.2012).

[28] E.g.. UN GA Res. 68/116 of 16.12.2013, UN doc. A/RES/68/116 (18.12.2013). See also 2005 World Summit Outcome, GA Res. 60/1, UN Doc. A/RES/60/1 (16.9.2005), para. 134(a).

[29] *P. Tomka* (note 1), 5.

putes among States, and the value of its work for the promotion of the rule of law".[30]

Clarification of treaty obligations through treaty interpretation is a crucial function of the ICJ linked to its upholding of the rule of law. As President *Tomka* notes, the ICJ is "turned to by States as an efficient institution geared towards the pacific settlement of disputes and the promotion of the rule of law". He argues that the "Court's rich jurisprudence … has contributed greatly to ensuring predictability, fairness and stability in inter-State relations".[31] Such a position is certainly supported by scholarly writing.[32] For instance, *von Bogdandy* and *Venzke* point out a number of important functions that international adjudication performs beyond the resolution of disputes.[33] These functions include the stabilization and development of "normative expectations" by clarifying and further developing international legal rules.[34] This role is strongly linked to rule of international law, given that one of its key dimensions is clarification of and maintenance of normative expectations essential for the stability and predictability of international rules.

6. The Rule of Law and Treaty Interpretation

The rules for interpreting treaties such as the Whaling Convention are primarily found within the Vienna Convention on the Law of Treaties (VCLT).[35] Importantly, however, while the VCLT sets out a limited number of express rules, these are framed within the *rule of law* in the particular context of international law. Indeed, Art. 2 of the VCLT specifies that, by

[30] Declaration on the Rule of Law at the National and International Levels, GA Res. 67/1, UN Doc. A/RES/67/1 (30.11.2012).

[31] *P. Tomka* (note 1), 5.

[32] *C. Tams/A. Tzanakopoulos*, Barcelona Traction at 40: The ICJ as an Agent of Legal Development, LJIL 23 (2010), 781.

[33] *A. von Bogdandy/I. Venzke*, On the Functions of International Courts, An Appraisal in Light of Their Burgeoning Public Authority, LJIL 26 (2013), 49 et seq.

[34] As an example *A. von Bogdandy/I. Venzke* point to the *Nicaragua* Case which had limited role in resolving the particular dispute, but stabilized "normative expectations" by reasserting the validity of international law and the international law prohibition on the use of force. *A. von Bogdandy/I. Venzke* (note 34), 50.

[35] The Vienna Convention on the Law of Treaties, 1155 UNTS 331 rules on treaty interpretation are accepted as a codification of customary international law; *Case concerning the Territorial Dispute* (*Libyan Arab Jamahiriya v. Chad*), Judgment, ICJ Reports 1994, 6, para. 41; *Case Concerning Oil Platforms* (*Islamic Republic of Iran v. United States of America*), Preliminary Objection, ICJ Reports 1996, 803, para. 23.

entering into treaty relations, states commit to being bound by their terms as legal instruments, "governed by international law". That is, treaty terms must be capable of binding states *as law* within the rule of law framework that states commit to as part of the international legal order.[36] To achieve such principles, states agree to a set of ground-rules for treaty interpretation, designed to ensure that terms are universally and consistently applied by the parties. Central to these interpretative rules is Art. 31 of the VCLT, which requires that terms are given their "ordinary meaning" in the context of the "object and purposes" of the treaty.[37]

Beyond this, however, the ICJ should adopt an interpretative approach consistent with its promise, duty and obligation to the rule of law. This means, exercising its interpretative role within the context of its overall obligation to promote "respect for the obligations arising from treaties" and to bring about "conformity with the principles of justice and international law" as required by the UN Charter. It also means that the exercise of that function has the ultimate aim of strengthening the rule of law. In particular, the ICJ must use its interpretative function to find a meaning which results in predictability, clarity, equality and supremacy of the law within the context of the overall treaty and indeed overall corpus of international law.

In summary then, we have seen that the rule of law has been declared to be fundamental to the international legal order and UN framework of which treaties form a part. The ICJ as the principle judicial organ of the UN has a particular responsibility for the interpretation of treaties. More specifically, the ICJ is under a duty to apply treaty law in a way which is consistent with the rule of international law.

III. The *Whaling Case*, a Test-Case for the Rule of Law

Having examined the concept of the rule of international law, we return to the *Whaling Case*. As noted, the Case was highlighted by President *Tomka* as an example of how the court could strengthen "international rule of law and peaceful inter-State relations" by "clarifying points of international law" in an important area of environmental governance. As will be

[36] The International Law Commission similarly, and aptly, encapsulated this commitment to the international rule of law: "[e]very State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law", 1949 Draft Declaration on Rights and Duties of States, Annex to GA Res. 375 (IV), UN Doc. A/RES/375 (6.10.1949), Art. 14.

[37] These rules are accepted as forming part of customary international law and thus binding on all states (note 36).

discussed, that is in very large part because the dispute essentially arises from competing interpretations of the meaning, scope and application of science under the ICRW. This has implications beyond whaling, to the rule of international law over the global commons more generally.

The root of the *Whaling Case* dispute lies in the 1982 decision of the parties to the ICRW to establish a general moratorium on commercial whaling subsequent to Art. 5 of the treaty.[38] That Article permits the IWC, as the governing body of the ICRW, to adopt "regulations with respect to the conservation and utilization of whale resources" based, *inter alia*, on "*scientific* findings" (emphasis added). At the 1982 meeting of the IWC Art. 5 was invoked to amend the Schedule to the Whaling Convention and the catch limits for all whales to zero, effectively prohibiting commercial whaling within the regime.[39]

Japan initially protested against the 1982 commercial whaling moratorium, arguing that it had "no basis in science", but was rather driven by domestic socio-political concerns about whaling.[40] However, it eventually withdrew its objection and instead indicated that it would undertake a "scientific whaling program", involving lethal sampling of whales, to prove the moratorium was not based on "sound science".[41] This programme was ostensibly undertaken in pursuance of Art. VIII of the ICRW, which reads as follows:

> "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. …

38 *Whaling Case* judgement (note 3), 35.

39 This was achieved by inserting para. 10(e) of the Schedule to the International Convention for the Regulation of Whaling; see International Whaling Commission, Annual Report of the International Whaling Commission 2012, 72 et seq.

40 Government of Japan, National Diet Debates, House of Representatives, Agriculture, Forestry and Fisheries Committee, 11.10.1983, in: *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Pleadings, Memorial of Australia, Annex 9, 117, available at <http://www.icj-cij.org>, herein "Australian Memorial" or "pleading party" and "pleading type" if other pleadings.

41 *Whaling Case* (note 3), Counter-Memorial of Japan, 13 et seq.

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."

Japan ran two back-to-back programs pursuant to Art. VIII – Japanese Whale Research Programme under Special Permit in the Antarctic" (JARPA) from 1987 to 2005 and subsequently (and immediately following JARPA) JARPA II from 2006 to 2014.[42] These programs had had functionally similar objectives but varied in their lethal take of different whale species. In both programs whale carcasses were sold for consumption as permitted by Art. VIII.

Despite Japan's recourse to Art. VIII and its claim to be harvesting whales to better inform the commercial moratorium, the majority of states in the IWC criticized the use of lethal sampling pursuant to JARPA/JARPA II.[43] The killing of whales, in any form, is a source of significant international controversy. So much so that only a very few nations still authorize the practice. Most do so for cultural, historical reasons – allowing aboriginal peoples to hunt whales in a manner consistent with their indigenous traditions. Two countries, Norway and Iceland, permit commercial whaling within their exclusive economic zones (EEZs) under objection to a moratorium established under the ICRW. However, it is Japan, a non-objecting member state of the ICRW, who has arguably been the subject of most international criticism.

Given the controversy, the IWC empaneled 14 scientists to review and report on JARPA II. In 2009 that Panel reported "an enormous amount of scientific work had been undertaken during the first six years of the programme" but that it had "difficulty … in assessing this initial progress against the programme's expressed, broad long-term objectives".[44] Subsequently it reported that it could not complete a meaningful review until Japan clarified the scientific basis for the sample size and design of the programme effects of catches on stocks had been addressed.[45] Australia argued that the inability of the Scientific Panel to report on JARPA II left the most important questions of the review unanswered: namely, the necessity, scien-

[42] *Whaling Case* (note 3), 36.

[43] *R. Ackerman*, Japanese Whaling in the Pacific Ocean: Defiance of International Whaling Norms in the Name of "Scientific Research", Culture and Tradition, B. C. Int' l & Comp. L. Rev. 25 (2002), 323. In the IWC see: *International Whaling Commission,* Annual Reports, 2009, 23; 2010, 23; 2012, 41 et seq. IWC Resolutions and reports, available at <https://archive.iwc.int>.

[44] International Whaling Commission, Annual Report of the International Whaling Commission 2009, 26.

[45] International Whaling Commission (note 44), 27.

tific justification and effect of JARPA II.[46] New Zealand argued that it was "clear" from the review that JARPA II had "a number of problems". These positions were echoed by a range of other state parties.[47]

Indeed, despite the Scientific Panel noting the "scientific work" undertaken as part of the Japanese programmes, only a limited number of countries (Norway, Grenada, Iceland) declared that the Japanese programmes "had given and continued to give valuable information on a number of scientific questions".[48] Other countries were much more circumspect, or openly dismissive of the scientific basis of JARPA/JARPA II. Australia and New Zealand argued that such programmes had produced "no agreed or substantiated outcomes" or meaningful contribution to the "species management of whales".[49] Other countries echoed these criticisms.[50]

In 2010, a year after the non-conclusive scientific review, Australia declared that "Japan's so called 'scientific' whaling is contrary to [Japans] international obligations and should stop".[51] Noting the impasse within the IWC and inability of the state parties to the Whaling Convention to resolve the dispute, Australia declared its intention to elevate the dispute to the ICJ.

1. Arguments

At the core of the Whaling Dispute revolved around the definition of scientific research, and as a subset of that, the scope of activities it covered, and the mechanism by which to demarcate non-scientific activities. In particular Australia and Japan each claimed the other party was misappropriating an agreed treaty term – "scientific research" – to mask activities that were not permitted by the treaty. Japan claimed that the moratorium on commercial whaling was not about science, but public policy and opinion. Australia argued that the resultant programme Japan called scientific research, was not

46 International Whaling Commission (note 44), 27 et seq.
47 IWC/64/OS, <https://archive.iwc.int>.
48 International Whaling Commission (note 39).
49 International Whaling Commission (note 39).
50 Mexico, for instance, argued that the Japanese programs, "contributed little to science and have done very little to improve the stocks of whales".
51 International Whaling Commission, Opening Statement by Australia, IWC/64/OS Australia, 2.6.2012, available at <https://archive.iwc.int>; Australian Federal Environment Minister, *Hon Tony Burke*, Press Statement, in: Minister for Australian Antarctic Division, Australia Continues Push for Reform at International Whaling Commission, 2.7.2012, available at <http://www.antarctica.gov.au>.

scientific at all, or at least that it was more commercial than it was scientific (this was a view echoed by New Zealand).

Hence, in Australia's memorial it argued that:

> "[Japan's] obligation not to kill whales for commercial purposes and its obligation not to conduct commercial whaling … [because] the *true purpose* of JARPA II is continued whaling pure and simple … the issue of special permits by Japan allegedly under Article VIII … purportedly authorising whaling 'for purposes of scientific research' is not consistent with the Convention." (emphasis added)

In Japan's counter-memorial, it argued that JAPRA II was:

> "A legitimate scientific programme, permitted under Article VIII of the ICRW. JARPA II's objectives and methods, together with its valuable scientific outputs … are fully consistent with the text as well as with the object and purpose of the ICRW … It is obvious that Australia is opposed to any form of whaling … *regardless of science or law* … Japan [has] the earnest hope [for] … rational discussion, putting an end to the unreasonable rows and restoring … whale conservation and management based on science." (emphasis added)

In its intervention New Zealand observed:

> "Article VIII permits the killing of whales under Special Permit only if:
> i. an *objective assessment* of the methodology, design and characteristics of the programme demonstrates that the killing is *only* 'for purposes of scientific research' (emphasis added); and
> ii. the killing is necessary for, and proportionate to, the objectives of that research and will have no adverse effect on the conservation of stocks; and
> iii. the Contracting Government issuing the Special Permit has discharged its duty of meaningful cooperation with the Scientific Committee and the Commission."

Bar the term "for the purposes of scientific research", the remainder of the criteria posited by New Zealand were not to be found in the ICRW. Japan conceded that New Zealand's approach to interpreting Article VIII was more "nuanced" and less "dogmatic" than Australia, but protested that:

> "New Zealand has a different conception of what counts as 'scientific research' … Japan has, accordingly, to address two different cases against it, emanating from two States that have stated openly that they are acting in a common cause."

In fact, New Zealand had not provided an alternative definition for "scientific research" at all. Rather, it argued that certain criterion must be implied into the treaty to demarcate scientific from non-scientific activity. Notwithstanding that, Japan's observation highlighted an underlying prob-

lem in the ICRW treaty and regime, specifically a lack of certainty amongst the parties, even those acting in common cause, about what constitutes "scientific research". That is, in part, because the ICRW does not provide a definition for that term, nor does it establish any demarcation criterion by which to distinguish that form of permissible activity from the regulated activities of commercial exploitation and indigenous subsistence whaling. The ICJ was being asked to clarify this phrase and provide some independent certainty to peaceably avoid further disputes about it.

2. The Decision

While it was apparent that the dispute between Australia and Japan was about what constitutes legitimate scientific research under the ICRW the Court largely avoided this question. In fact, despite what was reported in the press,[52] the ICJ denied that it's role was to "resolve matters of scientific or whaling policy"[53] at all, nor "pass judgment on the scientific merit or importance of [Japan's] programme [nor] … decide whether the design and implementation of a programme are the best possible means of achieving its stated objectives".[54] It also rejected Australia's argument that scientific research should meet basic, normative criteria: defined and achievable objectives (questions or hypotheses); "appropriate methods"; peer review; and the avoidance of adverse effects.[55] However, the court did not provide an alternative set of criteria, stating that: "the Court [does not] consider it necessary to devise alternative criteria or to offer a general definition of scientific research".[56]

Instead the court stated that the determination of whether scientific activities subject fell under Art. VIII would be evaluated under a two-arm, "standard of review", test as follows:

> "[F]irst whether the programme under which these activities occur involves scientific research.

[52] *A. Darby*, International Court of Justice Upholds Australia's Bid to Ban Japanese Whaling in Antarctica, Sydney Morning Herald, 31.3.2014 <http://www.smh.com.au> (2.3.2015); *M. Murphy*, Japan: Let Them Eat Whale, The Diplomat, 25.9.2014 <http://thediplomat.com> (2.3.2015).

[53] *Whaling Case* judgement, Merits (note 3), 32.

[54] *Whaling Case* judgement, Merits (note 3), 33.

[55] *Whaling Case* judgement, Merits (note 3), 30.

[56] *Whaling Case* judgement, Merits (note 3), 33.

> Secondly, [the court will ask] [if the actions pursuant to that programme] is 'for purposes of' scientific research by examining whether … the programme's design and implementation are reasonable in relation to achieving its stated objectives.
>
> This standard of review is an objective one."[57]

The court never elucidated where this test came from or why it was the appropriate test for the ICRW. While the test reflects some of the words of Art. VIII it is in other ways quite different, not least in relation to reasonableness. It is also worth noting at this point that although the Court refused to define what "scientific research" is, it uses this key phrase in both arms of the test.

In applying the standard of review test the Court found that the JARPA II activities involving the lethal sampling of whales "can broadly be characterized as scientific research".[58] The reasons for this are found at different parts of the judgment and appear to be because:

> "JARPA II had stated research objectives;
>
> that those objectives aligned with the research categories in ancillary, procedural, non-binding annexes;
>
> that JARPA II set out to systematically collect and analyze data and
>
> that JARPA II was conducted by scientific personnel."[59]

However, the court did not make explicit why these criteria were adopted as opposed to equally relevant other scientific criteria (such as peer review, novelty, rigor, accepted methodology, and so on). While the court said that the research objectives came within the research categories identified by the scientific committee in the ICRW annexes, mysteriously the Court failed to analyze these annexes.[60] Nor did it explain why the non-treaty, procedural annexes, which are designed to facilitate information sharing and cooperative research under Art. V (rather than provide for, or inform, a review protocol) were relevant to the legal definition of Art. VIII to begin with.[61]

The ICJ Majority judgment, focused, on whether JARPA II was "for the purposes of" scientific research, by applying the test of whether the pro-

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57 *Whaling Case* judgement, Merits (note 3), 29.
58 *Whaling Case* judgement, Merits (note 3), 41.
59 *Whaling Case* judgement, Merits (note 3), 149.
60 *Whaling Case* judgement, Merits (note 3), 149. See also *C. Brighten*, Unravelling Reasonableness: A Question of Treaty Interpretation, Austr. Yb. Int'l L. 32 (2014), 125, 131.
61 *B. Gogarty*, The ICJ Whaling Case in Context, The Yearbook of Polar Law VII (2015), 616.

gramme's "design and implementation" were "reasonable in relation to achieving its stated objectives".[62] These included:

i) A lack of justification for the dramatically increased scale of lethal sampling of some species and not others in JARPA II compared to JARPA;
ii) On the other hand, an unjustifiably small sample size of some targeted whales to provide information necessary under the JARPA II research objectives;
iii) The lack of transparency relating to the process used to determine sample size for certain whales;
iv) A lack of justification for taking *less* of some whales than the research quota allowed for in different years;
v) The lack of attention given to the possibility of using non-lethal research methods; and
vi) The lack of revision of JARPA II in the light of the actual number of whales taken, is open-ended timeframe and limited scientific outputs.[63]

The court did not establish these or other criteria in advance. While highlighting the procedural annexes to the ICRW as a basic reference, the court pointed to some of the criteria in these annexes, but did not explain why other criteria also set out in those annexes – such as peer review, novelty, rigor, accepted methodology – were not equally relevant. Importantly, at no point did the court highlight what interpretative method or influences directed its seemingly arbitrary selection and application of the above stated criteria. However, it subsequently concluded – based on these unexplained criteria – that JARPA II breached the second arm of the test because it was not "for the purposes of" scientific research.

IV. Did the *Whaling* Merits Judgment Advance the Rule of International Law?[64]

Did the *Whaling Case* judgment live up to its promise to strengthen the rule of international law? Even in the broadest view – that the rule of law is upheld through the court peaceably adjudicating disputes – that is questionable. Japan continues to take whales under the mantle of scientific research, initially in the northern hemisphere, but now, once again, in the southern

62 *Whaling Case* judgement, Merits (note 3), para. 127 ff.
63 *Whaling Case* judgement, Merits (note 3), para. 127 et seq.
64 This section draws on *B. Gogarty/P. Lawrence* (note 9), 149 et seq.

hemisphere under its newly started NEWREP-A lethal whaling program.[65] That programme has already attracted just as much protest as JARPA II, including by members of the IWC Scientific Committee, who after peer reviewing the programme, consider it not substantially different than JARPA II, and as such, scientifically unjustified.[66] Japan, for its part, argues NEWREP-A is scientific and justified, noting it has given "due regard" to the IWC Scientific Committee recommendations. Things are very much as they were before the ICJ decision. That, combined with Japan's subsequent limitation of ICJ (and the International Tribunal for the Law of the Sea [ITLOS]) jurisdiction, means that the unresolved dispute is unlikely to be peaceably adjudicated by the World Court.

The problem of course is that Art. VIII does not specifically mandate that the country issuing scientific permits comply with the Scientific Committee peer review recommendations. Nor did the ICJ conclude that should happen. Hence, it remains solely within the discretion of the issuing state to issue a permit; so long, of course, if it is, for the purposes of "scientific research". Japan's subsequent decision to exclude the Court from arbitrating "dispute[s] arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea"[67] means that the Court cannot adjudicate on NEWREP-A. Such a limitation is neither illegal nor unprecedented. ICJ jurisdiction is consensual, and regularly limited.[68] However, unlike pre-emptive limitations on jurisdiction, the Court *has* been afforded the opportunity to provide judicial exegesis of the specific treaty provisions in context. The problem is that the resultant decision appears to have provided little definitional certainty about future programs, at least not from the outset of those programs. Without this certainty, states cannot hold each other to account, or indeed, effectively defend themselves against criticism that they are misinterpreting treaty terms. This is the secondary, although equally important role of the court in maintaining the rule of law.

65 <http://news.nationalgeographic.com>.

66 *A. S. Brierley/P. J. Clapham* (note 16), 283.

67 Japan Declaration Recognizing the Jurisdiction of the Court as Compulsory, 6.10.2015, <http://www.icj-cij.org>.

68 In fact, Australia made a similar limitation on jurisdiction in 2002, when its state interests in oil and gas reserves in the Timor Sea were at threat from a potential ICJ dispute from Timor Leste. See Australian Claims to The Timor Sea's Petroleum Resources: Clever, Cunning, Or Criminal?, Mon. L.R. 37 (2011), 42.

1. A Circular Test That Lacks Independent Validation

As discussed above, the response of the Court to this problem was to set down a standard of review test obliging a state only permit lethal harvesting under Art. VIII if the proposal "involves scientific research" (arm 1) and is "for the purposes of scientific research" (arm 2). However, the ICJ expressly refused to provide a "general definition" of this term, or advance any criteria (except for those implicitly used by it) and, there is very little to test a new programme's aims and objectives against. In fact, the ICJ decision appears to give deference to the issuing country's assertion that the programme "involves scientific research". Instead, it focused very heavily on the question of reasonableness between the stated aims and objectives articulated as part of the first arm and the programme's design and implementation as part of the second.

The ICJ's refusal to define "scientific research" is somewhat perplexing. As Judge *Yusuf* pointed out:

> "[T]he distinction made in the Judgment between a programme that involves 'scientific research' and a programme 'for purposes of scientific research' is rather artificial and unsubstantiated (paragraph 67), particularly in view of the fact that the term 'scientific research' is not defined in the Judgment. It is like saying: 'I know how to identify the activities undertaken for the purpose of the 'term X', but I do not know how to define the term itself.'"[69]

This circularity and lack of definition of the key element of the test is equally perplexing from a rule of law perspective. The term is clearly central to the test the ICJ propounded and the question of the reasonableness of implementation is contingent upon it.

2. States Are Not Ruled by Law Because They Can Define the Scope of Their Own Obligations

If a country is left a largely unfettered latitude to determine for itself what constitutes scientific research, and there is no requirement to show that the primary aim of an activity is scientific, then it logically follows that the only thing it needs to do is ensure that its methodology and implementation of its research aims and objectives are effectively and reasonably connected to each other. Hence a party to the ICRW might argue that it is con-

[69] Dissenting Opinion of Judge *Yusuf*, 401, para. 51 et seq.

ducting scientific research whose objectives are the determination of the impact of whale meat consumption on general public health. So long as the methods adopted could be reasonably for the purposes of that ostensibly "scientific research" – killing whales would necessarily be part of the methodology – then it would appear to be valid according to the standard of review test adopted.

Although the above example may appear *reductio ad absurdum*, it reinforces the problem with providing no certainty and clarity to the primary element of the test. The validity of the test and thereby compliance with the legal obligation that flows from it are left to the state (that is apparently supposed to be bound to that obligation) to decide. If that is the case then the law is not supreme, the state is, because the state can determine the scope of its own obligations. In a legal system which relies upon horizontal sanctions for compliance this is particularly problematic. States cannot hold each other to account if it is unclear whether others have breached their obligations or not, or indeed if other states can avoid being held to account merely by redefining the scope of their own obligations.

3. There Is No Clarity About the Test or Its Application

Beyond the confusion about the key element of the test, the ICJ decision lacks clarity in respect of *how* or *why* the court came to its conclusion that JARPA II was invalid. Japan itself highlighted the lack of clarity in the ICJ decision in its representations to the IWC stating "the ruling was not clear, since one paragraph concludes that JARPA II was for purposes of scientific research, and another paragraph concluded the opposite".[70] While this may be an overstatement, the court was certainly not transparent about where it selected its evaluative criteria from, or how they were used to come to its decision based on the test it articulated. Judge *Bennouna* criticized the random selection of criteria by the court in its application of its self-selected test as "impressionistic", resting "essentially on queries, doubts and suspicions, based on a selection of indicators from among the mass of reports and scientific studies".[71] Indeed, the largely unexplained adoption and application of the standard of review test leaves many questions: Is this test relevant to other ICRW disputes about scientific research, is it relevant to other

70 IWC Chair's Report of the 65th Meeting (2014), <https://archive.iwc.int>.
71 Dissenting Opinion of Judge *Bennouna* (note 3), 1.

international treaties, international tribunals,[72] and what criteria should be used, how and why? There is very little clarity in respect of either the decision or its application to other disputes.

4. The Test Is Neither Predictable and Requires Retrospective Evaluation

The lack of clear criteria for the application of the standard of review test means that its usefulness is largely restricted to the facts of the JARPA II implementation. While the Court did make a limited examination of external factors relevant to the evaluation of the second arm of the test, this was only with a separate programme that had largely the same objectives and design (JARPA compared to JARPA II) and even then the comparison could only occur after showing the practical implementation of both programs differed in ways which could not be reasonably justified. This means that, until NEWREP-A has significant data, developed over several years, it cannot be internally evaluated for reasonableness or externally compared to previous programmes.

A test that requires significant implementation before it can establish whether an obligation has or has not been carried provides no legal predictability. States cannot determine, in advance, whether a proposed programme is legitimate until it has been implemented, and generated enough data in relation to either its objectives or to other programs that have similar aims and have produced a dataset. An appropriate interpretation of Art. VIII would have helped clarify whether a proposed programme was in breach before, not after, significant killing of living species occurs.

5. The Approach Is Out of Step With the Systematic Clarification of International Law

While it has been noted elsewhere that the standard of review test is extracted from WTO Agreement on Sanitary and Phytosanitary Measures

[72] *C. Foster*, Motivations and Methodologies: Was Japan's Whaling Programme for Purposes of Scientific Research? Whaling in the Antarctic: The ICJ Judgment and Its Implications, Paper presented at the Symposium at Kobe University, 3.5.-1.6.2014, <http://www.edu.kobe-u.ac.jp (accessed 18.6.2016).

(SPS Agreement),[73] the Court never explicitly states this. The use of the standard of review test within the SPS Agreement is predominately about measuring adopted risk assessment regimes – that is the implementation of scientific research – rather than their research design. In fact, the test largely presupposes the research design will be valid by requiring it to conform to international risk assessment standards, [74] but where it is not, provides an articulated legal approach (and associated jurisprudence) for contested scientific claims.[75] This approach involves WTO panels interpreting the SPS Agreement's requirement that sanitary and phytosanitary measures be based on "scientific principles" to mean identification of the science upon which the SPS measure was adopted. The scientific basis need not reflect majority views in the scientific community and can reflect minority views. But the "scientific basis" must come from "a respected and qualified source" and must have "the necessary scientific and methodological rigour to be considered reputable science". The views must be considered "legitimate science according to the standards of the relevant scientific community".[76] Panels are to refrain from "doing science" but nevertheless review whether the reasoning of the risk assessor was "objective and coherent".[77] The ICRW contains none of these legal mechanisms. Given their absence, the Court might have been expected to provide judicial criteria in their place, but it did not. Instead it implicitly accepted some criteria about what was scientific research and then implicitly used a number of criteria specific to JARPA II (and to a lesser extent JARPA) without stating whether these were generalizable, definitive or what weight should be given to each.

It could be contended that cross-fertilization of concepts in international adjudication is positive in ensuring the harmonization of international law. It is equally arguable that the WTO standard of review test and jurispru-

[73] Agreement on the Application of Sanitary and Phytosanitary Measures, 15.4.1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1867 UNTS 493 (herein "SPS Agreement"].

[74] SPS agreement (note 73), Art. 3 (2).

[75] SPS Agreement (note 73), Art. 2 (2) requires that SPS measures be based on "scientific principles". Art. 5 and Annex A para. 4 define what constitutes a risk assessment for these purposes including the scope of such assessments.

[76] Appellate Body Report, Canada/United States Continued Suspension of Obligations in the EC Hormones Dispute, para. 590, WT/DS320/AB/R, WT/DS321/AB/R (adopted 14.11.2008), available at <http://www.wto.org> (accessed 23.9.2016), para. 591. Affirmed in Appellate Body Report, Australia Measures Affecting the Importation of Apples from New Zealand, WT/DS367/AB/R (17.12.2010), available at <http://www.wto.org> (accessed 23.9.2016), para. 220.

[77] Appellate Body Report, Australia Measures Affecting the Importation of Apples from New Zealand (note 76).

dence represents the most sophisticated and successful approach for determining whether a national decision within a treaty framework is based on sound science or not. While there is some superficial attraction to this argument, it lacks express justification or explanation. Without that it is not possible to understand when similar harmonization should occur as an adjunct to, or instead of ordinary principles of treaty interpretation. In fact, without justification it appears to create a divergent approach, which could be said to de-harmonize the move towards the systematic clarification of international law. As Judge *Bennouna* observed,

> "the majority has failed to adhere to the methods of interpretation envisaged by the Vienna Convention on the Law of Treaties (Arts. 31 and 32), which have the status of customary law, and has consequently failed to confine itself to a strictly legal analysis of the Parties' obligations. … The best way for the Court to contribute to the promotion of co-operation between the States concerned is to do justice by applying international law, in accordance with its Statute."

Up until the *Whaling Case* decision, states involved in disputes about the interpretation of their treaty obligations would have reasonably assumed that should such dispute come before the ICJ, this court would apply the well-established rules on treaty interpretation codified in the VCLT.[78] That treaty receives scant mention and the Court appears not to follow it in any substantive way, despite the case being entirely about the interpretation of a treaty. This is particularly concerning in respect of the application of the rule of law to the process of treaty interpretation itself. Specifically, the court should be facilitating a transparent and consistent approach to treaty interpretation which can be applied equally to all like disputes.

Some have criticized the VCLT rules as masking the real basis for interpretive decisions by arguing that these rules cannot be applied without subjective value judgements being made.[79] Regardless of the veracity of this criticism, application of these rules remains important as it demonstrates to states that judges in the ICJ will exercise discretion in interpreting treaties, not in an arbitrary way, but pursuant to a set of rules. This is important for maintaining confidence in the Court as states will be reluctant to convey

[78] *R. K. Gardiner*, Treaty Interpretation, 2nd ed. 2015, 16 et seq. describes the ICJ's growing endorsement of the VCLT rules on treaty interpretation, from 1970 onwards, recognising that in some cases the Court applied the rules implicitly.

[79] See *M. Koskenniemi*, From Apology to Utopia: The Structure of International Legal Argument, 337.

jurisdiction to the court if there is a perception that it makes its decisions in an arbitrary fashion.[80]

V. What Influenced the Court's Divergent Approach?

While the Whaling Decision may, in some respects be seen as a move towards greater scientific rigor in terms of reasonable implementation of scientific research, we suggest it fell short of its promise to clarify and strengthen the rule of international law over commons areas. In many ways the decision reflects a sensitivity by the majority of the court that its decision might amount to a finding of bad faith by Japan. Japan somewhat stoked this concern by arguing that both Australia's and New Zealand's Argument were essentially "that Japan is acting in bad faith" or created "a presumption that a State granting a special permit is acting in bad faith".[81]

Had Japan succeeded in convincing the Court of this – it did not[82] – it would have created an extremely high evidential benchmark for Australia and New Zealand to overcome;[83] indeed one that has never been established in international litigation. It also seems to have put the Court on judicial notice that a finding that Japan was not issuing permits for the purposes of scientific research would have been perceived as a finding that Japan was not acting in good faith with its treaty obligations. Certainly a number of dissenting judges considered that this was exactly what the Court was being asked to do.[84] Judge *Yusuf* in fact considered that "both the review [of the IWC Science Committee] and the conclusions of the Judgment entail a finding of bad faith which is not explicitly expressed".[85]

The ICJ has avoided making declarations of bad faith, given the far reaching diplomatic consequences such a determination would have.[86] Instead, it has tended to make narrower decisions which are aimed peaceably resolving the dispute without impugning the intentions of one or more states. It

[80] *J. Stone*, Fictional Elements in Treaty Interpretation, Sydney L. Rev. 1 (1953-1954), 34 makes this point while writing prior to the codification of treaty interpretation cannons in the VCLT.

[81] See Counter-Memorial of Japan (note 3), 414; Observations of Japan (note 3), 24.

[82] *Whaling Case* judgement, Merits (note 3), para. 65 et seq.

[83] *Affaire du Lac Lanoux*, 16.11.1957, at XII UNRIAA 30.

[84] *Whaling Case* (note 3): Dissenting Opinion of Judge Bennouna, 341 et seq.; Dissenting Opinion of Judge *Owada*, 309; Dissenting Opinion of Judge *Yusuf*, 401 et seq.

[85] *Whaling* Case (note 3), Dissenting Opinion of Judge *Yusuf*, 401.

[86] *H. Thirlway*, The Law and Procedure of the ICJ 1960-1989: Part Three, BYIL 62 (1991), 15 et seq.

would appear that this happened in the *Whaling Case* decision, which focused only on the narrow question of implementation of a lethal program, not whether its overarching aims, objectives and approach are scientifically justified *per se*. The Majority's strict refusal to "evaluate the evidence in support of the Parties' competing contentions about whether or not JARPA II has attributes of commercial whaling" appears to support this.[87]

What also seems to have influenced the court was the need to avoid undertaking a scientific review of JARPA II, for which it both lacks disciplinary expertise and jurisdictional competency. The question of how to demarcate legitimate from illegitimate science is a fraught, task which Judge *Sebutinde* – in a separate opinion – considered "a task more suited to scientists rather than lawyers".[88] The Majority attempted to avoid the perception it was "doing science" by consistently stating that it was adopting a test that would not involve it "resolv[ing] matters of scientific … policy" or seeking to "pass judgment on the scientific merit or importance of [Japan's] programme". In other words, it would avoid questions of legitimate science; an integrally related but separate concern to that of bad faith. As we have discussed, by adopting unexplained evaluative criteria it seems to have still made a scientific assessment, albeit one restricted to the internal implementation of JARPA II, rather than its aims, objects and purposes.

VI. How the Court Could Have Approached the Dispute in a Way That Better Strengthened the Rule of Law

In many ways the ICJ appears to have been trapped between the need to peaceably settle the immediate dispute (without diplomatic incident), and the need to strengthen the rule of law more generally. We suggest that these two functions are not, and should not be in tension. In this section we illustrate, in an indicative way, options the court could have taken in dealing with science in the *Whaling Case*, in a manner which met both the objectives of the rule of law and resolution of the dispute at hand. Elements of the approach suggested are found in some of the separate or dissenting

87 *Whaling Case* judgement, Merits (note 3), para. 320 ff.

88 Similarly, Judge *Trindade's* separate opinion noted the whole notion of scientific research "is surrounded by uncertainties; it is undertaken on the basis of uncertainties". Consequently in his dissenting opinion, Judge *Owada* argued that a "judicial institution is under an intrinsic limitation on its power and must not exceed its competence as the administrator of the law by straying into [science]". Similarly, Judge *Yusuf* dissented stating that "the Court's function is not to conduct a scientific review of the design and implementation of JARPA II" because that was a question for scientists. See *Whaling Case* (note 3).

judgments in the *Whaling Case* itself.[89] The approach proposed is responsive to the critical rule of law analysis above, and we aim to demonstrate how the court could have adopted an interpretative function which was consistent, predictable, equal and capable of independent adjudication. In essence we argue that the court should have reinforced the ordinary approach to treaty interpretation, or explained why it departed from it, and when states should similarly depart from it. Where it did depart from these well-established rules of treaty interpretation, it should have provided a test which ensures the rule of law is maintained, rather than undermined.

Our intention here is not to step into the shoes of the Court, but rather to point to the feasibility of adopting an approach more consistent with strengthening the rule of law. We argue that doing so would have considerably enhanced the value of the decision in terms of resolution of similar global commons science-related disputes in the future. In fact, an effective clarification of the rules and principles relating to a generic term like "scientific research" within a treaty, should serve to avoid future disputes. That is, by providing guidance about how to determine whether something is scientific or not, the court allows states to better understand their own obligations and whether other states are complying with theirs.

Achieving legal consistency, equality and clarity must necessarily begin with adopting a consistent and systematic approach to legal interpretation which derives from a law that binds the parties. That should arise from three basic, normative sources. Firstly the customary rules of treaty interpretation enshrined in VCLT Arts. 31 and 32.[90] These provisions require treaties to be interpreted on the basis of their "ordinary meaning … in their context and in the light of [their] object and purpose" (Art. 31, para. 1).[91] Secondly where possible the court should adopt a contextual, ordinary meaning which meets the rule of law criteria set out above. Thirdly it should do this within and guided by the functions and provisions of its own statute, which directs the exercise of its interpretative functions in peaceably resolving the dispute, in this case Art. 50 of its statute.

Ordinary meaning. While the Majority appears to have eschewed adopting a definition of scientific research, the VCLT would indicate that we should start with the ordinary meaning of the term. Agreeing with this proposition, Judge *Sebutinde*, in his separate opinion stated:

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89 See for example *Whaling Case* (note 3), Dissenting Opinion of Judge *Bennouna*, 341 et seq.; Dissenting Opinion of Judge *Owada*, 257; Dissenting Opinion of Judge *Yusuf*, 401; Separate Opinion of Judge *Sebutinde*, 433; Separate Opinion of Judge *Charlesworth*, 453.

90 International Whaling Commission (note 39).

91 *Whaling Case* (note 3), Dissenting Opinion of Judge *Bennouna*, 342.

> "Although the concept of 'science' is inherently vague, 'scientific research' must, in its most basic sense, involve 'a systematic pursuit of knowledge concerning the structure and behaviour of the physical and natural world through observation and experiment' (Oxford Dictionary).[92]

Within context. Clearly the ICRW is about whales and whaling, hence, the relevant knowledge must be about the subject matter of the treaty, namely that knowledge pursued must relate to whales and/or their interaction with the physical or natural world. An immediate question is whether that knowledge should be based on contemporary understanding or knowledge as it stood at the time the treaty was entered into.[93] We consider that the ordinary definition of the term makes that question self-evident, insofar as existing knowledge cannot be "systematically pursued". Further examining the Whaling Convention *as a whole*, as is required by the VCLT it seems clear that it should be interpreted in an evolutionary fashion, a point reflected in both the majority judgment and in separate and individual judgments.[94] The temporal element is certainly therefore measured against contemporary standards. Hence it is reasonable to conclude that a proposed activity to constitute scientific research must create new knowledge and use contemporary experimental techniques.

Objects and purpose. We highlight that the VCLT does not expect strict definitions, but rather considers "meaning" as shaped by the overarching objects and purposes of the treaty. In the ICRW "'scientific research" is one of three possible forms of activity which human beings conduct in relation to whales (the other two being commercial and indigenous). In fact, it is an exception to, and therefore contrasted with, commercial whaling. Indeed,

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92 *Whaling Case* (note 3), Separate Opinion of Judge *Sebutinde*, 3.

93 The VCLT provides limited guidance on this issue, see *S. Helmersen*, Evolutive Treaty Interpretation: Legality, Semantics and Distinctions, European Journal of Legal Studies 6 (2013), 127, 131.

94 Thus the majority judgment concluded that the Whaling Convention was an "evolving" instrument based on its structure with a Schedule (which was an integral part of the Convention) containing "substantive provisions for regulating the conservation of whale stocks or the management of the whaling industry" to be updated by the Commission, which comprises representatives of member states. Judge *Greenwood* and Judge *Charlesworth* took a similar approach. The separate opinion of Judge *Trindade* concluded that the Whaling Convention was a "living instrument" but emphasized that it should be interpreted take into account the "evolving law on the conservation and sustainable use of living marine resources", *Whaling Case* (note 3), Separate Opinion of Judge *Greenwood*; *Whaling Case* (note 3), Separate Opinion of Judge ad hoc *Charlesworth*; *Whaling Case* (note 3), Separate Opinion of Judge *Trindade*, paras. 88 and 89; Judge *Charlesworth* similarly concluded that the ICRW should be interpreted in light of the precautionary approach as reflected in various environment instruments adopted in the recent period and other recent ICJ cases, *Whaling Case* (note 3), Separate Opinion of Judge ad hoc *Charlesworth*, paras. 6-10.

while Art. VIII allows the sale of whale meat, it makes it clear that this is *secondary* to the scientific purpose of the harvesting. Hence, the treaty requires a demarcation test, not a strict definition. That demarcation test must necessarily import an evaluation of form and degree, specifically the requirement to show the activity is predominantly about science, rather than commerce or indigenous use.

Upholding the rule of international law. The mechanism by which the above-stated questions are addressed must be clear, predictable and most importantly objectively ascertainable by a third party. Interestingly during the *Whaling Case* proceedings all parties agreed the issuing state's decision to issue a license for scientific research must be "objectively reasonable" or "supported by coherent reasoning and respectable scientific evidence".[95] This, of course, presents a problem when it is applied to a term whose denotation is constantly shifting (namely contemporary disciplinary knowledge).

In this case an appropriate interpretative test must be designed to allow different adjudicators or decision makers to use a common approach to reach consistent conclusions. Indeed, when read as a whole – particularly in relation to the preamble and Art. V of the ICRW which deal with the sharing of scientific knowledge – it is clear that the relevant scientific knowledge must be international or global in nature, and not just the knowledge of one state or one adjudicator. That is the method must avoid subjectivity and bias and be informed by independent and impartial specialized expertise about the degree of contribution to the relevant field of knowledge and relevant experimental method; and, indeed, the coherence of reasoning, and respectability of the evidence and scientific method (to use the terms agreed by the parties in proceedings). Thus, the VCLT when read in light of rule of law criteria supports the proposition that scientific questions are tested by experts who are able to independently and impartially evaluate the coherence, reason and scientific respectability.

Guided by the functions and provisions of the ICJ Statute. The integration of experts into the decision making process is clearly within the ICJ's core functions. Art 50 of the ICJ Statute empowers the court to "entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion" [96] It rarely does this, and indeed in the *Whaling Case* it only cross-examined

[95] *Whaling Case* judgement, Merits (note 3), para. 66.

[96] Statute of the ICJ, <http://www.icj-cij.org> (accessed 20.5.2016). Under Art. 50 of its Statute: "The Court may, at any time, entrust any individual, body, bureau, commission or other organisation that it may select, with the task of carrying out an enquiry or giving an expert opinion."

party/part experts.[97] As we have discussed this is problematic because such experts have been politicized by association with the dispute. Similarly, scientists within the deadlocked ICRW regime would appear to have been politicized by the time of the inquiry because they are part of the deadlocked regime which required adjudication by the Court. Instead, we would suggest the court should have put questions of science to properly appointed individuals or organizations with expertise in cetacean science to undertake an appropriate, independent and impartial evaluation of the degree and manner of the JARPA II.

Identifying the experts. By accepting that independent and impartial expertise needs to be sought it follows there must be a mechanism by which to select the appropriate experts. This would be a mixed question of law and fact. At that point the Court might have turned to significant domestic jurisprudence on how to identify and evaluate competing scientific expertise, such as the US Supreme Court's *Daubert* formulation.[98] Alternatively, it could have formulated an approach more appropriate to the ICRW specifically and international law more generally.

Separating court from expert function. Once the relevant independent and impartial disciplinary experts are identified the secondary question becomes what evaluative function they should undertake (i.e. questions of fact and science). It is important to emphasize that the use of independent scientific experts does not mean the Court abdicates its role of making a finding based on international law. Rather, the use of such experts entails recognition that particular issues of treaty interpretation and findings of fact can only be made on a sound basis with input from scientific experts. Here we would suggest, in line with what was said above, that it is the Court's function to reasonably balance the expert evidence about the degree of contribution to science against the degree of commercial enterprise involved. For instance, if independent disciplinary experts consider that a proposal might make minimal or no contribution to knowledge about a species, and use non-standard experimental methods but on the other hand it is clear that the conduct of the proposal has significant commercial results, then it is not

[97] *Whaling Case* judgement, Merits (note 3), oral proceedings.

[98] In *Daubert v. Merrell Dow Pharmaceuticals Inc*, (1993) adopted a test used to decide whether expert evidence based on scientific techniques was genuine "science". In rather simplified terms, this involved a four pronged test with the following elements: 1) whether the theoretical underpinnings of the methods yields testable predictions by means of which the theory could be falsified, 2) publication in a peer-reviewed journal, 3) a known rate of error that can be used in evaluating results, 4) acceptance of the methods within the relevant scientific community.

objectively reasonable to say the proposal involves scientific research for the purposes of the ICRW.

1. Decisions About Scientific Research Requires Input from Independent Scientific Experts

We accept that the above does not amount to a specific, articulated, interpretative test for Art. VIII or scientific obligations more generally. It was not meant to. As we have stated, it is not our intention to step into the court's shoes but rather to highlight the process of reasoning that could have been followed if the customary rules of treaty interpretation and normative rule of law criteria had been applied. We consider the above process to be non-controversial although we accept that its conclusion might be. Specifically, adopting a test that necessarily involves scientific experts in adjudication and decision making about (science based) treaty obligations is likely to be contentious.

The Court, to date has been reluctant to itself call on experts and has only once done so.[99] Perhaps the reason for this is that once the Court solicits such opinions it may feel constrained by the views obtained.[100] This reluctance has been strongly criticized as it means the Court has available to it a significantly more limited range of scientific expertise, on the basis of which, it makes findings of fact and law. The minority in the *Pulp Mills case* strongly criticized the Court for not availing itself of this opportunity.[101] Further, a number of prominent international academics have also criticized the Court on similar grounds.[102]

Beyond the criticism we would also point out that utilizing Art. 50 in these circumstances would have avoided the court being embroiled in "doing science" itself, which seem to have influenced its rather confusing and

[99] *Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Judgment, ICJ Reports 1949.

[100] Whaling in the Antarctica, The ICJ Judgment and Its Implications, 31.5.-1.6.2014, Kobe University, Centre for International Law, Kobe Japan, <http://www.edu.kobe-u.ac.jp> (accessed 20.5.2016) comment made during discussion under Chatham House rules.

[101] *Case concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Judgment, ICJ Reports 2010, Joint Dissenting Opinion Judges *Al-Khasawneh* and *Simma*, para. 14.

[102] *C. Foster,* New Clothes for the Emperor? Consultation of Experts by the International Court of Justice, Journal of International Dispute Settlement 4 (2013), 139, 144. See also *P. Merkouris*, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) Of Environmental Impact Assessments and "Phantom Experts", The Hague Justice Portal, 15.7.2010, <http://haguejusticeportal.net> (accessed 20.5.2016), 8 et seq.

circular approach. That Article allows a much clearer delineation point to be drawn between questions of law and questions of fact/science, both for the benefit of the court and as an example of how states should act in respect of such obligations in the future.

Space precludes elaborating on exactly how the court could have directly drawn on scientific expertise. One important point however is worth noting. A potential difficulty in the approach suggested is that if the scientific community dealing with whaling is split along pro-and anti-whaling lines then how could direct testimony from scientists help the Court distinguish between genuine scientific research? *David Coady's* concept of "meta expertise" is helpful here. Meta expertise involves the capacity to accurately identify who possesses expertise in a particular area.[103] Applying this concept here, the Court could have called on marine scientists, for example, not working directly on whaling issues, to assist in making judgements about the veracity of competing claims as to whether JARPA II constituted legitimate scientific research.

By clarifying the appropriate legal mechanism to incorporate scientific expertise into treaty interpretation the Court may have also avoided perceptions of bad faith. At present Japan's actions can be attributed to a subjective obligation whose criteria are uncertain leaving a range of possible interpretations available to it. Choosing one interpretation, which suits a state's interest when there is a multitude available, may involve self-interested opportunism – realistically that is what states do all the time – but it is not bad faith *per se*. By clarifying the law, and providing a process to make it more predictable and, importantly, capable of independent determination, the Court would have been indicating which of the possible options was the correct one, without having to question the motives of Japan, or indeed Australia and New Zealand.

An objection to what is being argued here would be the view that by taking a leadership role in promotion of the rule of law the Court would risk the losing party withdrawing its consent to the jurisdiction of the Court. But given Japan has gone ahead and withdrawn its jurisdiction in relation to issues covered by the W*haling Case* anyway, if the Court had gone ahead with the approach advocated here, this would have not had any impact on Japan's withdrawal of jurisdiction anyway. But such an approach would have ensured that the Court's decision was of greater benefit as a precedent in relation to systemic issues relating to science-related obligations.

[103] *D. Coady*, What to Believe Now: Applying Epistemology to Contemporary Issues, 2012, 46.

The utilization and clarification of the interpretative rules surrounding of Art. 50 would also bring commons governance into line with recent practice in the WTO dispute settlement system where there is now a large and growing jurisprudence in cases relating to the SPS agreement where WTO panels have demarcated questions of law and science, leaving experts to determine the latter.[104] Another approach is used in the World Heritage Convention[105] regime through which the questions of the degree of "outstanding universal value from a scientific point of view" of proposals is referred to an external independent scientific body to advise on.[106] The World Heritage Committee retains the legal obligation to make the decision based on this transparent scientific advice. This system is not perfect, and it is true that, on occasion politics trumps science.[107] However, it is much less contested than commons governance and experiences much less intractable disagreement about scientific obligations in spite of the World Heritage Convention science-related obligations being as vague as those found in the ICRW. To date, the practice of the committee would seem to suggest that there is a considerable advantage in obtaining such external scientific advice in terms of ensuring decisions are well informed, transparent and perceived as legitimate by state parties and other stakeholders.[108]

Following a justified, clear and prospective interpretative approach in keeping with these functional frameworks, consistent with the ordinary principles of treaty interpretation and the rule of law would, we argue, have been much more in keeping with the promise of the rule of international law. In particular it would have clarified the obligations on state parties pursuant to Art. VIII of the Whaling Convention. In the broader setting it would have provided much greater clarity about how and when states should involve disciplinary experts in addressing the content of internation-

104 See *R. Moncel* (note 9), 317 et seq.

105 Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151.

106 Convention Concerning the Protection of the World … (note 105), Arts. 2, 8, 9, 10 and 11. See also the Operational Guidelines for Implementation of the World Heritage Convention, <http://whc.unesco.org> (accessed 10.5.2016).

107 *Maswood* argues that "… the WHC has been able to rely on objective and neutral scientific evidence to avoid the politicisation of decision-making processes and to enhance compliance", *S. Maswood*, Kakadu and the Politics of World Heritage Listing, Aust. J. Int' l Aff. 54 (2000), 357.

108 E.g. see the recent decision of the Committee rejecting a request by the Australian government to reverse an extension of the world heritage wilderness area in Tasmania in June 2014. The Committee relied upon the following report: International Union for the Conservation of Nature, IUCN Report for the World Heritage Committee, 37th Session, available at <http://whc.unesco.org>.

al legal obligations that require science and scientific research to be undertaken. As we have argued such an approach would have made a major contribution to global commons governance, which is, in many fields, deadlocked by the politicization and vagaries about science.

VII. Conclusion

The ICJ in the *Whaling Case* missed an opportunity to create a valuable precedent which would have promoted the rule of law and clarity in relation to science-related obligations in global commons treaty regimes. In the *Whaling Case* the ICJ implicitly adopted a definition of science. A preferable course would have been to clearly identify a mechanism for determining the relevance, rationality and justification for the whole of a scientific enterprise, not just its technical implementation. That would necessarily involve the Court setting out clear, prospective and externally ascertainable criteria to demarcate science from non-science, and in particular identify the appropriate disciplinary experts to involve in that demarcation task.

Looking to the future, it is vital for the Court, when confronted with a similar decision in the future, involving clarification of science-related obligations in a global commons treaty, to take the transparent approach argued for here, in order to fulfil President *Tomka*'s vision of the Court as continuing to play a key role in the promotion of the international rule of law.

Such an approach is possible without the ICJ "doing science". The Court could and should exercise its powers to directly call scientific witnesses – rather than relying on the scientific experts called by the parties to ensure that its interpretation of treaty obligations is grounded on sound science. This interpretive judicial role is a role entirely appropriate to the Court and arguably essential to its full exercise jurisdiction.[109] This function, while challenging, is essentially no different from courts making demarcation decisions in relation to other contentious terms. For instance, there is no settled definition of torture, nor should there be, but there are criteria to indicate when legitimate interrogation methods cross the boundary lines and become torture. Legal interpretation is often about working towards an external mechanism to better identify the boundary line between two similar but different concepts in the interests of justice. Moreover, we noted that the idea of an international decision-making body calling on external ex-

[109] *R. Kolb*, Short Reflections on the ICJ's Whaling Case and the Review by International Courts and Tribunals of "Discretionary Powers", Australian Yearbook of International Law 32 (2013), 135, 139 et seq.

perts to assist in its decision-making processes has precedence in other regimes and we noted briefly the processes within the World Heritage Convention in this regard. Such processes have the attraction of making transparent the input of expert opinion, and lending legitimacy to the decision ultimately made, and strengthening the rule of law. More to the point, it would involve a leadership role by the Court, designed to strengthen the rule of international law over the global commons by recognizing the importance of integrating credible, independent and impartial scientific expertise in the decision making process.

Suggesting that the ICJ plays a broader function than resolution of the particular dispute before it, may raise hackles in that it could imply unrestrained judicial lawmaking and judges imposing their own subjective values in purporting to identify the objectives of a particular treaty regime or more broadly the underlying values of the international community.[110] However, in response to this concern, it should be recognized that where treaty rules are inherently vague or indeterminate, it is impossible for the Court to avoid making value judgments in applying the international rules on treaty interpretation. As *Julius Stone* pointed out in his seminal 1954 article, the canons of treaty interpretation are inherently pliable, and can mask the actual basis for judicial decision-making.[111] *Stone*, acknowledges however, that the canons of treaty interpretation, while concealing "judicial creativeness in international law" nevertheless play a valuable function by providing a structure to judicial decision-making and increasing confidence that courts will not be overly activist in their decision making which is crucial in states retaining confidence in international adjudication.

Treaty interpretation is linked to the rule of law, in that clarification of treaty obligations can help ensure predictability and clarity. These values are particularly important in relation to interpreting and applying definitions of science in global commons treaty regimes designed to protect global goods such as the atmosphere, particular species or the oceans. Allowing states to interpret their own obligations can seriously undermine the operation of commons-style treaties with potentially disastrous consequences.[112] The rule of law is an important value that is especially crucial in adjudicating disputes related to these types of regimes, the integrity of which is vital for both human beings and the ecosystems upon which they rely.

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110 *A. von Bogdandy/I. Venzke* recognize that the "values of the international community" is inherently vague, (note 33) above, 72.

111 *J. Stone* (note 80).

112 *R. Kolb* (note 109), 144.

As the General Assembly has recognized, strengthening international peace and security for the benefit of humanity requires a greater understanding of and commitment to, the rule of law by all states and organs of the UN system. It is equally important to point out that international peace and security and humanity's very existence are reliant on protecting the global commons – not least the biosphere, atmosphere and oceans – through the rule of sound scientific governance pursuant to the treaties designed to protect them. The quest to strengthen the rule of international law is therefore front and centre in the protection of our common future, a role, as President *Tomka* noted "best reserved for the world's foremost judicial institution and principal judicial organ of the United Nations, the World Court". We hope that is the case in the future.